
An ACCESS DISPUTES PANEL of the ACCESS DISPUTES COMMITTEE

Determination in respect of reference ADP52

(following a Hearing held at 1 Eversholt Street, Euston on 14th April 2010)

The Panel

John Beer	(First Capital Connect): elected representative for Franchised Passenger Class, Band 2
Elaine Davies	(Eurostar): elected representative for Non-Franchised Passenger Class
Nick Gibbons	(DB Schenker Rail (UK)): elected representative for Non-Passenger Class, Band 1
Nic Coome	appointed representative of Network Rail

The Parties

For GB Railfreight Limited ("GBRf")

Steve Turner Development & Performance Manager

For Network Rail Infrastructure Ltd ("Network Rail")

Gordon Cox Customer Relationship Executive (GBRf)

Gareth Richards Customer Manager (DBS)

Further dispute party:

For DB Schenker Rail (UK) Ltd ("DBS")

Nigel Oatway Access Manager

Panel Chairman: **Sir Anthony Holland**

Brief Summary of Dispute, and the jurisdiction of the Panel

1. The Panel was asked, in a joint submission from GBRf and Network Rail, to determine whether Network Rail had acted incorrectly in respect of its obligations under Part J7 of the Network Code in rejecting an application by GBRf to transfer quantum access rights (presently held by DB Schenker) for the operation of services (6Y15, and 6E16) to and from Fort William, on behalf of its new customer, RTZ/Alcan ("Alcan").
 - 1.1. Network Rail had rejected the GBRf application due to claiming that DB Schenker had demonstrated "*reasonable on-going commercial need*" for the Rights corresponding to the Train Slots 6Y15 and 6E16 paths sought
 - 1.2. GBRf challenged this decision on the grounds that other behaviour by DBS suggested that it did not have "*reasonable on-going commercial need*" for the Rights in question.
 - 1.3. DBS, who had previously been the supplier of services to RTZ/Alcan, had made a separate submission to the Panel, supporting both Network Rail's action in rejecting

GBRf's claim and substantiating what it considered to be its "reasonable on-going commercial need" for these Rights.

2. The Panel noted that the dispute was formally triggered by the serving by DBS (the Incumbent of the disputed Rights) on Network Rail of a Third Party Counter Notice in accordance with the provisions of Condition J7.6.1, and therefore, as provided for in Condition J13.1(e), matters in dispute between the Train Operator (in this case GBRf), and Network Rail fall to be referred to, and determined by, an ADRR Panel convened in accordance with Part A of the ADR Rules.
3. The Panel was asked
 - 3.1. by GBRf, to determine that

"Due to the minimal amount of traffic being conveyed, the vast majority of traffic switching operators, First GBRf being awarded the contract to operate Alcan trains (as part of a tender process) and action taken by DB Schenker in transferring all its staff at Fort William, that it is not 'reasonable' for DB Schenker to claim an ongoing commercial need and therefore the quantum access rights for train paths 6Y15 and 6E16 should transfer to First GBRf."
 - 3.2. by Network Rail to note that:

"The transfer of staff under TUPE is not relevant in the consideration for transfer of access rights under Part J of the Network Code. The incumbent operator, DB Schenker has demonstrated reasonable on going commercial need to retain the quantum access rights."

and
 - 3.3. by DBS to determine, as requested by Network Rail that

"DB Schenker has a reasonable on-going commercial need for 6Y15 and 6E16 and that, therefore, the Quantum Access Rights and associated Train Slots should remain with DB Schenker so that the traffic being carried for DB Schenker's remaining customers on these services can continue to be conveyed."

The Evidence laid before the Panel

4. The Panel confirmed that, in accordance with the duties and procedures laid down in Access Dispute Resolution Rules Part A ("The Function and Operation of Panels"), it had reviewed and considered the following items.
 - 4.1. ***"FIRST GBRF AND NETWORK RAIL JOINT REFERENCE TO ADP 52 IN THE MATTER OF A REFERENCE TO THE ACCESS DISPUTES PANEL ENTITLED ADP 52*** dated 31st March 2010, and containing the following appendices
 - Appendix A: Letter of 4th February DBS to GBRf regarding transfer of staff from DBS to GBRf;
 - Appendix B: Extract of Fort William roster details for Fort William staff ;;
 - Appendix C: Letters of 18th February 2010 from GBRf to Network Rail seeking the level 1 Rights in Service Group 4067 relating to
 1. **6E16** 17:50 (FSX and FO) Fort William to Tyne SS; and
 2. **6Y15** 08:29 (SX) Mossend Yard to Fort William

