

Network Code – Review of Part J Phase 2: proposals for change

No	Condition	Proposal for Change	Comment
1	Appendices	Delete existing Appendices 2, 3 and 5 and replace with new Appendices attached.	These revisions reflects the proposed changes to Condition J5.1(b), the revised definition of “Quantum Access Right” and some non-material drafting errors in the current Appendices.
Definitions			
2		Delete the existing definition of “ADRR Determination” and insert the following new definition: ““ADRR Determination” means a determination made by the relevant ADRR Panel following a reference made under either Condition J13.1 or J14.1, where such determination has not been referred to the Office of Rail Regulation under either Condition J13.3 or J14.2 within the time limit for such referral;”	This revised definition reflects the incorporation of the standard Network Code appeal mechanism under new Condition J14 (see N° 37).
3		In the definition of “Commencement Date”, delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	This change reflects the proposals to incorporate a new definition of “Quantum Access Right” in place of “Quantum Firm Right”, bringing Level Three and other Contingent Rights within the scope of Part J (see N° 8).
4		Insert the following new definition before the definition of “Cordon Cap Increase”: ““Contingent Right” has the meaning ascribed to it, if any, in the relevant Access Agreement;”	This change reflects the proposals to incorporate a new definition of “Quantum Access Right” in place of “Quantum Firm Right”, bringing Level Three and other Contingent Rights within the scope of Part J (see N° 8).
5		Insert the following new definition before the definition of “Level Two Rights”: ““Level Three Right” has the meaning ascribed to it, if any, in the relevant Access Agreement;”	This change reflects the proposals to incorporate a new definition of “Quantum Access Right” in place of “Quantum Firm Right”, bringing Level Three and other Contingent Rights within the scope of Part J (see N° 8).
6		Amend the definition of “Level Two Rights” to read “Level Two Right”.	This change is proposed to bring this definition into line with that used in existing track access contracts.

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7		<p>Delete the existing definition of “Office of Rail Regulation Determination” and insert the following new definition:</p> <p>““Office of Rail Regulation Determination” means a determination made by the Office of Rail Regulation following a reference made under either Condition J13.3 or J14.2;”</p>	<p>This revised definition reflects the incorporation of the standard Network Code appeal mechanism under new Condition J14 (see N° 37).</p>
8		<p>Insert the following new definition before the definition of “Quantum Adjustment”:</p> <p>““Quantum Access Right” means a Firm Right, any Contingent Right or any Level Three Right as such under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a Firm Right, Contingent Right or Level Three Right;”</p>	<p>Level Three (L3) Rights are not currently caught by the existing Part J provisions as they are not "Quantum Firm Rights" as defined in Part J. They effectively provide 'long-term' spot bids that will last for a duration of longer than six months. A situation could arise, however, where a commercial contract held by an Incumbent operator, for which it has <i>long-term</i> L3 access rights, is won by another freight operator (the Applicant). An Applicants only option might then be spot bid under the existing contractual <i>short-term</i> arrangements to move traffic. Due to the lack of capacity, for which L3 rights were originally granted, the Applicant might ultimately be frustrated in obtaining an appropriate path, potentially leaving the Incumbent as the only operator able to satisfy a customer requirement, thus reducing competition.</p>
9		<p>Delete the definition of “Quantum Firm Right”.</p>	<p>In paragraph 7.22 of ORR's June 2004 final conclusions document (<i>Changes to Access Rights</i>) it was confirmed that the Use It or Lose It (UIOLI) mechanism outlined under Conditions J4 and J5 would not apply to contingent access rights. This was, however, before the introduction of L3 Rights for freight operators, and the potential that such rights could restrict commercial opportunities for operators who are unable to secure sufficient access to the network. It is clear, therefore, that all access rights for which operators could bid during the timetable process and which could lead to capacity restrictions on the network, including L3 Rights and other passenger Contingent Rights, should be subject to the UIOLI provisions and (in the case of freight operators) transfer mechanisms of Part J. To rectify this potential situation it is proposed that a new defined term, “Quantum Access Right”, be incorporated into Part J.</p>
10		<p>In the definition of ““relate” and “in respect of””, delete the words “Quantum Firm Right” where they appear and insert the words “Quantum Access Right”.</p>	
11		<p>In the definition of “Rights Subject to Surrender”, delete the words “Quantum Firm Right” where they appear and insert the words “Quantum Access Right”.</p>	

