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10 March 2016

Dear John,

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Charging framework for the Heathrow Spur

tfl.gov.uk

Introduction

- 1 Thank you for the invitation to comment on the charging framework for the Heathrow Spur, as set out in the consultation document published by the Office of Rail and Road (the "**ORR**") on 11 February 2016 (the "**ORR Consultation**"). This response is being submitted by Transport for London ("**TfL**") and sets out our views on the ORR Consultation. Unless otherwise specified, defined terms have the same meaning in this response as are given to them in the ORR Consultation.
- 2 As noted in the ORR Consultation, TfL is co-sponsor of the Crossrail project, together with the Department for Transport (the "**DfT**") and it is intended that a TfL-appointed concessionaire (currently MTR Corporation (Crossrail) Limited) will operate Crossrail services on the Heathrow Spur. We therefore have both a public service and a commercial interest in procuring infrastructure capacity on the Heathrow Spur on appropriate and cost effective terms.
- 3 We have been given the opportunity to consider a draft of the DfT's response to the ORR Consultation, which we agree with. The DfT's views are consistent with those of TfL set out in this response. Whilst the DfT and TfL have aligned interests as co-sponsors of the Crossrail project, the responses reflect the differing roles and responsibilities of each organisation.

Summary

- 4 We welcome the ORR's provisional conclusion that Heathrow Airport Limited ("**HAL**") is not entitled to levy a charge relating to the Historic Long Term Costs of the Heathrow Spur. We have always been of the view that the Paragraph 3 Test cannot be met, for a number of reasons. These are set out in our response to the HAL consultation on "moving to a regulated railway" (the "**HAL Consultation**") which is attached for ease of reference¹.

¹ We note that we have provided additional information and answers to questions to the ORR following submission of our consultation response, which are not repeated here. Most of the comments set out in our response to the HAL Consultation still apply, including the basis upon which HAL should charge for access to the Heathrow Spur and how the charges should be reviewed periodically. Our response to the HAL Consultation sets out a significant number of comments on various aspects of HAL's proposed arrangements – both in relation to charging (Parts 4 and 5) and the access documentation (Parts 6 to 9) – which have failed to be adequately addressed by HAL.

- 5 The charges for accessing the Heathrow Spur should be those which are directly incurred as a result of operating the service in question². The charging structure currently proposed by HAL in its Network Statement does not appear to do this. There is insufficient detail for us to make an informed decision as to whether the charges proposed by HAL are the directly incurred costs of operating a service. The "common costs charge", for example, includes a number of HAL's fixed costs and, from benchmarking undertaken on behalf of TfL, is significantly more in all cases and in some cases by an order of magnitude higher than anywhere else in Europe³.
- 6 We set out our specific comments in relation to the ORR Consultation below in paragraphs 7 to 28. We set out our views on next steps in paragraphs 29 to 32.

Paragraph 3 Test: Third criterion

- 7 The ORR has reached the view that HAL has not demonstrated (whether by direct evidence or as a matter of inference⁴) that the Heathrow Spur project could not have been undertaken without the prospect of levying higher charges on rail users. We agree. Indeed it seems to us that there is strong evidence that the project not only could have been, but was in fact, undertaken without the prospect of levying higher charges on rail users.
- 8 The fact that the Heathrow Spur was added to the airport's RAB and was not ringfenced as a separate business or with a separate RAB is particularly strong evidence. Including such infrastructure on the airport RAB (and therefore funded by airport users) would, in our view, in most – if not all – circumstances preclude the application of the third criterion on the Paragraph 3 Test because the airport RAB provided the source of funding (and continues to do so): the project did in fact go ahead without the prospect of the higher charges that HAL is seeking to set.
- 9 We consider that there is further strong evidence that the construction of the Heathrow Spur formed a key part of meeting the requirements of the surface access policy to the airport – as well as being used to justify the construction of Terminal 5.

² Which is consistent with paragraph 1(4) of Schedule 3 of the Regulations. We set out our comments in relation to this in its response to the HAL Consultation (attached). The matters HAL will need to consider are: (1) what is regarded as being "directly incurred" costs; (2) how those "directly incurred" costs should be quantified; and (3) the metric for how those costs will be apportioned between users of the Heathrow Spur.

The HAL Network Statement should also be updated to set out the approved charges so that prospective operators have an understanding of the likely costs of operating services on the Heathrow Spur. See paragraphs 20 to 26 of this response for more detail on the "directly incurred" costs point.

³ We have already submitted the benchmarking analysis, prepared by PwC, to the ORR. This gives an indication of the level of "directly incurred" charges which might reasonably be expected. Whatever charge is proposed, HAL will need to provide evidence and a breakdown of how these constitute the "directly incurred" charges. Details of how they will be calculated and how they will be subject to periodic review are also outstanding.

⁴ We reserve our position as to whether or not it is permissible to establish the Third Criterion as a matter of inference, although we accept (as the ORR has indicated) that it might be a matter of weight. However, given the absolute (or in the ORR's view quasi-absolute) standard required ("could not"), if inference is permitted, it would have to be of overwhelming weight. On any view, that is not the situation here. 5 as defined and described in the Crossrail Act 2008.

- 10 The current Crossrail project⁶ is very different to the CrossRail project envisaged in the defunct Joint Operating Agreement from over 20 years ago. Rather than being a long distance operation, the Crossrail services will be high frequency metro style commuter services. We therefore agree with the conclusions drawn by the ORR in relation to the evidence provided by HAL on this. Those conclusions are even more compelling in the light of the Crossrail project as it is now being implemented to serve Heathrow Airport.
- 11 Rather than the airport bearing the costs of infrastructure enhancements to facilitate CrossRail (as originally contemplated), the investment has been made by the Crossrail project. This has included the construction of the Stockley grade separated junction on Network Rail's network. There has been no need to modify the track or stations on the Heathrow Spur in the way contemplated by the Joint Operating Agreement. There has been no additional investment in the Heathrow Spur or stations by HAL as a consequence of Crossrail. Some limited investment on the Heathrow Spur in relation to train control has been borne by the Crossrail project.
- 12 The potential Newco structure was not implemented and is therefore of no relevance. We agree with the ORR on this. Under the actual structure now implemented, HAL's expected revenue loss associated with the HEX services has already been taken into account by the Civil Aviation Authority in reducing the contribution of HAL to the DfT.
- 13 Taking into account all of this evidence, it is plain that there was a commercial incentive to construct the Heathrow Spur to allow airport expansion (to which the possible Newco arrangements set out in the Joint Operating Agreement are no longer relevant). The project could have been undertaken (and indeed was undertaken) without the prospect of levying higher charges on rail users.
- 14 This conclusion also makes sense when considering the purpose of the Regulations. The Regulations were designed to remove barriers to entry to the market for rail services – and to prevent an infrastructure manager from making a windfall from an investment at the expense of train service providers. The Paragraph 3 Test can therefore only be interpreted in a way to permit users of rail infrastructure to be charged higher fees where those fees were a condition of the infrastructure being built in the first place⁶. HAL has done nothing to demonstrate

⁶ We note that in paragraphs 27 to 32 of the ORR Consultation, the ORR considers that partial recovery of the Historical Long Term Costs is permissible and that the level of Historical Long Term Costs sets a maximum cap on what can be recovered. This means that there only had to be a prospect of some higher charges being levied but does not necessarily suggest a link between: (i) what was contemplated by way of higher charges; and (ii) the level of higher charges being set. We consider that the wording of the Regulations requires there to be a direct link between (i) and (ii) as in paragraph (b) of the test it refers to "such" higher charges. To justify the higher charges, the infrastructure manager must demonstrate that the particular higher charge was a pre-requisite of the project going ahead. Commercially, this seems sensible as it prevents the infrastructure manager from abusing this provision.

that this was the case with the Heathrow Spur: the evidence instead points to the contrary position.

- 15 We appreciate that the Heathrow Spur is a project which was approved before the Regulations came into force. As a result, the decision taken by the ORR on the Heathrow Spur may not apply for other projects which the ORR is asked to consider⁷. The ORR Consultation should also not impact on charges levied under the Paragraph 3 Test which have already been approved by the ORR.

Paragraph 3 Test: Proof

- 16 In paragraph 35 of the ORR Consultation, the ORR explains the proof that it expects to see for purposes of determining whether the project could not otherwise have been undertaken. Although it does not have an impact on the outcome, we consider that the test applied by the ORR departs from the natural meaning of the words in the Regulations⁸. Whilst in most cases the outcome will be the same, there may be instances on the margin where the outcome of applying the natural meaning of the words in the Regulations would be different to the outcome of the test applied by the ORR. In these circumstances (and were HAL to challenge the ORR's interpretation of the Paragraph 3 Test), we would not necessarily agree with the ORR that the test should be read in the way which the ORR has chosen to interpret it. In the case of the Heathrow Spur, this is unlikely to be an issue given both tests would be answered in the same way on the facts.
- 17 Where contemporaneous evidence is not available, we agree that it may be possible to infer that the project could not have gone ahead without the prospect of higher charges. We consider that an inference should only be drawn where the strength of the evidence is compelling (i.e. the threshold must be set at a high level before an inference can be drawn)⁹. This is because making inferences draws upon what *might have been* rather than, in the case of contemporaneous evidence, what *actually was*.

Paragraph 3 Test: Second criterion

- 18 We remain of the view that the second criterion of the Paragraph 3 Test¹⁰ has also not been satisfied by HAL¹¹. The Regulations should be construed in relation

⁷ For projects approved since the coming into force of the Regulations – and for future projects – the circumstances (and the evidence which will be available) are likely to be different. We appreciate that each project which seeks to levy a charge under the Paragraph 3 Test will therefore need to be considered by the ORR on a project-by-project basis, taking into account the available evidence at the relevant time.

⁸ Whilst the Regulations refer to "could not", the question which the ORR has considered is whether HAL has showed that, "when the decision was taken to approve the project, there was no realistic commercial possibility of the project going ahead without the prospect of levying charges on rail users that contributed to the Historical Long-Term Costs". We consider that this is a departure from the natural meaning of the words in the Regulations and is a lower barrier for HAL to reach.

⁹ We consider that the evidence from which any such inference could be drawn should generally be contemporaneous and joint between the parties rather than unilateral comment or opinion. An example of the former would be meeting minutes at which both parties were present and upon which both parties had opportunity to comment. An example of the latter would be an email or record of a discussion setting out one party's views on an issue.

¹⁰ i.e. that "the project must increase efficiency or cost effectiveness". We are not persuaded that this criterion has been met and reserve our position on this point. Our comments set out in the response to the HAL Consultation in paragraph 23 (attached) remain.

to rail infrastructure¹². Whilst journey times may be lower when compared to the Piccadilly line from certain (but not all) origin stations, the construction of the Heathrow Spur and operation of the HEX services is not an efficient use of overall capacity on the Great Western mainline. This is because: (1) the number of train paths available to other operators is constrained by the protected characteristics of the HEX service; and (2) the underutilised HEX services take up capacity which could be used for extra services to alleviate overcrowding to/from other destinations.

- 19 Plainly, the HEX service does not demonstrate either efficiency or cost effectiveness in the use of the rail network between Heathrow and Paddington and therefore we disagree that this element of the Paragraph 3 Test has been satisfied. Our comments set out in paragraph 23 of its response to the HAL Consultation continue to apply.

Charging framework and specific charging rules for the Heathrow Spur

- 20 The decision proposed to be taken by the ORR is a major step forward towards the successful introduction of the Crossrail services. Paragraph 3 of the Annex to the ORR Consultation sets out (at this stage) the proposed charging framework for use of the Heathrow Spur. In summary, this requires HAL to comply with the Regulations but prohibits the levying of a charge under paragraph 3 of Schedule 3 of the Regulations.
- 21 A substantial amount of further work still needs to be undertaken by HAL in a very short timeframe to establish a charging framework and specific charging rules for the Heathrow Spur. Paragraph 3 of the Annex to the ORR Consultation is the starting point for HAL; and whilst the ORR's provisional determination is consistent with the wording which it considered in its 2008 determination¹³, more needs to be done to allow prospective users of the Heathrow Spur to understand how much they will be expected to pay.
- 22 To ensure compliance with the Regulations, the charges for the Crossrail services can only be "the cost that is directly incurred as a result of operating the train service"¹⁴. TfL considers that they should also "take into account the mileage, composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilisation of the infrastructure"¹⁵. The charges should reflect the costs of using the infrastructure in question, on a facility-by-facility basis.

¹¹ We note that all of the criteria set out in the Paragraph 3 Test need to be satisfied before a charge can be levied, although we note that our views in relation to the second criterion do not impact on the conclusion reached by the ORR.

¹² Paragraph 26 of the ORR Consultation notes this in the context of whom the higher charges should be paid by. We consider that this construction should be applied more generally throughout the Regulations, including in the context of the second criterion of the Paragraph 3 Test.

¹³ See footnotes 25 and 26 below.

¹⁴ Paragraph 1(4) of Schedule 3 of the Regulations.

¹⁵ Paragraph 1(2) of Schedule 3 of the Regulations.

- 23 We expect the ORR to continue to be fully engaged and to direct HAL to provide clear, transparent and fully evidenced charges for use of both the network and station components of the Heathrow Spur and, in particular, the directly incurred costs. The continuing involvement of the ORR in establishing the full charging framework would, ideally, reduce the prospect of an appeal¹⁶ in relation to charging matters.
- 24 This is work which HAL, as infrastructure manager of the Heathrow Spur, is obliged to do and must do swiftly so as not to jeopardise the introduction of the Crossrail services. If HAL were to jeopardise the introduction of Crossrail services, such behaviour would in all likelihood be unlawful. This is why, in paragraph 30 of this response, we request that the ORR directs HAL to put a robust timetable in place to ensure arrangements are in place before the end of May 2016.
- 25 As noted in our response to the HAL Consultation¹⁷, none of these points have, to date, been taken into account by HAL and no further substantive work to progress the charging framework and rules has been evidenced by HAL. For example, there are a number of concerns which we have in relation to the "common costs charge" which will be a core part of the charging framework for use of the Heathrow Spur as commented on in paragraph 5 above. HAL has not demonstrated what the "directly incurred" costs of using the Heathrow Spur are. A benchmarking analysis undertaken on behalf of TfL has indicated that the charges proposed by HAL (excluding those that were proposed to be levied under the Paragraph 3 Test) are significantly in excess of directly incurred costs observed elsewhere in the UK and Europe.

Section 4 duties

- 26 In reaching its decision, the ORR has not taken into account its duties under section 4 of the Railways Act 1993, primarily on the basis that (in the ORR's view) the Paragraph 3 Test requires it to make a decision based on the evidence available¹⁸. We consider that the ORR has reached a decision which, in any event, is consistent with the ORR's section 4 duties and welcomes this. We wish to note, however, that we are not persuaded that the ORR should have no regard to those duties in relation to the Paragraph 3 Test as the application of the section 4 duties would appear to be both relevant to the issue in question and consistent with the Council Directives¹⁹.

Civil Aviation Authority

¹⁶ Whether under regulation 29 of the Regulations or otherwise.

¹⁷ See in particular paragraphs 4.7 and 43 and Part 5 of our response to the HAL Consultation.

¹⁸ The ORR considers that it "would not have been lawful to have had regard to our Section 4 duties in a way that would enable us to reach a different decision from the result that we would reach by applying the Paragraph 3 Test to the available evidence."

¹⁹ Given our view that the ORR's section 4 duties are consistent with the decision which the ORR has taken in relation to the Paragraph 3 Test, we make no further comment. However, there may be circumstances where the outcome of the Paragraph 3 Test could conflict with the ORR's section 4 duties, in which case we would wish to consider further whether those duties should apply to the functions being exercised by the ORR.

- 27 It will be important for HAL to demonstrate the interrelationship with the Civil Aviation Authority's setting of charges to airport users. We consider that HAL should have engaged the Civil Aviation Authority in connection with the matters contemplated by the ORR Consultation, given that they directly relate to matters within the scope of its jurisdiction. HAL should carefully consider the comments set out in our response to the HAL Consultation²⁰ to develop a satisfactory – and, more importantly, compliant regime.

Other points

- 28 We wish to make some supplementary points in relation to the ORR Consultation:
- 28.1 we have assumed that wherever the ORR refers to the "Heathrow Spur" in the ORR Consultation, this means the track, tunnels, running lines and associated equipment (such as signalling and electrification equipment) and the associated stations. It would be helpful if the ORR could confirm this when it publishes its final decision on the charging framework for the Heathrow Spur to avoid the possibility of arguments from HAL as to the scope of the ORR's decision²¹;
- 28.2 we disagree with the suggestion that it was the advent of Crossrail which was the trigger to bring the Heathrow Spur fully within the scope of the Regulations. As noted in our response to the HAL Consultation (attached) one cannot choose as a matter of contract whether or not to be bound by the law²²;
- 28.3 we agree with the conclusions in paragraph 54 of the ORR Consultation that HAL's assertions are logically consistent with a view that the Heathrow Spur project, once added to the RAB, would be treated in the same way as any other RAB addition;
- 28.4 notwithstanding the "without prejudice" nature of the 2006 Letters, we consider that they are nevertheless persuasive contemporaneous evidence that recovery of the Historical Long-Term Costs from rail users was not critical to the viability of the project;
- 28.5 in relation to paragraph 61 of the ORR Consultation, we consider that the scope of the Paragraph 3 Test does not extend to the issue of compensating any loss of HEX revenue. It is simply about the Historical Long-Term Costs of the project (i.e. the construction of the Heathrow Spur). However, we wish to emphasise that the potential loss of HEX revenue has already been taken into account through the reduction of HAL's contribution to the DfT²³; and

²⁰ Please see paragraph 38 of our response to the HAL Consultation.

²¹ If the ORR is not in a position to confirm this, we may have further comments to make.

²² Please see paragraph 2.1 of our response to the HAL Consultation.

²³ See paragraph 12 above.

28.6 we were disappointed that HAL did not agree to release the evidence relied upon by it and referred to in the ORR Consultation, which the ORR took into account in reaching its conclusions, and reserve our position to ask to see that evidence in future, not least for reasons of procedural fairness, if it becomes determinative²⁴.

Next steps

29 The ORR Consultation is an important step in the process of establishing a charging framework, specific charging rules and actual charges for use of the Heathrow Spur²⁵. The ORR's conclusions require HAL to comply with the Regulations but prohibit the levying of a charge resulting from the Paragraph 3 Test. In our view, much more information is needed to provide "*sufficient information on charging to enable a prospective operator to calculate the cost of operating services on the network in question*"²⁶.

30 We acknowledge²⁷ that the fees for use of the infrastructure and specific charging rules are for HAL to propose as infrastructure manager – and no doubt the ORR will consider HAL's proposals in due course (but, of necessity, in the near future) as part of the ORR's duty under the Regulations. The importance of the ORR's continuing engagement in the process cannot be underestimated. HAL needs urgently to propose the detailed fees for use of the infrastructure and specific charging rules so that the Crossrail services can be introduced as planned. We request that the ORR directs HAL to propose (within 2 weeks of the date of the ORR's final decision on the matters set out in the ORR Consultation) a comprehensive timetable with the objective of determining the charging framework and specific charging rules which are consistent with the Regulations by no later than the end of May 2016²⁸.

31 To achieve this May 2016 deadline will require intense work from HAL, which we stand ready to participate in as needed. HAL's work will allow the ORR to

²⁴ We asked to see: (1) the Initial submission of Heathrow Airport Limited (HAL) to the Office of Rail and Road (ORR) regarding HAL's charges for track access to the Heathrow Spur, dated 1 September 2015 (referred to in footnotes 13, 16 and 18 of the ORR Consultation); (2) the Detailed Answers to ORR emailed questions of 20 November 2015, provided 24 November 2015 (referred to in footnote 17 of the ORR Consultation); and (3) the Response from HAL to queries from ORR dated 11 September, received 05 October 2015 (referred to in footnote 23 of the ORR Consultation). This request was declined by the ORR, having asked HAL.

²⁵ We question whether the principles set out in the Regulations are, of themselves, sufficient to constitute a charging framework and specific charging rules for the purposes of the Regulations. This is because the proposed charging framework is simply a requirement to comply with law which, in any event would apply. The requirement to establish a charging framework must mean something more than complying with law, else it would not have been included in the Regulations.

We note (but disagrees with) the decision of the ORR set out in its determination dated 26 November 2008 on an appeal raised by EWS in relation to a charging framework for HS1 which states (at paragraph 39) "*The charging framework [in the development agreement] states, in essence, that any charges must comply with the charging principles set out in the Regulations. ORR considers that the principles contained in the Regulations are sufficiently detailed to enable charging rules to be established on this basis.*" We note that a more detailed charging framework and specific charging rules was set out in the HS1 Concession Agreement in due course.

²⁶ Paragraph 43 of the ORR's determination of 26 November 2008.

²⁷ As contemplated in paragraph 9 of the ORR Consultation.

²⁸ The proposed deadline of the end of May 2016 is reasonable and necessary to establish the template access arrangements that will need to include the detail of fees and charging, following which TfL's Crossrail concessionaire will need to negotiate bespoke access agreements with HAL based on those templates and the charges envisaged in time to commence operations in 2018. Finalising the access arrangements for the Heathrow Spur is now a matter of urgency and cannot drag on.

establish the charging framework and specific charging rules²⁹ for use of the Heathrow Spur and thereby to give prospective users sufficient information to allow them to calculate the cost of operating services on the Heathrow Spur.