- Appendix D: Letters of 18th March 2010 from Network Rail to GBRf rejecting GBRf's applications on grounds of DBS having demonstrated "reasonable on-going commercial need".
- 4.2. **Submission Paper from DB Schenker Rail Ltd in connection with the hearing of dispute between GB Railfreight Limited ("The Claimant") and Network Rail Infrastructure Limited ("the Respondent") concerning the operation of Condition J7 of the Network Code (ADP52):** dated 12th April 2010, and containing the following annexes
- Annexe 1: Letter 26/03/2010: registering interest in becoming a dispute Party to this dispute.
 - Annexes 2 & 3: Letters (dated 08/10/2010) from DBS to Network Rail written to cover confidential information for the purposes of demonstrating "reasonable on-going commercial need" for Rights to 6Y15 and 6E16 (covering letters only without accompanying documents) in reply to -
 - Annexes 4 & 5; Network Code Part J Section 7 Third Party Notices _ RTZ/Alczn Services (dated 23/02/2010) seeking surrender by DBS of Rights to 6Y15 and 6E16
 - Annexe 6; **Part J (Changes to Access Rights) of the Network Code: Criteria for interpreting the expression "reasonable on-going commercial need".** (ORR Doc 209956.02) ("CIRocn")
- 4.3. Opening statements from all three parties
- 4.4. The questions posed by Panel Chairman and Members and the responses given.
- 4.5. The Panel had requested that DBS should produce sufficient of the documentation referred to in the letters of 08/03/2010, to enable the Panel to assess whether it agreed with the view that the case for "Reasonable on-going commercial need" was made.

Some preliminary issues of definition; the relevant contractual provisions

5. The Panel's attention was drawn to the following definitions, contractual provisions, and precedents as relevant to its determination:

5.1. Access Dispute Resolution Rules

"Precedent

A1.17 *In reaching its determination, the Panel shall:*

- a) *take note of its prior determinations (and those of any predecessor body) and of any other relevant tribunal other than a superior tribunal, as persuasive authority but need not be bound by the same;*
- b) *be bound by any relevant decision of any superior tribunal..."*

"Determinations and Remedies

A1.18 *"The Panel shall reach its determination on the basis of the legal entitlements of the dispute parties and upon no other basis".*

5.2. Definitions

Rights Subject to Surrender	means, in relation to:
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	<p>(a) a Failure to Use Notice;</p> <p>(b) a Third Party Failure to Use Notice;</p> <p>(c) a Third Party Notice; or</p> <p>(d) a notice under Condition J9.2.1, as applicable, the Quantum Access Right to which such notice refers and:</p> <p>(i) any Train Slot or part of it in the Working Timetable which relates to that Quantum Access Right;</p> <p>(ii) any Ancillary Movements and Stabling that Network Rail determines:</p> <p>(A) are directly associated with the relevant Quantum Access Right; and</p> <p>(B) will no longer be required by the relevant Train Operator following the surrender or reduction of the Quantum Access Right, as applicable; and</p> <p>(iii) any Bid relating to any such Quantum Access Right;</p> <p>[Network Code Part J definitions]</p>
Quantum Access Right	<p>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>[Network Code Part J definitions]</p>
"Reasonable on-going commercial need"	<p>is interpreted as set out in Condition J12.1;</p> <p>12.1 In this Part J, the phrase 'reasonable on-going commercial need' shall be interpreted in accordance with rules or criteria (if any) determined and revised from time to time in accordance with this Condition J12 which, subject to Condition J12.4:</p> <p>(a) follow consultation by Network Rail with the appropriate franchising authority and Train Operators providing services for the carriage of goods by railway; and</p> <p>(b) have been approved by the Office of Rail Regulation.</p> <p>[Network Code Part J definitions]</p>
Operating Constraints	<p>means:</p> <p>(a) the Rules of the Route;</p> <p>(b) the Rules of the Plan; and</p> <p>(c) the Working Timetable and all appendices to the Working Timetable including the sectional appendices as defined in the Working Timetable and all supplements to the sectional appendices"</p>

5.3. Extracts from Condition J

J7 "Freight transfer mechanism"

