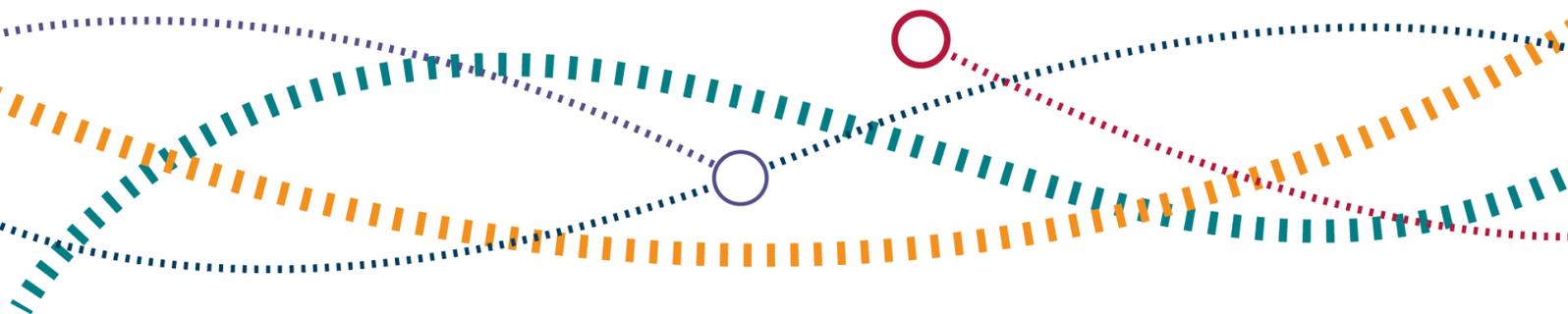




# **Appeal by Virgin Management Limited under Regulation 32 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016**

**ORR determination**

3 July 2025



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# Executive Summary

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1. This decision by the Office of Rail and Road (“ORR”) concerns an appeal by Virgin Management Limited (‘VML’), received on 26 February 2025, under Regulation 32 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016<sup>1</sup> (the ‘AMRs’). ORR has determined this appeal pursuant to its powers under the AMRs.
2. VML appeals on the basis that Network Rail failed correctly to apply Part J of the Network Code<sup>2</sup> when making a decision, on 5 August 2024, to modify the Track Access Contract between Network Rail and First Trenitalia West Coast Rail Limited (‘FTWCRL’) dated 1 December 2022 (the ‘TAC’). In summary, VML has appealed on two grounds:
  - (i) Network Rail was mistaken in following Part J2 as the paths corresponding to the access rights had been unused for 13 consecutive weeks, which in VML’s opinion, should have resulted in a failure to use notice being issued by Network Rail under J4.<sup>3</sup>
  - (ii) Network Rail incorrectly applied Part J2 by accepting a temporary surrender of access rights under J2.1 and in failing to consult under J2.6.
3. Having considered this appeal, in accordance with Regulation 32(5)(b)(i) of the AMRs, ORR makes the following decision:
  - (i) As to VML’s first ground, we note that Network Rail has a discretion as to whether to serve a Failure to Use Notice under Part J4 of the Network Code. Instead, Network Rail preferred to allow FTWCRL to follow Part J2 of the Network Code in respect of the access rights in question. We do not uphold this ground of VML’s appeal.
  - (ii) However, as to VML’s second ground, we hold that Network Rail failed to correctly apply Part J2 of the Network Code when making the decision, on

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<sup>1</sup> [The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016](#)

<sup>2</sup> All references to the Network Code in this determination relate to Network Rail’s Network Code. Other infrastructure managers have their own Network Codes

<sup>3</sup> VML’s first ground of appeal also referred to consultation under J2.6. We have addressed that point in our consideration of VML’s second ground of appeal.

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5 August 2024, to modify the TAC. In particular, Network Rail incorrectly applied Part J2 in accepting a temporary surrender under J2.1.

- (iii) The result of this is that the temporary surrender of access rights, and subsequent modification of the TAC is void.

4. In accordance with Regulation 32(5)(b)(iii) of the AMRs ORR makes the following directions:

- (i) Network Rail must provide an updated consolidated contract with the void modifications to FTWCRL's contract removed within seven days of the date of this decision.
- (ii) Network Rail must conduct a Rights Review Meeting with FTWCRL in accordance with J9 of the Network Code within fourteen days of the date of this decision to review unused access rights in the TAC. For the avoidance of doubt, this decision is specific to this case and should not be considered as guidance or part of the Network Code process more generally.

5. It is also clear from the information and evidence that ORR has considered during this appeal that the process for the consideration of unused access rights, as set out in Part J of the Network Code, is clear but is not regularly followed as intended by industry. Network Rail should therefore review its guidance and templates to ensure that this situation does not arise again. In particular, we recommend that:

- (i) Network Rail review its internal guidance, published guidance and published templates to align with Part J. Network Rail should work with industry to ensure its guidance and templates are fit for purpose, that processes are clear and explicit, it ensures network capacity is used and allocated efficiently and that unused capacity is relinquished in an open, transparent and non-discriminatory manner. We would expect Network Rail to initiate this process within 28 days of the date of this decision; and
- (ii) Network Rail review all previous notices of temporary relinquishment where those relinquishments remain in place to establish whether the correct process has been followed as outlined in our findings, and remedy where required. We would also expect Network Rail to initiate this process within 28 days of the date of this decision.

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6. We have set out at Annex 1 to this decision the text of J2 and J4 of the Network Code. The full text of Part J is available on Network Rail's website<sup>4</sup>. Capitalised terms in this decision, such as "Part J Access Beneficiary", are defined in the Network Code unless otherwise stated. References to the relevant condition within Part J of the Network Code are prefixed with 'J' in this decision, for example J2.1.

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<sup>4</sup> [The Network Code – Part J](#)

# 1. Background

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7. On 24 April 2024, ORR wrote to industry setting out a process for access applications for the December 2024, May 2025 and December 2025 timetable changes, due to numerous complex and competing applications in industry across that period. Applications were submitted to ORR for direction as Network Rail was not able to agree the capacity with operators and submit for our approval. VML submitted a track access application to ORR on 17 May 2024 as part of this process.<sup>5</sup>
8. Part of VML’s application seeks access rights for London Euston to Liverpool Lime Street services. VML proposes to use “*unused Avanti [FTWCRL] Euston to Liverpool paths that the operator is not utilising*”<sup>6</sup>. Rights for FTWCRL to operate these services were directed by ORR on 9 October 2023 to begin from the December 2023 timetable change. However, these rights have remained unused.
9. Following discussions between Network Rail and FTWCRL in early 2024, FTWCRL sought to temporarily surrender the unused access rights until the December 2025 timetable change, pursuant to a notice issued to Network Rail under J2.1.2 of Part J of the Network Code.
10. Part J provides mechanisms where, if an operator has not used access rights, they can be removed from its track access contract. Those mechanisms can be instigated by the operator (using Part J2, “Adjustment of Access Rights”), Network Rail (using Part J4, “Failure to Use”), or another Part J Access Beneficiary (using Part J5 “Failure to Use: third party application”).
11. There are two routes by which a Part J Access Beneficiary must or may surrender access rights under Part J2: J2.1, “Obligation of Part J Access Beneficiaries to surrender Access Rights”; or J2.11, “Right to elect to surrender or adjust Access Rights”.
12. Network Rail published letters on its website setting out its developing approach, during and after the pandemic, to managing unused access rights and Part J as industry moved toward resuming full service levels. The most relevant of these letters

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<sup>5</sup> This process is explained here - [Access application management, ORR letter to Network Rail and industry dated 24 April 2024](#)

<sup>6</sup> [VML Access Application](#)

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is dated 24 April 2023<sup>7</sup>, and sets out that Network Rail’s “*clear preference is for continuous review of access rights and voluntary adjustments or surrender*”. That letter also refers to a surrender as being temporary (for a period of up to two years) or permanent. While it refers to rights being “temporarily or permanently” surrendered under J2, it does not specify which condition of J2 provides a mechanism for a temporary surrender to take place.

