

**Department for Transport response to the ORR consultation on the Charging Framework for
the Heathrow Spur**

9 March 2016

Introduction

1. This document constitutes the response of the Secretary of State for Transport ("**SoS**") to the consultation launched by the Office of Rail and Road ("**ORR**") on 11 February 2016 relating to the charging framework for the Heathrow Spur ("**Consultation**").
2. This response is submitted by the Department for Transport ("**Department**") on behalf of the SoS, in its capacity as a sponsor of the Crossrail project and in its role in relation to the wider rail network in the UK.
3. Capitalised terms used in this response should be read as having the same meanings as they are given in the Consultation, unless indicated otherwise.

ORR's overall conclusion

4. The Department welcomes and fully supports ORR's overall conclusion that HAL should not be permitted to levy charges upon users of the Heathrow Spur that relate to the historical costs of constructing that rail infrastructure and that this key conclusion is unambiguously reflected in the draft charging framework annexed to the Consultation. The Department has always taken the view that HAL has not provided sufficient evidence to demonstrate satisfaction of the test contained in paragraph 3 of Schedule 3 to the Railways Infrastructure (Access and Management) Regulations 2005 ("**Paragraph 3 Test**"), and is pleased that ORR has reached the same conclusion.
5. The Department acknowledges and agrees with ORR's statement at paragraph 64 of the Consultation that while the charging framework prohibits HAL from recovering the historical long-term costs of the Heathrow Spur, it would not prohibit HAL from recovering future long-term costs from rail users in respect of any future investment in railway infrastructure provided it has met the Paragraph 3 Test. Further, the conclusion reached by the ORR in relation to the historical long-term costs of the Heathrow Spur (reflected in paragraph 3.2 of the draft charging framework) does not provide a precedent for other investment by HAL or any other infrastructure manager, since each project must be judged on its own facts and the available evidence at the relevant time.
6. Nonetheless there are some specific elements of the Consultation on which the Department has further comments. These are set out below.

Paragraph 3 Test – general commentary

7. In relation to each of the specific criteria of which the Paragraph 3 Test is comprised:
 - 7.1 the Department accepts that the first criterion - relating to the timing of construction of the Heathrow Spur - is plainly satisfied, and as such agrees with ORR's conclusion in that regard;
 - 7.2 for the reasons set out below, the Department does not accept that the second criterion - relating to resulting efficiencies and cost-effectiveness of the Heathrow Spur project - has been proved, and therefore does not agree with ORR's conclusion in that regard; and

- 7.3 the Department concurs with ORR's analysis of the third criterion, and ORR's conclusion that HAL has failed to provide enough evidence to demonstrate that the Heathrow Spur project could not have been undertaken without the prospect of higher access charges.

Paragraph 3 Test – second criterion

8. While it does not affect the overall decision ORR proposes to make in relation to historical costs, the Department would like to state for the record that it reserves its position in relation to ORR's conclusion, set out in paragraph 21 of the Consultation, that HAL has satisfied the second criterion of the Paragraph 3 Test. In particular, as was outlined in the Department's response to HAL's consultation in July 2015¹, which is attached to this document (**Annex A**), HEOC has long-term preferential access rights over the Heathrow Spur and therefore Crossrail (and any other) services will need to fit in around the Heathrow Express timetable. The consequence of this is that third party train operators do not have the ability to benefit from the most efficient use of the Heathrow Spur rail infrastructure.
9. Based on the information to which we have access, we remain of the view that HAL has not provided sufficient evidence to satisfy this criterion.

Proposed Charging Framework

10. The Department notes the charging framework proposed by ORR, set out in the Annex to the Consultation. The Department considers that the determination of the charging framework, and associated confirmation that historical costs cannot be recovered, will represent a significant step forward in the process of establishing the detailed charging scheme for the Heathrow Spur. This in turn will allow the Crossrail sponsors and operator to understand the charges to which they will be subject in order to secure access to the relevant infrastructure.
11. There is however some way to go before details of HAL's charging scheme are fully established. We note that ORR is obliged to establish not only the charging framework but also the “specific charging rules governing the determination of the fees”, and we are concerned that leaving HAL to propose specific charging rules based on the current, very broad, charging framework means that HAL could delay publication of a revised network statement. We note ORR's comment in paragraph 9 of the Consultation that HAL will be expected to update its network statement as soon as possible after the charging framework is adopted. We would urge ORR to set a deadline (shortly after adoption of the charging framework) by which this must happen, to ensure that further delays are avoided.
12. The Department considers that, since HAL have not made out a case for the recovery of historical capital costs of the Heathrow Spur in accordance with the Paragraph 3 Test, the overall charges for the use of the Heathrow Spur should be limited to the directly incurred costs of running trains on the infrastructure, which is the default position under the Regulations. We are concerned that HAL may seek to justify the imposition of other charges to compensate for the fact that it is not permitted to recover historical costs through satisfaction of the Paragraph 3 Test. We stand ready to work with HAL to agree upon a detailed charging scheme, but we will be prepared to consider further recourse to ORR if we consider that HAL's proposals do not accord with the charging framework established by ORR.

Applicability of ORR's section 4 duties

¹ See paragraphs 4.5 - 4.7.

13. We note that ORR has stated (in paragraph 41 of the Consultation) that it does not consider its duties under section 4 of the Railways Act 1993 ("**section 4 duties**") to be relevant to the decision about whether the Paragraph 3 Test is met. Whilst reserving our position on this specific point, we wish to reiterate that in our view the section 4 duties will be relevant in relation to other charges for use of the Heathrow Spur that HAL may propose within the context of the charging framework, and we welcome ORR's acknowledgement of this in paragraph 40 of the Consultation.

Policy considerations

14. We concur with ORR's analysis of CAA policy regarding surface access investment costs, as set out in paragraph 57 of the Consultation. We would also reiterate the comments we made in our response to HAL's consultation in July 2015, regarding the relevance of the Government's Aviation Policy Framework.² The Government's position is that developers should pay the costs of upgrading road, rail or other transport networks or services where there is a need to cope with additional passengers travelling to and from airports. The imposition of charges which seek to recover historical costs would, in our view, have represented an unhelpful precedent in this regard. If such charges became the default funding mechanism for surface access railways, it would shift the burden of capital costs onto publicly-funded railways, and would thereby potentially be contrary to Government policy.

The Deed of Undertaking

15. In paragraph 56 of the Consultation, ORR states that the 2006 Letters "*were superseded by the Deed of Undertaking*". We do not believe that accurately reflects the role of the Deed of Undertaking. To summarise, under the Deed HAL committed to ensuring it was fully compliant with the Regulations and to entering into a long-term access option with the SoS, in exchange for the SoS agreeing not to exercise certain powers that were proposed in the Crossrail Bill. The Deed specifically did not deal with the issue of access charges, and for this reason we do not consider that the 2006 Letters were superseded by the Deed of Undertaking. The two addressed different issues.

Application of the Regulations

16. In paragraph 2 of the Consultation, ORR states that in the Deed of Undertaking "*it was agreed that the advent of Crossrail services in 2018 would bring the Heathrow Spur fully within the scope of the Regulations*". We do not consider that this accurately reflects the position. The issue of whether or not the Heathrow Spur is covered by the Regulations is a matter of law and fact, not something that can be agreed upon by the SoS and HAL. The Department's position is that the Heathrow Spur has been subject to the Regulations since the latter came into force in 2005. HAL has been able to avoid compliance with the Regulations since that time as there have been no proposals for third party access to the Heathrow Spur, and hence no imperative to bring HAL into line with the requirements of the Regulations. The anticipated commencement of Crossrail services is now providing that imperative, but that does not mean that the advent of those services has *caused* the Heathrow Spur to fall within the scope of the Regulations. It has always been within the scope of the Regulations, albeit that HAL has not previously taken steps to ensure it is compliant with the same.

² See paragraph 9.3

17. It would therefore be more accurate to state that the SoS and HAL agreed, in the Deed of Undertaking, that HAL "would become fully compliant with the Regulations" prior to the commencement of Crossrail services on the Heathrow Spur.

Access Documentation

18. The Department would like to take this opportunity to point out that, quite apart from the need to establish a detailed charging structure, there is a considerable amount of work needed to bring HAL's proposed access documentation into an acceptable state to enable the Crossrail operator and other potential users of the Heathrow Spur to be able to properly apply for access. Despite repeated requests from both the Department and Transport for London, we have still not seen a revision to the inadequate and inaccurate set of documents that were included in HAL's original consultation which commenced on 1 July 2015.
19. We would welcome ORR exerting its influence to ensure that this documentation is revised as soon as possible so that it can form an adequate basis for an access application. If development of this documentation continues to be delayed in a way that risks jeopardising the opening strategy for Crossrail, with services planned to commence from Paddington high-level station in May 2018, we will need to consider applying to the ORR for a ruling on the matter.

Conclusion

20. The Department welcomes and fully supports ORR's overall conclusion that HAL should not be permitted to levy charges upon users of the Heathrow Spur that relate to the historical costs of constructing that rail infrastructure. We note, however, that there is a considerable amount of work to be done so that a detailed charging framework and suitable access documentation can be agreed and this now needs to be completed as soon as possible in order to achieve the planned commencement date of Crossrail services to Heathrow in May 2018.
21. We note that HAL will be expected to update its network statement as soon as possible after the charging framework is adopted and we would urge ORR to set a deadline (shortly after adoption of the charging framework) by which this must happen to ensure that further delays to the schedule for commencement of Crossrail services to Heathrow are avoided.

Annex A: Department's response to HAL's consultation in July 2015

Department for Transport

Response to Heathrow Airport Limited's Rail Industry Consultation on "moving to a regulated railway"

31 July 2015

This document constitutes the response of the Secretary of State for Transport (SoS) to the consultation launched by Heathrow Airport Limited ("HAL") on 30th June 2015 in connection with the infrastructure access and charging regime that it proposes to introduce in respect of the rail link from Heathrow Tunnel Junction to the airport, including the station infrastructure (the "Heathrow spur") in order to ensure compliance with the Railways Infrastructure (Access and Management) Regulations 2005 (the "2005 Regulations").