7.1 Application of this Condition J7

- 7.1.1 *This Condition J7 applies only to services for the carriage of goods by railway.*
- 7.1.2 *This Condition J7 applies only to an application from the Applicant which requests a Quantum Access Right for the provision of transport services to a third party that the Applicant will (subject, where applicable, to any competitive tendering process amongst other parties) replace the Incumbent in providing.*
- 7.1.3 *This Condition J7 shall not apply to applications under an Access Agreement by third party Train Operators that are substantially similar in nature to applications made under this Condition J7.*

7.2 Third Party Notice

If Network Rail receives an application from a Train Operator (the "Applicant") requesting a Quantum Access Right that is substantially similar to an existing Quantum Access Right of another Train Operator (the "Incumbent") then, within 10 Working Days following receipt of the Applicant's application, Network Rail shall serve a Third Party Notice on the Incumbent and send a copy of that notice to the Office of Rail Regulation. If the Applicant's application does not comply with Conditions J7.1 and J7.2, then within 10 Working Days following receipt of the Applicant's application Network Rail shall serve a notice on the Applicant rejecting its application and setting out its reasons for rejecting the application.

7.3 Applicant's responsibilities

When making an application to Network Rail of the type described in Condition J7.2, the Applicant shall:

- (a) *at the same time as submitting the application to Network Rail, send a copy of the application to the Incumbent; and*
- (b) *specify in the application:*
 - (i) *the date on which the Applicant requests that the Quantum Access Right takes effect in its Access Agreement; and*
 - (ii) *that the Quantum Access Right sought is for the provision of transport services to a third party that the Applicant will (subject, where applicable, to any competitive tendering process) replace the Incumbent in providing.*

7.4 Contents of Third Party Notice

A Third Party Notice shall specify:

- (a) *the Quantum Access Right sought by the Applicant;*
- (b) *the Rights Subject to Surrender, which Network Rail requires the Incumbent to surrender in order to accommodate the Applicant's request; and*
- (c) *the Train Slots in the Working Timetable that Network Rail believes correspond to the Rights Subject to Surrender.*

7.5 Acceptance of surrender

If the Incumbent agrees to the surrender specified in the Third Party Notice, then:

- (a) *it shall, within 10 Working Days, give notice to that effect to Network Rail;*
- (b) *the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's Access Agreement on the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.5(c); and*

- (c) *Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date on which the Train Operator agrees to the surrender pursuant to Condition J7.5(a).*

7.6 Third Party Counter Notice

7.6.1 The Incumbent may, within 10 Working Days of receipt of a Third Party Notice, serve a Third Party Counter Notice on Network Rail:

- (a) *specifying that it considers the Third Party Notice to be invalid; or*
- (b) *specifying that it objects to the surrender of the Rights Subject to Surrender because it has a reasonable on-going commercial need for all or any of the Rights Subject to Surrender; and*
- (c) *providing evidence in support of its opinion or objection as appropriate.*

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.

7.6.2 If the Incumbent disagrees with the Train Slots shown in the Third Party Notice as corresponding to the Rights Subject to Surrender, it shall include in the Third Party Counter Notice details of the Train Slots that it asserts correspond to the Rights Subject to Surrender.

7.6.3 If no Third Party Counter Notice is served within 10 Working Days of receipt of a Third Party Notice:

- (a) *the Incumbent will be deemed to have agreed to the surrender of the Rights Subject to Surrender specified in the Third Party Notice;*
- (b) *the Rights Subject to Surrender shall be surrendered and will be removed in their entirety from the Incumbent's Access Agreement with effect from the date on which notice is given to the Office of Rail Regulation pursuant to Condition J7.6.3(c); and*
- (c) *Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Incumbent's and Applicant's Access Agreements no more than 10 Working Days after the date on which the Train Operator is deemed to have agreed the surrender pursuant to Condition J7.6.3(a).*

7.6.4 If the Quantum Access Right sought by the Applicant is for the provision of transport services to a third party which are the subject of a competitive tendering process amongst other parties including the Incumbent, then the Incumbent:

- (a) *may notify Network Rail of this process; and*
- (b) *if it has done so, the period of 10 Working Days referred to in this Condition J7.6 shall be deemed to commence on the date that the third party indicates its intention to contract at the end of the relevant tendering process.*

7.7 Cessation of notice

If the Incumbent and Network Rail agree or it is Determined that the Incumbent has a reasonable on-going commercial need in respect of any or all of the Rights Subject to Surrender, the Third Party Notice shall cease to have effect to the extent that the Incumbent's claim has been substantiated. Network Rail shall notify the Applicant in writing within 10 Working Days of such agreement or Determination that the Applicant's application has failed (in whole or in part) and shall set out the reasons for such failure.