13. Under J11 (obligation of Network Rail to publish documentation), Network Rail is obliged to publish templates for any notices required under Part J. On 26 April 2024 Network Rail published a template notice on its website for surrenders under J2.1.2. That template notice refers to the surrender being temporary or permanent. No template notice has been published in respect of J2.11.
14. Network Rail is also obliged by J11.2.1 to publish a copy of every notice given or received pursuant to Part J. Network Rail has published some notices on its website but has only done so since 2024. From our records, we note that there is a discrepancy between notices we have received and those that Network Rail has published.
15. Network Rail has internal guidance, a commercial manual titled ‘Network Code Part J – Changes to Access Rights’. This is intended to set out Network Rail’s responsibilities and processes regarding Part J for the benefit of its own staff. Our reading of this document is that it lacks detail and is difficult to reconcile with the process Network Rail has followed in practice. The internal guidance omits reference to important parts of the Network Code, for example, it does not refer to J2.1, “Obligation of Part J Access Beneficiaries to surrender Access Rights”. It does include template notices but there is no template relating to surrenders under J2, despite such a template being available on its website.
16. FTWCRL considered it had surrendered the access rights through its notice to Network Rail dated 22 July 2024 pursuant to J2.1.2. Network Rail subsequently submitted a notice to ORR pursuant to J2.1.3 dated 5 August 2024<sup>8</sup>. The Network Rail notice referred to the surrender as temporary and set out how the rights were to be modified and reflected in the consolidated contract.
17. VML corresponded with Network Rail regarding its application and the issue of the unused rights between November 2024 and February 2025. This correspondence

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<sup>7</sup> [24.04.23 Unused access rights - Network Rail's approach post-pandemic recovery.pdf](#)

<sup>8</sup> [Part J Notification to the ORR - temporary surrender of rights 2.pdf](#)

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included discussions regarding Network Rail's approach to Part J in relation to FTWCRL. VML was not satisfied with Network Rail's explanations and, on 26 February 2025, submitted an appeal under Regulation 32 of the AMRs to ORR.

18. Under Regulation 32(1) of the AMRs, an applicant has a right of appeal to ORR if it believes that it has been “*unfairly treated, discriminated against or is in any other way aggrieved...*”. The process for such an appeal is set out in Regulation 32(5) of the AMRs. ORR's guidance<sup>9</sup> sets out its interpretation of the AMRs and, at Chapter 5, the process for appealing. We are also required to have regard to our duties under section 4 of the Railways Act 1993 in considering this appeal.
19. We have followed our guidance and the statutory requirements in relation to this appeal. In summary, the process required Network Rail and FTWCRL to provide representations on the appeal, then VML to have the opportunity to comment on those representations.
20. In particular, Network Rail and FTWCRL submitted their representations on the appeal on 11 April 2025. Network Rail submitted updated supporting documents on 16 May 2025, after we had advised it that the earlier representations were incomplete. VML submitted comments on FTWCRL's representations on 30 April 2024 and on Network Rail's representations on 6 May 2025. Following Network Rail's submission of updated supporting documents, VML submitted further comments on 4 June 2025.
21. ORR considers that we had all information relevant to this appeal on 4 June 2025. We have carefully considered all information received from VML, FTWCRL and Network Rail, even though it may not all have been specifically referred to in this determination.

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<sup>9</sup> [The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016, as amended - Access to the rail network and service facilities, infrastructure management and appeals](#)

## 2. Virgin Management Limited's appeal

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22. Part M of the Network Code allows for appeals relating to Part J to be brought to ORR, but they can only be made by Network Rail or a Part J Access Beneficiary. VML does not satisfy the definition of a Part J Access Beneficiary and therefore cannot bring an appeal under the Network Code.
23. VML stated in its appeal application, submitted to ORR on 26 February 2025, that it was making the application in the capacity of an aspirant railway undertaking and it was appealing about the allocation process for infrastructure capacity and its result, under 32(2)(c) of the AMRs.
24. VML's reasons for making the appeal, as set out in its application, are based on two grounds, which we have summarised below:
  - (i) Network Rail was mistaken in following Part J2 as the paths corresponding to the access rights had been unused for 13 consecutive weeks, which in VML's opinion, should have resulted in a failure to use notice being issued by Network Rail under J4.
  - (ii) Network Rail incorrectly applied Part J2 by accepting a temporary surrender of access rights under J2.1 and in failing to consult under J2.6.
25. VML asserted that Network Rail incorrectly accepted a "temporary" surrender from FTWCRL under J2.1. VML stated that J2.1.1 specifies that these rights must have been assessed as being of "*no current or foreseeable reasonable on-going commercial need*". VML noted that no mention is made of "temporary voluntary surrender" in J2.1.1. VML also noted that the only reference to "temporary" surrender is in J2.3 regarding Relevant Enquiries.
26. VML said that the impact of Network Rail's handling of this matter was that paths in the December 2025 timetable, that should have been made available for other operators due to FTWCRL not using them, "*have instead been protected*" for FTWCRL.
27. VML requested ORR overturn Network Rail's decision as set out in the notice to ORR dated 5 August 2024 and "*instructs the correct application of Part J*".

28. In its application, VML further summarised its appeal as follows:

- (i) Regarding its assertion that there was a mistaken decision to follow J2, VML noted Network Rail had confirmed FTWCRL's access rights for the second Liverpool paths (the unused access rights referenced by VML) came into effect in December 2023. Network Rail's published letters of 25 May 2021, 5 April 2022, 24 April 2023 and 19 February 2024 made it clear unused access rights should be discussed at periodic review meetings with a view to their voluntary surrender, and it followed that these unused paths would have been part of those regular discussions. VML considered that by March 2024, following 13 consecutive weeks of the paths being unused, and with no voluntary surrender being made, Network Rail could and should have served a failure to use notification on FTWCRL under J4.1 and J4.4 and this did not happen.
- (ii) VML also noted that it had submitted its track access application on 17 May 2024, which related to these paths, and this should have triggered a failure to use notice under J4, or if discussions were already taking place with FTWCRL about possible voluntary surrender under J2, triggered a consultation process under J2.6. Instead, Network Rail accepted the 22 July 2024 notification from FTWCRL for a temporary surrender under J2.1, without consultation, two months after VML's track access application was submitted.
- (iii) Regarding its assertion that J2 was incorrectly applied, VML explained the "correct outcome" could have been delivered if it had been properly applied but this was not the case.
- (iv) VML asserted there was a failure to consult under J2.6, noting that J2 envisages a Part J Access Beneficiary may make Relevant Enquiries<sup>10</sup> to inform any decision to surrender its access rights, which Network Rail is obliged to answer. In preparing that answer (a 'Relevant Response') Network Rail must carry out a consultation including with "persons whom it has reason to believe intend to become operators of trains".
- (v) VML went on to say that the only way a surrender could have been made under J2 without a consultation would be if no Relevant Enquiry was made

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<sup>10</sup> J2.3 sets out the content of a Relevant Enquiry that can be made of Network Rail and under J2.2 Network Rail are obliged to answer a Relevant Enquiry within 30 days of it being made.

at all (in this case, if FTWCRL had made an unsolicited approach to Network Rail and had unilaterally surrendered its rights without asking for or receiving any of the information that Network Rail would have been obliged to provide under J2.4).

- (vi) VML considered that it is inconceivable there was no engagement between FTWCRL and Network Rail constituting a Relevant Enquiry (under J2.2) prior to FTWCRL's 22 July 2024 notice. As part of that process, a consultation under J2.6 should have occurred and that consultation should have included VML.
- (vii) Regarding VML's assertion there was an inappropriate use of voluntary surrender provisions, it said that a temporary voluntary surrender is not available under J2.1. VML noted that J2.1.1 specifies that the unused access rights must have been assessed as having "no current or foreseeable reasonable ongoing commercial need" and there is no mention in J2.1.1 of the phrase, "temporary voluntary surrender", meaning a surrender under J2.1 must be permanent.
- (viii) VML went on to say that if FTWCRL considered in July 2024 there would be a commercial need for the rights from December 2024 and May 2025 (and hence sought to make its surrender temporary) the mechanism in J2.1 should not have been applied as a separate mechanism without the process in J2.2, which included a consultation, being followed.
- (ix) During the discussions with Network Rail about the operation of Part J, prior to making this appeal, Network Rail asserted, in an email dated 20 December 2024, that the phrase "part or parts of such Access Rights" can refer either to the geography or the duration of the right (i.e. that phrase could allow for a duration that was temporary). In its appeal, VML asserted that it is clear this is a reference to the length of the paths (i.e. adjusted to stop short of planned destination). VML noted again that the only reference to a "temporary" surrender in J2 is under J2.3 regarding Relevant Enquiries (which in those earlier discussions, Network Rail had maintained did not apply).