This response is submitted by the Department for Transport ("the Department"), on behalf of the SoS, including in its capacity as a sponsor of the Crossrail project and in its role in relation to the wider railway network.

Part A to this paper contains the Department's observations in respect of the charging framework proposed by HAL.

Part B to this paper contains the Department's observations on those aspects of the consultation documentation that do not relate to charging.

1. Executive Summary

1.1. The Department objects to the establishment of an investment recovery charge ("IRC"). The Department's objections are briefly summarised as follows:

- a. the conditions required by the 2005 Regulations for the establishment of an IRC have not been satisfied and as such any IRC would contravene the 2005 Regulations;
- b. the establishment of an IRC conflicts with previous understandings between the Department and HAL. There is no evidence which supersedes these understandings;
- c. HAL has not been able to articulate a justification for why the current charging framework should be changed and why an IRC should be levied on future train operating companies; and
- d. the proper application by the Office of Rail and Road (the "ORR") of its duties under section 4 of the Railways Act 1993 weighs heavily against the establishment of an IRC.

1.2. In the event that the ORR determines that an IRC should be established, which the Department strongly opposes, there are a number of features of HAL's proposed charging framework which are unsupportable due to inherent unfairness and lack of transparency. These include, but are not limited to:

- a. the inclusion of Terminal 5 assets in the calculation of the charge to be levied against Crossrail, even though it is not planned for Crossrail trains to call at

Terminal 5. This would result in the Crossrail operator paying for services which it does not use which would comprise more than 50% of the total fixed element of the access charges;

- b. the proposed rate of return of 5.35% (currently used for airport infrastructure), rather than a more appropriate 4.93% set by the ORR for rail infrastructure managers. If HAL applied the lower rate of return, it is estimated that the access charges would drop by around 5%;
- c. the proposal that the charge will vary depending on the total number of access paths that have been sold in order to guarantee full recovery of capital costs by HAL of the Heathrow spur. It is unfair for train operating companies to assume the volume risk in paying for access;
- d. the lack of transparency regarding the costs of track and stations access, as well as the lack of certainty on HAL's proposed review of future charges; and
- e. the proposal that train operating companies using the Heathrow spur would be charged a single price for crossing the boundary between the spur and Network Rail's infrastructure, in either direction. This is contrary to the usual principle that the charges should reflect usage.

- 1.3. The financial impact on Crossrail of HAL's proposed imposition of an IRC would be significant (circa £42m per annum in total) and substantially more than previously contemplated. This could negatively affect the provision of Crossrail and other train services.
- 1.4. The Department opposes the establishment of an IRC to enable the recovery of the historic capital costs of the Heathrow spur as this would act as an unhelpful precedent for a similar recovery of costs in relation to other surface access infrastructure for airports which may be contrary to the Government's Aviation Policy Framework.
- 1.5. As the Department strongly contends that HAL has not satisfied the exceptions set out in Schedule 3 of the 2005 Regulations, it notes that the default position for providing access would be to limit charges to directly incurred costs.
- 1.6. Whilst the Department disputes the imposition of an IRC, it recognises that the relevant rail regulations do require a reasonable set of charges to be imposed on future train operators accessing the Heathrow spur infrastructure. **Officials within the Department will remain available for further discussion throughout August and would be happy to further engage with the ORR, TfL and HAL to achieve a workable solution.**
- 1.7. The Department also considers that the documentation produced by HAL, which HAL proposes will form the contractual basis on which access to the Heathrow spur is granted, is flawed in a number of significant aspects. In particular:
 - a. the Network Code: (i) cannot work given the lack of any contractual link between TOCs and Network Rail; (ii) contains a seriously inadequate change process; and (iii) adopts a dispute resolution process which does not work in the context of the Heathrow spur; and
 - b. the Track Access Contract: (i) permits HAL to exclude Heathrow Express Operating Company Limited from the ambit of the Network Code, which is discriminatory; (ii) fails to provide for any compensation to be payable to TOCs when HAL imposes a restriction on use; and (ii) contains a performance regime which is flawed (in that it measures arrival times at a station that is not on the Heathrow spur - Paddington) and is unfairly biased against TOCs in a number of respects.

PART A - HAL's Charging Framework

2. Background

- 2.1. This **Part A** sets out the SoS's response to HAL's proposed charging structure.
- 2.2. HAL has provided limited background information in relation to this consultation. However, pursuant to a Deed of Undertaking entered into in 2008 between BAA plc, HAL, Heathrow Express Operating Company Limited and the SoS (the "Deed of Undertaking"), the two Crossrail sponsors, the SoS and Transport for London ("TfL"), have engaged in discussions with HAL. During these discussions, HAL has provided the sponsors with certain information regarding its proposed charging structure. Where applicable, this information is referred to in this response.
- 2.3. HAL's proposed charges include an element designed to remunerate HAL for the capital investment which it has made in the Heathrow spur. HAL posits that this is justified on the basis that it falls within the exception contained in paragraph 3 of Schedule 3 of the 2005 Regulations, commonly known as an "investment recovery charge" or "IRC".
- 2.4. Recovery by HAL of its capital investment in both the Heathrow spur infrastructure and the rolling stock used by Heathrow Express Operating Company Limited (which is in the same corporate group as HAL) to operate the Heathrow Express ("HEX") service, is currently achieved through HAL's regulatory asset base ("RAB"); where the Civil Aviation Authority ("CAA") establishes the maximum level of charges that may be levied by HAL on airlines for landing at the airport, it takes into account, as part of HAL's overall requirement for revenue, the cost of financing the capital outlay for the Heathrow spur infrastructure and the HEX rolling stock.
- 2.5. The proposal, as we understand it, is that the rail infrastructure assets which are currently included on the CAA's HAL RAB will remain on that asset base. However, any access charges levied against Train Operating Companies ("TOCs") by HAL for use of the Heathrow spur will be applied against HAL's revenue requirement by way of a "single till" mechanism.
- 2.6. It is understood that all of the revenues from HEX (which also includes the revenues of Heathrow Connect) are currently set off against HAL's revenue requirements (i.e. they are taken into account by the CAA as "single till" income). However, under the proposed new arrangements, HEX's revenue would not be applied exclusively towards cost recovery in this way. Instead, HEX, together with Crossrail (and any other users of the spur in the future) would be required to pay the access charge for use of the Heathrow spur. These charges would be counted as "single till" income for the purposes of the CAA RAB, replacing the single till income currently deriving solely from HEX's revenue (which includes the revenues of Heathrow Connect).
- 2.7. It should be noted that HAL has confirmed that the capital costs of the HEX rolling stock would stay on the CAA RAB but these assets would not form part of the calculation of the proposed IRC and would therefore continue to be paid for through airline charges as is currently the case.

3. Department for Transport's understanding of the current charging arrangements

- 3.1. As discussed above, HAL has not provided any justification for changing the current charging arrangements, nor has it been able to explain why the charges it is proposing now are significantly higher than those proposed in a 2006 letter addressed to the SoS (as further detailed in section 8).
- 3.2. Despite HAL's representations at meetings with the Department and TfL that the incumbent TOCs (HEx and Heathrow Connect) currently pay the same level of access charges as is now proposed, it was recently confirmed at a separate meeting with the CAA that the airlines operating at Heathrow have in fact been subsidising at least a substantial part of the historical capital investment in the Heathrow spur.
- 3.3. The Department has instructed specialist economic advisers, Oxera, to examine the accounts of HAL and HEx (which also report on Heathrow Connect accounts) to establish how much the two incumbent train operators have been paying for access to the spur. None of the statutory accounts investigated explicitly list any access charges payable to HAL. This research looked at a specific time period, 2008 – 2014.
- 3.4. The Department also asked Oxera to determine the level of historic access charges that would have been paid by HEx and Heathrow Connect over the period 2008-2014 had HAL imposed an IRC on the same basis as is now proposed (namely by establishing HAL's depreciation and rate of return requirements over the period in question).
- 3.5. **The analysis highlighted that HEx and Heathrow Connect did not earn enough revenue within this period to pay the Fixed Track Access Charge proposal by HAL (i.e. the IRC), let alone the Common Cost Charge, had such charges been imposed by HAL.**
- 3.6. The analysis suggested a shortfall between combined HEx and Heathrow Connect revenue and the Fixed Track Access Charge now required by HAL which varies between £40m and £10m over the 2008-2014 period.
- 3.7. The foregoing suggests that the airlines have been providing substantial subsidy for costs associated with the historical capital investment in the Heathrow spur. It follows that to levy the IRC as proposed would have the effect of either reducing landing charges for HAL's airlines or increasing HAL's operating profits.
- 3.8. HAL has not been able to justify why the proposed charges should apply to Crossrail. Given the lack of certainty and transparency in HAL's current charging framework, the Department strongly contends that the ORR should form its own view of the reasonable costs that should be levied on future TOCs, including the Crossrail operator.

4. Department for Transport's objections to HAL's proposed charging framework

- 4.1. In Section 6 of the draft Network Statement published as part of the consultation, HAL sets out the charges that it proposes to levy against train operators using the Heathrow spur. These charges comprise the following three elements:
 - a. Fixed Track Access Charge ("FTAC");
 - b. Common Cost Charge ("CCC"); and
 - c. Capacity Reservation Charge.
- 4.2. HAL states that "*the purpose of the FTAC is to allow HAL to recover historic investment on rail infrastructure, in accordance with paragraph 3 of Schedule 3 of the Rail Regulations 2005*". It is clear therefore that the FTAC constitutes an IRC.