- 32 The charging framework and the actual fees for use of the Heathrow Spur cannot be prepared in isolation. In parallel, a workstream is required to agree suitable access documentation, which addresses the concerns set out in our response to the HAL Consultation (attached)³⁰. HAL needs to engage on this. The access documentation also needs to be finalised before the end of May 2016. Experience to date has shown that HAL has been reluctant to engage with TfL or provide its proposals on a timely basis. We will be seeking the ORR's support in this respect and may be forced to appeal to the ORR under regulation 29 of the Regulations if HAL does not make timely progress with both the access documentation and charging arrangements.

We do not regard any aspect of this response confidential and is content for it to be referred to and published by the ORR. Subject to the points on Freedom of Information set out in the ORR Consultation, we would expect to see the responses of all other respondees to the ORR Consultation.

Please let me know if it would be helpful to discuss any of the points made in this response.

Yours sincerely,

Howard Smith
for and on behalf of
Transport for London

²⁹ This is a duty of the ORR pursuant to regulation 12(1) of the Regulations.

³⁰ Please see in particular Parts 6 to 9 of our response to the HAL Consultation, which sets out specific comments on the documentation.

Attachment

TfL response to **HAL** Consultation

Transport for London

**Response to Heathrow Airport Limited's
consultation on "moving to a regulated
railway"**

31 July 2015

Contents

PART 1 : EXECUTIVE SUMMARY	1
1 Introduction	1
2 The Deed of Undertaking.....	2
3 The ORR/CAA Jurisdiction	2
4 The Investment Recovery Charge	3
5 Other Charges	3
6 The Network Code and The Network Statement	3
7 The Response	4
PART 2 : INADEQUACY OF CONSULTATION	5
8 Introduction	5
9 Basis of HAL's Consultation.....	5
10 Advent of Crossrail	6
11 The Deed of Undertaking.....	6
12 Obligations under the Rail Regulations 2005	6
13 Extension of time	7
PART 3 : JURISDICTION	9
14 TfL's understanding of the proposed arrangements	9
15 Meeting with CAA and ORR	10
16 Access charges jurisdiction - the risk of double recovery	10
17 Access charges jurisdiction - investment recovery charge	11
18 Access charges jurisdiction – regulatory policies.....	12
19 Jurisdiction – practical arrangements	13
PART 4 : TfL COMMENTS ON HAL'S PROPOSALS FOR AN INVESTMENT RECOVERY CHARGE (DESCRIBED AS FIXED TRACK ACCESS CHARGE)	15
20 Introduction	15
21 Schedule 3 of the Rail Regulations 2005.....	15
22 Sub-paragraph 2(a): The project must increase cost efficiency or cost-effectiveness	16
23 TfL's Position	17

24	Sub-paragraph 2(b): The project could not otherwise have been undertaken.....	17
25	TfL's Position	18
26	HAL cannot satisfy exception	20
27	Abuse of a dominant position	20
28	Determination by the ORR – duties under Section 4 of the Railways Act 1993 ..	20
PART 5 : TfL COMMENTS ON CHARGING ARRANGEMENTS PROPOSED BY HAL		22
29	Introduction	22
30	Structure of Charges – Rail Regulations 2005	23
31	The approach taken by other infrastructure managers	23
32	Cost reflectivity and discrimination	23
33	Calculation of Fixed Track Access Charge	24
34	Use of FTAC term.....	26
35	Treatment of Volume Benefits	26
36	Operation of Aviation Single Till.....	26
37	Periodic review	27
38	Transparency	28
39	Renewals Funding	30
40	Stations Long Term Charge.....	30
41	Station Qualifying Expenditure	31
42	EC4T.....	31
43	Restrictions of Use.....	32
44	Performance Regime	32
45	Abuse of a dominant position	33
46	Directly incurred costs	34
PART 6 : COMMENTS ON THE HAL NETWORK STATEMENT		35
47	Introduction	35
48	Network Statements – requirements of the Rail Regulations 2005	35
49	Failure of HAL Network Statement to meet the requirements of the Rail Regulations 2005.....	35
50	Comments on the HAL Network Statement	37

PART 7 : COMMENTS ON THE HAL NETWORK CODE	43
51 Introduction	43
52 Comments on the HAL Network Code.....	43
53 Comments on the HAL ADRR	48
PART 8 : COMMENTS ON THE HAL TRACK ACCESS CONTRACT.....	51
54 Introduction	51
55 Comments on the HAL Track Access Contract	51
PART 9 : COMMENTS ON THE HAL STATIONS DOCUMENTATION	59
56 Introduction	59
57 General Comments on the HAL Stations Documentation.....	59
58 Comments on HAL Station Access Agreement	60
59 Comments on HAL Station Access Conditions.....	62
PART 10 : ABUSE OF DOMINANT POSITION	66
60 Introduction	66
61 Vertical integration and discrimination	66
62 Reduced on-rail competition	67
Schedule 1 Glossary	68
Schedule 2 Missing information	71
Schedule 3 HAL letters from 2006 on investment recovery charge	73
Schedule 4 The Network Rail and HS1 Limited approaches to directly incurred costs	75
Schedule 5 Application of the duties of ORR to the HAL consultation	78

**Transport for London response to Heathrow Airport Limited's consultation on
"moving to a regulated railway"**

PART 1: EXECUTIVE SUMMARY

1 Introduction

- 1.1 TfL is responsible for procuring the Crossrail passenger services, which are planned to operate between Shenfield/Abbey Wood and Heathrow Airport/Reading, through the new, largely tunnelled infrastructure currently under construction beneath central London.
- 1.2 That responsibility flows from its statutory duties under the Greater London Authority Act 1999, which include the promotion and encouragement of safe, integrated, efficient and economic transport facilities to, from and within Greater London and to secure the provision of such transport facilities and services.
- 1.3 It is difficult to overstate the role of Crossrail in the strategic planning of transport in the capital, and correspondingly easy to understand why getting access to the Heathrow Rail Infrastructure on terms which are clear and comprehensive, and at a price which is fair and reasonable, is so critical to the safe, integrated, efficient and economic development of London's transport facilities and services.
- 1.4 HAL's proposals, both as to the terms of access to its infrastructure and the price it proposes to charge, are so badly flawed that no reasonable party could agree to them.
- 1.5 The deficiencies are fundamental, and encompass not only the procedure which HAL has adopted (which is both in breach of the Deed of Undertaking, and on any view allows insufficient time for a fair consultation), but more critically reveal a basic misapprehension by HAL as to its obligations and duties at law. The result is an incomplete set of documents which fail to get anywhere close to a satisfactory, or legally compliant, basis for provision of access to the Heathrow Rail Infrastructure; and a proposed charging regime which fails to grapple with complex regulatory, economic and legal issues.
- 1.6 TfL is committed to ensuring that these deficiencies are corrected: it has invited HAL to agree to extend the consultation process in order to work with HAL (along with other interested parties, specifically the DfT, MTR Crossrail, Network Rail, the Mayor, HEOC, the ORR and the CAA) to arrive at a satisfactory and legally compliant proposal. HAL has rejected that offer. In those circumstances, unless HAL makes the necessary changes unilaterally by 31 August 2015, TfL will have no alternative but to exercise its rights of appeal to the ORR under regulation 29 of the Rail Regulations 2005 with a view to securing access to the Heathrow Infrastructure on fair and reasonable terms.
- 1.7 Given that Crossrail is due to begin service in 2018, there is no small degree of urgency involved: the access documentation and charging framework must be in place to allow TfL, MTR Crossrail and Network Rail sufficient time to make the arrangements necessary to meet the Crossrail start date.

1.8 This executive summary focusses on 5 particular aspects of HAL's proposals which demonstrate the extent to which HAL has failed to meet its obligations. It is not a summary of all of the deficiencies in HAL's documents, nor is the rest of this response exhaustive in that respect, since TfL has not been given sufficient time, nor the necessary information, to carry out a full analysis of HAL's proposals. The 5 aspects are as follows:

1.8.1 The Deed of Undertaking

1.8.2 The ORR/CAA Jurisdiction

1.8.3 The Investment Recovery Charge

1.8.4 Other Charges

1.8.5 The Network Code and the Network Statement

1.9 This response has been prepared with the assistance of PricewaterhouseCoopers LLP, drawing on their experience of setting access charges in the rail and other sectors.

2 **The Deed of Undertaking**

2.1 HAL has been subject to the Rail Regulations 2005 since they were promulgated in November 2005. It should therefore already have in place (among other things) a separation between infrastructure manager and operator, a Network Statement, and a charging framework. HAL's assertion that it agreed to be bound by the Rail Regulations only by virtue of the Deed of Undertaking is wrong: HAL cannot agree whether or not to be bound by the law.

2.2 The current unsatisfactory state of affairs arises because of HAL's disregard for those obligations, but also because of its breach of the terms of the Deed of Undertaking which envisages a two stage consultation process, such that the draft Network Statement would be provided to the ORR for comment, and the ORR would "confirm" the charging framework and specific charging rules some *11 months* before the "Implementation Date" (currently 31 August 2015, pursuant to the Deed of Amendment). This two stage process recognises the complexity of the issues and the need for early and proper consultation. HAL has simply ignored the law and its undertakings and has failed to engage in the process in a meaningful or constructive way. The result is, not to put too fine a point on it, a mess.

3 **The ORR/CAA Jurisdiction**

3.1 HAL's proposals, in so far as it is possible to understand them, appear to result in the CAA exercising a regulatory jurisdiction in respect of access charging for the Heathrow Infrastructure, in particular since the infrastructure is intended to remain on the Airport RAB, with the remuneration of capital investment and recovery of ongoing operating costs to be established by the CAA as part of the airport "periodic review" process.

3.2 This is plainly ill-considered, to the extent that it has been considered by HAL at all. The Heathrow Spur is rail infrastructure and subject to the Rail Regulations 2005, and must be subject to regulation (including the charging framework and review of

charges) by the ORR, not the CAA. HAL's proposals require fundamental recasting to reflect the proper regulatory position.

4 The Investment Recovery Charge

4.1 A significant (in monetary terms) element of HAL's proposed charging framework is the "Fixed Track Access Charge", which is, in fact, an Investment Recovery Charge, to which HAL claims to be entitled as an exception to the charging principles of the Rail Regulations 2005.

4.2 In order to recover its investment costs as part of the charges to users of the infrastructure in return for access, HAL must show that (i) the project increases efficiency or cost-effectiveness and (ii) that the Heathrow Infrastructure could not have been built without the prospect of those charges.

4.3 TfL remains to be persuaded that HAL can satisfy the first of these tests (and HAL has made no proper attempt to do so thus far). Indeed, HAL has not even set out what it means by the terms "cost effective" and "efficient"; the perspective from which these should be assessed; and how the "project" meets the criterion.

4.4 But more critically, TfL thinks it is extremely unlikely that HAL will be unable to demonstrate that the second limb is satisfied. The justification thus far provided by HAL, such as it is, points to the opposite conclusion. It is therefore not surprising to find that in 2006 BAA wrote to the DfT providing indicative costs for access to its network and explicitly stated that it did not envisage such costs including a charge for recovery of historic investment, a position adopted and repeated by HAL as recently as October 2012. Indeed, recovery of historic investment costs was not proposed by HAL until early in 2015, and has all the appearance of an afterthought, with an eye to commercial advantage.

5 Other Charges

5.1 The calculation of the proposed charges for access (IRC and otherwise) are flawed anyway. The detail is beyond the scope of an executive summary, and is set out further below. For present purposes it is sufficient to note that as currently envisaged, no account is taken in the charging regime of (for example) the relative characteristics of trains operating on the infrastructure; of the actual infrastructure that will be used; of the incidence of volume risk; of potential "cross subsidy" from rail operators to airlines; and of separation of track and station charging. Finally, it appears that HAL proposes to give itself full and unfettered rights to amend the access charges.

6 The Network Code and The Network Statement

6.1 As currently drafted, HAL's proposed Network Code and Network Statement are, to put it generously, works in progress: they are incomplete, internally contradictory and fail to meet basic requirements of the Rail Regulations 2005 and, more generally, a safe, transparent and fair framework for access to railway infrastructure. In addition, the proposals are inherently discriminatory, since they appear to treat HEOC more favourably than other applicants. It appears that HAL has not fully understood the nature and extent of the obligations and duties of an infrastructure

manager within the context of the Rail Regulations 2005, or the complexity and sophistication of the documentation required to set out those obligations and duties.

7 The Response

- 7.1 TfL's Response is in 10 Parts. Given the time that HAL has allowed for Consultation responses, it is inevitable that the Response is not exhaustive (and in any event could not be exhaustive until TfL has sight of the material identified in Schedule 2).
- 7.2 Nonetheless, TfL understands that HAL remains committed to publication by 31 August 2015, which suggests that HAL will not realistically be in a position to properly consider TfL's comments, still less engage in any form of dialogue or clarification process. It therefore seems that TfL will have no alternative but to institute the appeals process under regulation 29 of the Rail Regulations 2005.

PART 2: INADEQUACY OF CONSULTATION

8 Introduction

8.1 The Consultation being conducted by HAL is inadequate. In particular:

8.1.1 HAL has not:

- (a) provided sufficient essential supporting information or evidence for its proposals; or
- (b) established any process for raising clarification questions as part of the Consultation process;

8.1.2 There is no timetable, process or mechanism for requesting further information or clarification as part of the Consultation;

8.1.3 HAL did not agree to a request from TfL to extend the period of the Consultation to allow all consultees to properly, fully and carefully consider the complex issues raised in the Consultation and the volume of documentation proposed by HAL in connection with the Consultation.

9 Basis of HAL's Consultation

9.1 HAL's letter dated 1 July 2015 (which was not sent to TfL) purports to set out the basis on which HAL is consulting and what the outcome of the Consultation should be. The Letter reveals a basic lack of understanding of the meaning, requirements and effect of the Rail Regulations 2005, and the application of those regulations to HAL (for the reasons set out in paragraph 4).

9.2 Schedule 2 of this response sets out a list of information which TfL requires in order to be able to comment fully and fairly on HAL's proposals. In summary, HAL should have, but has not, provided the following:

9.2.1 **Consultation paper:** a consultation paper or document setting out the basis of consultation – including an explanation of some of the main provisions contained in the consultation documents, how those provisions were arrived at and what questions the consultees are being consulted on. Such a consultation paper is essential for consultees and would usually give helpful background and understanding on the basis of and reasons for the Consultation.

9.2.2 **Clarification question process:** a process by which TfL can raise questions as part of the Consultation - HAL has not done this; and

9.2.3 **Timetable:** a Consultation timetable that HAL intends to follow in order to finalise the regulated arrangements. TfL considers that HAL should issue a timetable from the end of the period of the Consultation until implementation of the arrangements, including the subsequent consultations proposed in the Extension Response. TfL reserves the right to appeal to ORR under regulation 29 of the Rail Regulations 2005 in respect of any matter contemplated by the Consultation or otherwise challenge HAL's proposals or conclusions.

9.2.4 **Supporting Information:** evidence in support of HAL's proposals in relation to charging, amongst other things.

9.3 HAL is obliged as a matter of law to comply with the requirements of the Rail Regulations 2005: as currently drafted, HAL's proposals fall short of that obligation in numerous, and in many cases fundamental, respects. A proper consultation process could have remedied many, if not all, of the deficiencies in HAL's proposals.

10 **Advent of Crossrail**

10.1 The Letter (and related information on the HAL website) asserts that it is the commencement of the Crossrail passenger services in 2018 that places certain obligations on HAL as the owner and operator of the Heathrow Rail Infrastructure. This is not correct. HAL has been bound by the Rail Regulations 2005 since they came into force in November 2005. This arose out of changes to European law that were implemented into English law by the Rail Regulations 2005 and not by the advent of Crossrail. No exemption is possible from the Rail Regulations 2005.

10.2 Further, TfL considers that HAL has been aware of the need to put in place requirements to meet the Rail Regulations 2005 since at least 2006¹ (and should have been aware of this requirement from an earlier date given it is an operator of railway infrastructure). In addition, TfL understands, HAL was originally working to a timetable of 2013 to introduce arrangements to ensure compliance with the Rail Regulations 2005².

11 **The Deed of Undertaking**

11.1 The Letter also asserts that "*under the 30 May 2008 Crossrail Deed of Undertaking between HAL and the Secretary of State for Transport, HAL undertook to be regulated*". This is also incorrect. HAL cannot, as a matter of contract or otherwise, agree whether or not to be bound by law.

12 **Obligations under the Rail Regulations 2005**

12.1 HAL implies in the Letter (and on its website) that, in order to satisfy its regulatory requirements, it has to complete 2 key tasks: (i) issue a Network Statement; and (ii) issue a Network Code. HAL goes on to imply that any other documents it has issued are being issued voluntarily and that HAL would not otherwise be obliged to publish them but for the advent of the Crossrail services. TfL notes that:

12.1.1 the obligations set out in the Rail Regulations 2005 are much broader than the current Consultation. Further, the Deed of Undertaking also envisages wider compliance with the Rail Regulations 2005 than HAL is demonstrating in the Consultation. TfL raises deficiencies in the Consultation elsewhere in this response but, in summary, TfL considers that HAL should as a minimum be:

¹ Letter from M A Noakes to A Ferguson dated 06 January 2006.
Letter from A C D Ferguson to M Noakes dated 26 May 2006.
Letter from M A Noakes to A C D Ferguson dated 05 June 2006.
(Letters set out in Schedule 3 of this response).

² Letter from B Kogan to A Gregory dated 10 January 2013.

- (a) providing more detail as to how access to services will be established in accordance with the Rail Regulations 2005 (regulation 7 in particular);
- (b) demonstrating compliance with the separation and business planning requirements contained in regulations 9 and 10 of the Rail Regulations 2005 (particularly given HEOC is described as a wholly-owned subsidiary of HAL in the HAL Network Statement);
- (c) providing substantiating information to support its proposals – the charging proposals in particular – in order that ORR can determine the charging framework as required by regulation 12 of the Rail Regulations 2005;
- (d) setting up a performance scheme as required by regulation 14 of the Rail Regulations 2005; and
- (e) establishing rules for the allocation of capacity as required by regulation 16 of the Rail Regulations 2005.

These requirements go far beyond issuing the HAL Network Statement and the HAL Network Code; and

12.1.2 in any event, certain documents which HAL has not provided are referenced within the documents which it has provided. In order for consultees to make an informed consultation response, receipt of those documents is essential. Indeed, TfL notes in Schedule 2 that there are many other referenced documents which are missing and which would be required to enable a comprehensive response to be given, to allow the establishment of the charging, regulatory and contractual framework (which are interdependent) for the Heathrow Rail Infrastructure.

13 **Extension of time**

- 13.1 As HAL will be aware, on 6 July, TfL wrote to HAL (copying the DfT and ORR) to request an extension of time for TfL to respond to the Consultation. TfL asked for a fair and reasonable opportunity to consider the 9 documents (including the 3 station annexes) and over 600 pages published by HAL and prepare a fully considered response on all relevant issues.
- 13.2 Further, in the same letter TfL requested that HAL prepares a timetable for the consultation so that TfL (and other consultees) could have transparency over the process that would be followed.
- 13.3 HAL did not respond to that letter within the week in which TfL requested a response. Indeed, it took HAL over two weeks (until the penultimate week of the period of the Consultation) for HAL to issue the Extension Response indicating that an extension would not be granted. TfL considers this delay to be unreasonable and reflective of HAL's attitude to the Consultation (and the pre-engagement). In particular, TfL disagrees with the assertions made by HAL in the Extension Response that:

- 13.3.1 it has provided a significant amount of information to allow TfL to better understand its proposals. Key information requested by TfL to allow it to understand HAL's proposals has not been provided, either as part of the pre-consultation engagement or as part of the Consultation itself;
- 13.3.2 stakeholders will be well versed on the form and operation of the documentation issued as part of the Consultation as they are based on pro formas. Many ill-considered changes and deletions have been made by HAL to the Documentation and indeed HAL did not provide a comparison against the Network Rail forms as part of the Consultation. Further changes are also required to reflect the circumstances of the Heathrow Rail Infrastructure. This means the Documentation is fundamentally different to the Network Rail contract documents and in any event remains inappropriate in many respects for use of the Heathrow Rail Infrastructure because:
- (a) HAL has proposed certain unsuitable changes to the Network Rail contract documents; and
 - (b) given the nature of the Heathrow Rail Infrastructure, HAL should have proposed further changes to certain parts of the Network Rail contract documents; and
- 13.3.3 TfL will have opportunities to respond to subsequent consultations. In the Consultation, HAL appears to be proposing the Documentation as the basis of the contractual framework for use of the Heathrow Rail Infrastructure and there has been no suggestion of any further consultation.
- 13.4 TfL remains of the view that an extension of the Consultation would have been appropriate. Unless substantial amendments are made to HAL's proposals, TfL will have no alternative but to appeal under regulation 29 of the Rail Regulations 2005. TfL invites HAL to reconsider its proposals in light of TfL's comments set out in this response.