### 3. Network Rail's representations on the appeal

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29. Network Rail's representations, received on 11 April 2025, contained a letter and 147 pages of supporting documents. VML submitted its comments on those representations on 6 May 2025. Information in the supporting documents regarding Network Rail's internal guidance was incomplete and Network Rail provided a complete version on 16 May 2025, on which VML provided further comments on 4 June 2025.
30. The representations included comments on the substantive matters VML raised in its appeal but also raised three "preliminary matters". Network Rail considered these preliminary matters rendered the appeal invalid and bound to fail and, as a result, the appeal should be dismissed.
31. In setting out these preliminary matters, Network Rail asserted that:
- (i) VML does not have standing to bring the appeal as it does not satisfy the definition of applicant under the AMRs;
  - (ii) the appeal is an incorrect use of Regulation 32 of the AMRs as VML is using it to complain about a decision under the Network Code regarding third party Access Rights; and
  - (iii) the remedy sought by VML will not assist it, as there was no meaningful remedy available, and, therefore, the appeal is academic.
32. Network Rail went on to set out its substantive comments on VML's appeal about the application of Part J. These are as follows:
33. In responding to VML's assertion that it should not have used the Part J2 process and should have instead used the Part J4 Failure To Use process, Network Rail said that it had identified a failure to use by FTWCRL which met Part J4.1.1(b) but noted that Part J4.4.1 confirms that where such a failure to use has occurred Network Rail "may" serve a failure to use notice (i.e. it was discretionary, not mandatory, to do so).
34. Network Rail also referred to its own published letter of 24 April 2023, which set out a "clear preference for continuous review of access rights and voluntary adjustments or surrender". It also asserted that it "worked to find a mutually acceptable and Part J

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*permitted outcome*” which resulted in it choosing not to serve a failure to use notice. Instead, Network Rail chose to reach agreed terms with FTWCRL which it considered were in keeping with what it referred to as “*the April 2023*” guidance. Network Rail, therefore, rejected VML’s assertion in its appeal that it should have served a failure to use notice.

35. In responding to VML’s assertion that the mechanism in J2.1 for surrendering access rights does not permit temporary surrenders, Network Rail stated that this was incorrect.
36. Network Rail went on to assert that the obligation, under J2.1, to surrender arises when a Part J Access Beneficiary has no current or foreseeable reasonable on-going commercial need for the train paths. In its view, as the wording is not “current and foreseeable” it is open to be used where an Access Beneficiary has:
  - (i) No current need (i.e. it gives up rights it doesn’t currently need) but it has a future need (i.e. a temporary surrender);
  - (ii) A current need but no foreseeable future need (i.e. a managed withdrawal); or
  - (iii) No current and no future need (i.e. an immediate complete surrender of all rights).
37. Network Rail did not refer to its previous view, provided in its email of December 2024, that a temporary surrender was covered by the phrase “part or parts of such Access Rights”.
38. Network Rail went on to assert that temporary surrenders are not expressly prohibited by the wording of Part J2.1.1 and the permissibility of surrenders were expressly notified to industry in its April 2023 letter, with what it describes as “the prior approval” of the Department for Transport and ORR.
39. After detailing some of the discussions with FTWCRL where it set out its plan to increase its use of rights, Network Rail asserted that, in the circumstances, a temporary surrender was permissible, Part J2.1 was the correct process to follow and was correctly followed by Network Rail.
40. Additionally, Network Rail commented on VML’s references in the appeal to J2.1 and the process in J2.2 regarding “*Reasonable Enquiries [sic]*” and describes it as an incorrect conflation of the rules. Network Rail provided its own view of the link

between J2.1 and J2.2, saying that, *“Where the conditions for a J2.1 surrender are met (i.e. no current or foreseeable reasonable on-going commercial need) the Access Beneficiary does not need to (indeed should not) make a Relevant Enquiry; they are obligated to surrender. Where an Access Beneficiary is not obligated to surrender but wishes to explore the possibility of surrender, a Relevant Enquiry can be made as part of the decision making and is then part of the process to surrender.”*

41. Network Rail commented on VML’s assertion that FTWCRL made a relevant enquiry pursuant to J2.3, the Relevant Enquiry was responded to by Network Rail and, in preparing its response, Network Rail should have consulted. It asserted that FTWCRL did not make a Relevant Enquiry and, accordingly, the need to consult did not arise. It also asserted that Network Rail’s substantive discussions with FTWCRL about the use of access rights were prior to VML’s 17 May 2024 track access application to ORR (meaning that VML was not considered a potential access party and would not have been included in a consultation).
42. Network Rail commented on the remedy VML is seeking, that ORR overturns Network Rail’s decision to allow the temporary surrender by FTWCRL. Network Rail said that it was actually FTWCRL’s decision, not Network Rail’s and, therefore, there is no Network Rail decision to overturn. Network Rail also said there was not a decision to accept FTWCRL’s temporary surrender as Network Rail does not have a right to refuse FTWCRL’s decision or to refuse or reject FTWCRL’s temporary surrender. Network Rail complied with its obligation, in J2.1.3, to notify ORR.
43. Network Rail also commented that, even if the notice to ORR was somehow overturned, the paths would not become available as the Part J process would be incomplete, the rights would not have been surrendered and would not be available for others.

## **VML’s comments on Network Rail’s representations**

44. In its initial comments on Network Rail’s representations, dated 6 May 2025, VML set out its view on the “preliminary matters” referred to by Network Rail and stated it disagreed strongly that VML had no standing to bring an appeal under Regulation 32 of the AMRs.
45. VML stated it satisfied the definition of ‘applicant’ for the purpose of the AMRs as it is a “legal entity” with a “commercial interest in procuring infrastructure capacity”, setting out how it had made an application, on 17 May 2024, for a track access contract to operate services between various locations.

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46. VML went on to comment on Network Rail's assertion that it could not, via this appeal, complain about Network Rail's decisions regarding a third party Access Beneficiary, saying that this could not be what was envisaged by the AMRs. The AMRs provide for an appeal based on an applicant being unfairly treated as a result of what it viewed as Network Rail's failure to properly follow and apply the processes set out in the Network Code.
47. VML noted that the end result of this was likely to be a decision relating to a third party's access agreement (as it contended in this appeal) and this could not be a bar to a Regulation 32 appeal as Network Rail had suggested.
48. VML commented on Network Rail's view that there was no decision to overturn regarding FTWCRL's temporary surrender of rights, as it was obliged to send a notice to ORR under J2.1.3 and that there was no meaningful remedy available. VML made it clear its appeal relates to the decision by Network Rail to modify FTWCRL's TAC as a result of what VML describes as Network Rail's "decision to accept the temporary surrender of rights" that FTWRCL purported to make under Part J2.1.
49. Regarding the substance of its appeal application, VML repeated its position that it had been treated unfairly because Network Rail had not correctly followed the requirements of the Network Code.
50. VML stated it did not assert Network Rail was mandated to issue a Failure to Use Notice, in circumstances where there had been a Failure to Use by FTWCRL but should have done so under J4.1 and J4.4. It noted that it appeared from Network Rail's supporting documents it intended to issue a notice before its discussions with FTWCRL resulted in a different course of action being taken.
51. VML also stated what it describes as "Network Rail's attempt to justify the application of J2.1 to the temporary surrender of access rights that took place in this case ignores the plain and ordinary meaning of words in J2.1". It noted Network Rail appears to argue that the wording of J2.1.1 (specifically the phrase, "no current or foreseeable reasonable on-going commercial need") permits three courses of action despite there being no express wording in J2.1.1 making reference to any such option. It described Network Rail's interpretation as "nonsensical".
52. VML described the natural and ordinary meaning of J2.1.1 as clear and said that if an Access Beneficiary has no current or foreseeable on-going commercial need to its Access Rights then it must surrender them voluntarily but, if it does have a current or

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foreseeable on-going commercial need then it cannot surrender them voluntarily and J2.1.1 will not apply.