- 4.3. The default position in the 2005 Regulations is that the charges which can be levied on a train operator for providing the minimum access package (which includes access to the track and stations) are limited to the costs directly incurred as a result of the train operator's use of that infrastructure. This default position applies unless an infrastructure manager can properly rely on one or both of the exceptions set out in Schedule 3 of the 2005 Regulations.
- 4.4. In relation to the FTAC, HAL is seeking to rely on the exception set out in paragraph 3 of Schedule 3 of the 2005 Regulations.

Paragraphs 3(1) and 3(2) state:

“3.—(1) Subject to sub-paragraph (2), for specific investment projects completed—

(a) since 15th March 1988; or

(b) following the coming into force of these Regulations, the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of the project.

(2) For sub-paragraph (1) to apply—

(a) the effect of the higher charges must be to increase the efficiency or cost effectiveness of the project; and

(b) the project could not otherwise have been undertaken without the prospect of such higher charges.

- 4.5. HAL has not provided any evidence or reasoning in its consultation documents showing that it meets these two requirements of an IRC. However, pursuant to the Deed of Undertaking, HAL provided the Crossrail sponsors with a note setting out its rationale for introducing an IRC, which is covered below.

First limb of Schedule 3 of the 2005 Regulations – increase in efficiency or cost-effectiveness

- 4.6. In relation to the first condition of paragraph 3(2) of Schedule 3 of the 2005 Regulations, HAL has claimed that the construction of the spur increased efficiency from the passengers' perspective but has not set out any evidence to support this contention. We understand that the ORR has been sympathetic to an argument along these lines in the past, and has accepted that the first limb of paragraph 3(2) may be considered satisfied if passengers are offered the opportunity of improved services (for example quicker journey times and greater connectivity). However, it cannot be the case that this holds true if the passenger experience has been improved *at any cost*. There must be a limit to the costs which can be charged to operators and reasonably passed on to passengers. We note that the costs of the spur are included on the CAA RAB for Heathrow, which suggests that the assets have, in the CAA's view, been efficiently acquired. However, this is not sufficient to demonstrate the increase in efficiency or cost-effectiveness required by the 2005 Regulations. In any event, the CAA's view of whether expenditure has been efficiently incurred may not be the same as the ORR's view of efficient expenditure in the context of rail regulation and HAL has not addressed any possible differences in the approach of the two regulators.

- 4.7. The Department can assume that HAL's interest in building the spur was to increase its own profits and that the airlines agreed to pay for the assets through the airport RAB because it improved their profitability too (by increasing passenger numbers and/or the landing charges that HAL could charge to airlines). Further, HAL negotiated preferential track access rights over Network Rail's track and stations which still exist. These give HEOC significant advantages over other operators, and dictate the way in which access rights are organised over the relevant sections of track and Paddington station. Such rights would not be permissible if that agreement were regulated under the 2005 Regulations and this suggests the driver of the spur's construction was HAL's profitability, not the improvement of the wider rail network. We would therefore dispute that Heathrow has demonstrated that it fulfils the first condition.
- 4.8. It follows that such preferential access rights mean that Crossrail services will need to fit in around the existing Heathrow Express timetable. The fact that Heathrow Express is able to benefit from a more efficient use of the Heathrow spur infrastructure and allocated platform space at Paddington should not be overlooked and there is a strong argument that the Crossrail operator should pay *lower*, rather than *higher* charges, as has been proposed by HAL.

Second limb of Schedule 3 of the 2005 Regulations – project could not otherwise have been undertaken without higher charges

- 4.9. In relation to the second limb, that “the project could not otherwise have been undertaken without the prospect of such higher charges”, our understanding of HAL's argument for having met this limb is briefly as follows:
- a. the Government of the day made it clear that no public funding would be available for the construction of the Heathrow spur;
 - b. the spur had to be funded privately;
 - c. private funders would expect a commercial return from their investment; and
 - d. therefore there must have been an expectation of higher charges being levied in order to recover the costs of construction and provide a commercial return; without this expectation the funders would not have funded the project and it could not have gone ahead.
- 4.10. Whilst the SoS accepts the premises (a), (b) and (c) it does not accept that the conclusion (d) reached by HAL is justified.
- 4.11. Paragraph (d) would be correct if the spur had been built in an unregulated market in which the only source of revenue was the charges levied for access. However, since commencement of services the funders of the spur have received a “return on investment” without levying access charges in the way which is now proposed. Analysis of the argument must take into account the way in which the airlines using Heathrow airport have been contributing, and continue to contribute, to the funding of the Heathrow spur through the mechanism of the CAA's RAB. This contribution is paid for through landing charges established by the regulator, which incorporates a regulated rate of return for HAL's capital investment. The spur's funders therefore receive a return on their investment through this mechanism. The airlines, which could be said in a wider sense to be investors in the spur, do not have a right to a direct return on this investment in the way that a normal equity or debt investor would in an unregulated industry. Instead, the acceptance by the airlines of the CAA's determination must reflect a recognition of the wider commercial benefits to the airlines arising from the construction of the Heathrow spur and the operation of train services on it. Such benefits

include increased passenger numbers, an enhanced passenger experience, the justification for higher seat prices and the fact that a significant proportion of airline and airport employees are able to travel to work by using the Heathrow spur.

4.12. We accept that investors of the Heathrow spur would not have been willing to invest without an expectation of commercial returns. However, it does not follow, as HAL suggest, that the project could not have gone ahead without levying higher charges on TOCs or indeed that the spur, treated in isolation, needed to make a profit. As explained above, the airlines have for many years contributed to the historic capital costs of the Heathrow spur (as well as the HEx rolling stock) through the landing charges set by the CAA. The airlines have done this on the basis of a commercial decision as to the net benefits they receive as a result of the spur carrying passengers to and from the airport. This was the environment in which the investors agreed to fund the project and HAL has provided no evidence that there was even an expectation, far less a requirement, on the part of the funders that the current arrangement would be replaced with a charging regime incorporating an IRC. Nor has HAL provided any reason why the current arrangements should not continue.

4.13. HAL's reasoning fails to recognise the commercial reality of the spur which has existed until now. The spur was constructed and commissioned long before Crossrail was given legislative backing in 2008. Passenger services have operated on the spur since 1998 without an IRC being charged under the 2005 Regulations. During that time, the airlines have, in effect, offset the costs of the railway through their landing charges. The Heathrow spur has been built, and operated for 17 years, without higher charges being charged in the form of an IRC. During the construction phase there was no immediately foreseeable prospect of third party operators using the infrastructure and, as far as we are aware, HEx and Heathrow Connect have, until now, never been required to pay an equivalent charge for track access to HAL. HAL has failed to provide evidence or reasoning supporting the fulfilment of the precondition that the spur could not have been built without the prospect of such higher charges. In our view there is therefore no legal basis for the establishment of an IRC.

5. Objections to specific features of HAL's charging framework

5.1. For the reasons given above, the SoS strongly opposes the principle of HAL's proposed IRC and considers it would contravene the 2005 Regulations. In addition to the points made in section 4, there are a number of features of the proposed charging structure, as well as the imposition of an IRC, which the SoS considers to be unfair and detrimental to both Crossrail and any other services that may make use of the Heathrow spur in the future.

5.2. One charge for entry on to or exit from HAL's network: HAL's proposal is that TOC's using the Heathrow spur would be charged a single price for crossing the boundary between the spur and Network Rail's infrastructure, in either direction. The charge would be the same whether the TOC were running a service to Terminals 1,2,3 or Terminal 4 or Terminal 5. This is contrary to the usual principle that the charges should reflect usage and that therefore an element of them should be expected to be variable in nature. This is particularly detrimental to Crossrail, which is not planned to call at Terminal 5. The inclusion of Terminal 5 infrastructure in the calculation of an IRC levied against Crossrail accounts for a significant proportion of the overall charge. We have received advice from economic advisers Oxera that removing the Terminal 5 assets from the asset base used to calculate the IRC for Crossrail would reduce the charge by

up to 52%. This would be consistent with the fact that almost half of Heathrow's passengers use Terminal 5.³

- 5.3. Guaranteed cost recovery: HAL's proposal is that its costs of running the infrastructure, including the historic capital costs, will always be recovered from the users of the spur, independent of the number of paths used collectively by the operators at any one time. This means that the TOCs, rather than the infrastructure manager, will bear the usage risk. The result is that HAL will have little if any incentive to maximise efficient use of its railway, as it will recover the same amount through access charges regardless of the number of train paths used. We do not consider this a reasonable approach, and note that the charging arrangements used by HS1 Ltd do not work in this way; instead, the IRC levied on HS1 Ltd is recovered on the basis of usage (the number of timetabled minutes).
- 5.4. Inclusion of asset renewals in IRC: It is worth noting that the cost recovery mechanism employed by HS1 Ltd allocates all cost recovery for asset renewals into a separate renewals account. HAL does not propose a similar approach meaning that TOCs do not have the same level of visibility on what they are paying for. In addition, HAL's Network Statement makes no reference as to the timeframe over which the IRC must be recovered. It is acknowledged that asset renewals would need to be incurred for as long as the infrastructure provides a service. However, it would be useful for HAL to indicate the timeframe over which it is seeking to recover for investment in its original railway infrastructure assets.
- 5.5. Peppercorn charge for station use: We understand that HAL intends to grant access to stations pursuant to a separate station access contract, as is the industry norm. However, HAL does not propose to impose a separate station access charge under the Station Access Contract, but instead will include station access charges within a unitary "access charge" levied pursuant to the Track Access Contract. This approach will severely impede cost transparency, making it extremely difficult for a TOC to examine and test the composition of the costs charged by HAL, both at the outset of its relationship with HAL but also upon any change being made to the station access arrangements.
- 5.6. Appropriate Rate of Return: The rate of return that HAL is allowed by the CAA to recover in relation to the assets on the aviation RAB is set by the CAA as an appropriate rate of return for the airports industry. This is currently 5.35%, and is higher than the rate of return deemed appropriate by the ORR for infrastructure managers (4.93%). Since HAL does not propose to set up a separate rail RAB but to leave the rail assets on the current aviation RAB, its proposed scheme, if implemented, would result in rail operators funding, through their access charges, a rate of return which was higher than the rate allowed to Network Rail for its infrastructure management. HAL has not provided any justification for receiving a higher rate of return than Network Rail currently does for providing a rail network. Analysis from Oxera suggests that if the lower rate of return based on the level permitted by the ORR was applied, there would be a circa 5% decrease in the level of access charges proposed.
- 5.7. Valuation of Regulatory Asset Base: In determining the proposed level of access charges, HAL has provided the project sponsors with a list of the railway infrastructure

³ <http://www.heathrow.com/company/company-news-and-information/company-information/facts-and-figures>

asset values. However, there is no means to test whether or not *all* of this investment was efficiently incurred expenditure.