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Condition J2			
12	Condition J2.2	Delete the words "20 Working Days" and insert the words "30 Working Days".	This extended timescale is proposed to bring Condition J2 into line with other similar provisions currently set out in the Network Code. It is considered that this will provide Network Rail with sufficient time to carry out an appropriate consultation (which may have to include Funders external to the railway industry) in order to provide a full and appropriate Relevant Response.
Condition J4			
13	Condition J4.2.1	Delete the words "Quantum Firm Right" and insert the words "Quantum Access Right".	These changes reflect the proposals to incorporate a new definition of "Quantum Access Right" in place of "Quantum Firm Right", bringing Level Three and other Contingent Rights within the scope of Part J (see N° 8).
14	Condition J4.2.1(a)	Delete the words "Quantum Firm Right" and insert the words "Quantum Access Right".	
15	Condition J4.2.1(b)	Delete the words "Quantum Firm Right" and insert the words "Quantum Access Right".	
16	Condition J4.2.2	<p>The existing Condition J4.2.2 should be deleted and replaced with the following:</p> <p>"4.2.2 Condition J4.2.1(a) shall not apply to Level Two Rights, Contingent Rights or Level Three Rights where Network Rail has been unable to accommodate the Train Operator's Bid into the First Working Timetable."</p>	Condition J4.2.2 currently indicates that J4.2.1(a) does not apply to Level Two (L2) rights. This caveat was added to prevent a L2 right being removed from a contract if Network Rail was simply unable to accommodate a bid into the working timetable. It also, however, potentially precludes L2 rights from being removed under the Failure to Use process even if an operator does not actually bid for them by the Priority Date. It is considered that, if the FOC has a commercial need against which to exercise such a right, it should, as a minimum, bid for a train slot to be included within the timetable. This provision should also relate to L3 Rights, which again should be underpinned by a commercial contract and can be bid for inclusion within the working timetable.
17	Condition J4.6(a)(i)	Delete the words "Quantum Firm Right" and insert the words "Quantum Access Right".	This change reflects the proposals to incorporate a new definition of "Quantum Access Right" in place of "Quantum Firm Right", bringing Level Three and other Contingent Rights within the