53. VML reiterated there is no right under J2.1.1 to a temporary surrender of Access Rights and commented on what Network Rail said in its representations about the references to temporary surrender in its published letter of 24 April 2023. It noted that Network Rail appears to refer to that letter to justify the action taken, purportedly under J2.2.1. It said, however, there is no suggestion in the letter that J2.2.1 should be the mechanism used for any temporary surrender. VML went on to note that J2.3.1 refers expressly to temporary surrender, but this is a different process which involves a consultation.
54. VML went on to comment on the discussions between Network Rail and FTWCRL, as set out in its representations. It noted the representations make it clear FTWCRL considered it did have a reasonable on-going commercial need for the Access Rights and states, therefore, the use of J2.1.1 was not appropriate.
55. VML described the discussions between Network Rail and FTWCRL as appearing to be a negotiation, as an alternative to a Failure to Use notice, that formed the basis of a Relevant Enquiry under J2.3, which required a consultation to take place.
56. VML concluded its comments by stating that it had standing to make the appeal and had grounds to do so. It maintained that it had been treated unfairly through Network Rail's failure to follow the correct processes as set out in the Network Code.
57. As noted earlier on in this decision, Network Rail did not provide a complete set of supporting documents with its representations on 11 April 2025, as its internal guidance document was missing. Once we had received the complete version we shared this with VML for comment.
58. In response, VML commented on a number of documents it had already seen and commented specifically on the internal guidance. It noted that it seemed to refer to a process for an Access Beneficiary to request information about the voluntary surrender or adjustment of its access rights. It said there was no suggestion that there are two processes within J2 and states this supports its view that a Relevant Enquiry must have been made under J2.2.

## 4. FTWCRL's representations on the appeal

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59. FTWCRL's representations, received on 11 April 2025, contained a letter with two appendices, one containing Part J clauses and one containing a list of letters and documents referenced. VML submitted its comments on the representations on 30 April 2025.
60. FTWCRL summarised what it called its timetable step up strategy (how it intended to deliver additional services within the next two timetable change dates (May 2025 and December 2025), its timetable discussions with Network Rail, its track access applications to ORR, its rolling stock etc).
61. FTWCRL stated that it "has been clear and consistent that our current position regarding the relinquishment of access rights is temporary", going on to explain how the unused access rights would be reinstated once it was able to operate more services.
62. It also commented on the future, in particular its role in the development of HS2 services, going on to state that the applications being sought by other operators, including VML, are not consistent with those plans.
63. It went on to discuss the "competing applications process" starting in April 2024, as well as communication published by the Department for Transport, which commented on VML's track access application. It went on to state that it remained strongly opposed to VML's application.
64. FTWCRL commented on its interaction with the Network Code. It noted it had temporarily relinquished some of its rights and stated they were completed in line with what it referred to as the "agreed Part J relinquishment process" and align with their timetable step up strategy. It also suggested it would have taken the same course of action regardless of VML's track access application.
65. Commenting specifically on Part J2, it confirmed it had used J.2.1 and said this was explicitly separate to other mechanisms within the Part J process, namely the ones relating to a Relevant Enquiry. It said this was consistent with the approach taken by other operators, referring to the notices regarding their published temporary surrenders and the relevant template published by Network Rail which referred to

temporary and permanent surrenders. It stated that “For a long-established period, Network Rail has considered clause J2.1 as allowing both permanent and temporary surrenders of rights”.

66. FTWRCL said it strongly disagreed with VML’s assertion in its appeal that the J4 Failure to Use mechanism should have been used. It said there were temporary, non-economic factors beyond its control affecting its operation of services and said that this was covered by J4.3.1(a).
67. FTWRCL reiterated it had a foreseeable on-going commercial need for the paths and without the above factors the services would have been operated at an earlier date. It had taken action which it believed to be in the best interests of network capacity, therefore, Failure to Use would not have been appropriate.
68. FTWRCL also set out its view on J.4.5.1 Cessation of Failure in relation to future timetables and VML’s reference to driver training in a letter to ORR and VML’s track access application.
69. FTWCRL went on explain its actions in relinquishing its unused rights under J.2.1 were intended to, as a good and efficient operator, provide non-utilised capacity back to the network.
70. FTWCRL also set out concerns about what it described as the “potential for unintended consequences” should ORR determine that the application of J2.1 was incorrect, saying it could potentially prevent operators coming forward to temporarily release capacity that could reasonably be used by other operators in the intervening period. It also set out its concerns about what it described as a possible adverse decision by ORR regarding J4.
71. Lastly, FTWCRL set out the outcome it was seeking from ORR’s appeal determination, that ORR:
  - (i) reinforce the integrity of Part J and the processes followed by FTWCRL by upholding its relinquishments as contractually agreed with Network Rail;
  - (ii) support the validity of FTWCRL’s current position for future timetables under J4.5.1; and
  - (iii) endorse and provide definitive support to FTWCRL’s position under J4.3.1.

## VML's comments on FTWCRL's representations

72. VML made a number of points regarding FTWCRL's comments on its timetable step up strategy, its role in the development of HS2 services and the Department for Transport's comments on open access applications.
73. VML commented on FTWCRL's use of the phrase "agreed Part J relinquishment process", stating it understood this to be referring to the J2.1 process. It said that just because the process was agreed with Network Rail (as with other operators) it did not necessarily follow that the process was the correct one.
74. Noting FTWCRL's confirmation it had always been clear that relinquishing the access rights had been temporary and had used J2.1.1 to effect this, VML referred to the "no current or foreseeable reasonable on-going commercial need" wording of that condition and said, in its opinion, that condition could only be used where there was a unilateral and unsolicited decision by FTWCRL to permanently surrender rights. It noted that J2.3 would seem more appropriate to engage in discussions about temporary surrender.
75. VML noted FTWCRL's references to ongoing discussions with Network Rail and commented that it must, therefore, follow that these formed part of a Relevant Enquiry under J2.3, which would have then led to VML being consulted but this process was not followed.
76. VML noted that the rights in question were intended for use and effective from December 2023. It commented that most of the reasons given for not using the rights were pre-existing and understood at the time they were granted and "should not be an allowable reason for non-performance of the contract". VML then said it seemed like the correct process to follow was Failure to Use.
77. VML commented on what FTWCRL had said regarding condition J4.3.1 and non-economic reasons (one of which related to industrial action). VML quoted an EU Glossary definition which it felt contradicted FTWCRL's view.
78. VML ended its comments by reiterating its view that the J2.1.1 process was the wrong one to follow and a Failure to Use process under J4 should have been followed by Network Rail.

## 5. ORR's Consideration of the Appeal

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### Preliminary Matters

79. ORR has considered the three 'preliminary matters' raised by Network Rail and has taken into account the comments on them from VML. We do not consider any of the preliminary matters raised to be valid reasons for dismissing the appeal.

#### Preliminary Matter 1 – Standing to bring the appeal

80. With regard to Network Rail's assertion that VML does not satisfy the definition of an 'applicant', we have considered this definition as set out in the AMRs. Under Regulation 32, an appeal can be brought by an 'applicant'. Applicant is defined as:

*“applicant” means a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007 and shippers, freight forwarders and combined transport operators, with a public-service or commercial interest in procuring infrastructure capacity”.*

81. The definition of applicant is wide and includes *“legal entities... with a... commercial interest in procuring infrastructure capacity”*.

82. VML's appeal application is in the name of Virgin Management Limited, which Network Rail asserts is a management company. However, this is the same entity that has made a track access application to ORR under the complex and competing applications process, which application ORR has accepted as part of that process. We therefore consider that VML is a legal entity with a commercial interest in procuring infrastructure capacity and, therefore, falls within the definition of an 'applicant'.