- 5.8. Review process: HAL's Network Statement suggests that the IRC would be reviewed annually from December 2016. Without full visibility of the future investment programme, it is difficult for TOCs to gauge with any certainty what the future level of charges will be. HAL's Network Statement suggests that it will not consult on any further review of charges. Such a process would lack transparency and would benefit from industry consultation.
- 5.9. Performance scheme: HAL's Network Statement refers to railway undertakings compensating HAL for delays/cancellations. However, there is no reference to compensating railway undertakings due to a fault attributable to HAL, which may lead to TOCs being unfairly treated.

6. Objections to the Common Cost Charge and Capacity Reservation charge

- 6.1. The Common Cost Charge is a charge for operational expenditure needed to manage the network, comprising the following elements; staff costs, maintenance costs, station management costs, non-traction electricity and rates. HAL has proposed that the Common Cost Charge will be a per movement charge of £138.40 (2015 prices) irrespective of the operating company using the network for any movement in or out of Heathrow.
- 6.2. We object to HAL's proposed method of calculating the Common Cost Charge, as it does not allow for differing charges reflecting different TOCs' impact upon the network. In particular, the proposed flat rate does not:
- a. take into account factors which might affect the variation in costs incurred by HAL in allowing different trains access to the spur (for example, because newer Crossrail trains will cause less wear on the infrastructure); or
 - b. reflect the distance covered by each TOC. In particular, Crossrail is not planned to call at Terminal 5 and so should not incur operational expenditure in relation to this part of HAL's infrastructure.
- 6.3. In addition, it seems very unlikely that HAL's proposed charging structure does not contain variable costs, such as routine maintenance. To the extent that such variable costs exist, HAL should be incentivised to reduce them and ensure they are efficiently incurred.
- 6.4. HAL also proposes to implement a pass-through, which it considers to be "at cost", and over which it is claimed in the Network Statement that HAL has no control. However, a large infrastructure manager such as HAL is obliged to manage and negotiate the rates it pays to utility companies. Without such negotiations taking place, it would be extremely difficult to argue that HAL has efficiently incurred all of its costs and has procured the best rates possible. It is noted that HS1 Ltd frequently renegotiates its various pass-through costs to ensure it is getting the best possible deal; it is unclear why HAL does not believe it can do the same.
- 6.5. In paragraph 6.1.4 of the Network Statement, HAL confirms that it does not propose to implement a capacity reservation charge before December 2015 but reserves the right to do so in the future. We consider that the introduction of such a charge in future would be contrary to the Deed of Undertaking agreed between HAL associated companies and the SoS in 2008 and would in any event require further consultation pursuant to the

2005 Regulations. In addition, HAL has not provided any indication as to the level of this future charge. We would expect the Network Statement to contain a clearer statement of HAL's intentions in this regard.

7. Revenue abstraction

7.1. We acknowledge that Crossrail will potentially abstract revenue from the HEx service. Since HEx revenue is currently netted off against HAL's revenue requirement as a single till income to the CAA RAB, the introduction of Crossrail services could have a negative effect on the airlines' commercial position. However, Crossrail will also bring benefits to the airlines in terms of increased passenger choice and quality of service. The net effect of these changes was considered by the CAA in its 2014 determination of airline charges. As a result, the CAA approved a £70m contribution from HAL towards Crossrail. In the course of the CAA's deliberations leading to the 2014 determination, the amount of this contribution was reduced from an expected sum of £180m in 2008 prices (as set out in an agreement between BAA plc and the SoS) to £70m. This supports the proposition that this is a fair reflection of the benefit to the airlines. Therefore there should be no further compensation for revenue abstraction suffered by HEx as a result of Crossrail services commencing services on the spur. In any case, revenue abstraction forms no part of the justification of an IRC under the 2005 Regulations.

8. Previous assurances given by HAL to the Crossrail Sponsors

8.1. In addition to the above arguments, the SoS would like to remind HAL of an assurance given by BAA plc (HAL's predecessor) in a letter dated 6th January 2006. The letter, together with a subsequent letter which refers to it dated 5th June 2006 and action points circulated after a meeting on 14th November 2012 in which its existence was acknowledged by HAL, are attached at **Annex A**. The letter shows that HAL intended to levy a charge based on certain operational, maintenance and renewals costs. The letter states that these had been calculated in 2006 at £12.1 million per annum. These would be indexed to take into account inflation, but would not otherwise be increased. The quantum of operational expenses referred to by HAL in that letter has never been validated and the letter did not deal with any justification for charging more than the costs directly incurred (i.e. the default position for the minimum access package as mentioned in paragraph 4.3). Nevertheless, the letter (written 8 years after construction of the spur) makes it clear that HAL did not intend to seek to recover the capital costs of the spur through access charges levied against the Crossrail TOC.

8.2. The 2006 letter indicates the views held by BAA plc at the time; it suggests that BAA plc cannot have contemplated levying charges at the level of those now being proposed, whether structured as an IRC or otherwise. Further, the specific reference to not seeking to recoup historical capital costs means that an IRC was not contemplated at that time (let alone when the spur was being constructed). This further demonstrates that the two limb test in the 2005 Regulations for an IRC has not been met.

8.3. The 2006 letter was sent in the context of preliminary discussions between the SoS and BAA plc regarding Crossrail's proposed use of the Heathrow spur. BAA plc wished to prevent certain powers in the Crossrail Bill from being exercised; the SoS wanted to avoid BAA plc petitioning against the Bill and wished to have assurance that BAA plc would grant Crossrail access rights over the spur. Part of this negotiation related to the fees that Crossrail would pay for the access rights and the outcome of these discussions is encapsulated in this letter and has not been challenged or renounced by HAL until

recent discussions commenced in March 2015 regarding HAL's proposed introduction of the IRC.

- 8.4. Separately, but as part of the overall discussions, the parties entered into a Deed of Undertaking in 2008. In this Deed, in consideration for the SoS agreeing not to use certain powers in the Crossrail Bill, BAA plc agreed (i) to achieve compliance with the 2005 Regulations and (ii) negotiate in good faith a track access option on the basis of heads of terms set out in the Deed.
- 8.5. The Deed of Undertaking did not deal with the issue of charges for track access. However, this is not surprising since the Deed provided for the negotiation of a track access option to guarantee the access rights. The heads of terms of the option anticipate that, as is usual practice, the matter of fees to be charged for access would be dealt with in the subsequent track access agreement. Since the Heathrow spur comes within the scope of the 2005 Regulations (as was acknowledged formally by the ORR in a statement dated 10th January 2013), all charges levied by the infrastructure manager, unless agreed otherwise with the users, must be lawfully levied in accordance with the 2005 Regulations.

9. The ORR's section 4 duties

- 9.1. Regulation 12 of the 2005 Regulations states that it is for the ORR to establish the charging framework under which an infrastructure manager should levy charges on operators of their infrastructure. The ORR is established under the Railways Act 1993. Section 4 of this Act imposes duties on the ORR and regulation 28 of the 2005 Regulations applies those duties to the ORR's functions under the 2005 Regulations. The duties which the SoS considers most relevant to the establishment by the ORR of the charging regime in relation to HAL's infrastructure, and the factors that the SoS would expect the ORR to take into account in respect of them, are set out below. We bring these to HAL's attention as we consider it important for HAL to be cognisant of the likely approach the ORR will take in exercising its duty to establish the charging framework.

9.2. To promote improvements in railway service performance:

(c) 4(1) The Office of Rail Regulation shall have a duty to exercise the functions assigned or transferred to it under or by virtue of this Part or the Railways Act 2005 that are not safety functions in the manner which it considers best calculated—

(d) (zb) to promote improvements in railway service performance;

(e) The fact that charges are designed to effect a full recovery of HAL's railway infrastructure costs (see below) means that the charges may alter, depending on how many paths have been sold by HAL at any one time. The effect of this would be that if, for example, the number of HEx trains decreased from four to two trains per hour, the charges levied against Crossrail and any other operators would increase correspondingly to ensure HAL's revenue did not drop. This means that HAL is not incentivised to provide an efficient service to users of the spur, and TOCs will have to take account of the uncertainty over the charges in their own policies, including the setting of ticket prices.

(f) Further, HAL's proposed charging structure assumes that it has no variable costs. This seems very unlikely, and to the extent that such variable costs exist, HAL should be incentivised to reduce them.

9.3. To protect the interests of users of railway services:

(a) *otherwise to protect the interests of users of railway services;*

(g) The imposition of an IRC by HAL will adversely affect the ability of Rail for London, which granted the Crossrail concession and the Crossrail TOC to deliver a cost effective service at a reasonable ticket price.