PART 3: JURISDICTION

14 TfL's understanding of the proposed arrangements

- 14.1 HAL's proposals fail to address which of the regulatory bodies is to have jurisdiction over the charges for access to the Heathrow Rail Infrastructure, and on what basis that jurisdiction is to be exercised. So far as TfL is able to understand the proposals, it appears that it is intended that the CAA will exercise regulatory functions in relation to an area (charging for rail access) in which it has no statutory jurisdiction, or experience.
- 14.2 The HAL Network Statement is the only document in which the proposed charging regime for the use of the Heathrow Rail Infrastructure is set out. These references (in Part 6 of the HAL Network Statement) simply state the intention to levy a FTAC (in fact, an investment recovery charge) and the amounts of those charges. There is no further explanation, still less justification, of those charges, whether by reference to the charging principles in the Rail Regulations 2005 or at all.
- 14.3 Based on the pre-consultation engagement between TfL and the DfT (in their capacity of sponsors of the Crossrail project) and HAL, TfL infers HAL's proposal to be as follows:
- 14.3.1 all of the Heathrow Rail Infrastructure would remain on the Airport RAB with the FTAC (or investment recovery charge) being calculated in accordance with the CAA's determination of charges under the airport "periodic review" process;
 - 14.3.2 the operations expenditure associated with the Heathrow Rail Infrastructure would also form part of the overall revenue requirement determined by the CAA as part of the airport "periodic review" process; and
 - 14.3.3 both the remuneration of capital investment and recovery of ongoing operating costs would be established by the CAA in the course of regulating HAL's aviation business. This would be a continuation of the arrangements which have been in place at least since the start of HAL's third regulatory control period or quinquennium in 1997. Throughout the intervening 18 years, all costs relating to this infrastructure have been recovered from airport users (net of income from rail operations) through the aviation charges levied on airlines (and TfL understands that HAL has granted security over the Heathrow Rail Infrastructure).
- 14.4 The Documentation therefore suggests HAL has not given proper thought to these "jurisdictional" matters in the formulation of its proposals. No such consideration was indicated during the pre-consultation engagement, and the CAA has confirmed that no discussions took place between it and HAL on these matters. Indeed, in most other respects the arrangements proposed by HAL (to the extent that it is possible to understand them) are consistent with a charging framework under the Rail Regulations 2005 which is limited to the recovery of direct costs only (and no investment recovery charge).

15 **Meeting with CAA and ORR**

15.1 TfL (together with the DfT, as joint sponsors of the Crossrail project) held a joint meeting 27 May 2015 with the CAA and ORR representatives³. At this meeting the CAA confirmed:

15.1.1 that it did not have any duty in relation to rail operators or users; and

15.1.2 it did not carry out any specific independent assessment or verification analysis of HAL's rail related revenue requirement.

15.2 The CAA does not have any rail industry expertise. It treats rail assets no differently to any other airport infrastructure, such as baggage handling systems. In contrast, ORR is ideally placed, with the relevant expertise, experience and knowledge of how a railway is and should be regulated, to establish the charging framework. Indeed, it is the duty of ORR (and not the CAA) under the Rail Regulations 2005 to establish the charging framework. It is ORR which has regulatory powers in respect of railways under the 1993 Act and the Rail Regulations. The CAA has no jurisdiction in this area.

16 **Access charges jurisdiction - the risk of double recovery**

16.1 TfL understands that HAL intends to continue to establish the revenue requirement associated with the Heathrow Rail Infrastructure on the same basis as it has done since the start of HAL's third control period, or quinquennium, in 1997. In principle, TfL would have no objection with this approach **if** the other arrangements for meeting that revenue requirement also continue. This means that airline aviation charges (net of the operating surplus received from the HEOC services) should continue to fund the Heathrow Rail Infrastructure.

16.2 Rail access to the airport offers not only the fastest route to central London but is the most environmentally acceptable mode. This results in rail access being compatible with planning and other statutory requirements and allowed the airport to expand. It is therefore the airport and the airlines which are the ultimate beneficiaries of the Heathrow Rail Infrastructure and it is therefore appropriate they should be responsible for the construction costs of the Heathrow Rail Infrastructure.

16.3 Payment of the construction costs of the Heathrow Rail Infrastructure by the airlines is wholly consistent with the Rail Regulations 2005, which provide that the cost of the "minimum access package" *shall be set at "the cost that is directly incurred as a result of operating the train service"*. Such costs can only be established by ORR as they relate to the operation of a particular train service – so would not form part of the CAA's determination in respect of airport charges. The result would be that airport users continue to pay the same aviation fees and HAL would continue to be responsible for the fixed Heathrow Rail Infrastructure (funding it from those aviation fees) as they would at present have done for 18 years. Nevertheless, airport users and HAL would benefit from the increased amenity and connectivity of additional services (including Crossrail) with such train service provider paying the additional costs which are directly incurred through the operation of its service.

³ Meeting minutes have been circulated for this meeting to HAL but please let TfL know if HAL needs a copy of these.

16.4 TfL acknowledges that the introduction of Crossrail services will have an adverse impact on HEOC farebox revenues and thus indirectly on the net revenue requirement to be recovered through airport charges, if left unadjusted. However, TfL notes that the contribution made by HAL to the DfT in connection with the introduction of the Crossrail services was reduced from the figure of £180m in 2008 prices (approximately £230m in current prices) to £70m (in February 2014 prices) to compensate HAL for this forecast reduction in HEOC income. The projected reduction in revenue has therefore already been taken into account and any further adjustment in the context of charges to be levied on users of the Heathrow Rail Infrastructure would result in HAL securing double recovery of projected reductions in farebox revenue.

17 Access charges jurisdiction - investment recovery charge

17.1 HAL proposes levying an investment recovery charge (by way of the FTAC) using the exceptions to the general charging principles set out in schedule 3 of the Rail Regulations 2005. The FTAC is very significant in amount (approximately £34 million per annum (2015 prices) for the proposed Crossrail service pattern based on the price of £597 per “movement” set out in the HAL Network Statement) which can only result in an equivalent reduction in airport charges or surplus accruing to HAL shareholders, or some combination thereof. This is particularly the case as the Crossrail services will be introduced prior to the expiry of the current quinquennium.

17.2 Under HAL's proposals, this FTAC will effectively be set by the CAA outside the rail regulatory framework and “imported” into the charging framework established under the Rail Regulations 2005. These charges are in effect unregulated because they are not established or determined by ORR, but instead would result from assumptions made by the CAA about income derived from railway income, which would form part of HAL's other single till income, which would in turn be used to reduce HAL's revenue requirement and reduce landing charges. The CAA has no locus in the matter of rail access charges to be incorporated into the charging framework. ORR has the expertise, experience and duty to establish such charging framework.

17.3 Price determinations in respect of rail access charges statutorily cannot be made by the CAA, only by ORR. However, HAL's proposed structure requires ORR to accept the outcome of the CAA's determinations (rather than consider and reach its own view). Accordingly, the CAA establishment of the charges would not meet the requirements of the Rail Regulations 2005 and would undermine the objective of those regulations which seek to establish a fair, transparent and non-discriminatory charging framework. The physical assets comprising the Heathrow Rail Infrastructure must be taken outside of the Airport RAB (where the CAA has jurisdiction) and ring-fenced in a Rail RAB over which ORR has jurisdiction. However, the capital recovery of such assets should remain within the Airport RAB.

17.4 This would need to be underpinned by an independent audit to ensure:

17.4.1 there is no mismatch between the assets falling within the Airport RAB and the assets falling within the Rail RAB;

17.4.2 that the physical assets transferring are appropriate; and

17.4.3 to the extent any charges include remuneration of capital investment, the initial book and depreciated/indexed values of the physical assets are accurate.

In discussions with ORR, HAL would then need to establish relevant policies in relation to matters including asset life, approach to amortisation and rate of return.

17.5 Of course, in any event, the imposition of an investment recovery charge would still need to satisfy the criteria set out in schedule 3 of the Rail Regulations 2005 for it to be permitted. For the reasons set out in elsewhere in this response, TfL does not consider that either limb of the test is met and the imposition of such a charge would be unfair and inconsistent with ORR's duties under the 1993 Act.

18 **Access charges jurisdiction – regulatory policies**

18.1 TfL acknowledges that sector regulators work closely together to establish best practice in regulatory policy making and to learn from experience. However, this falls some way short of a statutory basis for CAA to impose its policies on another sector regulator, simply for the administrative convenience of a monopoly infrastructure manager (HAL). This is particularly so where such policy could cut across equivalent policy established across the rail industry by the appropriate regulator for that sector (ORR).

18.2 An investment recovery charge calculation can be calculated in many different ways, one of which is the regulatory "building blocks" method which appears to be contemplating. This is typically based upon several factors, including:

18.2.1 allowable (efficient) costs of the assets;

18.2.2 when investment is logged to the regulatory asset base;

18.2.3 amortisation duration and profile;

18.2.4 regulatory rate of return; and

18.2.5 approach to indexation/inflation.

Both CAA and ORR will have their own separate policies in relation to each of these factors, such policies having been established through due process, in consultation with its stakeholders and consistent with the duties and objectives applicable to that regulator. For example, there is no reason why an airport business should have the same risk profile, investment trajectory or funding structure as a rail business (and even if there was initial congruence, divergence over time would be inevitable). This will be reflected in the rate of return allowed by the regulator.

18.3 Regulators regularly set efficiency targets which inevitably will vary over time and by sector. It is possible that the rail industry may for instance move to a CPI basis of indexation, while TfL is not aware of CAA policy in this regard. The impact of such divergence is unclear and charges established within the structure proposed by HAL (i.e. by the CAA) are open to challenge and to the prospect of under or over-recovery. In general, such anomalies will favour HAL because the infrastructure manager has both the detailed information and knowledge of both regulatory regimes to take commercial advantage of such anomalies.

19 Jurisdiction – practical arrangements

19.1 Assets

19.1.1 TfL considers the structure proposed by HAL to be opaque in terms of the assets which form the basis of the charges to be levied on rail operators and the assets which form the basis of the charges to be levied on airport users. TfL considers it essential for there to be clear delineation between the two, which has not been provided by HAL. In the absence of a clearly delineated and ring-fenced rail infrastructure under the oversight of ORR, there is real potential for interface assets (whether discrete, such as escalators or systems such as public address, ventilation or fire control) to be misallocated for cost and charging purposes. This leads to the possibility of double counting and over-recovery by HAL from rail operators.

19.1.2 TfL considers that the Heathrow Rail Infrastructure should be in the oversight of a single regulator (which can only be ORR) with the airport assets being separated out and under the jurisdiction of the CAA. A clear delineation will in any event be required both under ROGS and the relevant access contracts.

19.2 Terms of access

19.2.1 Access charges are paid in exchange for infrastructure access. Infrastructure access is intended to be granted by HAL on specific terms for particular payments. TfL considers that unless ORR is responsible for establishing the charging framework (and the specific charges made as part of that) it cannot effectively consider appeals in relation to that framework – or the terms of access.

19.2.2 Under the terms of the Exemption Order, HAL enjoys an exemption from both the access and licensing regimes under the 1993 Act. This means that standard terms (model clauses), asset stewardship and performance obligations need to be dealt with contractually rather than by way of a network licence. The only effective way of addressing a grievance in relation to the terms of access is under regulation 29 of the Rail Regulations 2005. However, under HAL's proposal, it will be the CAA (and not ORR) which determines the quantum of charges payable for access to the Heathrow Rail Infrastructure. As access charges and terms of access go hand-in-hand, under HAL's proposal, ORR's jurisdiction in relation to appeals will be fettered in relation to non-charge related terms because it will have no right to adjust access charges, for instance in relation to the standard of performance.

19.2.3 The structure proposed by HAL is also unworkable in the context of "change", with the proposed contractual framework having multiple defects in this regard, as set out below. The promotion of beneficial change (to infrastructure, rail vehicles or operations, including documentation) is needed through specific contract provisions (which preclude one party from overriding the wishes of others whilst simultaneously not unduly fettering the wishes of others) and is a critical element of the rail industry structure. This concept has been largely lost in HAL's proposed structure and the

nexus with charges severed. The intent of HAL's proposals appears to be to replicate the national rail industry approach, which culminates in disputes going to ORR. Often, such a dispute affects or relates to charges (for instance where one operator's change requirements necessitate higher operational expenditure or investment). If charges are being determined by the CAA, this is likely to be a fetter on ORR in the performance of its functions in relation to disputes.

PART 4: TfL COMMENTS ON HAL'S PROPOSALS FOR AN INVESTMENT RECOVERY CHARGE (DESCRIBED AS FIXED TRACK ACCESS CHARGE)

20 Introduction

- 20.1 In Part 6 of the HAL Network Statement, HAL indicates its intention to levy a FTAC. In a confusing contrast to the position on the Network Rail network, this is not intended as a method of recovering those costs of operating the network which are fixed, regardless of how many trains operate across it. Instead, HAL notes that this 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"*.
- 20.2 HAL's proposed FTAC/investment recovery charge does not meet the requirements of the Rail Regulations 2005 for the imposition of such a charge and is unfair, inconsistent and potentially discriminatory for the reasons set out below.

21 Schedule 3 of the Rail Regulations 2005

- 21.1 Paragraph 3 of schedule 3 of the Rail Regulations 2005 sets out the exceptions to the general charging principles which would otherwise apply for accessing railway infrastructure as follows:

- "(1) Subject to 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 project must increase efficiency or cost-effectiveness; and*
 - (b) the project could not otherwise have been undertaken without the prospect of such higher charges.*
- (3) A charging arrangement to which sub-paragraph (1) applies may incorporate agreements on the sharing of the risk associated with new investments."*

- 21.2 As noted in paragraph 9.2 above, HAL has not provided any explanation of the approach which it has taken to the proposed charging, regulatory and contractual framework, and in particular has made no attempt as part of the Consultation to justify the imposition of the FTAC.

- 21.3 TfL has separately considered a paper prepared by HAL in May 2015, entitled "Heathrow Railway Infrastructure – Charges Information Paper" (not submitted as part of the Consultation) which seeks to justify the imposition of the FTAC. TfL has considered the arguments advanced by HAL to justify the FTAC, as set out below. Before dealing with the detail, TfL observes that:

- 21.3.1 The imposition of an investment recovery charge operates as an exception to general charging principles;
- 21.3.2 The burden is on the infrastructure manager seeking to impose such charges to justify them;
- 21.3.3 *Both* limbs of the test in schedule 3 must be satisfied before such charges can be imposed;
- 21.3.4 TfL is far from satisfied at present that the project can be shown to have increased the efficiency or cost-effectiveness of the railway generally (nor even of the airport or wider benefits across society); and
- 21.3.5 TfL regards HAL's prospects of establishing that *but for* the prospect of levying higher access charges in respect of long term costs of the project for access to the infrastructure, the project *could not* have been undertaken as vanishingly small. Other than broad assertions about investors requiring return on capital, HAL has made no effort to satisfy this test.

22 **Sub-paragraph 2(a): The project must increase cost efficiency or cost-effectiveness**

22.1 **HAL's Position**

- 22.1.1 In the HAL Charges Information Paper, HAL seeks to satisfy the first limb of the test as follows: "The relatively higher charges (expected and actual) for the use of the infrastructure increase the efficiency in a number of ways including (i) reducing the total cost of the project by reducing the borrowing requirements and through that the overall cost of borrowing; and (ii) this in turn influences whether a project proceeds". In addition to this argument, HAL points out that by virtue of its addition to the Airport RAB, it can be inferred that the capital cost of the project was efficiently incurred.
- 22.1.2 There are a number of points to be made about this.
 - (a) HAL does not anywhere explain what the actual "relatively higher charges" that it implies are currently being levied are. This is important, for a number of reasons. TfL does not accept, for example, that whatever charges are currently being levied include any form of IRC, in which case HAL's position in relation to this limb is undermined.
 - (b) HAL in fact only identifies one reason why "relatively higher charges" increase efficiency, and that is that it reduces the debt burden on funders, making it more likely that projects will be built, which increases the overall benefit to society (which HAL describes as "the measure of efficiency most relevant in the context of rail infrastructure"). In reality, of course, for a regulated business like HAL, the level of charges is not the key driver of the

cost of the project; rather the cost of the project drives the level of the charges and the debt and equity finance that is required.

- (c) The second reason identified by HAL (*"this in turn influences whether a project proceeds"*) is fundamentally flawed for at least two reasons. First, this is a point which is anyway of relevance to the second rather than the first "limb". Second, and most crucially, we do not believe that the prospect of rail access charges which are higher than directly incurred cost either: (i) was (as a matter of fact) a factor in the decision to proceed with the project; or (ii) would have been (as a matter of theory and evidence) a factor in the decision to proceed with the project. With regard to the former, we refer elsewhere in this submission to statements by HAL which suggest that they had no intention of levying an IRC or equivalent. With regard to the latter, we have carried out some preliminary analysis which shows that the full economic cost of the rail infrastructure could be (and could have been) recovered through a very modest increase in airline charges with only a very marginal reduction in demand for flights to and from one of the world's largest, busiest and most capacity constrained airports.

23 TfL's Position

- 23.1 TfL believes that it is for HAL to explain why it believes this limb is satisfied, but is far from convinced that this will be possible. In doing this, HAL should define (in a way that they have abjectly failed even to attempt): what "cost effectiveness" and "efficiency" means; from whose perspective it should be assessed; what the "project" actually is; and how the project performs against the criterion.
- 23.2 By way of simple illustration of why this is important, while the infrastructure might well improve efficiency and cost effectiveness from the perspective of HAL and the passengers which use the HEOC "express" services (and Heathrow airport more generally), the same cannot be said for passengers who use other rail services which run into London Paddington who lose out as a result of the HEOC "express" services benefitting from fixed clockface departures and dedicated platforms at London Paddington station. This is evidenced in Network Rail's 2011 London and South East Route Utilisation Strategy.

24 Sub-paragraph 2(b): The project could not otherwise have been undertaken

24.1 HAL's Position

- 24.1.1 HAL's case in support of sub-paragraph (2) is similarly limited. The evidence that HAL relies upon comprises an interview with the then SOS in the Independent Newspaper in 1988; and an extract from the debate in the House of Lords in relation to the Heathrow Express Bill in February 1988. HAL's case is *"that the Government of the day did not want to fund the Heathrow Spur and instead relying on HAL to fund the project privately, funding which was only available with the expectation of a full commercial return from the project. Without this expectation of full cost recovery and the higher charges that are necessary to cover those costs the project would not have been undertaken as the finance would not have been*

available". In conclusion, HAL states that "investment in [the Heathrow Spur] was to be a "commercial opportunity" (which by definition requires a return)".

24.1.2 Those assertions are the full extent of HAL's attempts to satisfy the test in sub-paragraph (2)(b). Leaving aside the fact that there is absolutely no evidence provided to support them, TfL notes the following:

- (a) There is no evidence that whatever funding arrangements were in place, they required a return from higher charges for access to the infrastructure on the basis of the long term costs of the project, without which the project *could not* go ahead.
- (b) There is no explanation as to what funding arrangements were available, or used, and the part that the prospect of higher charges played in those arrangements.
- (c) There is no evidence that the funders have not already recovered their costs: if they have, then there is no basis for any further charges.
- (d) There is no evidence that HAL have ever charged an investment recovery charge to HEOC, whether on the basis now proposed or at all, which it will have had to have done if it is to satisfy sub-paragraph (2)(b). Indeed, there is no evidence that HAL intends to charge the investment recovery charge (if established) to HEOC going forward.
- (e) There is no certainty that the proposed investment recovery charge would not result in an over-recovery by HAL.

24.1.3 It is plainly not sufficient simply to assert that, as a matter of definition, funders are unlikely to invest unless they receive a return. The purpose of the test in sub-paragraph (2)(b) is to permit higher charges to be levied against those who wish to access the infrastructure *only* where the very existence of the infrastructure was conditional on the payment of such charges. It is not simply to allow the funders to seek to recover a return that was never contemplated simply because they have made an investment, and investments by definition make returns. If access to the infrastructure is desired, but the infrastructure could only have been built if users pay higher charges, then it is reasonable and fair to require users to pay, but not otherwise.

25 TfL's Position

25.1 HAL claims that there must have been an expectation of higher charges being levied in order to justify the investment in the Heathrow Rail Infrastructure. TfL disagrees. The cost of construction of the Heathrow Rail Infrastructure was funded by BAA plc through its own capital and debt funding – and was included in the capital programme for the airport. These costs have been taken into account by the CAA, as part of the airport's overall expenditure, in determining the landing charges payable by the airlines and also include a rate of return.