7.8 Surrender of access rights

7.8.1 If it is Determined that the Incumbent has no reasonable on-going commercial need for all or any of the Rights Subject to Surrender, then the rights that are to be surrendered will be surrendered, and removed in their entirety from the Train Operator's Access Agreement, from the date:

- (a) *on which notice is given to the Office of Rail Regulation pursuant to Condition J7.8.2, in the event of an ADRR Determination; or*

(b) specified in the Office of Rail Regulation Determination, if applicable.

7.8.2 In the event of an ADRR Determination in accordance with Condition J7.8.1, Network Rail shall notify the Office of Rail Regulation of the relevant modifications to the Train Operator's Access Agreement no more than 10 Working Days after the date of that ADRR Determination and shall include a copy of the relevant ADRR Determination with such notice.

7.8.3 In respect of this Condition J7.8, any relevant Determination will be between Network Rail and the Incumbent, and the Applicant shall accept that the Determination will dispose of the matter as between the Applicant and Network Rail.

7.9 Grant to Applicant

Network Rail shall, through the issue of a notice to both the Applicant and the Incumbent, grant to the Applicant the rights surrendered by the Incumbent under this Condition J7. Such rights shall be granted to the Applicant:

(a) as from the latest of the following dates on which:

(i) notice is given to the Office of Rail Regulation pursuant to Condition J7.5(c), J7.6.3(c) or J7.8.2 or the date specified in the Office of Rail Regulation Determination (as applicable);

(ii) the Applicant's Access Agreement is modified to include, where applicable, any relevant Restrictive Provisions associated with such rights contained in the Incumbent's Access Agreement; or

(iii) the relevant Cordon Cap Increase, if any, has effect pursuant to Condition J8;

(b) with Service Characteristics in substantially the same form as the Rights Subject to Surrender; and

(c) for a period of time:

(i) equal to that which the Incumbent would have enjoyed had the rights remained with the Incumbent; or

(ii) until expiry of the Applicant's Access Agreement,

whichever is the shorter.

7.10 Bids

Where any Rights Subject to Surrender surrendered under this Condition J7 include the surrender of a Bid, Network Rail's obligations under Condition D4.7.1 shall, in respect of that Bid:

(a) cease to have effect in relation to the Incumbent as from the date the surrender takes effect in accordance with this Condition J7; and

(b) be deemed to have effect in relation to the Applicant as from the date the Bid is granted to the Applicant in accordance with Condition J7.9.

Extract from Part J (Changes to Access Rights) of the Network Code: Criteria for Interpreting the expression "reasonable on-going commercial need". (Doc 209956.02)

"Condition J7 (Freight Transfer Mechanism)

Where there is a transfer of customer traffic between operators, there should be a presumption that the relevant access rights/train slots should transfer with the customer contract.

"Reasonable on-going commercial need"

To demonstrate for the purposes of Condition J7.6.1(a), that it has a “reasonable on-going commercial need” [for] all or any of the Rights Subject to Surrender, a Train Operator must be able to demonstrate in respect of each of such rights that they are required to continue to convey traffic for another customers which is also being conveyed using the rights in question”