(h) As well as the immediate effect on Crossrail, the imposition of an IRC would form an unhelpful precedent in the event that other railway links are constructed to Heathrow and other airports in the future. The Government's position for existing airports is that developers should pay the costs of upgrading or enhancing road, rail or other transport networks or services where there is a need to cope with additional passengers travelling to and from expanded or growing airports. If the IRC were to become the default funding mechanism for surface access railways, this would shift the burden of the capital cost of such infrastructure to publicly funded railways and would thus assume an element of public funding which would be contrary to general Government policy.⁴

9.4. To promote the use of the railway network in Great Britain:

(i) (b) *to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;*

(j) The Heathrow spur is a small but strategically important part of the railway network of Great Britain. It is important that the charging framework encourages the efficient use of available capacity on the Heathrow spur as part of that network. An IRC would unfairly transfer the burden of the capital costs of the spur from the original funders to the TOCs and could act as a deterrent for new and existing customers to make full use of the spur. As regards the Crossrail TOC, this would mean that the public sector would effectively be paying for a substantial part of the construction of the spur, which runs directly against the government policy at the time when the spur was built which was, as HAL has acknowledged, that the Government would provide no capital funding for the project.

9.5. To promote efficiency and economy on the part of persons providing railway services:

(k) (c) *to promote efficiency and economy on the part of persons providing railway services;-*

(l) The introduction of an IRC would add cost to Crossrail and any other TOCs providing rail services on the spur. Further, the fact that the proposed charges do not reflect the costs of providing access to the spur (because access is charged at a flat rate) means that train operators will have little or no incentive to look for

⁴ It should also be noted that, as per section 5.12 of page 75 of the Government's latest Aviation Policy Framework: "*Where the scheme has a wider range of beneficiaries, the Government will consider, along with other relevant stakeholders, the need for additional public funding on a case-by-case basis.*" https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/153776/aviation-policy-framework.pdf

efficiencies which will benefit the passengers and the rail network generally (for example, to reduce wear and tear caused by the trains or alter service patterns to create an efficient service).

9.6. To enable planning of railway services businesses:

(m) (g) *to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.*

(n) HAL's full-cost-recovery model means that charges will alter depending on how many other services are operated on the spur, so Crossrail will have to carry the risk that its access charges could significantly increase due to circumstances out of its control. This is an inappropriate allocation of risk (the infrastructure manager would normally be expected to carry this risk) and is contrary to the practice followed elsewhere on the rail network (in particular, HS1).

9.7. To protect the prices charged and the service provided:

(o) (2) *Without prejudice to the generality of subsection (1)(a) above, the Office of Rail Regulation [shall] have a duty, in particular, to exercise the functions assigned or transferred to it under or by virtue of this Part or the Railways Act 2005 that are not safety functions in the manner which it considers is best calculated to protect—*

(p) (a) *the interests of users and potential users of services for the carriage of passengers by railway provided by a private sector operator otherwise than under a franchise agreement, in respect of—*

(q) (i) *the prices charged for travel by means of those services, and*

(r) (ii) *the quality of the service provided,*

(s) *. . . ; and*

(t) (b) *the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of—*

(u) (i) *the prices charged for such use; and*

(v) (ii) *the quality of the service provided.*

(w) Crossrail is a service provided otherwise than under a franchise agreement so the ORR has a duty to consider the effect of the charges on the prices charged for the services on Crossrail and the quality of the service that the Crossrail TOC can offer. The imposition of an IRC will adversely affect the commercial viability of the Crossrail services which will increase the likely ticket price and may adversely affect the quality of the service that the Crossrail TOC can offer.

(x) Crossrail offers the public services which are more flexible (because they will go to more destinations) and more cost effective than the existing HEX and Heathrow connect services. Crossrail passengers will be able to travel direct from Heathrow to central London, Canary Wharf, east London and Essex. It is in the public interest that the new services are available at a fair and reasonable price

which is consistent with TfL's overall pricing structure across the whole of the area in which it operates.

9.8. To have regard to the general guidance of the SoS:

(y) (5) *The Office of Rail Regulation shall also be under a duty in exercising the functions assigned or transferred to it under this Part [or the Railways Act 2005 that are not safety functions—*

(z) [(a) *to have regard to any general guidance given to [it] by the Secretary of State about railway services or other matters relating to railways;]*

(aa) The SoS has issued guidance to the ORR under this section which includes the following paragraphs (emphasis added):-

(bb) “The Secretary of State’s key priorities for the rail industry are for the industry: to maintain a high level of safety; to control its costs and live within the public funding available to it; to meet the needs of passengers and freight users; and to contribute to the Government’s sustainable development objective.

(cc) Public resources available to spend on the railway are constrained. In having regard to the funds available to the Secretary of State, the ORR is asked to note that the Secretary of State is required to live within allocated resource budgets and to secure value for money from public expenditure. Accordingly, where the ORR is taking decisions which may have actual or potential financial consequences for the Secretary of State, **the Secretary of State wishes the ORR to note particularly that he does not wish to incur additional expenditure beyond allocated budgets and does not wish to incur expenditure which is not value for money.**”

(dd) We contend that the imposition of an IRC by HAL would be contrary to the needs of passengers who would be likely to suffer increased fares or a reduced quality of service as a result of the additional cost of the IRC. Further, the SoS could indirectly be required to incur additional expenditure (through its funding of TfL) as a result of the charge falling outside the previously assumed budgets based on the previous assurances given by BAA regarding the likely levels of access charges.

9.9. To have regard to the funds available to the SoS:

(ee) (c) *to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services;*

(ff) Crossrail is partly funded by the SoS. The SoS has made significant contributions towards the construction costs of the Crossrail project and makes grants to TfL. It is therefore in the public interest that the charges levied by HAL for use of the Heathrow spur are fair, reasonable, and provide proper incentives for efficiency and cost effectiveness.

9.10. To have regard to the functions of the Mayor of London and Transport for London:

(gg) (d) *to have regard to the ability of the Mayor of London, . . . and Transport for London to carry out the functions conferred or imposed on them by or under any enactment.*

As the Mayor of London and TfL have a general transport duty to promote economic and efficient transport facilities and services within Greater London, the implementation of an IRC would severely restrict the ability to carry out this duty. If the ORR determines that an IRC should be levied on future TOCs, this may result in future fares set by TfL needing to increase, or future Crossrail services needing to be reduced. Paragraph 13.1 provides further details on the likely impacts.

9.11. To have regard to the interests of securing value for money:

(5C) *In performing its duties under subsections (1) to (5A) above in relation to—*

- (a) any matter affecting the interests of users or potential users of railway services,*
- (b) any matter affecting the interests of persons providing railway services, or*
- (c) any matter not falling within paragraph (a) or (b) but falling within subsection (5D),*

the Office of Rail Regulation must have regard, in particular, to the interests, in securing value for money, of the persons mentioned in paragraphs (a) and (b) above, of the persons who make available the resources and other funds mentioned in that subsection and of the general public.

(5D) *A matter falls within this subsection if the Office of Rail Regulation has been informed that—*

- (a) public financial resources (within the meaning of paragraph 1D of Schedule 4A to this Act), or*
- (b) funds that do not comprise such resources but are provided in whole or in part by Transport for London, the National Assembly for Wales, a Passenger Transport Executive or any other body in receipt of such resources,*

are or are likely to become available to be applied for purposes connected with that matter.

The imposition of the IRC would impose an additional cost on the Crossrail service and is likely to adversely affect the passengers (against whom higher charges would be levied) and the Crossrail sponsors who will need to adjust their budgets to take into account the additional and previously unanticipated costs of the proposed IRC.

10. Crossrail Act: Objective of ORR in relation to Crossrail

10.1. Sections 22(1) and 23(1) of the Crossrail Act 2008 makes further provision regarding the ORR's duties under section 4 of the Railways Act 1993 as follows:

"22(1) The list of objectives in section 4(1) of the Railways Act 1993 (c 43) (objectives of Office of Rail Regulation and Secretary of State) shall be treated, in relation to the Office of Rail Regulation only, as including the objective of facilitating the construction of Crossrail.

23(1) The Office of Rail Regulation shall from time to time publish a report on (a) what it has done, or proposes to do, to further the objective given to it under section 22; (b) how it has exercised or proposes to exercise its functions in connection with the operation of Crossrail passenger services."

10.2. Although this provision appears to be aimed at the construction activities themselves, it should be noted that the Crossrail Act provides that "[r]eferences in this Act to Crossrail are to a railway transport system..." (Section 56(2)), which suggests that the "construction of Crossrail" includes the putting in place of all the systems and requirements of an operational railway. Further, the construction of the engineering works themselves are not sufficient to create an operational railway, which was the purpose of the project. Section 23(1) supports this view by making reference to the operation of Crossrail passenger services. Consequently we consider that the ORR is under a duty to exercise its functions with the objective of facilitating the interests of the project as a whole, including the interests of the project sponsors and the future passengers of Crossrail when considering the appropriate charging framework which should apply to the Heathrow spur. In particular, we consider that this means that the ORR should avoid imposing a charging framework which would have an adverse impact on the efficiency and cost effectiveness of Crossrail.

11. State Aid considerations

11.1. HAL's position is that, provided that the charge is properly levied in accordance with the 2005 Regulations, no issue of State aid can arise. This is because the charge represents a payment for use of the infrastructure, applied equally to all users of that infrastructure. Therefore, HAL contends that it matters not where the funding is coming from, whether it is airline passengers, rail passengers or the Government.

11.2. However, the Department's concern stems from the fact that railways are funded in a different way to airports and in particular the operators of railways routinely receive public subsidies. This is a problem unique to the Heathrow spur as it serves only Heathrow and is a dedicated link rather than a general transport measure. This will inevitably mean that public money will be used to pay the IRC. Therefore, the state will be funding a dedicated surface access link to an airport. The fact that this funding will commence many years after the infrastructure has been built does not alter this fact. Without further explanation or justification of this element of state funding, concerns regarding state aid remain, which weigh heavily against the lawful imposition of an IRC.

12. Financial impact if Investment Recovery Charge is implemented

12.1. If HAL is permitted to impose an IRC upon future TOCs, the financial impact would be significant for Crossrail.

12.2. The 2006 letter referred to in section 8 is evidence of HAL's intention at the time to only charge Crossrail for operational expenditure, maintenance and renewals.