- 25.2 In effect, this means the airlines have been paying for the construction cost of the Heathrow Rail Infrastructure not covered from the operating surplus of HEOC. This makes sense in the context of a regulated airport where airlines have an interest in ensuring that passengers can get to the airport to use their services and are the ultimate beneficiaries of the Heathrow Rail Infrastructure. The airlines pay for a tangible asset which they ultimately stand to benefit from. It was in the context of airlines (as the beneficiaries) paying for the infrastructure investment that the funding decision was made – it was not envisaged that users of the Heathrow Rail Infrastructure would be required to fund the long term investment (such users only being envisaged at the time to be BAA subsidiary companies).
- 25.3 TfL cannot see how the coming into effect of the Rail Regulations 2005 changes this position. There remains an advantage for airlines (as the beneficiaries) contributing towards the capital costs of investment in the Heathrow Rail Infrastructure through the airport landing charges. Nothing has changed. The FTAC has not been paid by users of the Heathrow Rail Infrastructure since the coming into force of the Rail Regulations 2005. It appears that HAL is now seeking to levy this charge simply because there is the prospect of a non-affiliate using the Heathrow Rail Infrastructure. TfL considers this to be discriminatory.
- 25.4 At the time of investing in the Heathrow Rail Infrastructure, there was no realistic prospect of the Crossrail passenger services being introduced. This cannot therefore have been taken into account in making the investment decision. Indeed, at the time of investment, only the HEOC express services were envisaged and so it is only on this basis that the investment decision could have been made (the “Heathrow Connect” stopping service being introduced six and a half years after the commissioning of the Heathrow Rail Infrastructure).
- 25.5 As stated above, PricewaterhouseCoopers LLP has carried out some preliminary analysis on TfL’s behalf which shows that the full economic cost of the rail infrastructure could be (and could have been) recovered through a very modest increase in airline charges with only a very marginal reduction in demand for flights to and from one of the world’s largest, busiest and most capacity constrained airports.
- 25.6 BAA (through a senior representative with rail responsibility) indicated on a number of occasions in a number of letters that it would not be seeking to levy a charge to recover historic investment as part of its access charges⁴. Ultimately, the airport and the airlines are the beneficiaries of the Heathrow Rail Infrastructure. TfL relied upon these representations when developing the Crossrail business case. The exchange of correspondence from BAA is set out in Schedule 3.
- 25.7 This limb of the test cannot therefore be satisfied by HAL. The construction of the Heathrow Rail Infrastructure:
- 25.7.1 would have been undertaken in any event;
 - 25.7.2 without higher track or station access charges ever being envisaged; and

⁴ Letter from M A Noakes to A Ferguson dated 06 January 2006.
Letter from A C D Ferguson to M Noakes dated 26 May 2006.
Letter from M A Noakes to A C D Ferguson dated 05 June 2006.
(Letters set out in Schedule 3).

25.7.3 with multiple assurances from a senior representative of BAA being given to TfL of this fact.

25.8 This means HAL is not entitled to levy the FTAC under the Rail Regulations 2005.

26 **HAL cannot satisfy exception**

26.1 TfL has outlined above that HAL cannot justify higher access charges based on the "specific investment project" exception in the Rail Regulations 2005.

26.2 HAL is therefore not in a position to satisfy the exception to the general charging principles set out in paragraph 3 of schedule 3 of the Rail Regulations 2005. HAL (as infrastructure manager) will therefore be required to comply with the general charging principles relating to access under the Rail Regulations 2005 and set its access charges "*at the cost that is directly incurred as a result of operating the train service*".

27 **Abuse of a dominant position**

27.1 TfL considers that HAL's proposals for an investment recovery charge would constitute an abuse of its dominant position as the infrastructure manager of the Heathrow Rail Infrastructure. More detailed commentary on this point is set out in Part 10.

28 **Determination by the ORR – duties under Section 4 of the Railways Act 1993**

28.1 HAL will be aware that ORR is required to exercise its functions in making any determination or deciding an appeal or otherwise under the Rail Regulations 2005 in a manner which it considers is best calculated to achieve the general duties described set out in the 1993 Act.

28.2 TfL will in due course be submitting to the ORR that it should have particular regard to the following duties set out in Section 4 of the 1993 Act when considering HAL's proposed charging regime (and HAL Network Statement and HAL Network Code), each of which militate against the imposition of higher charges in respect of the long term costs of the project:

28.2.1 to promote improvements in railway service performance (section 4(1)(zb));

28.2.2 otherwise to protect the users of railway services (section 4(1)(a));

28.2.3 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 (section 4(1)(b));

28.2.4 to contribute to the development of an integrated system of transport of passengers and goods (section 4(1)(ba));

28.2.5 to contribute to the achievement of sustainable development (section 4(1)(bb));

28.2.6 to promote efficiency and economy on the part of persons providing railway services; (section 4(1)(c));

- 28.2.7 to promote competition in the provision of railway services for the benefit of users of railway services (section 4(1)(d));
 - 28.2.8 to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator (section 4(1)(e));
 - 28.2.9 to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g));
 - 28.2.10 to exercise its functions in a manner which is best calculated to protect 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 the quality of and prices charged for such services (section 4(2)(b));
 - 28.2.11 in exercising the functions assigned or transferred to it, to have regard to any general guidance given to it by the Secretary of State about railway services or other matters relating to railways and 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 (sections 4(5)(a) and (c));
 - 28.2.12 in exercising the functions assigned or transferred to it, 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 (section 4(5)(d)); and
 - 28.2.13 in performing its duties, to have regard, in particular, to the interests, in securing value for money, of users and potential users of railway services and providers of railway services, of the persons who make available the resources and other funds mentioned in that subsection and of the general public (section 4(5C)).
- 28.3 TfL would also draw HAL's attention to section 22 of the Crossrail Act, which provides that the list of objectives in section 4(1) of the 1993 Act shall be treated, in relation to ORR only, as including the objective of facilitating the construction of Crossrail. ORR is also under a duty under section 23(1)(b) of the Crossrail Act to publish a report from time to time on how it has exercised or proposes to exercise its functions in connection with the operation of Crossrail passenger services.
- 28.4 Schedule 5 of this response sets out TfL's preliminary views of how the ORR may exercise its duties.

PART 5: TfL COMMENTS ON CHARGING ARRANGEMENTS PROPOSED BY HAL

29 Introduction

29.1 Part 5 of TfL's response to the Consultation sets out its comments on the charging arrangements (other than the proposed FTAC, which is discussed in Part 4) proposed by HAL as part of the Consultation. In particular:

29.1.1 HAL does not intend to levy charges for use of the Heathrow Rail Infrastructure on the basis of "*the cost that is directly incurred as a result of operating the train service*" contrary to the requirements of the Rail Regulations 2005, and has offered no justification for seeking to levy charges in excess of this level (see paragraphs 30 and 31);

29.1.2 the proposed charging structure does not take into account the characteristics of the type of rail vehicles operating on the infrastructure and the relative impact of one train compared to another on that infrastructure, which is inequitable, potentially discriminatory and does not incentivise efficient use (see paragraph 32);

29.1.3 the proposed charging arrangement means that TfL, through its concession operator MTR Crossrail, will be paying for infrastructure which it does not use, which is unreasonable, inequitable and in contravention of the Rail Regulations 2005 (see paragraph 32);

29.1.4 it is not reasonable for users of the Heathrow Rail Infrastructure to be expected to assume volume risk (i.e. HAL recovers its costs in full – including the FTAC – regardless of how many trains use the Heathrow Rail Infrastructure (see paragraph 35);

29.1.5 the operation of the airport single till will mean that users of the Heathrow Rail Infrastructure might subsidise aeronautical charges which would be unfair (see paragraph 36);

29.1.6 there is no explanation in the Consultation of how the aviation charges set by the CAA periodically in respect of the airport as a whole interface with the charges levied by HAL on users of the Heathrow Rail Infrastructure (see paragraph 36);

29.1.7 it appears that HAL is giving itself full and unfettered rights to amend the access charges payable by users, which is unreasonable (see paragraph 37);

29.1.8 TfL notes that the proposed charging arrangement is not transparent because:

- (a) station costs are not separately identified by location nor are they recovered under the HAL Station Access Agreement. Instead, these substantial costs are stated to be within the track access charge, with a nominal £1 sum being paid for station access. This proposal is not cost reflective so that users would be obliged to pay a proportion of costs relating to infrastructure it does not use

and results in HAL having no incentive to establish efficient station costs (see paragraphs 40 and 41); and

- (b) it is not clear how the costs of HEOC staff are charged to HAL and how HAL then recovers such costs (if this falls within the proposed track access charge). TfL would expect a “qualifying expenditure” following the Network Rail and HS1 Limited models to be included in the proposed arrangements to ensure the proposals are cost reflective and reflect the costs only of infrastructure which a user uses (see paragraph 41);

29.1.9 HAL appears to be proposing charges that are based on “pre-efficient” levels of efficiency. This is contrary to regulatory practice, which is to set OMRC charges on the basis of post-efficient costs. TfL would expect a formal benchmarking exercise to take place aimed at determining (i) whether HAL is at the “efficient frontier” and (ii) if not, the efficiencies that would be required to arrive at the frontier (and therefore the discount in charges from pre-efficient levels).

30 **Structure of Charges – Rail Regulations 2005**

- 30.1 The Rail Regulations 2005 require charges for the minimum access package and track access to service facilities to be the directly incurred costs. Such costs will be substantially lower than the overall costs of providing the infrastructure.
- 30.2 Exceptions to the general charging principles are set out in the Rail Regulations. HAL has asserted in the HAL Network Statement that one of the exceptions is the basis of the FTAC to recover the historic investment in the Heathrow Rail Infrastructure. For the reasons set out in Part 4 of this response, TfL considers that HAL has not met the tests required to impose such a charge.
- 30.3 HAL has not described the basis for the remainder of charges it seeks to impose – i.e. what are the “directly incurred” costs and how full recovery of operations, maintenance and renewal costs over and above the “directly incurred” costs is justified. TfL considers that it is not compliant with the Rail Regulations 2005.

31 **The approach taken by other infrastructure managers**

- 31.1 TfL describes the approach taken by Network Rail, HS1 Limited and HAL to the determination of “directly incurred” costs in 0. TfL considers that the Network Rail and HS1 Limited approaches, whilst differing, are objectively justifiable on the basis of the costs which are directly incurred as a result of a train running. HAL has made no attempt to provide the “directly incurred” charges it proposes to levy or be transparent in the way it proposes to levy its charges.

32 **Cost reflectivity and discrimination**

- 32.1 HAL proposes a single unitary charge to use any portion of the HAL Infrastructure and has proposed this on the basis of a train “movement”. TfL has inferred that this will be a movement to/from the Heathrow Rail Infrastructure/Network Rail boundary from/to the point of origin/final destination of the service. Although not entirely clear, it appears that the single unitary charge is levied irrespective of which stations are

called at, how quick a turnaround is provided, the nature of the station services provided at a particular station and the route section traversed.

- 32.2 As well as not being reflective of the characteristics of the rolling stock used to operate a service, the single unitary charge also means an operator is potentially paying for infrastructure it is not using (and is therefore discriminatory). For example, Crossrail services will not be calling at terminal 5 but will be paying for this more recent (thus lower amortisation of Airport RAB value) and proportionately more expensive infrastructure. Indeed, in a letter from HAL dated 05 June 2006, it is expressly stated that all of the costs of operating from CTA to T5 will be “entirely for HAL’s account”.⁵ This undertaking has not been reflected in the actual charging framework proposed by HAL.
- 32.3 In the case of Network Rail’s revenue requirement to be met by its fixed track access charge, this is allocated to routes on a variety of metrics included vehicle km, train km, EMGTPA, so the fixed track access charge varies by route and therefore by train operator. For use of the HS1 network, as can be seen from paragraph 3.1 of 0 costs are allocated to train operators for infrastructure that they specifically use (OMRCA2 costs – see paragraph 3 of 0) and the “directly incurred” costs vary depending upon the class of train being operated on the infrastructure.
- 32.4 HAL’s proposal for a single unitary charge is not cost reflective and does not appear to comply with paragraph 1(9) of schedule 3 of the Rail Regulations 2005 which requires “*the relative magnitudes of the infrastructure charges must be related to the costs attributable to the services*”. The proposal also does not reflect wider ORR policy in this area (reflective costs at a route level being a thrust of Network Rail regulation in recent times).
- 32.5 Overall, TfL considers there to be a material lack of clarity on the proposed arrangements, how the charges have been formulated and what charges each operator will be expected to pay. It is not clear, for example, how investment made at one station would be passed on in the charging arrangements – would an operator not calling at terminal 5 be expected to pay for upgrades to that station (noting HAL’s claim in 2006 that this would be “entirely for HAL’s account”)? There is the potential for any such operator to be unfairly treated and discriminated against in how the charges are determined.
- 32.6 These are fundamental elements of the Consultation and HAL has not provided sufficient information for an informed response to be given. In this respect, as in many others, the Consultation is fundamentally flawed.

33 Calculation of Fixed Track Access Charge

- 33.1 There is a brief description of the steps in the process for calculating the FTAC (or investment recovery charge) in section 6.1.2 of the HAL Network Statement. However, there are a number of aspects of the calculation that remain unclear or where the rationale is absent. These are highlighted below by reference to the relevant calculation step described in the HAL Network Statement.

⁵ Set out in Schedule 3.

Calculation of the current value of rail Infrastructure Manager Assets using standard UK economic regulatory practice

- 33.2 This does not make clear:
- 33.2.1 the basis of the initial value of the asset (is it cash spent, is there any adjustment for “inefficient” expenditure);
 - 33.2.2 the timing of investment being recognised (“logged up”) in the asset base; or
 - 33.2.3 how the asset values are indexed. As the charges cover the period to December 2016, forecast indices may be being used. If so, the treatment of differences from the outturn index should be clarified.

- 33.3 Indeed, there also appear to be a number of inaccuracies in the data which undermine the usefulness of the data as a basis upon which charges should be set. Preliminary analysis undertaken by PricewaterhouseCoopers LLP (on behalf of TfL) suggests that a number of apparent inaccuracies in the data, suggesting it is unreliable.

Indexation of current value of rail Infrastructure Manager Assets using the Cost of Capital for the Q6 period, as determined by the CAA, to achieve return on assets

- 33.4 Whilst the CAA rate of return (5.35% real pre-tax) can be obtained via the CAA website, it would have been helpful for the rate to have been quoted in the HAL Network Statement.
- 33.5 There is no discussion of why the CAA airport rate of return is appropriate for the Heathrow Rail Infrastructure. For instance, the ORR allowed rate of return for the Network Rail network is 4.93% real pre-tax, (4.31% real, vanilla), although this is not necessarily the “right” answer either).

Calculation of forecast depreciation for the chargeable period

- 33.6 The depreciation period is not specified - is it the useful economic life of the relevant asset?
- 33.7 If so some statement of asset lives for key asset classes would be helpful.
- 33.8 The basis of the depreciation calculation is not specified (e.g. straight line, reducing balance).

The sum of the return on assets and forecast depreciation creates the lump sum of FTAC that HAL will recover through TACs

- 33.9 This gives rise to a declining charge over time (assuming constant rate of return). There is no discussion as to why this is considered an appropriate profile. ORR allows an alternative profile such that charges are constant in real terms over time to better reflect the likely timing of benefits arising from the investment. Given the very long lives of many of the Heathrow Rail Infrastructure assets, the alternative profile should be used to ensure inter-generational fairness.

Finally the lump sum of FTAC is divided by forecast number of train movements

33.10 The number of movements used is not specified. This should be supplied together with the basis of calculation (e.g. train movements per hour, number of operational hours).

34 Use of FTAC term

34.1 The use of the term “Fixed Track Access Charge” is confusing as it may suggest an equivalent basis with the Network Rail charge of the same name. This is not the case:

34.1.1 the HAL FTAC is an investment recovery charge for the purposes of the Rail Regulations 2005;

34.1.2 the HAL FTAC recovers historic investment in full whereas the Network Rail equivalent does not; and

34.1.3 even in the event that no element of Network Rail’s revenue requirement was met by DfT grant, the Network Rail fixed track access charge would not recover historic investment in full because the initial value of Network Rail regulatory asset base, upon privatisation in 1994, was substantially less than the value of Network Rail’s assets.

35 Treatment of Volume Benefits

35.1 HAL’s charging structure (whereby it always recovers costs in full irrespective of usage) means it has no incentive to actively sell spare capacity. TfL considers that ORR approval of this element of the charging framework would not be consistent with ORR’s duties under section 4 of the 1993 Act to “promote the use of the railway network in Great Britain”. Indeed, TfL considers that as part of its competition monitoring obligations in regulation 30 of the Rail Regulations 2005, ORR should ensure that HAL is incentivised to promote competition in and use of the Heathrow Rail Infrastructure.

35.2 Even if HAL was to impose a FTAC (which, for the reasons set out in Part 4, TfL does not consider it is entitled to do), such “per movement” charge should be based on the available capacity of the Heathrow Rail Infrastructure and not the capacity which is currently used (i.e. 24 movements per hour, rather than the 16 proposed).

36 Operation of Aviation Single Till

36.1 In relation to Heathrow airport as a whole, TfL understands from pre-consultation discussions with HAL that the rail access charges will be considered by the CAA to be other single till income in the regulatory framework for the setting of aeronautical charges. Thus all airport single till revenue is applied to reduce aeronautical charges.

36.2 The Heathrow Rail Infrastructure delivers airport and airline workers into the airport, as well as customers for the retail outlets at the airport which generate a significant proportion of the single till revenue. Of course, airline passengers are also transported to the airport via the Heathrow Rail Infrastructure, from which HAL ultimately derives the substantial part of its income through the aviation charges. A

charging regime in which train operators fund the full costs of operating, maintaining, renewing and the historic investment in the rail network but:

36.2.1 receive no offset from the commercial and other income generated at the airport; and

36.2.2 are not the beneficiaries of the construction of the Heathrow Rail Infrastructure (see paragraph 16.2),

is inequitable.

36.3 HAL will derive considerable benefit from the introduction of the Crossrail services which will benefit its single till. Indeed, with the prospect of a third runway at the airport, ensuring passenger surface access to the airport will be key and the Crossrail services will enable it to achieve even more revenue to feed into the single till mechanism.

36.4 By contrast, the Network Rail charging framework is specifically designed to recover Network Rail's costs of operating, maintaining, renewing and enhancing its network. In the Network Rail framework, all single till revenue is set off against these costs to reduce the access charges to be levied on operators or grant to be paid by the DfT.

37 **Periodic review**

37.1 The process for the review of charges is unclear. The HAL Network Statement simply states that the charges will be reviewed in December 2016 albeit:

37.1.1 the FTAC review will incorporate investment in the network over the period from September 2015 to December 2016 –suggesting that prospective renewal spend for this period is not incorporated in the current level of charges but will be reflected in future charges on a basis to be determined; and

37.1.2 the Common Costs Charge review will consider the degree that charges vary with traffic (this means that compliance with the Rail Regulations 2005 would be deferred until a future date).

37.2 Schedule 7 of the HAL Track Access Contract states that the charges “*shall apply until 31 December 2016 at which time they will be reviewed and adjusted and thereafter charges will be reviewed and adjusted on an annual basis*”.

37.3 There is no clear mechanism for the review of the charges and it is not clear how “common costs” can also “vary with traffic”. Indeed, the proposed arrangements afford no certainty of what the charges will be (or the process for determining them) when the Crossrail services are scheduled to commence in 2018. This means that neither TfL nor MTR Crossrail will be able to plan their respective businesses with a reasonable degree of assurance.

37.4 It is not clear whether HAL intends to unilaterally impose revised charges on train operators (which TfL would be firmly in opposition of), for there to be some form of consultation process or whether (as TfL would prefer) there to be scrutiny and oversight from ORR. Indeed, it is not clear how often and the basis upon which future charges would be set, reviewed and amended. TfL considers that HAL should

(as a very minimum) set out an outline of the process for reviewing charges in future and the basis upon which charges could be amended. TfL would expect this to be contractually binding on HAL and subject to regulatory scrutiny from ORR.

37.5 HAL's proposal means there would be a considerable degree of uncertainty in the access charges which would be payable – not enabling MTR Crossrail or TfL to plan their respective businesses with a reasonable degree of assurance (to which reference is made to ORR's duties under the 1993 Act). This is particularly the case because there is no certainty beyond December 2016 of what the charges will be or how they will be calculated.

38 **Transparency**

38.1 There is a lack of transparency in the charges which HAL proposes to levy, in the following areas, such that it is not possible for a consultee (or a prospective user) to assess the reasonableness of the charges proposed:

38.2 Separation

38.2.1 There is no description in the HAL Network Statement of how the Heathrow Railway Infrastructure and operations have been separated, nor the interaction with the CAA aviation charge setting process. In particular, HEOC is a wholly-owned subsidiary of HAL and TfL would have expected HAL to clearly demonstrate what steps have been taken to ensure separation (including that capacity allocation and charging will be undertaken in compliance with the Rail Regulations 2005).

38.2.2 It is also not clear what charges HEOC will actually pay to HAL for its use of the Heathrow Rail Infrastructure. Given the lack of transparency in relation to separation and discrimination highlighted elsewhere in this response, TfL would expect to have seen an explicit statement on separation between HAL and HEOC and how the charging arrangements will apply to HEOC.

38.3 Interaction with CAA aeronautical charge setting

38.3.1 Although it is not specified in any of the Documents, from discussions with HAL as part of the pre-consultation engagement, TfL has inferred that the track access charges paid by train operators will be treated as single till income in the aviation charge setting process. HAL has not made clear – nor is TfL reasonably able to infer – how this works in relation to the HEOC operations:

(a) Do the revenue and train operating costs associated with the HEOC service currently included in the aviation single till, now fall outside as an unregulated net revenue stream, to be replaced by a track access charge?

(b) Is there a charge to HEOC, the receipt of which is treated as additional aviation single till income, for the HEOC train / depot / station assets in the Airport RAB?

There is the potential for a sizeable additional unregulated income stream gain for HAL at the expense of train operators. This is particularly so if there

is no charge for the HEOC assets and following the introduction (and payment for) Crossrail services. There is no visibility of any of this vital information which should, in addition, be of interest to the CAA and airport users.

38.3.2 In any event, once MTR Crossrail starts paying access charges for the remainder of Heathrow airport's current control period (to 31 December 2018) HAL will be recovering costs it has already been remunerated for through airport charges. As noted in paragraph 17, TfL is concerned that the rate of return on an Airport RAB could quickly become misaligned with ORR's regulatory policies. TfL remains strongly of the view that ORR, as the expert on the rail industry, is much better placed to determine public expenditure on rail (rather than the CAA determining how much private airlines will pay).