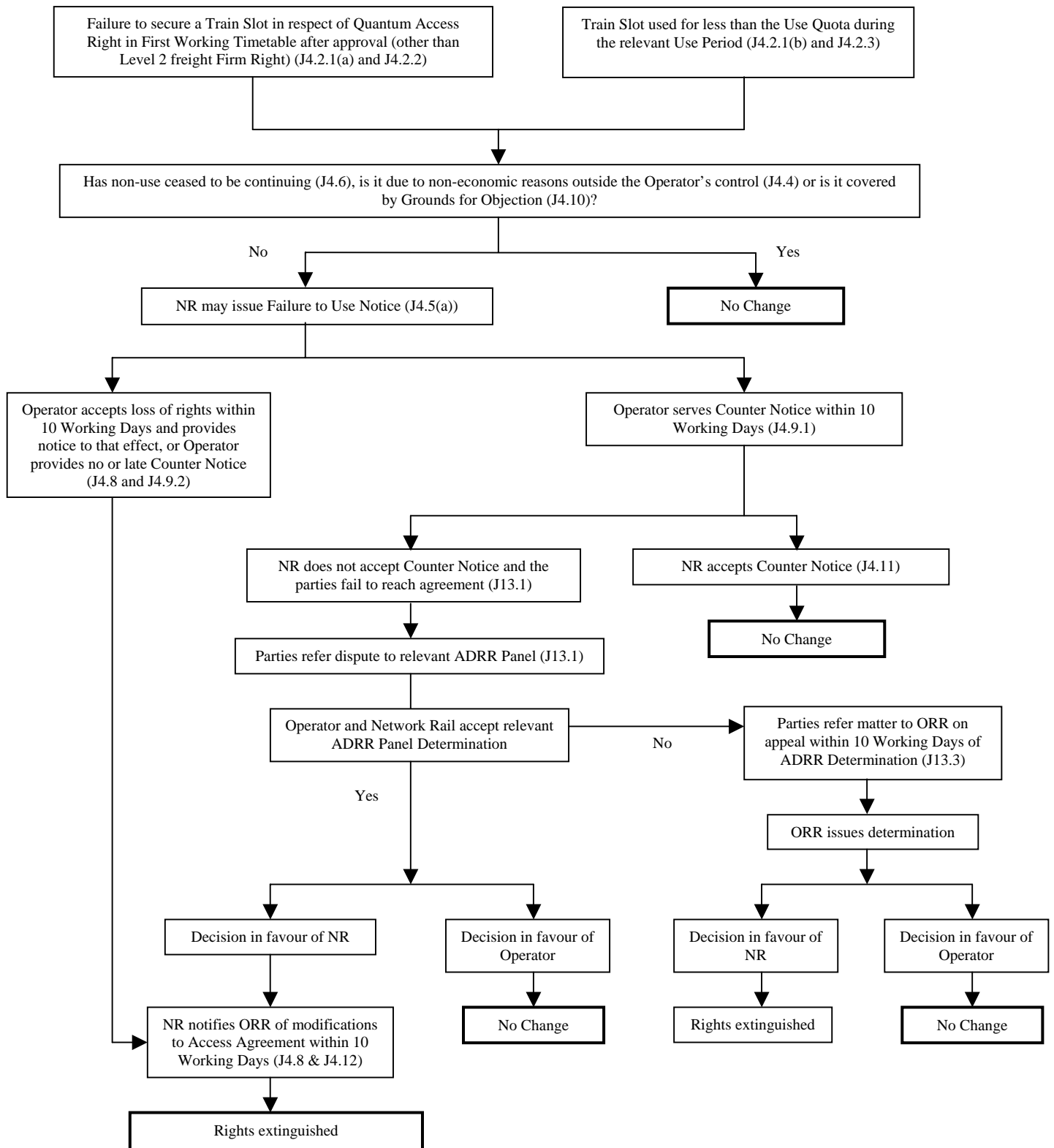
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			scope of Part J (see N° 8).
18	Condition J4.9.1	Insert new sub-paragraph (a) as follows: “(a) it considers the Failure to Use Notice to be invalid;” Existing sub-paragraphs (a) to (c) should subsequently be renumbered (b) to (d).	This change is proposed to ensure that any instances where an Incumbent operator considers a Failure to Use Notice to be invalid are formally notified to Network Rail along with the reasons for such an assertion.
19	Renumbered Condition J4.9.1(c)(i)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	See comment on the relationship of Part J to L3 Rights (see N° 8).
20	Renumbered Condition J4.9.1(c)(ii)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	
21	Condition 4.11(a)	Delete the words “Condition J4.9.1(a) or (b)” and insert the words “Condition J4.9.1(a), (b) or (c)”.	
Condition J5			
22	Condition J5.1(a)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	See comment on the relationship of Part J to L3 Rights (see N° 8).
23	Condition J5.1(b)	Delete the existing Condition J5.1(b) and insert new provision as follows: “(b) the Train Slot: (i) is one in respect of which the Applicant can demonstrate a reasonable commercial need; and (ii) was secured in exercise of a Quantum Access Right of another Train Operator (the “Incumbent”); and (iii) is one in respect of which there is a continuing Failure to Use by the Incumbent,”	It is proposed that new Condition J5.1(b)(ii) be inserted to allow, where a clear reasonable commercial need can be demonstrated, an Applicant to require Network Rail to issue a Third Party Failure to Use Notice to an Incumbent requiring it to surrender an access right that prevents the Applicant gaining required access to the network.