12.3. HAL's Network Statement, published as part of the recent consultation, provides limited information on the charges that would apply to Crossrail. This is because Crossrail services will commence in 2018 and the charges HAL has provided only apply to the end of 2016. The charges referred to would include an FTAC of £597.30 per path and a CCC of £138.40 per path (both 2015 prices).

- 12.4. As part of an exchange of information prior to the consultation, HAL provided both TfL and the Department with a set of charges to apply from 2019 to 2023. This suggested the FTAC would be £493 and the CCC would remain at £138 (2015 prices).
- 12.5. This lower set of charges, said to apply from 2019, does not feature in the Network Statement. Despite the fact that the assets will depreciate over time, it should be noted that older assets will cost more to repair and renew, which means that future charges may actually increase. It is therefore difficult to predict with any precision the level of future charges. Indeed, HAL's Network Statement refers to a review in 2016 which "*will incorporate investment in the network over the period from September 2015 to December 2016*". The Department and TfL have no visibility as to the nature and scale of this investment and it is difficult to gauge how much this will increase future charges.
- 12.6. If future charges are to remain at similar levels suggested by the HAL Network Statement (i.e. £597.30 per path for the FTAC and £138.40 per path for the CCC), based on 8 Crossrail trains per hour, this would equate to around £42m per annum in charges to be borne by Crossrail, which is significantly more than contemplated in the Crossrail business case. **Annex B** provides more details behind these calculations.

13. Risks if Investment Recovery Charge is implemented

- 13.1. Should the IRC be established, the resultant effect would be one or more of the following:
- a. tickets prices would need to rise to meet the higher charges;
 - b. Crossrail services would need to reduce;
 - c. TfL may need to limit essential investment elsewhere in the London transport network; and/or
 - d. TfL may ask for further funding from the Department, which would have a directly negative effect on public funding.
- 13.2. In addition, the IRC would have significant implications for future franchised services running onto the existing HAL infrastructure, as they would be likely to be asked to pay an IRC as part of an access charge.

PART B - HAL's Access Documentation

14. Summary

14.1. The access documents issued by HAL and which form part of the consultation are as follows:

- a. Network Statement;
- b. Network Code;
- c. template Track Access Contract;
- d. template Station Access Contract;
- e. template Station Access Conditions; and
- f. template Station Access Annexes,

together, "the Documentation".

14.2. This **Part B** sets out the SoS's observations on the adequacy of the Documentation.

14.3. We note that, other than the Network Statement, for the most part the Documentation closely follows the equivalent template documents used by Network Rail in respect of the national network and approved by the ORR. While we agree that it is sensible to use these NR documents as a basis for the Documentation, given that they are already approved by the ORR and have general acceptance within the industry, a common theme of the concerns we set out below is that HAL has not done enough to adapt the NR documents to ensure that they function effectively in the context of the Heathrow spur.

14.4. This has two key impacts:

- a. The template documentation is drafted on the assumption that the national regulatory regime applies, in that the infrastructure manager will hold a network licence and the ORR will undertake its usual regulatory function. However, in the case of the Heathrow spur HAL will not hold a network licence, and it is not clear how the obligations normally found in the licence will be imposed. Equally, while the ORR's role in respect of the national network is well understood, its role in relation to the Heathrow spur is less clear. If in fact the ORR is not required or does not choose to take on the role envisaged for it by the Documentation, those elements of the Documentation that rely upon the ORR will cease to function; and
- b. The Documentation also makes references to the Network Code used by Network Rail ("NR Network Code") and seeks to incorporate elements of it. This is problematic, given that there will not be any contractual nexus between the TOC under a HAL Track Access Contract and Network Rail. The result is that neither the TOC nor Network Rail are able to enforce rights against the other.

14.5. In addition we are concerned that in some areas the Documentation has been drafted in such a way as to deprive TOCs of important rights which they would have under equivalent arrangements with Network Rail. We are not clear why this should be the case. We expand on these concerns below.

14.6. The observations set out in this Part B represent the key issues identified by the Department in the limited time that has been made available by HAL for submission of consultation responses. They are not an exhaustive list of comments.

15. Regulatory regime

- 15.1. The Heathrow spur is currently exempt from the licensing and access requirements of the Railways Act 1993 ("Act") pursuant to the Railways (Heathrow Express) (Exemptions) Order 1994. This means that HAL is not required to obtain a network licence pursuant to section 8 of the Act and we presume that HAL does not intend to do so. This leaves the Department confused about how HAL anticipates being regulated and how HAL will be obliged to comply with the (extremely important) regulatory requirements that are typically found in a network licence.
- 15.2. There are numerous parts of the Documentation that anticipate the ORR undertaking a similar role in respect of the Heathrow spur as it does in respect of the national rail network pursuant to the Act. For example, the appeal process in Part M of the Network Code, the dispute resolution process in the annex to Part M, the change process in the Station Access Conditions and the assignment provisions in clause 15 of the Track Access Contract.
- 15.3. The role of the ORR under the 2005 Regulations (to which HAL is subject) is quite different to that under the Act. Primarily, under the 2005 Regulations the ORR:
- a. has responsibility for setting the charging framework; and
 - b. acts as the body to which a dissatisfied access applicant can appeal.
- 15.4. We question:
- a. whether the ORR has all the powers it needs to fulfil the functions required of it under the Documentation; or
 - b. even if it has those powers, whether in fact the ORR will be willing to fulfil those functions.
- 15.5. Until this has been clarified, it is impossible to have confidence that the Documentation is fit for purpose. If it turns out that the ORR is unable/unwilling to undertake any of the tasks allocated to it, key parts of the contractual arrangements between HAL and TOCs will become unviable.

16. Network Code

Performance Monitoring

- 16.1. The HAL Network Code notes that Network Rail operates a performance monitoring system for the national network, and states that Network Rail will provide this service to HAL for the foreseeable future. It then states simply that "*Part B of the NR Network Code applies*".
- 16.2. We agree that it is sensible to make use of the national performance monitoring system on the Heathrow Spur. All the infrastructure is in place to administer that national system, and industry parties are accustomed to it. However, the method by which HAL purport simply to incorporate Part B of the NR Network Code into the HAL Network Code is seriously flawed.
- 16.3. The NR Network Code is incorporated into each Track Access Agreement to which Network Rail is a party. It therefore forms part of the direct contractual relationship between Network Rail and each TOC. On the Heathrow Spur, there will be no such direct contractual relationship between Network Rail and each TOC. Instead of Network

Rail, the Track Access Contract will be entered into by HAL. This fundamental difference means that purporting simply to incorporate Part B of the NR Network Code into the HAL Network Code without any amendment cannot work.

- 16.4. Part B of the NR Network Code contains numerous rights for TOCs. Where a direct contractual relationship exists with Network Rail, the TOC will be able to enforce these rights and ensure its position is properly protected. If there is no direct relationship, the TOC has no means by which to protect itself and secure fair treatment in accordance with the provisions of that Part B.
- 16.5. Key rights given to TOCs pursuant to Part B of the NR Network Code include:
- a. the right to have a say in the composition of the Delay Attribution Board;
 - b. the right to be consulted about allocation of responsibility for particular delay incidents, and the right to refer matters for review;
 - c. the right to propose amendments to the Delay Attribution Guide or the Performance Data Accuracy Code;
 - d. the right to notify Network Rail that the Performance Monitoring System is not functioning satisfactorily; and
 - e. generally, the ability to require Network Rail to comply with its obligations under Part B.
- 16.6. Part B of the NR Network Code also include obligations upon the TOC, including an obligation to contribute to the cost of the Delay Attribution Board. It is not clear from the Documentation whether the cost will be charged to TOCs under the HAL Network Code. If it is, we cannot see how Network Rail will be able to enforce payment of that contribution if it does not have a direct contractual link with the TOC.
- 16.7. The Documentation provides no detail on:
- a. the arrangements currently in place between Network Rail and HAL;
 - b. whether or not Network Rail agree to the proposals put forward by HAL; and
 - c. what measures HAL would put in place should Network Rail decide in future not to continue to supply the relevant services to HAL.

This lack of information is a further cause for concern as it means we are unable to judge the robustness of the current arrangements and whether they may need adaptation to accommodate additional TOCs on the Heathrow spur.

- 16.8. The Department considers that HAL must produce its own Part B that can operate independently of the NR Network Code in order to satisfy its obligations under Regulation 14 of the 2005 Regulations, namely to establish a performance scheme *"to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network"*.

Modifications to the HAL Network Code

- 16.9. Part C states simply:

"Proposed changes to the HAL Network Code will be notified through industry consultation as and when required."

This is wholly inadequate.

- 16.10. Comparison with the NR Network Code is informative in this regard. Part C of the NR Network Code comprises a detailed modification procedure involving different Classes and Bands of Train Operator, Class Representative Committees, voting rights

and an appeal procedure. We recognise that a system of this complexity is probably disproportionate in the context of the Heathrow spur (and in any event could not work given that only two TOCs are expected to operate on the spur for the foreseeable future), and so it is correct that HAL adopts a different approach. However, the approach proposed by HAL is, as noted above, wholly inadequate.

16.11. In our view, Part C should set out a thorough and detailed modification process which:

- a. applies to all modifications proposed (we note that HAL currently proposes consultation "*as and when required*" - we have no idea what this means)
- b. requires HAL properly to communicate the proposed modification to all affected parties, supplying all necessary information and responding promptly to queries raised;
- c. gives affected parties appropriate rights to be consulted and have their views taken into account;
- d. sets out the process by which HAL will take decisions; and
- e. provides an effective appeal process, possibly involving the ORR;
- f. gives TOCs the opportunity to propose modifications, as well as HAL.

16.12. The current proposal from HAL would provide HAL with ample opportunity to introduce whatever changes to the Network Code it saw fit, with very limited consideration being given to the effect of such changes on the TOCs or other interested parties. This inevitably creates a substantial risk for TOCs.

Timetable development

16.13. Part D of the HAL Network Code sets out the process by which the timetable is developed. It mirrors the process in the NR Network Code, but does not make reference to it. The result is that the process set out in Part D operates entirely independently of the equivalent process in the NR Network Code.