38.4 Determination of the Rail RAB

38.4.1 The asset base for the calculation of the FTAC is based, TfL considers (from a review of limited information supplied by HAL) on an extract of asset register data to determine the amount and timing of investment to which indexation and amortisation have been applied to determine the Rail RAB value at a point in time.

38.4.2 It is not an extraction of the relevant rail assets from the CAA asset base at the "commencement date" for separate form of rail regulation. This cannot be done because of the "top down" nature of the determination of the CAA asset base (i.e. there is no definitive list of assets comprising the CAA asset base).

38.4.3 This means there is no certainty that HAL is proposing to set an investment recovery charge which is based on appropriately defined and appropriately valued assets. This introduces the very substantial risk of HAL recovering of an amount already recovered (or being recovered) under the existing CAA regime.

38.4.4 The nature of the asset register from which the cost information has been taken is not known. If it was a fixed asset register to support accounting information then these values may differ from those that would be determined by economic regulation as they would not necessarily exclude inefficient expenditure. For example, additional costs arising from the 1994 tunnel collapse may be included.

38.5 Supporting detail for charges

38.5.1 TfL was disappointed to see that HAL has provided no supporting detail in the Documentation for the level of charges which it proposes to levy, including:

- (a) for the FTAC, insufficient detail has been provided on the nature, values and lives of the relevant assets; or

- (b) for the Common Cost Charges, there is not even the most rudimentary split between operations and maintenance costs, let alone any further breakdown of each of these between track and stations; or
- (c) there is no distinction between track and station access costs; or
- (d) the assumed number of movements used to derive the proposed “per movement” charges.

39 **Renewals Funding**

- 39.1 As noted in paragraph 37 above, the HAL Network Statement states that the FTAC review will incorporate investment in the network over the period from September 2015 to December 2016, suggesting to TfL that no renewal expenditure in this period has been included in the calculation of the charges.
- 39.2 TfL would query this statement, as information supplied to TfL by HAL as part of pre-Consultation engagement would suggest that £1.1m of additional investment will be added to the asset base in the year ending 31st December 2016. As far as TfL can determine, this amount would feed into the FTAC calculation.
- 39.3 If renewals expenditure is indeed dealt with on a prospective basis, then the treatment of underspends against forecast should be clarified. There is a risk that the underspends will, by virtue of the way they flow through the aviation regulation mechanism, accrue to airport users and HAL as the infrastructure manager. This would be an unacceptable position for TfL, whereby it has made the relevant payments but other (non-rail) third parties would receive the benefit of any underspend.

40 **Stations Long Term Charge**

- 40.1 HAL intends to incorporate the charges for station access into the track access contract (which TfL is strongly against) but for access to stations to be granted by a separate station access contract, in consideration of a £1 payment. This means that:
 - 40.1.1 it is impossible for users of a station to examine and test the make-up of the costs being charged or relate outputs to what is being paid;
 - 40.1.2 there is no easy way to properly adjust the charges in the event that there are changes to the station access regime or indeed if the stations are divested by HAL; and
 - 40.1.3 HAL’s failure to perform under the station access agreement does not afford sufficient remedy (e.g. access charges cannot be withheld and there is nothing to abate).
- 40.2 TfL therefore disagrees with the proposed structure and notes it does not follow the “pro forma” industry approach as suggested by HAL in the Extension Response.

41 Station Qualifying Expenditure

- 41.1 HAL has provided little relevant information (including in the HAL Network Statement) on the stations or how its infrastructure management activities will be structured. For example, it is not clear how costs will be established and the consequent charges will be calculated. Instead, HAL proposes to lump all costs into the track access charge.
- 41.2 TfL has inferred that station platform staff, station dispatch arrangements, equipment and related services are to be provided by HEOC (as this is currently the position) and figure 2 in the HAL Network Statement suggests this will continue to be the case.
- 41.3 The arrangements by which operators would procure and pay (via a QX charge or otherwise) for these services is not made clear in the HAL Network Statement, the HAL Station Access Agreement, the HAL SACs or the HAL Annexes.

42 EC4T

- 42.1 TfL understands from discussions with Network Rail and HAL that:
 - 42.1.1 electricity for the Heathrow Rail Infrastructure is supplied by Network Rail;
 - 42.1.2 the Great Western ESTA currently solely comprises the electrified route from London Paddington to Heathrow Airport;
 - 42.1.3 HEOC trains are not metered; and
 - 42.1.4 there are issues to be addressed in relation to HEOC's use of the Network Rail network, as it will cease to be the sole operator of electric trains in the Great Western ESTA following Great Western electrification and the advent of the Intercity Express Programme trains.
- 42.2 The following issues are not addressed in the HAL Network Statement:
 - 42.2.1 How the contractual relationship between:
 - (a) HAL (as infrastructure manager of the Heathrow Rail Infrastructure) and a user of the Heathrow Rail Infrastructure; and
 - (b) a user of the Heathrow Rail Infrastructure and Network Rail,will work in practice;
 - 42.2.2 How meter readings from metered train consumption will be used to derive charges – the HAL Track Access Contract makes reference to the Network Rail Traction Electricity Rules (which are a Network Rail document and so do not apply to the Heathrow Rail Infrastructure, where the contract will be between HAL and the user of the track (and not Network Rail));
 - 42.2.3 How volume wash up differences will be dealt with between metered and non-metered operators (as Crossrail class 345 trains will be metered);

- 42.2.4 How electrical losses in the supply to trains on the Heathrow Rail Infrastructure are dealt with; and
- 42.2.5 How boundary issues are dealt with if a different Network Rail tariff applies to the Heathrow Rail Infrastructure (which is off the Network Rail network) and the Network Rail network.

43 **Restrictions of Use**

- 43.1 Please see TfL's comments in:
 - 43.1.1 paragraph 55.2 in relation to Restrictions of Use (and compensation);
 - 43.1.2 paragraph 50.9 in relation to the lack of an Engineering Access Statement; and
 - 43.1.3 paragraph 55.4.10 in relation to the (undefined) definition of Major Engineering Works and how this relates to Restrictions of Use.

44 **Performance Regime**

- 44.1 Paragraph 55.4 sets out TfL's comments on the HAL Track Access Contract. In particular, TfL notes that HAL does not propose to include a Part B in the HAL Network Code, meaning that it will have no obligation to monitor performance – making it impossible to have any performance regime.
- 44.2 For the purposes of this Part 5, TfL makes the following points:
 - 44.2.1 schedule 8 of the HAL Track Access Contract appears to be a copy of the HEOC/Network Rail regime, raising doubts as to the relevance/applicability of this schedule (as it has been designed for HEOC as an operator on Network Rail's network, rather than HAL as an infrastructure manager of the Heathrow Rail Infrastructure);
 - 44.2.2 HAL's claim that "Part B of the NR Network Code applies" to the use of the Heathrow Rail Infrastructure is unacceptable for reasons set out in paragraph 52.2;
 - 44.2.3 the HAL Network Statement suggests for operator on operator delay that HAL will operate a "STAR model" with payments made to/from HAL. The principles by which operator on operator payment rates are derived for the regime, other than it shall take "account of HAL's liability to pay" those other (impacted) operators are not clear;
 - 44.2.4 HAL will only compensate for its infrastructure failures when it causes a late presentation of an operator's train to the Network Rail network at the rate agreed within the relevant Network Rail track access contract. This is unacceptable because:
 - (a) under the Rail Regulations 2005, an infrastructure manager is required to put in place a performance incentive scheme in relation to the use of its infrastructure – i.e. the Heathrow Rail Infrastructure. It does not just apply when it impacts on another infrastructure manager's infrastructure;

- (b) “lateness” is not specifically defined in this context (is it greater than 3 minutes?);
- (c) under the schedule 8 regime in a Network Rail track access contract, a Monitoring Point at which lateness is recorded is a station where passengers board or alight – HAL is proposing that only the portal is a Monitoring Point. This seems unreasonable as a method of measuring performance across the whole of the Heathrow Rail Infrastructure;
- (d) HAL assumes (reasonably, in TfL’s view) that anyone accessing the Heathrow Rail Infrastructure will also be accessing the adjoining Network Rail infrastructure. However, this assumption has not been followed through in other areas of the HAL Network Statement, e.g. in detailing how access requests to these adjoining networks are coordinated;
- (e) the applicability of the payment rate in the relevant Network Rail track access contract is not clear as this rate may not be calibrated with reference to revenue accruing off the Network Rail network and is not tied in to the specifics of the Heathrow Rail Infrastructure; and
- (f) the proposed performance regime is “asymmetric”: whilst the performance target (as TfL understands it) is 95%, a “free zone” is provided to 92% before HAL compensates users (whereas users are expected to make payments to HAL for performance in excess of 95%); and
- (g) the presence of the “free zone”, coupled with the fact that the regime is based on annual (rather than daily or periodic performance) could also mean that HAL has little or no contractual incentives to uphold performance under certain circumstances (for example, if performance had been in excess of 92% for a significant portion of the year, no amount of bad performance could bring to an annualised level that would invoice compensating TfL).

44.2.5 In addition, the HAL Network Statement states that the performance regime shall be subject to review each year but is silent on the scope and objectives of such a review, or the process by which it will be carried out. On its face, this is unfair, since it suggests that HAL may be able to unilaterally impose a revised performance regime.

45 **Abuse of a dominant position**

45.1 In addition to its comments on the impact of the investment recovery charge (see paragraph 27, TfL considers that HAL’s wider charging proposals would also constitute an abuse of its dominant position as the infrastructure manager of the Heathrow Rail Infrastructure. Please see TfL’s comments in Part 10 on this point.

45.2 Such an abuse would also have significant adverse effects on customers (i.e. there would be a very real customer detriment). PricewaterhouseCoopers LLP has carried out some preliminary analysis on behalf of TfL which shows that if HAL's proposed charges were actually implemented and these charges had to be recovered from increased rail farebox revenues, TfL would need to consider the impact on fare levels to/from Heathrow airport (and within London more widely) and service levels to/from Heathrow airport. This would be inconsistent with the duties of various parties (e.g. TfL and the ORR) to facilitate use of the Crossrail service, to say nothing of the potentially adverse impact on HAL itself of passengers being made to choose inferior ways of travelling to and from the airport.

46 **Directly incurred costs**

46.1 TfL considers HAL's arrangements are unworkable in practice and instead considers the cost of access to the Heathrow Rail Infrastructure should be:

46.1.1 the cost that is directly incurred as a result of operating the train service;

46.1.2 such directly incurred costs reflect the impact the trains have on the infrastructure and the parts of the infrastructure used by the service; and

46.1.3 substantially less than the CCC suggested by HAL. PricewaterhouseCoopers LLP has carried out some preliminary analysis on behalf of TfL which suggests that HAL's proposed CCC is an order of magnitude higher than an equivalent charge for a minimum access package on the Network Rail infrastructure and on comparable networks in Europe.

PART 6: COMMENTS ON THE HAL NETWORK STATEMENT

47 Introduction

- 47.1 HAL's Network Statement is inadequate. It does not comply with the requirements for a network statement set out in the Rail Regulations 2005 and it contains significant other deficiencies which mean that it is not fit for purpose.
- 47.2 The aim of a network statement is to give prospective users of a piece of rail infrastructure sufficient information to allow a prospective user to understand what is required to apply for, gain access to and operate on that rail infrastructure.
- 47.3 The information set out in the HAL Network Statement is in many respects insufficient, confusing or conflicting, such that prospective users (including TfL) would not be able to apply for, gain access to or operate on the Heathrow Rail Infrastructure.

48 Network Statements – requirements of the Rail Regulations 2005

- 48.1 Regulation 11(4) of the Rail Regulations 2005 requires a network statement to contain the following information:

“(a) a section setting out the nature of the railway infrastructure which is available to applicants and the conditions of access to it;

(b) details as to where further information may be obtained about the nature of the track access to, and supply of services in, any of the terminals, ports and service facilities to which access may be obtained pursuant to regulations 6 and 7;

(c) a description of the charging principles and tariffs, including details of the charging methodology, exceptions to the charging principles, and discounts;

(d) details of charges for the supply of those services listed in schedule 3 which are provided by only one supplier;

(e) a description of the principles and criteria for the allocation of infrastructure capacity, setting out the general capacity characteristics of the infrastructure available and the restrictions on its use, including likely capacity requirements for maintenance;

(f) the procedures and deadlines in the capacity allocation process and specific criteria employed in that process [...]; and

(g) the measures taken by the infrastructure manager to ensure fair treatment of freight services and international services, and in responding to ad hoc requests for infrastructure capacity.”

49 Failure of HAL Network Statement to meet the requirements of the Rail Regulations 2005

- 49.1 The HAL Network Statement does not satisfy the requirements of the Rail Regulations 2005 for the following reasons:

- 49.1.1 there is no information about access to or the supply of services at any of the stations forming part of the Heathrow Rail Infrastructure (or from where further information can be obtained) (i.e. not meeting the requirements of regulation 11(4)(b));
- 49.1.2 there is no information available relating to the charging methodology and how this has been determined. Although TfL acknowledges that certain principles have been set out in Part 6 of the HAL Network Statement, it is not clear how these charges have been devised, where there are exceptions and whether any discounts are available (i.e. not meeting the requirements of regulation 11(4)(c)). Please also see TfL's comments in Part 5 on charging more generally;
- 49.1.3 no information has been provided on charges for accessing the services listed in schedule 2 of the Rail Regulations 2005 (which include stations) as HAL appears to want to hide these within the track access charge (i.e. not meeting the requirements of regulation 11(4)(d)). Please also see TfL's comments in paragraph 38 in relation to the lack of transparency in charging for track and station access;
- 49.1.4 whilst HAL has set out its capacity allocation principles in Part 4 of the HAL Network Statement, as noted in paragraph 49.1.5 below, TfL is of the view that these are discriminatory as they favour incumbent operators and therefore HAL has not complied with its obligations to fair and non-discriminatory grant of access. There are also no indications in the HAL Network Statement on the likely capacity requirements for maintenance or details of the process by which these are agreed between operators (i.e. the engineering access statement process). Instead, paragraph 4.5 of the HAL Network Statement has a very high level statement that "route maintenance is restricted to periods when there are no timetabled services running or as agreed by all parties". This affords little certainty to prospective users of when maintenance works may take place – for example, if a prospective user proposed a 24-hour service using the Heathrow Rail Infrastructure, the position is not clear. TfL would draw attention to the equivalent paragraphs in the Network Rail and HS1 Limited network statements which are more detailed and offer more certainty to prospective users. As a result, TfL considers that HAL has not satisfied the requirements of regulation 11(4)(e); and
- 49.1.5 paragraph 4.3 of the HAL Network Statement gives a very high level overview of the timetabling process – essentially saying that it is the same as the process which applies on the Network Rail network. Indeed, this is reflected in Annex A which sets out the timetabling process for access to the Network Rail network rather than the Heathrow Rail Infrastructure and seems to be inconsistent with statements made elsewhere in the HAL Network Statement as to the processes which HAL will take in relation to establishing the timetable planning rules and engineering access statement (please see TfL's comments in paragraph 50.8). This does not meet the requirements of regulation 11(4)(f). The Heathrow Rail Infrastructure is a separate piece of infrastructure for which users will have a separate access agreement with HAL and there will be a distinct process by which HAL

allocates capacity in its role as infrastructure manager (even if such process is designed to align with the Network Rail processes). It is therefore essential that HAL provides details of the procedures, deadlines and criteria which it will use to allocate capacity for its network. It is not sufficient to say that the Network Rail processes will apply.

- 49.2 The HAL Network Statement does not fulfil the requirements of the Rail Regulations 2005. TfL disagrees with the statement made by HAL in paragraph 1.5.1 of the HAL Network Statement that “This Network Statement is provided in compliance with HAL’s obligations under the Regulations.”

50 **Comments on the HAL Network Statement**

- 50.1 In addition to failing to comply with the formal requirements of the Rail Regulations 2005, HAL’s Network Statement is deficient in a number of other practical respects. The following list should not be regarded as necessarily exhaustive.

- 50.2 ***Who is the infrastructure manager?***: The HAL Network Statement does not make clear which company is the infrastructure manager of the Heathrow Rail Infrastructure. Paragraph 1.2 states that “HAL is the owner of the Heathrow Spur and NR is the asset manager under the Regulations”. “Asset manager” is not defined in the Rail Regulations 2005 and, despite the table on page 8 of the HAL Network Statement, it is not clear to TfL whether HAL and/or Network Rail is the infrastructure manager under the Rail Regulations 2005 or for the purposes of the ROGS. It is also not clear which party will be the infrastructure manager or station operator of each of the stations forming part of the Heathrow Rail Infrastructure (and which party will be granting the relevant access), which could be HAL or HEOC (please also see TfL’s comments in paragraph 50.4 below in relation to stations).

- 50.3 ***Regulation***: HAL appears to have misunderstood how the railway in Great Britain is regulated. For example, HAL claims that “access to the main UK rail network is principally governed by the Regulations” (with no mention being made of the 1993 Act). TfL is concerned that HAL does not fully understand how the railway is regulated within Great Britain – or how it will itself be regulated: the Documents generally frequently confuse the regulatory issue in terms of whether the 1993 Act and/or the Rail Regulations 2005 apply. The position should be made clear in the HAL Network Statement to assist prospective users of the Heathrow Rail Infrastructure.

- 50.4 ***Stations***: There is very little information in the HAL Network Statement in relation to the stations forming part of the Heathrow Rail Infrastructure (save for the technical aspects set out in paragraph 3.3.2 of the HAL Network Statement). It is not clear who grants access to those stations, who is responsible for their maintenance and the charging arrangements for the stations (which appear to be hidden in the track access costs). This is crucial, since gaining access to the stations is equally as important as gaining access to the track infrastructure. For example, in the “contact” section in paragraph 1.8 of the HAL Network Statement, reference is only made to “TACs” and there is no mention of station access. TfL considers the lack of stations information to be a serious and significant omission from the HAL Network Statement.

- 50.5 **Absence of relevant documentation:** There are a number of documents referred to in the HAL Network Statement which have not been provided and no indication of their relative stage of development has been given (for example, the Engineering Access Statement, Timetable Planning Rules, Emergency Access Code, Performance Data Accuracy Code, Operational Resilience Plan and Railway Systems Code). These are key documents and must be provided if TfL is to be able to comment on HAL's proposals. Please see TfL's comments in paragraph 8.1.1 and Schedule 2 of this response for further comments on the absence of relevant documentation.
- 50.6 **Discriminatory capacity allocation criteria:** HAL's proposed prioritisation when allocating capacity as described in the "description of timetabling process" section (paragraph 4.2) is, on its face, discriminatory and unlawful. HAL proposes to give priority to existing track access capacity allocation, followed by future track access capacity commitments and then other passenger services. Plainly this approach favours the incumbent operator since its access rights get higher priority than new requests for access when the timetable is prepared. Once HAL has sold capacity, all requests to exercise rights to place capacity into a timetable should be treated on a fair and non-discriminatory basis provided they are exercised by the relevant timetable priority date. It is not acceptable – and indeed is discriminatory and unlawful - that incumbent operators (which, in the case of HEOC is within the same group of companies as HAL) have their current access protected and preferred.
- 50.7 **Traction electricity and other services:** Paragraph 5.3.1 of the HAL Network Statement states "HAL provides the infrastructure to distribute the traction power and the TOC procures that traction power from Network Rail." There is no information within the HAL Network Statement as to how this is done or the relevant contact at Network Rail, making it very difficult for a prospective user seeking to use the Heathrow Rail Infrastructure. The correct position is that:
- 50.7.1 it is HAL's responsibility as infrastructure manager to provide electricity if it runs an electrified network;
 - 50.7.2 more information is needed about the process for obtaining that traction electricity (whether from HAL or Network Rail);
 - 50.7.3 information is also required on "off network" facilities which may be needed to operate a service on the Heathrow Rail Infrastructure, even if it is simply contact details for the relevant facility owners.
- 50.8 **Performance regime:** HAL has set out the performance regime principles in paragraph 6.2.2 of the HAL Network Statement. However, these principles are not reflected in the wording of schedule 8 of the HAL Track Access Agreement. TfL requests that HAL articulates its performance regime principles consistently and transparently so that consultees can consider and respond appropriately.
- 50.9 **Engineering Access Statement and Timetable Planning Rules:** the HAL Network Statement does not set out the process for establishing (including consultation) these key documents. In relation to:
- 50.9.1 the engineering access statement, the HAL Network Statement states that it "is set by NR as HAL's appointed asset manager". Users will have their

access contracts with HAL and TfL would expect HAL to have responsibilities to consult with its users in relation to engineering access (even if it subcontracts such responsibilities to Network Rail). TfL would not expect such statement to be unilaterally set by a third party with which a user of the Heathrow Rail Infrastructure has no contractual relationship;

50.9.2 the timetable planning rules, there is reference to consultation. However, the process for consultation is not set out in the HAL Network Statement and TfL would prefer it made clear that once established by HAL, the timetable planning rules will be consulted upon in their entirety with interested parties.

TfL would expect HAL to undertake a consultation with interested parties on each occasion either of these documents are prepared as they fundamentally impact on a user's access to the Heathrow Rail Infrastructure. The HAL Network Statement also suggests there may not be a formal consultation process for the subsidiary timetable and TfL objects to this proposal.