#### Preliminary Matter 2 – Incorrect use of Regulation 32 of the AMRs

83. Network Rail noted that VML relies upon Regulation 32(2)(c) of the AMRs as the basis of the appeal relating to the allocation process and its result. Network Rail asserted that VML is conflating two different processes and wrongly using the process in Regulation 32 to complain about matters concerning decisions under the Network Code relating to a *“third party Access Beneficiary”*. For this reason, Network Rail asserted that the appeal is an incorrect use of Regulation 32 and accordingly the appeal should fail.

84. J12 of the Network Code sets out the procedure for resolving disputes arising under the Network Code, including a route to appeal to ORR. However, those provisions only apply to Network Rail and Part J Access Beneficiaries. A ‘Part J Access Beneficiary’ is defined under the Network Code as “...a Train Operator or a Freight Customer Access Option Holder”. A ‘Train Operator’ is defined as “... in respect of an Access Agreement, a person (whether or not an operator of trains) who has permission to use track pursuant to that agreement”. VML does not meet the definition of ‘Part J Access Beneficiary’ as it does not have such permission, but rather VML aspires to receive it. As such, VML’s only route to seek a remedy is to bring an appeal under Regulation 32 of the AMRs.
85. Under Regulation 32(1) of the AMRs, an “applicant” has a right to bring an appeal where:
- “...it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved...”*
86. As noted above in relation to Preliminary Matter 1, VML falls within the scope of the definition of an “applicant” for the purpose of the AMRs. Regulation 32 goes on to set out a non-exhaustive list of matters that can be appealed. In its representations, VML set out that it believed it has been treated unfairly by Network Rail’s failure to properly follow and apply the process for the surrender of access rights, and in general terms why it is aggrieved by Network Rail’s decision. VML’s use of Regulation 32 therefore falls within the conditions for an applicant to bring an appeal under Regulation 32.

### **Preliminary Matter 3 - No meaningful remedy available**

87. Network Rail asserted that the remedy sought by VML will not assist it and therefore the appeal is academic. In particular, Network Rail asserted that there is no ‘decision’ to overturn and no remedy that can be directed by ORR. Network Rail also stated the appeal seeks to challenge FTWCRL’s obligation to surrender access rights.
88. In its representations, dated 6 May 2025, VML noted it seeks to challenge Network Rail’s ‘decision’ to accept the temporary surrender of rights which FTWCRL purported to make under J2.1 and Network Rail’s ‘decision’ to amend the TAC between it and FTWCRL as a result. VML went on to state that ORR should overturn Network Rail’s decision and instruct it to re-run the process in a way that, it says, does not treat VML unfairly.

89. As set out above, under Regulation 32(1) of the AMRs, an applicant has a right of appeal if it believes it has "*been unfairly treated, discriminated against or is in any other way aggrieved*". There is no express requirement under Regulation 32 for there to be a meaningful or any remedy in order for an applicant to bring an appeal. On the contrary, Regulation 32(5)(iii) only requires ORR to issue a direction to remedy the situation from which the appeal arose "where appropriate". In any event, VML has specified a remedy which it seeks by this appeal, namely, the quashing of Network Rail's decisions as set out in the preceding paragraphs.

## **Substantive Appeal Matters**

90. ORR has also considered the substantive points raised in this appeal and the representations by VML, Network Rail, and FTWCRL. As to VML's first ground, we note that Network Rail has a discretion as to whether to serve a Failure to Use Notice under Part J4 of the Network Code. Instead, Network Rail preferred to allow FTWCRL to follow Part J2 of the Network Code in respect of the access rights in question. We do not uphold this ground of VML's appeal. However, as to VML's second ground, it is our conclusion that Network Rail was incorrect to accept a temporary surrender of access rights under J2.1 of the Network Code. The effect of this is that (i) the notice issued by FTWCRL dated 22 July 2024 pursuant to J2.1.2 and (ii) the subsequent notice issued to ORR dated 5 August 2024 pursuant to J2.1.3, which both purport to surrender access rights temporarily (the 'purported Relevant Surrender'), are both void. The contractual amendments made pursuant to those notices are also void. The result of this is that the access rights that were purportedly temporarily surrendered currently still remain within FTWCRL's TAC. We set out the reasons for this below.

### **First Ground of Appeal**

91. VML asserted that Network Rail was mistaken in following Part J2 as the paths corresponding to the access rights had been unused for 13 consecutive weeks, which in VML's opinion, should have resulted in a Failure to Use Notice being issued by Network Rail under J4.

92. Condition J4.4 provides as follows:

"4 ***Failure to Use***

...

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

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

93. Where a Failure to Use arises, J4.1.1 gives Network Rail a discretion as to whether or not to serve a Failure to Use Notice. In this regard, the regime under J4 empowers Network Rail to service a Failure to Use Notice, but it is not required to do so.
94. We note that there was correspondence between Network Rail and FTWCRL regarding the possibility of a Failure to Use Notice being issued. However, the outcome of this was that Network Rail preferred to allow FTWCRL to follow Part J2 of the Network Code in respect of the access rights in question. Therefore, we do not uphold this ground of VML’s appeal.

## **Second Ground of Appeal**

95. FTWCRL sought, by notice to Network Rail, dated 22 July 2024, to surrender certain access rights on a temporary basis. That notice was issued to Network Rail pursuant to J2.1.2 of the Network Code. In turn, Network Rail issued a notice to ORR dated 5 August 2024 pursuant to J2.1.3 of the Network Code purportedly modifying the TAC.
96. The overview of Part J given in J1.1 sets out that Part J provides mechanisms for Access Rights to be removed from a Part J Access Beneficiary’s contract. The mechanisms can be instigated by the Part J Access Beneficiary (under J2), Network Rail (under J4) or a third-party Part J Access Beneficiary who wishes to use the rights in question (under J5), and provide a number of routes whereby a Part J Access Beneficiary must or may surrender access rights.

97. In particular, J2 provides:

### **“2 Adjustment of Access Rights**

#### **2.1 Obligation of Part J Access Beneficiaries to surrender Access Rights**

*2.1.1 Without prejudice to the rest of this Part J, a Part J Access Beneficiary shall voluntarily and in good faith surrender those Access Rights or part or parts of such Access Rights in respect of which it has no current or foreseeable*

*reasonable on-going commercial need, provided that an Appointed Operator may not surrender on behalf of a Freight Customer Access Option Holder any Access Right which has been drawn down by that Freight Customer Access Option Holder into the Access Agreement of that Appointed Operator without the written consent of that Freight Customer Access Option Holder.*

2.1.2 *If a Part J Access Beneficiary wishes to make a Relevant Surrender pursuant to Condition J2.1.1, it shall give Network Rail notice to that effect. The Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J2.1.3.*

2.1.3 *Network Rail shall notify the Office of Rail and Road of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Relevant Surrender pursuant to Condition J2.1.2."*

.....

## **2.11 Right to elect to surrender or adjust Access Rights**

2.11.1 *If, following receipt of a Relevant Response, the Part J Access Beneficiary:*

- (a) wishes to have a Specified Relevant Adjustment effected; and*
- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,*

*it shall be entitled to do so after giving to Network Rail and the Office of Rail and Road a notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Adjustment shall have effect from the date the Office of Rail and Road gives*

*its consent to the making of the Relevant Adjustment in question in accordance with Condition J2.13.*

2.11.2 *If, following receipt of a Relevant Response, the Part J Access Beneficiary:*

*(a) wishes to make a Specified Relevant Surrender; and  
(b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,*

*it shall give Network Rail notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J2.11.3.*

2.11.3 *Network Rail shall notify the Office of Rail and Road of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Specified Relevant Surrender pursuant to Condition J2.11.2."*

98. We have carefully considered the wording in J2 and the representations set out by all parties regarding the interpretation and application of J2, in particular J2.1. Part J2 creates a regime whereby a Part J Access Beneficiary **must** or **can** surrender access rights under J2.1 and J2.11 respectively. In particular:

*Obligation to surrender Access Rights*

- (a) J2.1 imposes a duty on a Part J Access Beneficiary to surrender rights in certain circumstances. This is made clear by the wording in J2.1, which refers to the 'obligation' of a Part J Access Beneficiary and the requirement that it 'shall' surrender access rights in the circumstances specified.
- (b) The circumstances specified are where the Part J Access Beneficiary has "*no current or foreseeable reasonable on-going commercial need*" subject to a proviso which applies in the freight context, which is not relevant to this

appeal. Where those circumstances arise, the Part J Access Beneficiary must surrender its rights by notifying Network Rail. In turn, J2.1.3 imposes an obligation on Network Rail to notify ORR and the surrender of access rights has effect from the date of the giving of this notice to ORR.

