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To Network Rail Infrastructure Limited and the Class Representative Committee

**By email only**

Dear Colleagues,

**Request to review the Network Code and provisions in the EAS and TPR on capacity studies in relation to Restrictions of Use**

1. We are writing to invite Network Rail and the Class Representative Committee to review an important aspect of the industry's rules concerning the requirements for carrying out capacity studies in relation to Restrictions of Use (RoU) of the network.
2. We have published today our determination regarding Network Rail's appeal in respect of the Timetabling Panel's Determination of dispute references TTP1706 and TTP1708 (copy attached). As part of its appeal Network Rail asked ORR to make a determination that a capacity study is not mandatory when Network Rail seeks RoU possessions under Conditions D3.4 or D3.5 of the Network Code.
3. We determined that it would be inappropriate for us to make such a definitive finding as Network Rail requested. Our reasons for this are set out in our appeal determination but, in summary, we do not consider that the Timetabling Panel made a definitive finding as to whether a capacity study is mandated as part of the RoU process, as Network Rail contested. As such, it would be inappropriate for ORR to determine how these parts of the Network Code or the Rules (comprising the Engineering Access Statement ("EAS") and the Timetable Planning Rules ("TPR")) are to be interpreted. We are also mindful that such a determination may have significant consequences for many industry parties not represented at the dispute reference hearing.
4. Nonetheless, we recognise that the question raised by Network Rail, and the potential consequences, is important to the industry. We are therefore writing to ask Network Rail and the Class Representative Committee to review and, as appropriate, amend the relevant provisions within the Rules and/or the Network Code to clarify when a Capacity Study is to be produced by Network Rail as part of the RoU possessions procedure.

### **The relevant Conditions of the Network Code and the Rules**

5. The TPR regulate the standard timings between stations and junctions together with other matters enabling trains to be scheduled into the Working Timetable.
6. The EAS describes the rules regulating the arrangements for engineering access to the rail network. It also sets out the location, number, dating and duration of possession access (Restrictions of Use), which Network Rail requires to carry out inspection, maintenance, renewal and enhancement of the network.
7. As part of the bi-annual timetable development process, Network Rail revises and publishes the Rules at D-44 (44 weeks before the start of each timetable). Between D-44 and publication of the timetable at D-26 Network Rail may, subject to consultation, revise the Rules in order to optimise the timetable. This process is set out in Condition D2.2.
8. Throughout the year, Network Rail will inevitably require additional RoU to those in the version of the EAS published under Condition D2.2.
9. Condition D3.4 sets out the process to facilitate RoU with at least 12 weeks' notice and Condition D3.5 sets out the process where there is less than 12 weeks' notice (acknowledging that it may not be reasonably practical to comply with the same timing requirements of Condition D3.4 in such circumstances).
10. Condition D3.4.2 entitles Network Rail to vary the working timetable but only for the purpose of taking RoU which are consistent with the Rules.
11. Condition D3.4.3 requires Network Rail to include in the Rules a procedure to enable amendment of the Rules following their finalisation in accordance with Condition D2.2.

### **Capacity Studies and the Access Impact Matrix**

12. The Network Code does not explicitly refer to any requirement to conduct a Capacity Study, either in relation to the bi-annual timetable revision process under Condition D2 or the Working Timetable variation process in Condition D3.
13. However, both the EAS and TPR include an Access Impact Matrix (section 6 of the EAS, and section 7 of the TPR). The introductions to both state: "This section describes the introduction of the Access Impact process to be followed to enable agreement between Network Rail and Timetable Participants for delivering Capacity Study requests relating to the Engineering Access Statement".<sup>1</sup>
14. The introduction also states: "The Access Impact Matrix was created by Network Rail and Crosscountry to jointly resolve Access dispute TTP773". In that instance (in 2015), Crosscountry had appealed on the grounds that Network Rail had

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<sup>1</sup> Section 7.1.1 TPR and section 6.1.1 EAS

not provided sufficient information under Condition D3.4.10(b) to enable Crosscountry to reach an informed decision for the purposes of Condition D3.4.8.

15. In the course of appeal TTP773, Network Rail asked the Panel to endorse the Access Impact Matrix as best practice to be followed by Network Rail when RoUs are requested and additional capacity work is required.