- 50.10 **Charging:** TfL's comments on the charging arrangements set out in Part 6 of the HAL Network Statement are set out in Parts 4 and 5 of this response.
- 50.11 **Maintenance plan:** Connected with TfL's comments on the Engineering Access Statement and Timetable Planning Rules in paragraph 50.9, there is reference in paragraph 4.5 of the HAL Network Statement to "HAL's maintenance and renewals plan". TfL has had no sight of this plan and is therefore unable to consider its adequacy and the impact which it may have on the operation of rail services. TfL therefore reserves its right to make further comments in relation to such plan once TfL has seen it. Paragraph 4.5 of the HAL Network Statement states that "The capacity for such work is published within the Engineering Access Statement and managed as part of the train planning process." TfL queries whether management as part of the train planning process is consistent with maintenance being restricted to periods where there are no timetabled services running, as specified later on in the paragraph. As noted above, TfL would also expect HAL to undertake consultation in relation to the planning of engineering works and what forms part of those plans.
- 50.12 **Heathrow rail infrastructure standards and rules and rolling stock compatibility:** TfL requires clarity over which NR standards must be complied with to access the Heathrow Rail Infrastructure. This is currently drafted as "all applicable NR standards" and it is not clear which Network Rail standards are applicable. Paragraph 2.5 of the HAL Network Statement also suggests that HAL has not yet developed an objective process for assessing rolling stock compatibility as it relies upon Network Rail processes and then suggests there may be additional requirements which it then seeks to impose (which are not made clear). This does not afford any certainty to a prospective user of the Heathrow Rail Infrastructure as to what rolling stock needs to satisfy and TfL therefore is concerned at the absence of an objective process. TfL would have thought that this should include references to the specifics of the tunnel and compliance with relevant technical standards.
- 50.13 **HAL Network Code:** TfL notes the HAL Network Statement is not factually correct when it describes the Network Code in paragraph 2.3.2. This indicates that the HAL

Network Code provides: (1) scope to amend the HAL Network Code itself; (2) mechanisms to establish performance monitoring systems to be applied in the event of an operational disruption. As discussed in paragraphs 52.2 and 52.3, neither of these provisions are actually contained in the HAL Network Code.

- 50.14 **HAL Access Disputes Resolution Rules:** TfL notes HAL's proposal to introduce its own distinct disputes resolution arrangements for the Heathrow Rail Infrastructure. TfL comments on this point in more detail in paragraph 53 below.
- 50.15 **Access options:** TfL disagrees with the suggestion in paragraph 4.4.3 of the HAL Network Statement that an access option will only be granted where an applicant wishes to operate trains for which specific infrastructure enhancement is required. TfL recognises that the Rail Regulations 2005 place certain restrictions on the length of a framework agreement which is tied in with investment (and an access option for equivalent lengths of time would be considered in the same light). However, there may be other circumstances which would justify the grant of an access option – such as investment in non-train assets. This paragraph should be broader in scope than currently drafted.
- 50.16 **Compliance with law:** The validity period of the HAL Network Statement is September 2015 – December 2016. The DfT has recently undertaken a consultation in relation to the replacement of the Rail Regulations 2005 with the Rail Regulations 2015. The Rail Regulations 2015 are expected to come into effect before the end of 2015. No reference has been made to the Rail Regulations 2015 in the HAL Network Statement, which is a surprising oversight given the validity period of the document. TfL notes that there are a number of requirements set out in the Rail Regulations 2015, including in relation to business plans. TfL is concerned that the HAL Network Statement may not comply with the Rail Regulations 2015. In addition TfL has not been provided with HAL's business plan as required by the Rail Regulations 2015.
- 50.17 **Process for gaining access:** It is not clear from the HAL Network Statement how a prospective user of the Heathrow Rail Infrastructure should seek access and the matters which HAL will take into account in assessing whether to grant such access.
- 50.18 **Absence of relevant information:** There are a number of elements which can be found in Network Rail's network statement which are not present in the HAL Network Statement, which is, on its face, surprising. For example, line gradient, maximum train length, tunnel restrictions, train regulation and environmental restrictions are not specified in 0 of the HAL Network Statement. TfL is of the view that, wherever practicable, HAL should consider aligning the HAL Network Statement with the Network Rail equivalent.
- 50.19 **Issuer:** In paragraph 1.1 of the HAL Network Statement, it is not clear what the "issuer" refers to – is it the issuer of the Network Statement, a company which offers bonds/financing or some other company?
- 50.20 **Heathrow Connect:** Paragraph 1.2.2 of the HAL Network Statement refers to the current services. The Heathrow Connect service calls at intermediate stations between the airport and London Paddington (and not central London). In addition, the HAL Network Statement refers to a "change to this service" but does not make it

clear what that change may be, which could have an important impact on prospective users planning with reasonable certainty the future of their businesses.

- 50.21 **HEOC:** TfL queries the relevance of HEOC being exempted from designation under section 23(1) of the 1993 Act in the context of HAL granting access to the Heathrow Rail Infrastructure (paragraph 1.4 of the HAL Network Statement).
- 50.22 **Heathrow group:** It is not clear which companies form part of the Heathrow group (the definition of “Group” is inconsistent with the information set out in paragraph 1.1).
- 50.23 **Updates to HAL Network Statement:** TfL notes that Network Rail consults on updates to its network statement once a year, following which an update is published. This is expressly stated in the Network Rail network statement. TfL expects HAL to follow a similar consultation process prior to publication of an updated HAL Network Statement and expects to be consulted as part of that process. This should be made clear in paragraph 1.7.2 of the HAL Network Statement.
- 50.24 **Contacts:** It would be helpful for the “contacts” section of the HAL Network Statement to be updated to reflect relevant contacts at Network Rail/HEOC (and TfL/MTR Crossrail in due course). This will ensure a prospective user can find out all necessary information to be able to access the Heathrow Rail Infrastructure and other services operating on that infrastructure.
- 50.25 **One stop shop:** Both the Network Rail and HS1 Limited network statements refer to the “One Stop Shop” service. There is a noticeable absence of references to this or to RailNetEurope (and associated tools produced by RNE) in the HAL Network Statement. TfL wishes to seek clarification from HAL as to the reason for this and would draw HAL’s attention to the requirements of regulation 19(3) of the Rail Regulations 2005 in this respect.
- 50.26 **Safety certificate:** TfL questions why HAL does not want sight of an application for a safety certificate in the context of ROGS when a party may be interested in accessing the Heathrow Rail Infrastructure (paragraph 2.2.4).
- 50.27 **Insurance requirements:** TfL considers it would be helpful for HAL to state in paragraph 2.2.5 of the HAL Network Statement that the £155 million should be stated as being on a “per incident” basis. This is more accurate and more closely aligned with ORR’s current requirements on insurance.
- 50.28 **Station works:** HAL mentions in paragraph 3.3.2 of the HAL Network Statement that a programme of works is taking place during 2015 to reduce the risk of passenger accidents which “will impact the platform train interface when introducing other services”. The impact of this on vehicles which can use the stations is not specified and so prospective users will have no certainty over whether their rolling stock will be able to access the Heathrow Rail Infrastructure. TfL therefore requests that additional certainty is provided by HAL in this area.
- 50.29 **Capacity allocation:** The one sentence introduction in paragraph 4.1 of the HAL Network Statement does not offer sufficient context to prospective users. TfL considers HAL should have greater regard to the Network Rail equivalent in this

area. TfL considers that greater prominence should be given in paragraphs 4.3 and 4.4.1 of the HAL Network Statement to coordination with Network Rail. In this respect, TfL's comments on the "one stop shop" in paragraph 50.25 above apply.

- 50.30 **Operational regulation:** TfL requests clarity from HAL in relation to the train regulation policies as described in paragraph 4.7.2 of the HAL Network Statement. In the first paragraph, it states that Network Rail (acting on behalf of HAL) develops and maintains those policies, whereas the final sentence indicates that it is HAL that does this. TfL agrees that a consultation is appropriate in relation to such policies but seeks clarity as to who will be responsible for that consultation and the development of the policies. TfL also wishes to consider the current train regulation policies for the Heathrow Rail Infrastructure and may have further comments on this aspect of the proposal.
- 50.31 **Missing information:** There are a number of areas where HAL does not include information which may be relevant to prospective users (in addition to those set out in paragraph 50.18) and will also be required for ORR to reach a rational and reasonable view on the proposed charging, regulatory and contractual framework (see also Schedule 2). For example, no statement is made as to whether dangerous goods are permitted on the Heathrow Rail Infrastructure. Similarly, there is no information on gauging and axle weight restrictions or whether self-powered trains (such as diesel multiple units) can be used on the Heathrow Rail Infrastructure. Although TfL does not intend to transport any such goods/operate such trains, this point is reflective of the general lack of information within the HAL Network Statement. Although TfL does not consider that a network statement with an equivalent level of detail to the Network Rail or HS1 Limited network statements would be proportionate for a network the size of the Heathrow Rail Infrastructure, TfL recommends that HAL more closely and carefully considers the Network Rail and HS1 Limited equivalents. There is information contained within those documents which it would be useful to see in the HAL Network Statement (tailored as appropriate to reflect the nature of the Heathrow Rail Infrastructure).
- 50.32 **Train regulation policies:** There is no provision for resolution of disputes regarding the train regulation policies established by HAL. TfL considers that an equivalent provision to the Network Rail network statement provision **should** be included in the HAL Network Statement.
- 50.33 **Typographical errors and definitions:** there are a significant number of typographical errors, unused and incomplete definitions and uses of capitalised terms which have then not been defined **throughout** the HAL Network Statement which HAL will no doubt address as part of its development of the HAL Network Statement following the conclusion of the Consultation.

PART 7: COMMENTS ON THE HAL NETWORK CODE

51 Introduction

- 51.1 The HAL Network Code, as currently drafted, could not be incorporated into and form the basis of a contractual relationship between HAL and a user of the Heathrow Rail Infrastructure: the access contract will be between HAL and a train operator for use of the Heathrow Rail Infrastructure – Network Rail will not be a party to it. Therefore the HAL Network Code should contain all of the contractual terms which would allow a user to gain access to the Heathrow Rail Infrastructure.
- 51.2 In particular, TfL is surprised that HAL is proposing a regime which is fundamentally discriminatory through the proposal that HEOC will not be party to certain aspects of the HAL Network Code (as demonstrated by clause 2.3 of the HAL Track Access Contract). This is unacceptable and is, in TfL's view, in breach of the core principles of the railway reflected in the Rail Regulations 2005, that operators should be granted access on fair, non-discriminatory and equivalent terms.
- 51.3 TfL's (non-exhaustive) comments on (i) the HAL Network Code and (ii) the HAL Access Dispute Resolution Rules which are annexed to the HAL Network Code, are set out below.

52 Comments on the HAL Network Code

- 52.1 ***Discrimination:*** HAL proposes that HEOC will not be party to the entirety of the HAL Network Code (as set out in paragraph 2.3 of the HAL Track Access Contract, although the precise parts of the HAL Network Code which HEOC will not be bound by are not specified). A network code is designed to be a core set of (practical) arrangements which relate to the operation of the track infrastructure which all users of that track infrastructure will be bound by. This is a multi-lateral element of the track access contract and ensures that all users of the track infrastructure follow the same processes collaboratively, for the effective operation of the railway. TfL can understand why London Underground Limited would be included on the "exceptions" list set out in paragraph 2.3 of the HAL Track Access Contract because it does not use the track infrastructure comprised in the Heathrow Rail Infrastructure. However, HEOC does use that track infrastructure and it is therefore unacceptable, and apparently discriminatory and unlawful, that it would not be bound by every provision of the HAL Network Code in the same way as other users of the infrastructure. HAL's proposal would:
- 52.1.1 have serious practical implications for the operation of the track forming part of the Heathrow Rail Infrastructure as HEOC would not be bound by decisions made under the HAL Network Code; and
- 52.1.2 be inherently discriminatory as HEOC would be granted access to the Heathrow Rail Infrastructure on materially favourable terms which would not apply to other users (by imposing less onerous terms of access). This would be in breach of regulation 7(3) of the Rail Regulations 2005 which require an infrastructure manager to provide access in a non-discriminatory manner.

52.2 **Part B:** Part B of both the Network Rail and HS1 Limited network codes oblige the infrastructure manager to monitor performance. It is only from Part B that this contractual obligation arises – which also requires operators to participate in the performance regime. Part B of the Network Rail and HS1 Limited network codes set out measures by which the infrastructure manager will monitor trains operating on its network, the times at which trains pass specific monitoring points and differences from the scheduled timetable, with delays being attributed in accordance with the Delay Attribution Guide (which is incorporated into Part B). It is not acceptable for HAL to claim that “Part B of the NR Network Code applies” to the use of the Heathrow Rail Infrastructure for the following reasons:

52.2.1 regulation 14(1) of the Rail Regulations 2005 requires an infrastructure manager to “establish a performance scheme as part of the charging system to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network.” As infrastructure manager of the Heathrow Rail Infrastructure (as acknowledged by HAL through the issuing of the HAL Network Statement in an attempt to satisfy regulation 11 of the Rail Regulations 2005) HAL (and not Network Rail) is required to establish a performance scheme. Necessarily, this will involve the monitoring of performance of the Heathrow Rail Infrastructure (and trains operating on it). HAL cannot therefore have no obligations or requirements in relation to performance monitoring in the HAL Network Code (even if it ultimately chooses to subcontract those obligations to Network Rail);

52.2.2 in any event, in relation to the Heathrow Rail Infrastructure, the user of that infrastructure has a contract only with HAL and not with Network Rail. Performance monitoring obligations (including the incorporation of the Delay Attribution Guide) must be between HAL (as infrastructure manager and the party granting access) and the user of the Heathrow Rail Infrastructure;

52.2.3 HAL’s proposal is inconsistent with its statement in paragraph 2.3.2 of the HAL Network Statement in relation to performance monitoring systems; and

52.2.4 HAL has not articulated its position on whether the Delay Attribution Guide which applies on the Network Rail network will apply or whether there is intended to be a specific delay attribution guide for the Heathrow Rail Infrastructure. This is another example where HAL has failed to properly articulate its proposals in the Consultation.

If it is intended that an arrangement equivalent to the Network Rail performance regime will apply on the Heathrow Rail Infrastructure, a Part B needs to be prepared which achieves that aim. Any such Part B will also need to address interface and boundary issues between the Heathrow Rail Infrastructure and the Network Rail network.

52.3 **Part C:** Part C of the Network Rail and HS1 Limited network codes set the process for modifying that document and other relevant operational documents with ORR, the infrastructure manager and users of the infrastructure being able to instigate modifications. In the HAL Network Code, just one sentence has been included:

“Proposed changes to the HAL Network Code will be notified through industry consultation as and when required.” This is fundamentally unacceptable to TfL for the following reasons:

- 52.3.1 it is inevitable that modifications will be required to the HAL Network Code from time to time. Accordingly, it is essential from a practical perspective that a process is included for making any such modifications;
- 52.3.2 it is important that not just HAL can make proposals to modify the HAL Network Code but other users of the Heathrow Rail Infrastructure and, of course, ORR. A process needs to be included to facilitate this;
- 52.3.3 Part C forms part of a contractual relationship between HAL and each user of the Heathrow Rail Infrastructure but only in relation to the Heathrow Rail Infrastructure. It does not form a contractual relationship with Network Rail or a link to Network Rail’s consultation process for amending its network code. The Network Rail Network Code is different to the HAL Network Code. If it is proposed to adopt a similar process to Network Rail, it is this similar process which should be detailed in the HAL Network Code which will apply between HAL and each user of the Heathrow Rail Infrastructure;
- 52.3.4 HAL’s proposal is to “notify” users of changes to the HAL Network Code which does not suggest a collaborative or consultative approach, which TfL considers to be required as it will amend a contractual relationship;
- 52.3.5 in any event, TfL notes that the HAL Network Code itself refers to there being a Part C or concepts which exist in Network Rail’s equivalent of Part C (for example, the definition of “Class Member”, the HAL ADRR refers to “Band; Class; Franchised Passenger Class [...]” and paragraph 3 of Part H of the HAL ADRR also refers to the Class Representative Committee process). In addition, paragraph 68 of Part J of the HAL ADRR refers to the HAL ADRR being amended in accordance with Part C – as currently drafted, there is no process in Part C; and
- 52.3.6 there is no process to change the HAL ADRR as the process for changing the access disputes resolution rules on the national network is governed by Part C of the Network Rail Network Code.

In relation to Part C, TfL considers that HAL should propose a process for modifying the HAL Network Code and ancillary documents. TfL accepts that a detailed “Class Representative Committee” approach (as is the case with Network Rail) is not likely to be proportionate for the Heathrow Rail Infrastructure given the number of likely users of the infrastructure. However, some form of consultative process is required – perhaps akin to the Part C process set out in HS1 Limited’s network code.

- 52.4 **Part E:** There is no Part E, which in the Network Rail and HS1 Limited network codes relates to environmental protection. This has not been included by HAL without any explanation for the rationale for doing so. TfL considers it to be essential that full and proper regard is given to environmental protection given the operation of railway infrastructure and trains could cause “Environmental Damage”. The proposal that a Part E should not be included suggests (in the absence of any

explanation) that HAL will have no regard to the environment in performing its operations. TfL objects to such an approach.

- 52.5 **Part L:** Part L of the Network Rail and HS1 Limited network codes deal with performance and parties working together to continuously improve performance. The Network Rail Network Code also addresses local outputs, which is understandable in the context of a large network. No equivalent to Part L is proposed in the HAL Network Code. In this respect, TfL repeats its comments on Part B set out in paragraph 52.2 above.
- 52.6 **Confusion over regulatory status:** TfL notes that HAL has removed most references to it holding a network licence, presumably because the Exemption Order does not require it to have a network licence. However, a confusing reference to HAL holding a network licence remains in Condition GA2. TfL questions whether HAL will hold a network licence and, if it will not, where concepts which are typically found in a network licence will be included (such as a requirement to hold insurance, dispute resolution, customer facing obligations). It is also important to ensure (as a network licence ordinarily would) that restrictions are placed on cross-subsidisation with other (non-rail) business, which will be particularly important in the context of HAL's business and the wider airport business. Similarly, Part G of the HAL Network Code refers to "closures of lines which are covered by the statutory procedures under the Act" which may not be applicable in the context of the regulation or the inherent nature of the Heathrow Rail Infrastructure.
- 52.7 **Compensation for exercise of Part J rights:** TfL notes that whilst HAL has followed some of Network Rail's equivalent to Part J, it has not proposed including rights of compensation for when access rights are sacrificed. TfL considers that compensation should be offered by HAL when it makes an adjustment to access rights of a user of the Heathrow Rail Infrastructure.
- 52.8 **Concession:** There are a number of references in the HAL Network Code to franchise or franchising authority, which appear to have been adopted from the Network Rail Network Code. In the context of the Heathrow Rail Infrastructure, TfL considers it to be more appropriate to refer to concession or concessioning authority. As HAL notes, HEOC is exempt from the requirement to be franchised under the 1993 Act. TfL, through RfL, lets the Crossrail services under a concession agreement rather than a franchise agreement and accordingly it would be appropriate for references to be updated to reflect this. As far as can reasonably be foreseen at this stage, there will be no franchised operator using the Heathrow Rail Infrastructure.
- 52.9 **Impact of Vehicle Change:** Having reviewed the HAL Network Code alongside the Network Rail Network Code, TfL is concerned by explanatory note B, in which it is suggested that a Vehicle Change need only be accepted by HAL before it can be implemented. In the Network Rail Network Code, it is made clear that it must also be accepted by "those Access Beneficiaries whom it will affect". If a Vehicle Change is likely to have an impact on other users of the Heathrow Rail Infrastructure, it is important that those other users have an input into the process and formally accept the change. It may be that this is an oversight on HAL's part and that it is intended that all parties who may be affected by a Vehicle Change have to accept the change

before it can be implemented. If this is the case, it should be made clear in the explanatory note.