The Panel’s findings in respect of facts

6. The Panel noted the following facts and sequence of events, as represented by the parties as worthy of consideration in the formulation of its determination
7. In early October 2009, Alcan issued a tender for the provision of trains to deliver coal to Lynemouth Power Station, and alumina to Lynemouth Smelter and Fort William Smelter.
 - 7.1. On 16th February 2010, GBRf was notified in writing that they had been successful in the tender process for all services and they would start on 20th February 2010. However as the successful party, GBRF was advised prior to this date by telephone and it is understood that the unsuccessful parties were also told.
 - 7.2. GBRf took the view that all coal services and the alumina services between North Blyth and Lynemouth operated as discrete services for Alcan and that the Fort William services operated as part of the DB Schenker ‘Network’ services.
 - 7.3. First GBRf therefore submitted an application to transfer quantum access rights, under Condition J7 of the Network Code, to transfer the coal services and the alumina services between North Blyth and Lynemouth. This application was made on 10th February 2010.
 - 7.4. Network Rail responded on the 8th March 2010, stating that the rights applied for would transfer as DB Schenker had agreed to release them.
 - 7.5. These services have been operated since 20th February 2010 using the Quantum Access Rights and associated Train Slots surrendered by DBS.
8. As regards movements for Alcan between Central Scotland and Fort William, these have been operated by GBRf, since 20th February 2010, but only on the basis of “spot bidding” for paths. On the ground operations at Fort William had been assured by former DBS staff who, in common with DBS staff at Lynemouth, had been transferred under TUPE to GBRf’s employ.
 - 8.1. GBRf construed DBS’s actions in relation to its staff at Fort William, combined with an analysis of the traffics conveyed upon 6Y15 and 6E16 which showed that the preponderant traffic was to Alcan, as grounds for seeking the transfer of the Quantum Access Rights to 6Y15 and 6E16, as *“an application from the Applicant which requests a Quantum Access Right for the provision of transport services to a third party that the Applicant will (subject, where applicable, to any competitive tendering process amongst other parties) replace the Incumbent in providing”* [Condition J7.1.2]
 - 8.2. On 18th February 2010 GBRf accordingly submitted an application to transfer the Quantum Access Rights to 6Y15 and 6E16 from the Incumbent operator, under Condition J7 of the Network Code, access rights.
 - 8.3. On 18th March 2010, Network Rail advised GBRf that it had failed in its attempt to transfer the pathways due to DB Schenker providing evidence of a *‘reasonable ongoing commercial need’* for the rights, in order to be able to convey the traffics of other customers

9. Network Rail representatives have visited the Doncaster offices of DBS, and have been shown contractual documents that have assured Network Rail that DBS has "*reasonable on-going commercial need*" for both services in order to serve customers (other than Alcan) who had committed to the use of its services to reach terminals on the West Highland Line.
10. The Panel, having seen the confidential information submitted by DBS, was not inclined to challenge Network Rail's decision to issue rejection notices in respect of the transfer of the Quantum Access Rights to 6Y15 and 6E16, but considered that it needed to have a clearer understanding of the precise nature of those rights, and why GBRf considered their transfer to be of critical importance. As a result of questioning the Panel elicited the following points as potentially germane to its ultimate determination:
 - 10.1. freight train rights are subject to the Operating Constraints; for those working over the West Highland line the constraining length limit, determined by the length of passing loops, is 31 SLU including locomotive (i.e overall train length of 199 metres);
 - 10.2. the rights to 6Y15 and 6E16, as contained in Schedule 5 of DBS' Track Access Contract are not qualified in the template column "Maximum Length of train";
 - 10.3. there is an historic operational dispensation [recorded in the "Scotland Route Specially Authorised Loads Book"], that certain trains (amongst them 6Y15 and 6E16) can convey additional vehicles on the West Highland Line. In the case of 6Y15 and 6E16, the overall train length can be increased to 41 SLU (i.e 263 metres) to and from Fort William, but, as a consequence the Working Timetable has to ensure that the over-length train is not required to meet another over-length train between Craigendoran Junction and Fort William.
 - 10.4. GBRf are currently operating the Alcan traffic on the basis of five trains per week limited to 31 SLU, under Spot bidding conditions, but wish to obtain Firm Level 1 rights at the earliest opportunity. GBRf are proposing, and the Panel was not given any indication that this proposal was intrinsically unacceptable to Network Rail, to consolidate the 5 trains per week into three longer trains (i.e subject to Network Rail dispensation). Such a consolidation would offer the customer and GBRf economies of operation in terms of the commitment of resources, and also reduce the number of GBRf paths Network Rail would need to find for an equivalent number of wagon movements. However, within the framework of the current Working Timetable, such a planned path would, in the Southbound (empty) direction, require to meet and pass 6Y15, creating, should 6Y15 retain its dispensation to operate to 41SLU, the need for an "impossible" manoeuvre.
 - 10.5. DBS has operated its service between Mossend and Fort William using the Train Slots for 6Y15 and 6E16, on 8 occasions since 20th February 2010, on each occasion working North and Southbound services on an out and back basis from Mossend.

The Panel's findings in respect of entitlements

11. The Panel considered that the issues raised regarding such matters as the transfer of staff between Train Operators at Fort William to be irrelevant to the central issues which related entirely to the operation of the provisions of Condition J7 the Freight Transfer Mechanism, and the two specific questions
 - 11.1. had the parties complied properly with the procedures for the serving and exchange of notices? and
 - 11.2. had Network Rail been correct to construe DBS as having a "*reasonable on-going commercial need*" for 6Y15 and 6E16, such as to warrant its declining to transfer these rights to GBRf?