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24	New Condition	Insert new Condition 5.5 as follows: “5.5 <i>Counter Notice</i> Subject to the redaction of any commercially sensitive information, the Incumbent shall send a copy of any Counter Notice issued under Condition J5.4(b) to the Applicant.”	If a Counter Notice is issued under J5.4 the proposed new provision will require the applicant to be informed accordingly, thus encouraging further discussion with Network Rail, resubmission of the relevant Third Party Failure to Use Notice if appropriate, or appeal under new Condition J14.
Condition J7			
25	Condition J7.1.2	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	See comment on the relationship of Part J to L3 Rights (see N° 8).
26	Condition J7.2	Delete the words “Quantum Firm Right” where they appear and insert the words “Quantum Access Right”.	
27	Condition J7.3(b)(i)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	
28	Condition J7.3(b)(ii)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	
29	Condition J7.4(a)	Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.	
30	Condition J7.6.1	Insert new sub-paragraph (a) as follows: “(a) specifying that it considers the Third Party Notice to be invalid; or” Existing sub-paragraphs (a) and (b) should subsequently be renumbered (b) and (c).	These changes are proposed to ensure that any instances where an Incumbent operator considers a Third Party Notice to be invalid are formally notified to Network Rail along with the reasons for such an assertion.
31	Renumbered Condition J7.6.1(c)	Delete existing sub-paragraph and insert the following: “(c) providing evidence in support of its opinion or objection as appropriate.”	