- 52.10 **Timetabling process:** The timetabling process set out in Annex 1 to Part D of the HAL Network Code appears to be inconsistent with HAL's proposals in **relation** to timetabling in the HAL Network Statement.
- 52.11 **Non-inclusion of TfL:** There are a number of provisions of the Network Rail Network Code which give rights to TfL to receive certain notifications or to be consulted. TfL observes that HAL has not included TfL within the scope of such provisions in the HAL Network Code and considers that it should be **included** in such provisions. These include notices given by ORR (condition A4.1(b)(i)), notification of Vehicle Change, notice of details of a proposed variation to the Heathrow Rail Operational Code and TfL giving notice it wishes to be consulted on any matter concerning the Heathrow Rail Operational Code.
- 52.12 **One stop shop:** TfL notes that, when compared with the Network Rail and HS1 **Limited** network statements, HAL has deleted all references to the one stop shop service. TfL reiterates its comments in relation to the HAL Network Statement on the one stop shop service and considers that an equivalent approach should be taken in the HAL Network Code.
- 52.13 **Definition of "HAL" and "HAL infrastructure":** HAL appears to have incorrectly set out its own company name in the definition of "HAL" which refers to HAL Airport Limited rather than Heathrow Airport Limited. Further, the definition of "HAL infrastructure" should make clear that it relates to the rail-**related** infrastructure only (i.e. the Heathrow Rail Infrastructure) and not the wider airport infrastructure.
- 52.14 **ORR:** TfL questions whether ORR will publish separate "ORR HROC Criteria" which is referred to in Part H of the HAL Network Code.
- 52.15 **Statutory references:** HAL should carefully review each of the statutory references set out in the HAL Network Code to ensure they remain appropriate. For example, there are references to the Companies Act 1985 which need to be updated to reflect the relevant provision of the Companies Act 2006.
- 52.16 **Depots:** In the HAL Network Statement, HAL makes clear that no depot forms part of the Heathrow Rail Infrastructure. However, references to "light **maintenance** depot" are to be found in the HAL Network Code, which is confusing for prospective users.
- 52.17 **Possessions Strategy Notices, Calendar of Events, Expedited Procedure Strategic Planning Route and Local Output:** Whilst TfL acknowledges that an equivalent is included in the Network Rail Network Code, TfL queries whether the provisions relating to possessions strategy notices are proportionate in the context and size of the Heathrow Rail Infrastructure. TfL wonders whether there would ever be a programme of Restrictions of Use extending over more than a year or a period containing two or more Timetable Change Dates. For the same reasons, TfL similarly questions the need for the "Calendar of Events and Event Steering Group" provisions in Part D of the HAL Network Code, particularly given HAL's statement in the HAL Network Statement relating to when maintenance work takes place (please see TfL's comments in paragraph 50.9) TfL also wonders whether there is need for

the “Expedited Procedure”, “Strategic Planning Route” or “Local Output” concepts given the relative size and likely number of users of the Heathrow Rail Infrastructure.

52.18 **Missing text:** Text may erroneously have been deleted from the Network Rail equivalent document when preparing the condition immediately following **Condition** J2.4.2, where the “pre-existing obligations of confidence” wording and first line of the successive condition appear to have been omitted.

52.19 **Scotland:** There are references in the HAL Network Code to the Scottish legal system, including the Court of Session which TfL does not consider to be relevant in the context of the Heathrow Rail Infrastructure entirely located in England. TfL thinks this could be as a result of using the Network Rail Network Code as the starting point.

52.20 **Typos and definitions:** HAL should undertake a general tidying up of the HAL Network Code prior to its introduction. For example:

52.20.1 there are references to “the Network” rather than the “HAL infrastructure”;

52.20.2 references to “D nn” rather than “D-nn”;

52.20.3 paragraphs D1.1.11 and D5.4.2 have not been properly replicated from the Network Rail Network Code;

52.20.4 Passenger Focus and London TravelWatch should be included as consultees in paragraph D7.2.2; and

52.20.5 certain items used as a defined term are not then defined.

53 **Comments on the HAL ADRR**

53.1 **General:** TfL notes that HAL has proposed its own set of dispute resolution rules, annexed to the HAL Network Code, which are separate and distinct from those annexed to the Network Rail Network Code for the national network. TfL questions whether this approach is appropriate given the size of the Heathrow Rail Infrastructure and suggests it may be more appropriate (and less costly) for HAL to use the wider industry dispute resolution process (with appropriate amendments being made to such process where necessary). TfL considers there to be a lack of clarity over how disputes will be resolved. It is not clear from the Documentation whether there will also be a separate timetabling panel to address timetabling disputes as anticipated in Part D of the HAL Network Code, although this appears to be the implication. If so, it is unclear how these bodies will be established. Clarity is needed over the relationship between the HAL process and the wider industry process where the dispute spans across the Heathrow Rail Infrastructure and the Network Rail network. It is also not clear whether the resolution processes would be bound by previous decisions on the Network Rail network. TfL therefore considers that further explanation needs to be given by HAL on the rationale and operation of the proposed HAL ADRR. In the interests of reducing the costs of using the Heathrow Rail Infrastructure, TfL considers a more proportionate approach would be preferable.

53.2 **Governance:** The Class Representative Committee established pursuant to Part C of the Network Rail Network Code is a vital body within the national rail industry

architecture and its composition and constitution the subject of careful consideration at the time of rail privatisation. This was to ensure that no particular constituency held sway or could be unfairly disadvantaged in the work of the committee. Similar considerations applied to the committee established under the industry access dispute resolution rules, which therefore has the same electoral college, drawn from four classes of party (Network Rail, franchised passenger operators, non-franchised passenger operators and non-passenger operators). In Chapter J of the HAL ADRR, HAL proposes it will have two members on the committee which manages the operation of the HAL ADRR (but replicated the other constituencies from the standard industry access disputes resolution rules. The consequence of this is that the committee under the HAL ADRR would have just 3 members, with HAL having a two thirds majority. In addition, Part C of the HAL Network Code does not contain the provisions for the establishment of the relevant committees. The HAL ADRR also requires a quorum of 5, so that the committee established under the HAL ADRR could never conduct any business, including the appointment of the Committee Chair, the Allocation Chair or the Secretary (all as described within the HAL ADRR). This renders the HAL ADRR useless from the outset and the proposed HAL access contracts without an effective dispute resolution mechanism. There also needs to be a process for amending the HAL ADRR.

53.3 **Timetabling Pool and Committee Members:** TfL notes the statement made in the HAL Network Code that the committee established under the access disputes resolution rules applicable on the wider network will provide services under the HAL ADRR. However, no explanation is provided in either the HAL Network Statement of the HAL ADRR as to how this will be achieved. In fact, the HAL ADRR is inconsistent with the HAL Network Statement which anticipates the establishment of a Committee specific to the operation of the HAL ADRR. Chapter H of the HAL ADRR sets out how the timetabling pool will be constituted and includes representatives from “each of the three Bands of the Franchised Passenger Class”, “each of the two Bands of the Non-Passenger Class”, “the Non-Franchised Passenger Class”; and HAL. Firstly, TfL observes that the class concept is not one which has been used in the HAL Network Code (nor does it seem reasonable to include it for a network the size of the Heathrow Rail Infrastructure) and so it is impossible to determine who the Timetabling Pool would be. Secondly, if HAL’s proposals were to be implemented, the balance of the Timetabling Pool would be in favour of HAL, with 4 HAL representatives and at least one from HEOC (a company within the same group). This does not support the impartiality of the Timetabling Pool and has significant concerns about the arrangement. TfL has similar concerns relating to the constitution of the Committee as described in Part J of the HAL ADRR.

53.4 **Delay Attribution Board:** The definition of “Delay Attribution Board” refers to Condition B6.2 of the HAL Network Code. As noted in paragraph 52.2, HAL has not proposed a Part B (which TfL disagrees with) and therefore there is currently no process to appoint a Delay Attribution Board for the Heathrow Rail Infrastructure. It seems disproportionate for a separate Delay Attribution Board solely for the Heathrow Rail Infrastructure to be appointed. In connection with this, TfL notes that no clarification has been given over whether there will be a separate delay attribution guide for the Heathrow Rail Infrastructure or in general what the Heathrow Rail Infrastructure-specific performance processes will be.

- 53.5 **Charging:** It is not clear from the Consultation how the dispute resolution services contemplated by the HAL ADRR will be paid for generally (other than in the context of a particular dispute). The HAL Network Statement does not list this as part of the proposed “Common Cost Charge” which is levied on users of the Heathrow Rail Infrastructure, so TfL assumes that this is a cost which HAL will itself bear. TfL notes paragraph J51 of the HAL ADRR but it is not clear what happens where a party paying the Railway Safety Levy enters into a contract other than as a requirement of a regulated contract for the use of a network. What will happen in the case of MTR Crossrail, for example? The Railway Safety Levy will be paid in respect of the Network Rail network but the track access contract in respect of the Heathrow Rail Infrastructure will not be a regulated contract given the existence of the Exemption Order. TfL therefore considers that HAL should make clear how the dispute resolution services will be paid for.
- 53.6 **Insufficient attention:** TfL considers that insufficient attention has been given by HAL to the development of the HAL ADRR. For example, the definition of “Access Conditions” refers to the “National Station Access Conditions, the Independent Station Access Conditions or the Depot Access Conditions”. These refer to Network Rail documents and not to the HAL SACs which is has proposed (on which, please see TfL’s comments in paragraph 59). Indeed, as HAL states in the HAL Network Statement, there are no depots on the Heathrow Rail Infrastructure, so these references are not relevant. TfL questions the entire approach to dispute resolution adopted by HAL which is considered unworkable and expensive to administer. Effective and efficient proposals reflecting the scale of the Heathrow Rail Infrastructure and the likely number of operators needs to be made by HAL for dispute resolution.
- 53.7 **Inconsistencies:** There are other inconsistencies with the HAL Network Code which include:
- 53.7.1 HAL does not permit the service of documents by fax in the HAL Network Code (in contrast to the Network Rail position) but does allow the service of notice by fax under the HAL ADRR; and
- 53.7.2 there are numerous references to Conditions of the HAL Network Code which do not exist (e.g. references to Parts B and C of the HAL Network Code, including that the HAL ADRR can be amended in accordance with Part C).
- 53.8 **ORR:** The HAL ADRR places a number of obligations on the ORR which go beyond the general right of appeal set out in regulation 29 of the Rail Regulations 2005. TfL queries whether the ORR has had chance to review and accept the additional roles which HAL purports to give to it under these separate dispute resolution arrangements.
- 53.9 **Scotland:** Please see our comments in paragraph 52.19 which apply equally in respect of various parts of the HS1 ADRR.
- 53.10 **Definition of Access Dispute Resolution Rules:** The definition should make clear that it relates to the regulation of disputes only in relation to the Heathrow Rail Infrastructure (as currently drafted, it is potentially wider).

PART 8: COMMENTS ON THE HAL TRACK ACCESS CONTRACT

54 Introduction

- 54.1 The proposed arrangements set out in the HAL Track Access Contract are inadequate, confused and contradictory. TfL has inferred that HAL has used the current track access agreement for “Heathrow Express” services between HEOC and Network Rail as the starting point for the HAL Track Access Contract. HAL has then made further amendments (many of which are not appropriate) for it to apply to the Heathrow Rail Infrastructure. HAL does not appear to have used the current model form track access contract or current HS1 Limited template framework agreement as the starting point, meaning it is inherently out of date by 20 years.
- 54.2 In TfL’s view, HAL’s proposed Track Access Contract could not form the basis of a contractual relationship between HAL and a user of the Heathrow Rail Infrastructure. TfL considers elsewhere in this response the lack of clarity caused by the contractual relationship being between HAL and the track user being confused with the relationship between HAL, Network Rail and the track user. HAL also demonstrates a lack of understanding of the track access regime in the rail industry and how HAL itself will be regulated.
- 54.3 In particular, and most seriously, the HAL Track Access Contract is tailored to HEOC and appears to discriminate in favour of its own group company, with other operators being treated less favourably (which links in to incumbent operators being given priority in capacity allocation – please see TfL’s comments in paragraph 52.1). As noted in paragraph 55.1, clause 2.3 of the HAL Track Access Contract compounds this discrimination by indicating that HEOC will not be bound by essential terms of the HAL Network Code – meaning other operators will again be treated less favourably.

55 Comments on the HAL Track Access Contract

- 55.1 **Discrimination:** HAL’s proposed approach is discriminatory, in favour of HEOC. Clause 2.3 of the HAL Track Access Contract indicates that HEOC will not be party to all of the HAL Network Code, despite using the same Heathrow Rail Infrastructure (the position of London Underground is different, given it uses different track and stations). From an operational perspective, it is essential that all users of the Heathrow Rail Infrastructure are bound by the same multi-lateral practical arrangements set out in the HAL Network Code (subject to TfL’s comments in Part 7). It is discriminatory if additional obligations are placed on all users of the Heathrow Rail Infrastructure other than HEOC (being in the same group of companies as HAL).
- 55.2 **Restrictions of Use:** It is unacceptable that schedule 4 of the HAL Track Access Contract has been marked “Not used” with some (but not all) cross references to schedule 4 being deleted (as compared with the Network Rail and HS1 Limited template forms). HAL is selling – and a user will be buying – rights to use the Heathrow Rail Infrastructure under the HAL Track Access Contract. If HAL subsequently puts in place arrangements which prevent a user from using those rights and, most importantly, preventing a user’s customers from using its services, compensation will be required. At the very least, HAL should compensate a user for its additional costs and loss of revenue experienced as a result of the imposition of a

restriction of use. This is something which must be addressed by HAL as it is of key importance to the operation of a railway network and it is inevitable that at some point in future an unplanned restriction of use will need to be imposed by HAL.

55.3 **Charging:** The charging arrangements are not transparent or certain – and TfL refers to its comments in Parts 4 and 5 on this. In particular, in the context of the HAL Track Access Contract, clause 7 (which refers to schedule 7) will need to be reinstated and the arrangements set out in schedule 7 need considerable more clarity. As currently drafted, schedule 7 is difficult to understand and there is no certainty over when and what needs to be paid. For example:

55.3.1 there is nothing indicating when charges are paid;

55.3.2 it is not clear whether charges are levied on a per “Railway Period” basis or annually or some other frequency;

55.3.3 there is nothing included in relation to how long a user has to pay the access charges (or repercussions if a user does not);

55.3.4 charging arrangements should not include “deductions agreed by HAL as being due under Schedule 8”, as schedule 8 deductions should result from an objective process rather than needing HAL’s subjective consent;

55.3.5 the “direct debit” wording is inappropriate and an invoicing and payment option (common with other track access agreements) should instead be included which is consistent with the provisions in clause 16 on payment;

55.3.6 charges should be expressed to be on a per movement basis and a formula included to work out the overall amounts payable (e.g. how are the number of movements worked out – is this from a timetable or from what has actually operated in practice or some other method?);

55.3.7 TfL considers that charges should vary with usage and should reflect the characteristics of the train in questions and its impact on the infrastructure (please see paragraph 32 on this);

55.3.8 linked with TfL’s comments in the “periodic review” section (see paragraph 55.6), HAL should not be able to unilaterally review and adjust charges each year: there should be parameters for doing so, an agreed process for resolution of disputes and ORR supervision of negotiations on the level of infrastructure charges, as required by regulation 28(3) of the Rail Regulations 2005; and

55.3.9 references to “Track Charges” found in the Network Rail and HS1 Limited model forms of contract should be inserted in the HAL Track Access Contract wherever relevant.

55.4 **Performance:** The performance regime proposed in schedule 8 of the HAL Track Access Contract is not acceptable for the following reasons:

55.4.1 the proposed performance regime appears to be the current performance regime for the HEOC “Heathrow Express” service and has not been tailored to the circumstances of the Heathrow Rail Infrastructure;

- 55.4.2 the proposed performance regime set out in the HAL Track Access Agreement is inconsistent with the proposals set out in the HAL Network Statement;
- 55.4.3 the proposed regime does not meet the requirements of regulation 14 of the Rail Regulations 2005 which requires the infrastructure manager to “*establish a performance scheme as part of the charging system to encourage railway undertakings and the infrastructure manager to minimise disruption and improve performance of the railway network*”. HAL’s proposed regime applies “between Paddington Station and CTA” and so is not a performance regime for the Heathrow Rail Infrastructure (indeed, it does not appear to extend to the other stations at the airport). TfL considers that HAL needs to fundamentally rethink the performance regime it proposes to apply, for the Heathrow Rail Infrastructure only (the Network Rail performance regime being separate and distinct) in light of this and TfL’s other comments. TfL notes that, as part of this, HAL will need to consider how its performance regime interacts with (but remains independent of) the Network Rail performance regime for the Network Rail network;
- 55.4.4 the proposed performance regime is ill-defined as “performance achieved” (which triggers performance payments) is not adequately described;
- 55.4.5 TfL strongly disagrees with the proposed levels of performance payment and how the bonus/penalty regime has been structured by HAL (including that it has been structured on an annual, rather than periodic basis);
- 55.4.6 TfL firmly disagrees with the presumption included in the HAL Track Access Contract that delays accrued on the Heathrow Rail Infrastructure are deemed to have been caused by a Train Operator Event of Default unless it can be shown that they are caused by a HAL Event of Default:
- (a) Firstly, any delay should be allocated on the basis of pre-agreed delay attribution principles and a delay attribution guide (in relation to which HAL has not set out its proposals) rather than a presumption of it being caused by the Train Operator.
 - (b) Secondly, causing a delay should not constitute an “Event of Default” as this can lead to suspension of track access rights and, ultimately, termination of the HAL Track Access Contract. A delay caused by either party should not constitute an Event of Default.
- 55.4.7 how “punctuality” is assessed and its relationship with delay attribution principles is not clear from paragraphs 3 and 4 of schedule 8 – HAL has also not defined a “discountable delay” which is an important concept in the context of this schedule;
- 55.4.8 it would be helpful for the HAL Track Access Contract (and wider Documentation) to use the “Railway Period” concept for calculations, given this is the process more generally adopted across the industry (including the adjoining Network Rail network);

- 55.4.9 TfL disagrees with paragraph 4.3 of schedule 8 (relating to 16/17 minute journey times from Paddington to CTA) which appears to be included just for HEOC services, relates to the Network Rail infrastructure which is not the subject of the HAL Track Access Contract and is not workable in the context of stopping services to the airport;
- 55.4.10 the concept of “Major Engineering Works” has been included in paragraph 4.4 of schedule 8 which suggests (reasonably) these may be required from time to time. As noted in paragraph 50.9 of its comments on the HAL Network Statement, no provision has been included for how engineering works are determined and, importantly, as noted in paragraph 55.2, HAL has not included any provisions in the HAL Track Access Contract which relate to compensation for restrictions of use. These are key issues which need to be addressed by HAL;
- 55.4.11 TfL disagrees with the (overly) simplistic proposal in relation to cancellations, which are not well-defined or transparent, and disagrees with the suggestion that a delay of 10 minutes or more automatically constitutes a cancelled train regardless of whether that train actually operates; and
- 55.4.12 TfL wonders how paragraphs 7.2, 7.4 and 7.5 and 11 of schedule 8 are relevant to the contractual arrangement between HAL and any operator other than HEOC (as they appear to be tailored to the specific nature of the HEOC service).
- 55.5 **Limitation of liability:** the limitation on liability proposed by HAL under clause 11.5 of the HAL Track Access Contract is too limited and should follow the Network Rail model form equivalent. The Network Rail position is that liability under schedules 4 (Restrictions of Use), 5 (The Services and the Specified Equipment), 7 (Track Charges and Other Payments) or 8 (Performance Payments) does not fall within the cap on liability set out in schedule 9. TfL considers HAL’s position to be unreasonable as restrictions of use and performance payments will generally be within HAL’s control and should not be subject to the overall cap on liability. In relation to schedule 9 of the HAL Track Access Contract, HAL’s drafting is confusing, with two different maximum levels of liability specified (£51 million and £155 million) and “Retail Prices Index” needs to be defined (in the Network Rail model form contract, it is defined in schedule 7, but this is not defined in the HAL Track Access Contract). TfL requires clarity on what HAL’s actual proposal is but observes that this level of liability seems very high for a network the size of the Heathrow Rail Infrastructure.
- 55.6 **Periodic review:** the process for reviewing the access charges to be levied by HAL is unclear. The definition of “access charges review” remains in the HAL Track Access Contract and refers to Schedule 4A of the 1993 Act. Schedule 4A of the 1993 Act sets out the Network Rail periodic review process and the way it has been drafted means it can only apply to Network Rail, so this cannot be appropriate in the HAL Track Access Contract. However, TfL considers that an alternative (possibly contractual) mechanism is required in the HAL Track Access Contract to ensure HAL cannot unilaterally impose amendments to charges and that there is a formal, prescribed process (with appropriate factors to consider) to amend the access charges.

55.7 **Traction Electricity Rules:** TfL is concerned at the many references to “Traction Electricity Rules” in the HAL Track Access Contract when HAL’s proposal (as set out in the HAL Network Statement) is that TfL will procure traction electricity from Network Rail directly. The current drafting of the HAL Track Access Contract is confusing in this respect. The arrangements proposed by HAL in the HAL Network Statement would suggest two bi-partite contracts between:

55.7.1 HAL and a user of the track comprised in the Heathrow Rail Infrastructure (in respect of track access except for traction electricity); and

55.7.2 Network Rail and a user of the track comprised in the Heathrow Rail Infrastructure (in respect of traction electricity).

As Network Rail is not party to the HAL Track Access Contract, this would suggest that all traction electricity-related matters should be dealt with elsewhere. Alternatively, if HAL is to procure traction electricity from Network Rail on behalf of users (as part of its responsibilities as infrastructure manager) then this arrangement needs to be made clear in the HAL Track Access Contract and a HAL-specific set of traction electricity rules is likely to be required. The status of the “Traction Electricity Rules” therefore needs some clarification – particularly as elements are incorporated into the HAL Track Access Contract

55.8 **Regulation:** HAL appears to have confused itself as to how it will be regulated or whether it will be regulated. This confusion makes the HAL Track Access Contract difficult to understand. For example, the recitals refer to HAL being “required to” grant a user access to the track, reflecting the process set out in section 18 of the 1993 Act (which TfL had understood would not apply in respect of the Heathrow Rail Infrastructure given the existence of the Exemption Order). There are also references to “HAL’s network licence” and obtaining ORR consent to modifications and other arrangements (which may not be required if the Heathrow Rail Infrastructure is to be unregulated). Further clarity is needed from HAL on the proposed regulatory position.