16.14. This is a key flaw. If efficient use is to be made of the network it is essential that the NR timetable and the HAL timetable are coordinated, so that services can pass between the NR mainline and the Heathrow spur without delay or hold ups. Given that HAL and Network Rail are distinct infrastructure managers and party to separate track access agreements it is inevitable that separate processes are required. Nonetheless it is important that the two are coordinated.

16.15. We recognise that this coordination currently happens in practice. While we have no reason to believe that it will not continue to occur, the HAL Network Code gives TOCs no assurance that this will be the case. We suggest that Part D should incorporate provisions setting out the steps HAL will take (and presumably currently takes) to ensure so far as possible that the timetable developed for the Heathrow spur is coordinated with that developed by Network Rail for the national network.

Dispute Resolution

16.16. The Annex to the HAL Network Code contains the Access Dispute Resolution Rules ("ADRR"). So far as we can tell these replicate the ADRR set out in the Annex to the NR Network Code, and which apply generally to parties which have access to the national NR network. It is not clear whether HAL intends that the ADRR set out in the

HAL Network Code are an equivalent, but separate, set of rules to those in the NR Network Code, or whether HAL anticipates that parties gaining access to the Heathrow spur will participate in, and be subject to, the general rail industry dispute resolution arrangements set out in the NR Network Code. In either case the Documentation is flawed.

- 16.17. As currently drafted the ADRR cannot function as a set of dispute resolution arrangements that are specific to the Heathrow spur. To give an example, Chapter J of the ADRR establishes the Committee, which is the principal governance body charged with overseeing the operation of the ADRR. The Committee Members are stated to be appointed by each of the three Bands of the Franchised Passenger Class, each of the two Bands of the Non-Passenger Class, and by the Non-Franchised Passenger Class, adopting the method used to appoint members of the Class Representative Committee under Part C of the HAL Network Code. These concepts of 'Bands' and 'Classes' are not adopted elsewhere in the HAL Network Code, and would not make sense if they were given that there will always be a very limited number of TOCs operating on the Heathrow spur. Moreover, as noted above, the HAL Network Code does not contain a Part C. These basic flaws impact throughout the ADRR, to the extent that they do not make sense in the context of the rest of the HAL Network Code.
- 16.18. As noted above, an alternative interpretation of the ADRR is that HAL intends the system established by the NR Network Code to apply to access disputes arising in relation to the Heathrow spur. This may well be a better approach in terms of making use of industry recognised arrangements that are already well-established. However, as identified previously, there is no contractual mechanism which allows HAL and TOCs using the Heathrow spur to avail themselves of arrangements established under the NR Network Code.
- 16.19. The Department suggests that HAL reviews its proposed ADRR with a view to establishing a workable dispute resolution process.

17. Track Access Contract

Exclusion of Heathrow Express

- 17.1. Clause 2.3 of the HAL Track Access Contract states that HAL will ensure that all TOCs having the right to use the Heathrow spur are subject to the HAL Network Code. However, the Heathrow Express Operating Company Limited ("HEOC") is expressly excluded from this requirement. This leaves open the possibility that HAL may choose not to require HEOC, which is in the same corporate group as HAL, to comply with the HAL Network Code.
- 17.2. HAL does not provide in the Documentation any indication of its rationale in this regard. In particular, it is not clear:
- a. why HAL considers that HEOC should not be subject to the HAL Network Code;
 - b. which parts of the HAL Network Code will not apply to HEOC; or
 - c. what impact this approach could have on operation of the Heathrow spur.
- 17.3. The Department objects to the potential exclusion of HEOC from the application of some or all of the HAL Network Code. This could lead to HEOC having to comply with less onerous access terms than other TOCs, a situation that would clearly discriminate against other TOCs and in favour of HEOC - HAL's sister company. This would

constitute a breach of HAL's obligation under regulation 7(3) of the 2005 Regulations to provide access in a non-discriminatory manner.

Restrictions on Use

- 17.4. The HAL Track Access Contract is based upon the Network Rail equivalent. Schedule 4 in the Network Rail document contains detailed provisions setting out the circumstances in which Network Rail is required to compensate the TOC for periods during which the TOC's use of the relevant routes is restricted due to, for example, engineering works.
- 17.5. The HAL Track Access Contract omits this schedule. As a result there is no mechanism through which the TOC can recover compensation for restrictions on use of the Heathrow spur.
- 17.6. We do not consider this a reasonable position for HAL to take. The fundamental service provided by HAL under the TAC is access to the Heathrow spur. Restrictions on such access may result in additional costs being incurred by the TOC and revenue lost. An obligation to compensate the TOC in such circumstances is, in our view, the quid pro quo of HAL's right to impose access charges.
- 17.7. We also note that the 2005 Regulations are shortly to be replaced/updated by regulations implementing Directive 2012/34/EU (the "Recast Directive"). Annex IV of the Recast Directive requires the Network Statement to include information about restrictions of use.

Incorporation of Traction Electricity Rules

- 17.8. The arrangements HAL proposes for provision of traction power are not clear. The HAL Network Statement states (at paragraph 5.3.1) that TOCs will procure traction power from Network Rail. In contrast, clause 2.1 of the HAL Track Access Contract states that the Traction Electricity Rules (being rules published by Network Rail) are incorporated into the contract. This appears to suggest that traction power will be provided through the Track Access Contract.
- 17.9. We suggest that HAL provides greater clarity on its proposals in this regard. Is it HAL's intention that TOCs contract directly with Network Rail for the provision of traction power? If so, how will these arrangements sit alongside the Track Access Contract? Alternatively, if traction power is to be provided through the Track Access Agreement, how can the Traction Electricity Rules be incorporated into the HAL Track Access Agreement given that there will not be a direct contractual relationship between the TOC and Network Rail?

Performance Regime

- 17.10. Schedule 8 of the HAL Track Access Contract sets out the performance regime. No explanation has been provided about the provenance of this regime or why HAL considers it a suitable way to measure performance on the Heathrow spur. We note that it does not replicate the performance regime typically seen in Network Rail track access agreements.

17.11. Schedule 8 states that:

- a. the performance regime applies to Services between Paddington Station and CTA (undefined, but understood to be the Central Terminal Area);
- b. performance is measured by reference to arrival times at Paddington Station and CTA; and
- c. delays/cancellations resulting from events occurring on the "Branch" (again, not defined but assumed to mean the Heathrow spur) shall be taken into account for the purposes of the performance regime.

17.12. It is unclear to us how this regime can be said to gauge performance only on the Heathrow spur if one of the two key measuring points, Paddington Station, is in fact on a Network Rail line. The proposed regime means that performance on the Network Rail infrastructure would impact upon performance measures for the Heathrow spur. For this reason the Department does not consider that the proposed regime satisfies HAL's obligations under Regulation 14 of the 2005 Regulations (see paragraph 16.8 above).

17.13. In addition to this fundamental point, the Department has a number of other concerns with Schedule 8 of the HAL Track Access Contract:

- a. There are no provisions setting out how responsibility for delays/cancellations will be allocated between the parties. We would expect an objective process to be put in place to deal with this, but all that currently appears is a statement in paragraph 2.2 of Schedule 8 that a delay/cancellation is deemed to have been caused by a "Train Operator Event of Default unless the same are caused by a HAL Event of Default". We object to this in principle. We are also confused by the terminology used - delays and cancellations are not typically caused by "Events of Default";
- b. Paragraph 4.3 of Schedule 8 specifies journey times between Paddington Station and CTA. We do not know how these have been derived. They appear to relate to Heathrow Express in which case they are not relevant to all potential TOCs;
- c. Paragraph 6.3 specifies that any trip which fails to start within 30 seconds of its scheduled departure time as a result of "Train Operator Default" shall be deemed to have met the punctuality target. In the Department's view this is not reasonable. In addition we note that "Train Operator Default" is not defined, which again causes confusion in relation to the attribution of responsibility; and
- d. Generally the performance regime as currently drafted does not appear to have been tailored to the needs of potential TOCs on the Heathrow spur. The Department would ask HAL to review Schedule 8 to produce a more robust and appropriate regime.

18. Station Access Contract and Station Access Conditions

18.1. HAL intends to incorporate the charges for station access into the Track Access Contract, but for access to stations to be granted by a separate Station Access Contract in consideration for a peppercorn rent. This means that it will be impossible for TOCs to examine and test the make-up of the costs being charged. It also means that there is no easy way to adjust the charges properly in the event that there are changes to the station access regime. We suggest that charges should be separated between the two contracts as is the case on the national network.