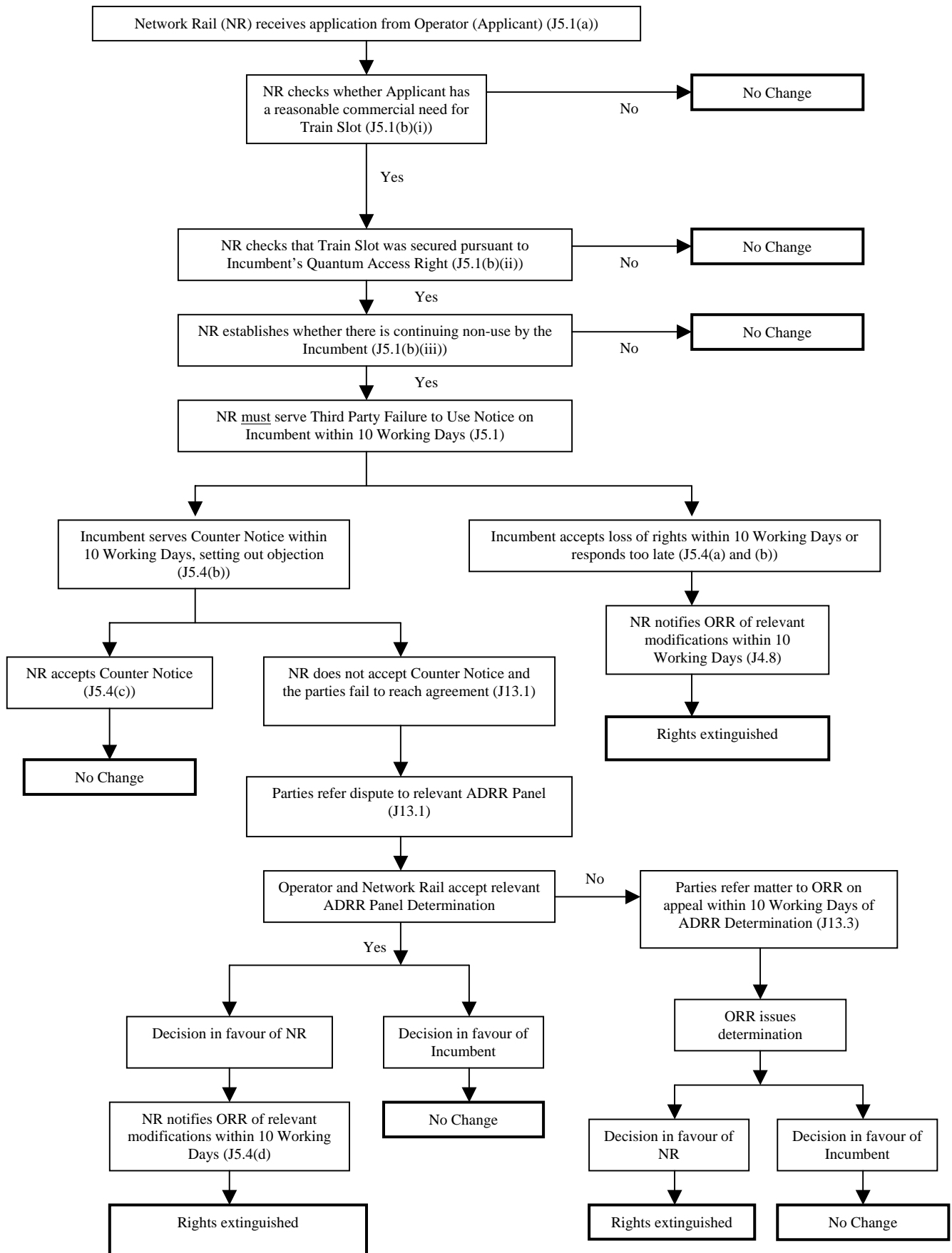
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32	Condition J7.6.1	<p>After the renumbered sub-paragraph J7.6.1(c) the following words shall be inserted:</p> <p>“The Incumbent shall send a copy of any Counter Notice and such evidence to both the Office of Rail Regulation and, subject to the redaction of any commercially sensitive information, the Applicant.”</p>	<p>If a Counter Notice is issued under J7.6 the proposed new provision will require the applicant to be informed accordingly, thus encouraging further discussion with Network Rail, resubmission of the relevant Third Party Notice if appropriate, or appeal under new Condition J14.</p>
33	Condition J7.6.4	<p>Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.</p>	<p>See comment on the relationship of Part J to L3 Rights (see N° 8).</p>
Condition J8			
34	Condition J8.1	<p>Delete the words “Quantum Firm Right” and insert the words “Quantum Access Right”.</p>	<p>See comment on the relationship of Part J to L3 Rights (see N° 8).</p>
Condition J9			
35	Condition J9.1.4	<p>Insert the following sentence at the end of the existing paragraph:</p> <p>“If, however, Network Rail considers a notice issued by a Train Operator in accordance with this provision to be invalid, it shall, within 10 Working Days of the receipt of the notice, issue a notice to the Train Operator rejecting the request and setting out its reasons for doing so.”</p>	<p>This change is proposed to ensure that any instances where Network Rail considers a third party request to schedule a Rights Review Meeting to be invalid, it notifies the originator and clearly explains the reasons supporting this view. This will allow either the resubmission of the notice if appropriate, or an appeal under new Condition J14.</p>
Condition J11			
36	Condition J11	<p>Delete “J1.9.2(c)” and insert “J4.9.2(c)”.</p>	<p>This change corrects an error from the Phase One proposal for change.</p>
New Condition J14			
37	New Condition	<p>Insert new Condition J14 as follows:</p>	<p>The proposal aims to address the issue of whether, under Condition J9.1.4, a third party freight operator request that a</p>

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		<p>“14. Appeal procedure</p> <p><i>14.1 Right of appeal to relevant ADRR Panel</i></p> <p>Without prejudice to the provisions of Condition J13, if any Access Party is otherwise dissatisfied as to any matter concerning the operation of Part J in respect of any access agreement, that party may refer the matter to the relevant ADRR Panel for determination under Part A of the Access Dispute Resolution Rules.</p> <p><i>14.2 Right of appeal to the Office of Rail Regulation</i></p> <p>If any Access Party is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition J14.1, that Access Party may refer the matter to the Office of Rail Regulation for determination under Part M.”</p>	<p>Rights Review Meeting should be convened between Network Rail and another freight operator is enforceable. We consider that this could be resolved through the inclusion of the following general appeal provisions under a new Condition J14:</p> <p>This additional Condition should also allow an Applicant to have a right of appeal against a decision made under either Condition J5 or J7 that its application for access rights is invalid (see N^os 18 and 30).</p>

Appendix 2: Condition J4 UIOLI process for unused rights or where slots are not sought by another operator



Appendix 3: Condition J5 UIOLI process where slots are sought by another operator



Appendix 5: Condition J7 freight transfer mechanism