12. In respect of the first of these questions, the Panel was pleased to have confirmation from all three parties, in response to direct questioning from the Chairman, that all parties were satisfied with the way in which the procedural provisions of Condition J7 had been administered.
13. In respect of the second of these questions the Panel found that
 - 13.1. Network Rail had properly interpreted the information it had been given by DBS in concluding that DBS had a "*reasonable on-going commercial need*" for the Quantum Access Rights that supported the train slots 6Y15 and 6E16 between Mossend and Fort William, and that therefore,
 - 13.2. Network Rail had been correct to reject GBRf's application to transfer those Rights to GBRf. That said,
 - 13.3. given the scope of the traffics for which Network Rail and the Panel has been given information, and the number of times that the services in question have operated since 20th February, Network Rail should reasonably have considered whether
 - 13.3.1. DBS' "*reasonable on-going commercial need*" was adequately met by a service such as its contractual rights in Schedule 5 prescribed, namely an SX service subject to the standard Operating Constraints on the West Highland line, and in particular a maximum train length of 31 SLU;
 - 13.3.2. there was any "*reasonable on-going commercial need*" for the special dispensation for either 6Y15 or 6E16 to operate between Mossend and Fort William with a maximum length increased to 41 SLUs; and that
 - 13.3.3. it needed to take immediate steps, as part of its responsibilities to maximise the capability of the Network, to withdraw this, and other, superannuated dispensations, so that its discretion is unfettered should another Train Operator (such as GBRf) wish to invoke the precedent that such dispensations can reasonably be granted, but in connection with a different Quantum Access Right.
14. The Panel was concerned that the Network Rail representatives could not give clear answers as to how they would address the matter of reviewing and revising such special operating dispensations as had outlived their usefulness, but was satisfied that
 - 14.1. the responsibility for such "good housekeeping" was unequivocally Network Rail's, and
 - 14.2. the carrying through of such "good housekeeping" should not delay putting GBRf in the position that it had adequate Level 1 Rights and Train Slots to fulfil those responsibilities to convey the Alcan traffic that it had acquired as a result of the tendering and transfer of rights mechanisms contemplated in Condition J7.

The Panel's Determination:

15. Taking all the foregoing arguments into account, the Panel therefore **finds**, in respect of the representations made by the parties, that the following points are decisive in its determination;
 - 15.1. considerations of "*reasonable on-going commercial need*" in relation to an application to Transfer Quantum Access Rights under Condition J7, are to be determined by reference to the contractual obligations of the Incumbent to existing customers, and the extent to which those obligations can only be met by the exercise of existing Rights;
 - 15.2. considerations of transfer of staff have no consequence in the criteria for assessing "*reasonable on-going commercial need*";

- 15.3. on the other hand, the requirement that the “*on-going commercial need*” should be adjudged “*reasonable*” implies that, where there is the possibility of a discretion in relation to the scale of the Right, the Right that it secures should be proportionate to the scale of the commercial need. In this instance there is such discretion, as between a right for DBS to operate a service as per its Schedule 5 Level 1 Rights conforming to the standard Operating Constraints of a maximum train length of 31 SLU, or to continue to have access to the option to operate at the dispensation length of 41SLU.
16. The Panel therefore **determines** that
- 16.1. Network Rail has acted appropriately in adjudging that DBS has “*reasonable on-going commercial need*” to the Quantum Access Rights for SX services 6Y15 and 6E16, and rejecting GBRf’s application that they be transferred to it.
- 16.2. Network Rail should have considered whether that “*on-going commercial need*” reasonably justified perpetuating the discretionary permission to operate those services at a train length of 41 SLUs. In the view of the Panel, given the evidence presented, Network Rail should reasonably have concluded that that train length dispensation
- 16.2.1. was not something to which DBS was contractually entitled, and
- 16.2.2. was not appropriate to the scale of DBS “*reasonable on-going commercial need*”, and therefore, **to the extent that it is an impediment to the granting to GBRf of appropriate Level 1 Rights to permit the efficient operation of the Alcan traffic**
- 16.2.3. could, and **should**, be **withdrawn** at Network Rail’s initiative.
17. The Panel has complied with the requirements of Rule A1.72, and is satisfied that the determination, in all the circumstances set out above, is legally sound, and appropriate in form.



Sir Anthony Holland
Panel Chairman

21 April 2010