16. The Panel said that while it could support this approach, it would require proper consultation via the Timetable Planning Rules change procedure rather than being directed by the Panel. The Panel did however, direct Network Rail to issue the Access Impact Statement (sic) (amended to show the need for consideration of the Decision Criteria and to replace CPPP with DPPP<sup>2</sup>) as a draft for consultation with a view to incorporate the matrix, as may be suitably amended following such consultation, into the TPR at the earliest opportunity.

17. ORR did not see the consultation but would note that the version subsequently incorporated into the EAS and TPR appears to be identical to the version submitted as part of Network Rail's submission to appeal TTP773 with no changes to refer to the Decision Criteria or DPPP in place of CPPP.

#### **The requirement to carry out Capacity Studies**

18. The text of the Access Impact Matrix does not explain whether Capacity Studies are required for some or all proposed RoUs, although it would appear from our explanation of its origin in paragraph 13 above, that the matrix was intended to be used in at least some cases under Condition D3.4. Rather, the Access Impact Matrix states that the process applies to "Capacity Study requests relating to the Engineering Access Statement." (emphasis added). The question as to whether the access impact process applies to a RoU, is therefore determined by whether it "relates to" the EAS.

19. Section 1.5 of the EAS contains a standard change procedure. For ease of reference, we reproduce the "Procedure for Altering Engineering Access Statement or Timetable Planning Rules other than through the Twice-Yearly Process Having Effect from a Passenger Change Date" below:

*"1.5.1.1 This Procedure has been devised in accordance with Network Code Condition D2.2.7 to provide **a means of altering** Engineering Access Statement and/or Timetable Planning Rules other than through the twice-yearly process having effect from the Passenger Change Dates...*

*1.5.1.2 This procedure will be used by Network Rail to add, substitute or delete engineering access opportunities contained within Engineering Access*

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<sup>2</sup> CPPP is the Confirmed Period Possessions Plan; DPPP is the Draft Period Possessions Plan

**Statement. All possessions so agreed will be regarded as being within Engineering Access Statement...** [emphasis added].<sup>3</sup>

20. There is an apparent conflict between these provisions. While paragraph 1.5.1.1 expressly refers to the process as a means of altering the EAS, the second sentence of paragraph 1.5.1.2 appears effectively to deem all possessions agreed outside of the twice-yearly process to be within the EAS, without in fact altering it.

21. ORR considers that there is an argument that regardless of whether late notice possessions modify or alter the EAS, as a matter of ordinary English, this can be said to "relate to" the EAS. ORR considers that this would have the effect that any requests for a Capacity Study in relation to a late notice possession would necessarily trigger the access impact process. Given the timescales that might be necessary for a full Capacity Study to be undertaken and the shortness of time available in relation to some late notice possessions, this may be problematic.

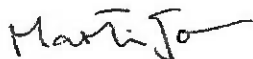
22. However, the distinction identified above may have been intended as a means of excluding late notice possessions, which do not vary the text of the EAS, from parts of the EAS only intended to relate to the twice-yearly process for possessions. If that is correct, it may be that that access impact process was only intended to apply to the twice-yearly process by which the EAS is initially drafted.

23. Given the ambiguity and potential substantial consequences of either interpretation, ORR strongly recommends that Network Rail and the Class Representative Committee consider this point, in order to amend the drafting of the Rules and/or the Network Code as appropriate, in order to clarify the circumstances in which a capacity study is intended to be undertaken. In particular, you should look to vary the introductory text to the Access Impact Matrix (within the EAS and TPR) to clarify the situation.

24. If you have any questions about this letter please contact Jonathan Rodgers at [jonathan.rodgers@orr.gov.uk](mailto:jonathan.rodgers@orr.gov.uk).

This letter will be published on our website.

Yours faithfully



**Martin Jones**

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<sup>3</sup> Paragraphs 1.5.1.1 and 1.5.1.2 of the EAS are repeated in paragraphs 2.4.1 and 2.4.2 of the TPR. We note that the reference to Condition D2.2.7 in paragraph 1.5.1.1 of the EAS quoted above is incorrect; the correct reference is Condition D3.4.3, which is accurately stated in the TPR.