*Right to elect to surrender or adjust Access Rights*

- (a) J2.11 gives a Part J Access Beneficiary a right to elect to surrender or adjust access rights. It is not obliged to do so. J2.2 – J2.10 creates a process for a Part J Access Beneficiary to make Relevant Enquiries, and for Network Rail to make Relevant Responses, in respect of access rights that the Part J Access Beneficiary “*may be willing to surrender*” or “*adjust*” (see J2.3.1(a) and (b)). That process is to enable, amongst other matters, the Part J Access Beneficiary to make a proper assessment of the effect of the making of the Specified Relevant Surrender or Specified Relevant Adjustment in question (see J2.4).
- (b) The process involving Relevant Enquiries and Relevant Responses etc., includes provision for Network Rail to consult with other stakeholders, including “*other persons whom it has reason to believe intend to become operators of trains ...*” (J2.6). It shall carry out such consultation “*...as shall be necessary or expedient so as to enable NR properly to inform itself of the effects on the capacity of the track in question which the surrender/adjustment is likely to have*” (J2.6).
- (c) Where a Part J Access Beneficiary wishes to elect to surrender its access rights, it shall give Network Rail notice to that effect (see J2.11.2). In turn J2.11.3 imposes an obligation on Network Rail to notify ORR. The surrender of rights has effect from the date of the giving of this notice to ORR.

99. We do not agree with Network Rail’s interpretation set out at paragraph 36 above of the phrase “*no current or foreseeable reasonable on-going commercial need*”. The scope of J2.1.1 is such that, if a party has a foreseeable need to use the rights again, such that it only wants to surrender them temporarily, then it would not come within the scope of J2.1.1 as it cannot be said that it has “*no current or foreseeable reasonable on-going commercial need*”.

100. FTWCRL’s submissions and the supporting documents submitted by Network Rail and FTWCRL make the point on a number of occasions that FTWCRL has a ‘foreseeable reasonable ongoing commercial need’ to the rights in question and this is why a temporary surrender was sought. As such, the conditions for J2.1.1 to apply

do not arise in the case of the purported surrender of rights by FTWCRL on a temporary basis as set out in its notice of 22 July 2024; and it was incorrect of Network Rail to accept a temporary surrender of access rights under J2.1 of the Network Code and to issue a notice to ORR purportedly under J2.1.3 on 5 August 2024.

101. We have also considered the effect of the invalidity of the purported Relevant Surrender on the subsequent modifications to the TAC. We conclude that the notice issued by FTWCRL dated 22 July 2024 under J2.1.2 and the subsequent notice issued to ORR dated 5 August 2024 under J2.1.3, which both purport to surrender access rights temporarily, are void. This is on the basis that: on a private law analysis, the purported Relevant Surrender is void for common mistake; and, on a public law analysis, it is rendered void through material misdirection and/or error in law. On either analysis, it follows that the modifications to the TAC made pursuant to the purported Relevant Surrender (to the extent that surrender purports to surrender rights temporarily) are also void.
102. Under Regulation 32(5)(b)(iii) of the AMRs, ORR must, where appropriate, issue a direction to “...remedy the situation from which the appeal arose”. We have considered our duties under section 4 of the Railways Act 1993 and have set out in paragraph 106 the terms of the direction that ORR deems appropriate to remedy the situation from which the appeal arose. We do not, however, consider it is appropriate for ORR to give direction as to what the ‘next steps’ would be for the parties. We have commented below as to possible scenarios that could arise. It is for the parties, however, to determine the appropriate next steps taking into account their respective obligations set out in the Network Code and this is reflected in the directions issued as part of this appeal.
103. Where a Part J Access Beneficiary holds rights, which have been included in the timetable, that it is not currently using but has some foreseeable need for them (such that J2.1.1 does not apply) the following arises:
  - (a) If the Part J Access Beneficiary does not use those rights for 13 consecutive weeks, the regime set out in J4 would take effect, subject to a number of exceptions and certain conditions being met. In those circumstances there is the possibility that Network Rail could serve a Failure to Use Notice under J4.4 requiring the Part J Access Beneficiary to surrender its rights. In this regard, the regime under J4 empowers Network Rail to service a Failure to Use Notice, but it is not required to do so.

- (b) It would be open to the Part J Access Beneficiary to consider surrendering or adjusting its access rights under J2.11. J2.3 and following set out the process by which the Part J Access Beneficiary can make Relevant Enquiries (J2.3), and Network Rail must provide Relevant Information (J2.4), as well as provision for a consultation must generally be undertaken (J2.6) to inform the Part J Access Beneficiary's decision as to whether to adjust or surrender the rights in question.
- (c) Further, under Part J5, a Part J Access Beneficiary can apply for rights held by another (incumbent) Part J Access Beneficiary who has not used them, where the applicant Part J Access Beneficiary can demonstrate a reasonable commercial need for them, subject to a number of exceptions and certain conditions being met.

104. On the other hand, where a Part J Access Beneficiary holds rights for which it has no current or foreseeable commercial on-going need, it is obliged to surrender those rights under J2.1. Should it fail to do so, there is the possibility that Network Rail could seek to serve a Failure to Use Notice under J4 or a Part J Access Beneficiary to make an application to use those rights under J5.

## 6. ORR's Conclusions and Determination

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105. Having considered this appeal, in accordance with Regulation 32(5)(b)(i) of the AMRs, ORR makes the following decision:

- (i) As to VML's first ground, we note that Network Rail has a discretion as to whether to serve a Failure to Use Notice under Part J4 of the Network Code. Instead, Network Rail preferred to allow FTWCRL to follow Part J2 of the Network Code in respect of the access rights in question. We do not uphold this ground of VML's appeal.
- (ii) However, as to VML's second ground, we hold that Network Rail failed to correctly apply Part J2 of the Network Code when making the decision, on 5 August 2024, to modify the TAC. In particular, Network Rail incorrectly applied Part J2 in accepting a temporary surrender under J2.1.
- (iii) The result of this is that the temporary surrender of access rights, and subsequent modification of the TAC is void.

106. In accordance with Regulation 32(5)(b)(iii) of the AMRs, ORR makes the following directions:

- (i) Network Rail must provide an updated consolidated contract with the void modifications to FTWCRL's contract removed within seven days of the date of this decision; and
- (ii) Network Rail must conduct a Rights Review Meeting with FTWCRL in accordance with J9 of the Network Code within fourteen days of the date of this decision to review unused access rights in the TAC. For the avoidance of doubt, this decision is specific to this case and should not be considered as guidance or part of the Network Code process more generally.

107. It is also clear from the information and evidence that ORR has considered during this appeal that the process for the consideration of unused access rights, as set out in Part J of the Network Code, is clear but is not regularly followed as intended by industry. In particular, we recommend that:

**Office of Rail and Road | Appeal by Virgin Management Limited under Regulation 32 of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016**

- (i) Network Rail review its internal guidance, published guidance and published templates to align with Part J. Network Rail should work with industry to ensure its guidance and templates are fit for purpose, that processes are clear and explicit, it ensures network capacity is used and allocated efficiently and that unused capacity is relinquished in an open, transparent and non-discriminatory manner. We would expect Network Rail to initiate this process within 28 days of the date of this decision; and
- (ii) Network Rail review all previous notices of temporary relinquishment where those relinquishments remain in place to establish whether the correct process has been followed as outlined in our findings, and remedy where required. We would also expect Network Rail will need to initiate this process within 28 days of the date of this decision.