Conclusion and closing remarks

19. Conclusions

- 19.1. For the reasons set out in **Part A** we consider that the inclusion of an IRC in the charging framework established by the ORR for the Heathrow spur would be contrary to law and public policy, and in particular would not be a proper exercise of the ORR's duties under section 4 of the Railways Act 1993.
- 19.2. HAL has not provided any evidence or reasoning which demonstrates that it meets the two requirements of Schedule 3 of the 2005 Regulations for levying higher charges.
- 19.3. In relation to the first limb of Schedule 3, the driver of the construction of the spur was to improve HAL's profitability, not the improvement of the wider network. The Department therefore disputes that HAL can prove that the spur has resulted in improved efficiency or cost-effectiveness.
- 19.4. In relation to the second limb of Schedule 3, there is no evidence that HAL's charging regime set at the outset of the project would be replaced by a different charging framework incorporating the IRC as now proposed. HAL has not provided any reasoning why the current arrangements should not continue and there was no foreseeable prospect during the construction phase of the project that third party operators would seek access to HAL's infrastructure. HAL's letter to the SoS, written in 2006, is further evidence of HAL not having contemplated the imposition of higher charges (i.e. an IRC).
- 19.5. It has been demonstrated that the two incumbent train operators using the spur do not currently pay an equivalent set of access charges. Therefore the second limb of Schedule 3 of the 2005 Regulations, namely that the project could not otherwise have gone ahead without the prospect of levying higher charges, has also not been satisfied.
- 19.6. In the event that the ORR determines that an IRC should be established, the Department considers that certain aspects of the charging framework proposed by HAL are contrary to the aims of establishing a charging regime which is fair and transparent to all users of the network.
- 19.7. In particular, HAL proposes to include Terminal 5 assets in the IRC, despite Crossrail not being planned to call at Terminal 5. This is inherently unfair and would result in the Crossrail operator paying for services which it does not use. It is also unfair that future train operating companies should bear the volume risk in paying for access, rather than this being assumed by the infrastructure manager.
- 19.8. HAL's proposed rate of return (of 5.35%, which is currently used for airport infrastructure) should instead reflect the nature of the assets and therefore a more appropriate 4.93% set by the ORR should be adopted.
- 19.9. **Significantly, the proper application by the ORR of its duties under the Railways Act 1993, as the Department has set out in section 9 to this response, weighs heavily against the establishment of an IRC.**

- 19.10. For the reasons outlined in **Part B** we consider that the documentation that has been presented by HAL for the purposes of its consultation is inadequate and contains a number of significant flaws. These deficiencies need to be properly addressed before they can form the basis of a compliant access and charging regime under the 2005 Regulations.
- 19.11. The Network Code: (i) expressly seeks to incorporate Part B of the national Network Code in order to provide a performance scheme, but this cannot work given the lack of any contractual link between TOCs and Network Rail; (ii) contains a seriously inadequate change process; and (iii) adopts a dispute resolution process which does not work in the context of the Heathrow spur.
- 19.12. The Track Access Contract: (i) permits HAL to exclude Heathrow Express Operating Company Limited from the ambit of the Network Code, which is discriminatory; (ii) fails to provide for any compensation to be payable to TOCs when HAL imposes a restriction on use; (iii) includes confusing arrangements for the supply of traction power; and (iv) contains a performance regime which is flawed (in that it measures arrival times at a station that is not on the Heathrow spur - Paddington) and is unfairly biased against TOCs in a number of respects.

20. Closing remarks

- 20.1. The Department is acutely aware of the challenging timescales within which the ORR would have to determine an appropriate charging structure to enable HAL to achieve compliance with the relevant rail regulations before 1st September 2015.
- 20.2. In the absence of HAL justifying the imposition of higher charges, the default position in the 2005 Regulations is that the charges which can be levied on a train operator for providing the minimum access package (which includes access to the track and stations) are limited to the costs directly incurred as a result of the train operator's use of that infrastructure.
- 20.3. Whilst the Department disputes the imposition of the IRC, it recognises that the relevant rail regulations do require a reasonable set of charges to be imposed on future train operators accessing the Heathrow spur infrastructure. Officials within the Department will remain available for further discussion throughout August and would be happy to further engage with the ORR, TfL and HAL to achieve a workable solution.

Annex A – Previous assurances provided by HAL in letters from 2006

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6 January 2006

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MPD3
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Without Prejudice

Dear Anthony

CROSSRAIL BILL

We refer to the Access Contract sent to you under cover of our letter of 19 December 2005 and in particular Schedule 7 Charges on which we were silent. We have now considered the basis on which we propose to charge for access to our rail infrastructure and have set out below the principles on which the drafting will be based.

1. We propose that there should be an access charge of £12.1m per year as from 1 January 2015.
2. The access charge would be increased annually in accordance with a suitable index (not the RPI) which reflects the increase in costs of operating and maintaining track and station infrastructure.
3. Other than as provided for in item 2 above there would be no periodic reviews of the access charge over the entire term of the Access Contract.
4. The access charge has been calculated on the basis of Crossrail paying a proportion of all the operating, maintenance, repair and renewal costs of the Heathrow track and station infrastructure used by Crossrail. However the cost of paying Network Rail for the supply of the traction power has been excluded. It is envisaged that both Heathrow Express and Crossrail will pay their share of this cost directly to Network Rail.
5. The access charge makes no provision for either depreciation or return on capital employed for the assets invested in by BAA and used by Crossrail to access Heathrow. The inclusion of these items (not proposed by BAA) would be expected to at least double this charge.

6. HAL will be able to vary the access charge at anytime in order to recover a share in any increase in costs which arise from any changes in law, regulations or guidance. These costs could include increases in staffing levels, changes to maintenance requirements or any upgrades to rail and station infrastructure due to safety, security, environmental or any other reasons.

Yours sincerely

M A NOAKES
General Manager Rail

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5 June 2006



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Without Prejudice

Dear Anthony

Crossrail – Access Charge

Thank you for your letter of 26 May 2006, taking each of your points in turn, we have set out our response below.

1. To be clear, our assumption on which the £12.1m annual access charge was predicated, was that Crossrail passenger services would commence on 1 January 2015 and run for 30 years. Consequently, if the Crossrail service was to commence at a later date, the access charge would be increased by an indexed amount from 1 January 2015. The selection of an appropriate index is still under consideration.
2. It is intended that the change of law protection applies from the signature of the access option.
3. Yes, you have correctly understood the position.
4. The proportion is 65%. The charge includes the full cost of operating, maintaining and renewing the infrastructure between the Central Terminal Area station and the Terminal 4 station. The charge excludes all the costs of operating etc. from the Central Terminal Area station to the Terminal 5 station which will be entirely for HAL's account.
5. The breakdown of the charge is over a period of 30 years, because as you will appreciate renewals are an intermittent expenditure.

Operations	23%
Maintenance	43%
Renewals	34%
6. Crossrail's share of any increase in costs will depend on where the costs are incurred. For example if the costs were incurred at the Terminal 4 station the share would be 100% and if they were incurred at the CTA station they would be 50%. The costs would be calculated on the basis of the actual costs incurred.

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Heathrow Gatwick Stansted Glasgow Edinburgh Aberdeen Southampton
Registered Office: Registered Office: 111 Wood Lane London SW1P 1JQ

7. This reference is meant to cover the requirements of bodies such as Her Majesty's Railway Inspectorate, the London Fire and Emergency Planning Authority, the Home Office, the Department for Transport and the Civil Aviation Authority.
8. If this were to occur, the charge would be varied in accordance with paragraph 6 of our letter, because this would be a change of regulatory law/guidance. This issue was not expressly addressed in our letter of 6 January 2006.
9. This is correct, save for those arising from any renewals of the HAL infrastructure or arising as a variation as mentioned in paragraph 6 of our letter.
10. We would envisage that Network Rail will apportion the cost of traction power between Crossrail, Heathrow Express and possibly any other train operator in accordance with actual usage. Please note that this will also apply to the cost of maintaining the overhead line equipment on the mainline.
11. Insofar that HAL has rights to recover costs in respect of the electrification works under the terms of this agreement, then HAL will remain entitled to make such a recovery.

We look forward to receiving your response on the commercial principles contained within the draft Access Contract which we have discussed at some length, together with your response to our proposed access charge at your earliest convenience.

Yours sincerely



PP
M A Noakes
General Manager Rail

cc E English
D Fennell

File 204-100
Ref: P/204108rev.doc

**CROSSRAIL SERVICES GROUP MEETING
ACTION NOTE OF MEETING No 9 HELD ON 14 NOVEMBER 2012 AT 55
BROADWAY**

Those Present:-

Paul Richardson	TfL	David Martin	Heathrow
Trevor Sandford	TfL	Brigitte Over	Heathrow
Peter Allen	JST	Richard Porter	Heathrow

ITEM		ACTION
9.1	PR noted that TfL proposes to have “Crossrail purple” coloured train doors. DM will consult with HEX on this issue and will feedback at the next meeting. PR will notify the group of the date of the Crossrail branding launch.	DM PR
9.2	Heathrow will advise the timescales between commencement and the equivalent of the completion of GRIP stage 5 with respect to signage, CIS and announcements.	Heathrow
9.3	It was agreed that TfL would write formally to Heathrow regarding the train drivers proposal and would work up an initial draft proposal. In the meantime Heathrow will consider the issues.	PR Heathrow
9.4	DM to send TfL a list of queries on the proposed 2016-18 timetable. TfL to respond.	DM PR
9.5	Brigitte to circulate a pdf version of the signed 6/1/06 BAA letter about access charges. It was noted that the access charge commencement date in paragraph 1 had changed from 1/1/15 to 1/5/18.	Brigitte
9.6	Brigitte to circulate the latest version of the regulatory compliance schedule.	Brigitte
9.7	Brigitte to check and circulate the resources spreadsheet.	Brigitte
9.8	The agenda for the next meeting will include an item relating to drivers. Date of next meeting – 12 th December 2012	PA

OUTSTANDING ACTIONS

ITEM		ACTION
7.4	PR will discuss the TAA period with colleagues in the light of the 15/17 year period noted in Annex 2 of the Contribution Letter.	PR
8.2	Resources spreadsheet:- i. Item 9. PR to send Heathrow the cleaning manual. RP will	PR

	<p>identify the T5 underground cleaning issues;</p> <p>ii. Item 14. PR will write to Heathrow requesting the driver training manual;</p> <p>iii. PR will identify the issues which need to be completed in time for the CTOC ITT and will check the associated comments in the resources spreadsheet.</p>	<p>PR</p> <p>PR</p>
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Crossrail Joint Sponsor Team
14 November 2012

Annex B – Indicative HAL charges and effect on Crossrail

Heathrow Indicative Charges as advised by HAL

Projected Crossrail train paths

	Daily Paths per Track Access Option	Number of days	Annual Paths
Weekday	158	253	39,974
Saturday	160	58	9,280
Sunday	152	53	8,056
	470	364	57,310

Fixed Track Access Charge, £ (2015)	597
Common Cost Charge, £ (2015)	138

Annual charges, £ (2015) 42,162,967

Saturday includes

Boxing Day

Sunday includes 7 Bank Holidays