108. Our decision on this appeal is binding and where a person is given a direction pursuant to an appeal under Regulation 32, they are under a duty to comply with and give effect to that direction. We expect parties to comply with a direction within the timeframe specified in the directions notice. If a party fails to do so we may take enforcement action under Regulation 38, which could result in a financial penalty against the breaching party.

**Liz Thornhill**

**General Counsel**

**Duly Authorised by the Office of Rail and Road**

3 July 2025

# Annex 1: Part J of the Network Code

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## Part J2

### 2 Adjustment of Access Rights

#### 2.1 Obligation of Part J Access Beneficiaries to surrender Access Rights

2.1.1 Without prejudice to the rest of this Part J, a Part J Access Beneficiary shall voluntarily and in good faith surrender those Access Rights or part or parts of such Access Rights in respect of which it has no current or foreseeable reasonable on-going commercial need, provided that an Appointed Operator may not surrender on behalf of a Freight Customer Access Option Holder any Access Right which has been drawn down by that Freight Customer Access Option Holder into the Access Agreement of that Appointed Operator without the written consent of that Freight Customer Access Option Holder.

2.1.2 If a Part J Access Beneficiary wishes to make a Relevant Surrender pursuant to Condition J2.1.1, it shall give Network Rail notice to that effect. The Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J2.1.3.

2.1.3 Network Rail shall notify the Office of Rail and Road of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Relevant Surrender pursuant to Condition J2.1.2.

#### 2.2 Obligation of Network Rail to answer Part J Access Beneficiary's Relevant Enquiries

2.2.1 Network Rail shall provide the Part J Access Beneficiary with a Relevant Response within 30 Working Days of the making of a Relevant Enquiry.

#### 2.3 Contents of Relevant Enquiries

2.3.1 Each Relevant Enquiry shall contain:

- (a) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be

- willing to surrender to Network Rail;
- (b) a specification of the Access Rights (if any) which the Part J Access Beneficiary, at that time, is aware that it may be willing to adjust;
  - (c) a request that Network Rail provides the Part J Access Beneficiary with Relevant Information in relation to:
    - (i) any Specified Relevant Surrender; and
    - (ii) any Specified Relevant Adjustment;
  - (d) a specification of the dates with effect from which the Specified Relevant Surrender or Specified Relevant Adjustment may be expected to take place;
  - (e) a statement whether or not any Specified Relevant Surrender or Specified Relevant Adjustment is to be temporary; and
  - (f) in the case of a temporary Specified Relevant Surrender or Specified Relevant Adjustment, a specification of the date on which the temporary Specified Relevant Surrender or Specified Relevant Adjustment shall cease to have effect, being no later than the second anniversary of the date when it is to take effect.

## **2.4 Information to be provided by Network Rail**

2.4.1 Subject to Condition J3, the Relevant Information which Network Rail shall provide in each Relevant Response shall be a statement of:

- (a) the costs which Network Rail may reasonably expect to save or incur if any Specified Relevant Surrender or Specified Relevant Adjustment is made;
- (b) the times at which and the periods over which the Relevant Financial Consequences will have effect;
- (c) the steps which Network Rail would expect to take to achieve the Relevant Financial Consequences within the times referred to in Condition J2.4.1(b) and the opportunities which Network Rail has to accelerate or postpone the effect of the Relevant Financial Consequences;
- (d) the extent to which any Released Capacity may reasonably be expected to be used:

- (i) by any other operator of trains or Freight Customer Access Option Holder; and
  - (ii) in relation to the maintenance, re-alignment, re-configuration, repair or renewal of any part of the Network;
- (e) the reasonably foreseeable financial effects on Network Rail of the release of capacity;
- (f) Network Rail's proposals as to the amounts (if any) which should be payable by or to the Part J Access Beneficiary under the Access Agreement as a consequence of the making of any Specified Relevant Surrender or Specified Relevant Adjustment and its reasons for them, including in relation to the sharing between Network Rail and the Part J Access Beneficiary of the Relevant Financial Consequences; and
- (g) whether any other person has made an enquiry of Network Rail pursuant to an agreement between that person and Network Rail in relation to the surrender or adjustment of Access Rights under that agreement which, if made, might reasonably be expected to affect the interests of the Part J Access Beneficiary in relation to the Specified Relevant Surrender or Specified Relevant Adjustment in question,

together with such other information as the Part J Access Beneficiary reasonably requests, in each case in a form and amount of detail which is sufficient to enable the Part J Access Beneficiary to make a proper assessment of the effect of the making of the Specified Relevant Surrender or Specified Relevant Adjustment in question.

## **2.5 Pre-existing obligations of confidence**

- 2.5.1 Nothing in this Condition J2 shall require Network Rail to break an obligation of confidence which arose before 1 April 1994.

## **2.6 Consultation by Network Rail**

- 2.6.1 In preparing each Relevant Response, Network Rail shall:

- (a) except to the extent otherwise requested by the Part J Access Beneficiary and in accordance with such (if any) conditions as the Part J Access Beneficiary shall specify; and
- (b) subject to Condition J3, carry out such consultation of:

- (i) other operators of trains, other Freight Customer Access Option Holders and other persons whom it has reason to believe intend to become operators of trains or Freight Customer Access Option Holders; and
- (ii) any Funders which may be directly affected and of which Network Rail is aware, or ought reasonably to have been aware,

as shall be necessary or expedient so as to enable Network Rail properly to inform itself of the effects on the capacity of the track in question which the Specified Relevant Surrender or Specified Relevant Adjustment in question, if made, is likely to have.

## **2.7 Obligation to co-operate**

2.7.1 If:

- (a) Network Rail has made any enquiry of a Part J Access Beneficiary in relation to a Relevant Enquiry made by that Part J Access Beneficiary or any other Part J Access Beneficiary under this Condition J2; and
- (b) the enquiry is one which the Part J Access Beneficiary may reasonably be expected to answer,

the Part J Access Beneficiary shall provide Network Rail with a response to the enquiry to the extent and in the amount of detail which is reasonable in the circumstances.

2.7.2 Information provided in any response under Condition J2.7.1 shall be treated as Qualifying Information and Condition J3 shall apply accordingly.

## **2.8 Estimated costs of providing Relevant Response**

2.8.1 Network Rail:

- (a) shall provide the Part J Access Beneficiary, if so requested by it and as soon as reasonably practicable after the request, with:
  - (i) its best estimate of its costs of providing a Relevant Response; and

- (ii) having provided such an estimate, its best estimate of the costs which it has incurred in preparing the Relevant Response in question up to the date of the request or any other date specified in the request; and
- (b) shall not, in preparing a Relevant Response, exceed the amount of the estimate without first notifying and obtaining the consent of the Part J Access Beneficiary.

## **2.9 Payments of costs of Relevant Responses**

2.9.1 The Part J Access Beneficiary shall:

- (a) be entitled to make any request of the kind referred to in Condition J2.8 at the time of making the Relevant Enquiry in question and at any time and from time to time thereafter, and the failure of the Part J Access Beneficiary to make any such request on any occasion shall not prejudice its right to make such a request on a later occasion;
- (b) pay to Network Rail an amount calculated pursuant to Condition J2.10; and
- (c) be entitled to receive from Network Rail, on request, a certificate from its auditors verifying that the costs referred to in Condition J2.10 have been incurred in providing the Relevant Response.

## **2.10 Division and payments of costs**

2.10.1 The amount referred to in Condition J2.9(b) shall be an amount equal to 75 per cent of the amount of Network Rail's reasonable costs of providing the Relevant Response which exceed £1,000 (excluding VAT). Such amount shall be payable not later than 20 Working Days after the later of:

- (a) the date upon which the Relevant Response shall be provided; and
- (b) the date upon which Network Rail requests payment of the amount in question in an invoice which is sufficient for the purposes of Value Added Tax.

2.10.2 For the purposes of this Condition J2, Network Rail's costs shall include a fair allocation of its administrative and other regional and national costs of carrying on its business.

## **2.11 Right to elect to surrender or adjust Access Rights**

2.11.1 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

- (a) wishes to have a Specified Relevant Adjustment effected; and
- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall be entitled to do so after giving to Network Rail and the Office of Rail and Road a notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Adjustment shall have effect from the date the Office of Rail and Road gives its consent to the making of the Relevant Adjustment in question in accordance with Condition J2.13.

2.11.2 If, following receipt of a Relevant Response, the Part J Access Beneficiary:

- (a) wishes to make a Specified Relevant Surrender; and
- (b) accepts any amounts payable and sharing of any Relevant Financial Consequences proposed by Network Rail in the Relevant Response,

it shall give Network Rail notice to that effect within 15 Working Days after the date upon which it receives the Relevant Response in question. The Specified Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J2.11.3.

2.11.3 Network Rail shall notify the Office of Rail and Road of the relevant modification to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date on which the Part J Access Beneficiary gives notice to Network Rail agreeing to the Specified Relevant Surrender pursuant to Condition J2.11.2.

## **2.12 Right of Part J Access Beneficiary to have Access Rights adjusted**

2.12.1 If it is Determined that the Part J Access Beneficiary should be entitled to make any Relevant Surrender or have any Relevant Adjustment given effect, the Part J Access Beneficiary shall give notice to Network Rail as to whether it elects to exercise that entitlement. If the Part J

Access Beneficiary does not give notice to Network Rail within 15 Working Days of the date of the Determination, the Part J Access Beneficiary shall lose the entitlement in question.

2.12.2 If the Part J Access Beneficiary gives notice pursuant to Condition J2.12.1 of an election to exercise an entitlement to make a Relevant Surrender, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of such notice. Network Rail shall include a copy of the relevant ADRR Determination, if applicable, with the notification.

2.12.3 Any Relevant Surrender shall have effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J2.12.2.

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

2.13.1 Subject to Condition J2.13.4, a Quality Adjustment shall have effect only with, and from the date specified in, in the Office of Rail and Road's consent.

2.13.2 Network Rail shall submit the relevant modifications to the Access Agreement or Access Agreements which have the effect of a Quality Adjustment to the Office of Rail and Road for consent within 10 Working Days of:

- (a) The Part J Access Beneficiary's election to have a Specified Relevant Adjustment effected under Condition J2.11; or
- (b) The Part J Access Beneficiary's election to have a Relevant Adjustment effected under Condition J2.12.

2.13.3 Network Rail and the Part J Access Beneficiary shall use all reasonable endeavours to procure that the Office of Rail and Road is furnished with sufficient information and evidence as it requires to determine:

- (a) whether or not to give its consent to the making of the Quality Adjustment in question or to part only of the modifications submitted to it: and
- (b) the date from which the Quality Adjustment, or part only, shall have effect.

2.13.4 The Office of Rail and Road's consent is not required in respect of a

Quality Adjustment where the Quality Adjustment has been Determined by the Office of Rail and Road in accordance with Condition J11.

## Part J4

### 4 Failure to Use

#### 4.1 Failure to Use

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

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

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

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

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

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

- (a) it fails to draw down the Access Rights to use such Train Slot

into the Access Agreement of an Appointed Operator resulting in such Train Slot not being used by an Appointed Operator; or

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

## **4.2 Use Quota and Use Period**

4.2.1 The Use Quota and Use Period shall apply to services for the carriage of goods by railway and passengers.

4.2.2 The Use Quota shall be one.

4.2.3 The Use Period shall be thirteen consecutive weeks for which a Train Slot is included in the Working Timetable. Where a Train Slot is derived from a Quantum Access Right which permits a Train Slot to be obtained on more than one day of the week, the use of the Train Slot on each relevant day of the week shall be assessed separately.

4.2.4 A train movement shall not count towards the Use Quota if it is made with the primary purpose of achieving the Use Quota for that Train Slot.

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

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

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

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

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

## **4.5 Cessation of Failure to Use**

4.5.1 Before a Failure to Use Notice has been served in accordance with Condition J4.4, there will be a cessation of a Failure to Use if:

(a) in relation to a Failure to Use under Condition J4.1.1(a), the Part J Access Beneficiary makes;

(i) a Train Operator Variation Request for a Train Slot in respect of the relevant Quantum Access Right in the Working Timetable; or

(ii) an Access Proposal for a Train Slot in respect of the relevant Quantum Access Right in any subsequent New Working Timetable; or

(b) in relation to a Failure to Use under Condition J4.1.1(b), the Part J Access Beneficiary makes use of a relevant Train Slot such that the Use Quota is met.

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

4.6.1 A Failure to Use Notice shall specify:

(a) the Failure to Use which Network Rail considers has occurred;

(b) the Rights Subject to Surrender which Network Rail requires the Part J Access Beneficiary to surrender; and

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

#### **4.7 Acceptance of surrender**

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

(a) it shall, within 10 Working Days, notify Network Rail and the Office of Rail and Road;

(b) the Rights Subject to Surrender shall be surrendered with effect from the date on which notice is given to the Office of Rail and Road pursuant to Condition J4.7.1(c); and

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

to Condition J4.7.1(a).

#### **4.8 Counter Notice**

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

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

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

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

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

#### **4.9 Grounds for Objection**

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

(a) the Rights Subject to Surrender relate to an enhancement of the Network for which the Part J Access Beneficiary is contracted to pay through access charges; or

(b) the Rights Subject to Surrender have been partially used by the Part J Access Beneficiary to the extent that:

(i) either the Origin has been operated from, or the Destination has been operated to during the Use Period through the partial use of the associated Train Slot in the Working Timetable; and

(ii) the partial use is supported by a relevant contract between the Part J Access Beneficiary and an end customer; and

(iii) prior to the receipt of the Failure to Use Notice, the Part J Access Beneficiary has advised Network Rail in writing that it wishes to amend the relevant Quantum Access Right(s) to reflect the partial use and specifies the particular amendments it is seeking to be made; or

(c) the Rights Subject to Surrender are required to be retained by the Part J Access Beneficiary for reasons of national security or for the transit of nuclear materials. In such cases, it will be necessary for the Part J Access Beneficiary to provide with its Counter Notice a written statement from the relevant Government Department supporting the reasons for the retention of the Rights Subject to Surrender

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

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

(a) that the matters set out in Condition J4.8.1(a), (b) or (c) have been substantiated, the Failure to Use Notice shall have failed and Network Rail shall notify the Part J Access Beneficiary in writing that this is the case within 10 Working Days of receipt of the Counter Notice; or

(b) that the Part J Access Beneficiary’s Grounds for Objection has been substantiated in respect of any or all of the Rights Subject to Surrender (or parts thereof in the case of the Ground for Objection specified in Condition J4.9.1(b)) then, subject to Condition J4.10.2 below, the Failure to Use Notice

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

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

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

4.11.1 If Network Rail considers that:

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

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

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

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

4.12.2 If the Part J Beneficiary disagrees with Network Rail's decision under Condition J.4.11, then in addition to its response under Condition J4.12.1, it shall also at the same time refer the matter for determination in accordance with the ADRR.

4.12.3 If the Part J Access Beneficiary fails to respond to Network Rail in accordance with Condition J4.12.1 it will be deemed to have accepted Network Rail's decision.

#### **4.13 Surrender of Access Rights**

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

- (a) where either the Part J Access Beneficiary accepts Network Rail's decision made pursuant to Condition J4.11 or there is an ADRR Determination, on the date on which such notice is given to the Office of Rail and Road pursuant to Condition J4.12.2; or

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

4.13.2 In the event of the Part J Access Beneficiary accepting Network Rail's decision or there is an ADRR Determination in accordance with Condition J4.12.1, Network Rail shall notify the Office of Rail and Road of the relevant modifications to the Part J Access Beneficiary's (and, if applicable, Appointed Operator's) Access Agreement no more than 10 Working Days after the date of the acceptance or of the relevant ADRR Determination, as applicable and shall include a copy of the relevant ADRR Determination, if applicable, with such notice.

#### **4.14 Access Proposals**

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



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