55.9 **Claims Allocation and Handling Agreement:** HAL has not made clear its proposed arrangements for claims allocation and handling. In particular, it is not clear whether it proposes to:

55.9.1 have a Heathrow Rail Infrastructure-specific CAHA (which is the approach adopted by HS1 Limited for its infrastructure); or

55.9.2 to adopt the Network Rail CAHA (and, if so, whether any amendments are proposed to the Network Rail CAHA to reflect the circumstances of the Heathrow Rail Infrastructure).

55.10 The definition of “Claims Allocation and Handling Agreement” suggests it has been approved by ORR. Even if it has already been approved by ORR, however, it has not been submitted to consultees as part of the Consultation. Given the importance of the matters covered by the CAHA, TfL considers it essential to be provided with information on the proposed arrangements, as well as the proposed form of agreement.

- 55.11 **Schedule 5:** In the absence of an accompanying document to the Consultation which sets out HAL's rationale for its proposed approach to the Heathrow Rail Infrastructure, it is difficult to consider why HAL has taken the approach it has to defining access rights. TfL:
- 55.11.1 questions whether the approach taken by HAL is proportionate for the Heathrow Rail Infrastructure (e.g. references to calling patterns, journey time protection, platform rights, connections and departure time ranges);
 - 55.11.2 queries why HAL has included the HEOC, Heathrow Connect and shuttles (including in defining the Specified Equipment) in this schedule;
 - 55.11.3 considers HAL is incorrect in selling Firm Rights to a "minimum" number of Passenger Train Slots as this means a train operator could have Firm Rights to an unlimited number of Passenger Train Slots (which does not make sense from a practical perspective);
 - 55.11.4 needs further information on HAL's proposed flexing right and the proposed number of minutes' flex it will have; and
 - 55.11.5 questions whether HAL will have its own rolling stock library or whether HAL intended to refer to the Network Rail central rolling stock library.
- 55.12 **Concession:** References to "franchises" in the HAL Track Access Contract should instead be to concessions let by TfL in respect of the Crossrail services. At this stage, a franchise operator using the Heathrow Rail Infrastructure is not reasonably foreseeable.
- 55.13 **Stabling:** References are included in the HAL Track Access Contract to stabling but the position regarding the availability of stabling facilities has not been made clear.
- 55.14 **Environmental Damage:** The indemnities set out in clause 10 of the HAL Track Access Contract refer generically to "environmental damage" which (unlike in the Network Rail and HS1 Limited equivalents) is not defined. This links in with TfL's comments on the inadequacies of the environment-related provisions in the Documentation generally – see paragraph 52.4 in relation to TfL's comments on the deletion of Part E of the HAL Network Code as an example.
- 55.15 **Contract Year:** HAL appears to have "hard wired" the Contract Year date in to the HAL Track Access Contract. In order for transparency across all operators (given the context in which this definition is used) it will be important for this date to be the same in each and every track access contract – and should apply for contracts between HAL and HEOC as well.
- 55.16 **Railway Code:** Clarity is also required around the Railway Code and whether there will be a separate railway code for the Heathrow Rail Infrastructure or, if not, how Network Rail's Railway Code will be adapted/adopted for use on the Heathrow Rail Infrastructure. This is an area on which clarification and a draft document is required.
- 55.17 **Notification/consultation:** TfL considers that:

- 55.17.1 it should be a party to whom confidential information can be divulged under clause 14.2 of the HAL Track Access Contract (as it will be in the position of concessioning authority, rather than the Secretary of State);
- 55.17.2 clause 15.2 of the HAL Track Access Contract should be modified to reflect the position of TfL as concessioning authority and to recognise that TfL may take steps to “step-in” other than under section 30 of the 1993 Act (as TfL does not have the benefit of equivalent powers to the Secretary of State in this respect);
- 55.17.3 it (in addition to the Secretary of State) should be consulted under paragraph 7.5(b) of schedule 5 of the HAL Track Access Contract in relation to the Journey Time Review Notice (if this concept is retained in the arrangements). TfL has an interest as transport authority for London in this and considers that it should be consulted;
- 55.17.4 prior consultation with TfL (in addition to or rather than the Secretary of State) under schedule 10 of the HAL Track Access Contract; and
- 55.17.5 giving TfL (rather than or in addition to the Secretary of State) rights under the Contracts (Rights of Third Parties) Act 1999.
- 55.18 **Modifications:** Please see TfL’s comments in paragraph 52.3 in relation to the HAL Network Code. As currently drafted, the HAL Network Code does not permit changes to the contractual documentation – so clause 2.3 of the HAL Track Access Contract is not correct. TfL considers that HAL should prepare an equivalent to Part C of Network Rail’s network code, in which case this provision would make sense.
- 55.19 **Consequential amendments:** Given TfL’s recommendation that HAL should insert equivalents of Parts B, C, E and L into the HAL Network Code, it will be essential for HAL to consider the Network Rail/HS1 Limited model form of track access agreement and reinstate appropriate cross references to the HAL Network Code in the HAL Track Access Contract.
- 55.20 **Statutory references – consistency:** TfL notes that, contrary to the position in the HAL Network Code, references to the “Companies Act 1985” have been updated to refer to the Companies Act 2006 in the HAL Track Access Contract. Similarly, the HAL Track Access Contract has not been updated to refer to the Office of Rail and Road (rather than the Office of Rail Regulation) whereas the HAL Network Code generally has. This means there are currently inconsistencies between the HAL Track Access Contract and the HAL Network Code, which is incorporated in the HAL Track Access Contract, which is undesirable.
- 55.21 **Inconsistencies:** There are other inconsistencies between the HAL Track Access Contract and the other Documentation prepared by HAL – for example, in the HAL Track Access Contract, service of invoices can take place by fax, whereas this method of service has been specifically removed in other provisions. The “Transition” provisions in clause 19 should also not be relevant for a new track access contract under a new regulatory regime being put in place. A number of references to freight-specific terms also appear to be included in the HAL Track Access Contract, which seems inconsistent given freight does not appear to be provided for by HAL (as TfL has inferred from other parts of the Documentation).

55.22 *Typographical errors and definitions:* In addition to all of the other issues identified in this response, there are a number of typographical errors, unused definitions, capitalised terms which have been used but not defined and general 'tidying up" which needs to be undertaken by HAL. HAL will no doubt address these as part of its development of the HAL Track Access Contract following the conclusion of the Consultation.

PART 9: COMMENTS ON THE HAL STATIONS DOCUMENTATION

56 Introduction

56.1 TfL's comments on the HAL Stations Documentation are set out as follows:

56.1.1 General comments on the HAL Stations Documentation (paragraph 57);

56.1.2 Specific comments relating to each of:

- (a) the HAL Stations Access Agreement (see paragraph 58);
- (b) the HAL Station Access Conditions and Station Annexes (see paragraph 59); and

57 General Comments on the HAL Stations Documentation

57.1 **Structure:** HAL has provided little information on the stations, in terms of HAL's locus to grant access and to undertake the role equivalent to station facility owner or as to who will actually responsible for managing, operating and maintaining the fabric of the stations; and how the costs relating to each station will be accounted for and apportioned amongst users. This is considered further at paragraph 58.2 below.

57.2 **Safety:** As a consequence of there being minimal information available on the stations as noted in paragraph 57.1 above, there is a lack of clarity over who has responsibility for safety at the stations. As noted in paragraph 58.2 below, HAL has removed the requirement for it to hold a safety authorisation as a condition precedent to the Station Access Agreement although it is a requirement under ROGS that a safety authorisation is obtained by any party that manages and operates a station. This raises an implication that another party will perform that role (see paragraph 58.2.3) but who or on what basis is not clear.

57.3 **Missing information:** There are many areas where HAL has not provided information referred to in the HAL Stations Documentation which would be key to both TfL's and prospective users' understanding of the proposed arrangements. Included in Schedule 2 is a list of information which TfL would require in due course to be able to fully understand and comment on the proposed arrangements contemplated by the HAL Stations Documentation.

57.4 **Basis of documentation:** The HAL Station Access Agreement and HAL Station Access Conditions appear to be based on the ORR template Station Access Agreement (multiple stations) and the 2013 SACs, which were primarily designed for use at Network Rail stations leased to franchise operators for the 7 or so years of their franchise. Under that structure, responsibility for maintenance and repair is split between those two parties. The proposed HAL structure appears to more closely mirror the Network Rail independent stations model under which the property owner and station facility owner roles merge with, for example, that one party retaining full responsibility for asset condition and maintenance. As a consequence, the HAL Stations Documentation proceeds on a flawed premise and the carefully engineered rights, protections and balances which are a feature of the 2013 SACs have been lost in translation. By way of example, see below at paragraph 59.2.

57.5 **Proposed Charging Arrangements:** HAL's proposal is for a single unitary charge under which station access costs are intended to be incorporated within the track access charge, with a nominal Common Charge being payable under the HAL Stations Documentation. TfL is unable to discern how the station component is calculated; how the charge correlates to the assets at the relevant facility; what level of maintenance and services it is buying and so on. The stations are separate facilities distinct both from each other and more fundamentally from the network and so subject to regulation in their own right. HAL is therefore required to comply with the general principles of charging in the 2005 Rail Regulations and provide certainty and transparency over the station charging arrangements. The lack of a clear and distinct charging structure for stations access impact upon a number of Conditions within the HAL Station Access Conditions (see paragraph 59 generally). As noted above, the HAL Stations Documentation has been predicated on template documentation, a fundamental principle of which is a specific station access charging regime. By borrowing so fundamentally from the 2013 SACs but without adopting a clear and transparent station access charge, TfL considers the HAL Stations Documentation is defective.

58 **Comments on HAL Station Access Agreement**

58.1 **Regulation:** It is also not clear from the HAL Stations Documentation whether access to the stations will be regulated under the 1993 Act and whether HAL will be regulated by way of a station licence. The HAL Station Access Agreement suggests that HAL will be exempt from the requirement to hold a licence under the 1993 Act, presumably because the Exemption Order does not require it to have a station licence. However, the HAL Stations Documentation confusingly makes numerous references to the 1993 Act and the station facility owner's licence obligations (e.g. D1.1, I2.1.9 and N1.5). TfL therefore questions whether HAL will hold a station licence and, if it will not, where concepts which are typically found in a station licence will be included (such as compliance with railway group standards, claims allocation and handling, disability protection policy and arrangement and provision of information). These concepts are not currently addressed in the HAL Stations Documentation and HAL should explain how, in the absence of a licence, users will be provided with sufficient comfort that these areas will be addressed. TfL considers that they will need to be contractualised or otherwise addressed in the HAL Stations Documentation.

58.2 **Structure:** HAL has provided little information on the stations, in terms of the station boundaries, HAL's locus to undertake the equivalent role of station facility owner and how the stations will be operated.

58.2.1 **Station Boundaries:** The structure proposed by HAL is poorly defined in terms of the assets which form part of the charges to be levied on rail operators – and specifically which assets form part of the station and thus are the subject of the rights obligations set out within the HAL Stations Documentation – and specifically which assets form part of each station for the purposes of the station access charges. TfL acknowledges that stations plans have been made available, but due to the limited consultation period it has not been possible to determine the sufficiency of the plans or validate their consistency with operational needs. TfL's own experience is that for large and complex stations involving support from or to other structures, a

simple plan is inadequate. Nor has there been sufficient time to consider and comment on the adequacy of the common station service and amenities.

- 58.2.2 **Locus:** TfL infers that the intention is for HAL to become infrastructure manager of the Heathrow Rail Infrastructure (including the stations) and undertake the equivalent role of station facility owner. However, there is no clarity over what legal rights or interest HAL has to act in this capacity as it is not clear who owns the Heathrow Rail Infrastructure – whether it is HAL as freeholder, or another legal entity within the Heathrow Airport company structure which in turn leases the stations to HAL. This distinction is fundamental for understanding, amongst other things, who has station stewardship responsibilities (see below at paragraph 59.2). As currently drafted, the proposed contractual arrangements would indicate that HAL's proprietary interests are granted to it by a superior party.
- 58.2.3 **Role of Heathrow Express:** The HAL Station Access Agreement has been prepared on the basis that HAL will be the "station facility owner" and there is therefore an inference that HAL will be responsible for managing and operating the stations. TfL understands that, in practice, these responsibilities are currently undertaken by Heathrow Express (in an equivalent role to a station facility owner) and note the suggestion elsewhere in the Consultation documents that this arrangement will continue (it is assumed for reasons relating to obtaining the requisite safety authorisations under ROGS). It is therefore not clear which party will undertake day-to-day infrastructure manager responsibilities and operations at the stations, including granting access. Gaining access to the stations is a fundamental requirement for train operators and the level of ambiguity over who will grant access must be resolved.
- 58.2.4 **Future ownership:** TfL also questions what the position would be and its impact on charging if in future HAL transferred the ownership of the Heathrow Rail Infrastructure to a third party or if the decision was taken to close a station. Some form of protection will be required for existing and potential users of a particular station, as well as other interested parties (such as the Mayor of London).
- 58.2.5 **Safety:** It is not clear who has responsibility for safety at the stations. HAL has removed reference to the requirement for it to hold a safety authorisation as a condition precedent to the Station Access Agreement (although TfL notes that a contradictory reference to HAL holding a Safety Authorisation remains in the Station Facility Owner Events of Defaults). It is unclear whether this is because it is intended that Heathrow Express will hold the safety authorisation and be responsible for operating the station. It is a requirement under ROGS (from which HAL is not exempt under the Exemption Order) that a safety authorisation is obtained by any party that manages and undertakes safety responsibilities in respect of infrastructure (including stations) on the UK's railways – typically on UK rail infrastructure it will be the station facility owner that performs safety duties. The contractual arrangements need to provide clarity and certainty over which party will undertake safety obligations – whether that is HAL or Heathrow

Express – and demonstrate that party has the relevant competence to undertake such duties. If Heathrow Express is intended to undertake safety obligations, TfL would question whether Heathrow Express should in fact be undertaking the role of "station facility owner".

59 **Comments on HAL Station Access Conditions**

59.1 **Charges:**

59.1.1 **General:** It is neither clear nor transparent how HAL is proposing to charge for use of the stations. The proposed HAL contractual arrangements are structured in a manner that stations and track are treated as standalone facilities and therefore each facility necessarily should have its own separate charging structure which accurately reflects and relates to the facilities and services being provided. As currently drafted, however, HAL appears to lump all costs into the track access charge which means it is not possible to ascertain which charges will be levied and at what level. TfL considers there needs to be cost certainty and transparency and as a consequence of the way in which HAL has chosen to structure the HAL Stations Documentation (i.e. on the basis of the 2013 SACs under which a long term charge and Qualifying Expenditure is contemplated), TfL believes such cost certainty and transparency is most effectively achieved by using the 2013 SACs charging model of a Long Term Charge and Qualifying Expenditure, as to use an alternative model would result in other terms of the HAL Stations Documentation being unworkable.

59.1.2 **Combined Charge:** As noted above, TfL understands that HAL intends to incorporate charges for station access into the track access charge, but with access to stations being granted by a separate station access agreement in consideration for a nominal Common Charge. This approach does not appear to comply with the Rail Regulations 2005 which requires infrastructure charges to relate to the costs attributable to the services being provided. It is also inherently discriminatory and unfair: the levy of a single access charge to use any part of the Heathrow Rail Infrastructure does not account for the fact that Crossrail services will not be calling at terminal 5. While TfL notes that the concept of a "Common Charge" has been retained, it is effectively meaningless given the nominal value.

59.1.3 **Long Term Charge:** The absence of a specific long term charge for station access means that there is no transparency over the make-up of the costs being charged. As such, train operators have no certainty as regards what long term renewals works will be undertaken by HAL and to what standard since there is no specific charge relating to such works. As HAL will have responsibility for station stewardship (see below at paragraph 59.2), it would be appropriate for HAL to levy a long term charge (set for a period of 3 to 7 years and subject to periodic review) to enable it to recover the efficient maintenance, renewal and repair costs associated with the stations, and provide train operators with clarity and certainty over HAL's maintenance and renewals outputs. Without a long term charge, train operators are denied a suitable remedy for HAL failure to perform since there is no long term charge to abate.

- 59.1.4 **Qualifying Expenditure:** Similarly, TfL considers that without the concept of Qualifying Expenditure, train operators have no transparency of the level at which they are being charged for routine and foreseeable operational activities. Furthermore, TfL notes that HAL has indicated in the HAL Network Statement that station platform staff and related services will continue to be provided by Heathrow Express but it is unclear how train operators would procure and pay for these services without there being the concept of Qualifying Expenditure under the HAL Station Access Conditions.
- 59.2 **Station Asset Stewardship:** The HAL Station Access Conditions do not make clear what HAL's obligations will be in relation to station asset stewardship and how HAL's performance relating to upkeep of the stations will be measured (this is linked to the payment of a Long Term Charge). The infrastructure manager's station stewardship obligations are typically detailed in its licences. In the absence of any HAL licence, TfL would expect to see HAL's station stewardship obligations (in terms of scope and standards of performance) being detailed in the contractual arrangements, and it is unacceptable that the HAL Stations Documentation provides no clarity over how long-term maintenance, renewal and improvement of the stations will be secured. Train operators will require certainty that HAL, as infrastructure manager, will undertake station stewardship obligations in accordance with a specified performance regime, as well as clarity over how they will be charged for the delivery of these obligations. Furthermore, as noted above in paragraph 59.2, the proposed single unitary charge provides no transparency as to what proportion of the charge relates to station asset stewardship.
- 59.3 **Maintenance and Repair:** Given HAL's intention to act as infrastructure manager and undertake a role equivalent to a station facility owner, it necessarily follows that HAL should be responsible for all aspects of repair and maintenance at the stations, including all costs associated with such repair and maintenance irrespective of the cause. Categorising the costs for activities set out in the HAL Station Annexes is crucial to understanding the charging for repair and maintenance of such activities and the split between long term charge and qualifying expenditure of those costs. Given its proposed structure, HAL will be responsible for performing both maintenance and repair but, as currently drafted, the HAL Stations Documentation lacks clarity over what services train operators will receive from the station facility owner. Train operators will require certainty in the HAL Station Access Conditions that HAL will ensure the ongoing upkeep of the stations and over the standards to which those services will be performed.
- 59.4 **Proposals for Changes:** TfL has not had the opportunity to consider fully the implications of the Change procedures set out in Parts B and C of the HAL Station Access Conditions due to the limited period for consultation but in any event remains to be convinced that the general mechanisms for proposing Changes under Parts B and C of the HAL Station Access Conditions are workable:
- 59.4.1 **Basis of Change:** The Change provisions in the HAL Station Access Conditions appear to be unworkable as it is unclear how the impact of the Changes will flow through the station access charges given they are subsumed in the track access charge. The effect is that changes may be proposed without it being understood how these will impact on the charges.

There needs to be a process for promoting beneficial change however, the lack of clarity over charging results in a process that ultimately will block beneficial changes due to an inability to quantify the financial consequences or charge for them. TfL notes that it is clearly contemplated by HAL that there may be third party investment in the stations, but the basis upon which the Change procedure has predicated and the lack of clarity surrounding charges means that it will be extremely difficult to secure any such investment.

- 59.4.2 **Role of the ORR:** TfL would question what locus ORR has to approve proposals and hear appeals under the Change procedures given that, as TfL understands it, HAL will not be regulated by way of a network licence or station licence under the 1993 Act. TfL would like to understand from HAL whether it has received confirmation from ORR that it is willing to act in this capacity and what the terms of reference are.
- 59.4.3 **Requisite Majority:** The Requisite Majority is set at 51%, substantially lower than the industry norm (80%) and potentially gives one party a disproportionate influence, as one extra departure could effectively give a party control.
- 59.5 **Remedies:** HAL has removed the self-help remedies and abatement regime available to train operators, the consequence being that train operators no longer have an adequate remedy for poor performance. This represents a fundamental departure from the industry norm which TfL considers HAL should explain and justify. The only remedies that remain available to train operators (namely the indemnity and contractual damages) will in most circumstances be unworkable for a claim for poor performance, with the consequence that train operators are provided with no effective remedy. The remedies available to train operators should be reflective of the services being received and designed in conjunction with appropriate charging arrangements.
- 59.6 **Inconsistencies:** There are several inconsistencies with the HAL Stations Documentation which include:
- 59.6.1 numerous references throughout the HAL SACs to Parts which are no longer used (e.g. Condition D2.1.2 refers to Park K; Condition D2.2.2 refers to Condition L2.3); and
- 59.6.2 references to sections of the 1993 Act, even though as TfL understands access to the stations will not be regulated under the 1993 Act and HAL will not be regulated by way of a station licence. (e.g. Conditions B6.2.2 and 6.2.3 of the HAL SACs).
- 59.7 **Scotland, Welsh Government and PTEs:** There are references in the HAL Stations Documentation to the Scottish Ministers, Welsh Government and PTEs. The definition of "Network" under the HAL SACs also includes reference to Scotland. TfL does not consider these references to be relevant in the context of the Heathrow Rail Infrastructure entirely located in England, and specifically the Greater London area. TfL thinks this could be as a result of using the 2013 SACs as the starting point.

- 59.8 **Typos and definitions:** HAL should undertake a general tidying up of the HAL Stations Documents prior to their introduction. For example, there are references to "the Network" rather than the "HAL Infrastructure", and to "HAL" rather than "the Station Facility Owner".
- 59.9 **Insurance:** HAL has not provided for a minimum sum in respect of its insurance obligations. TfL considers the absence of a notion of a minimum sum means that any insurance procured is unlikely to be for an inefficient price.
- 59.10 **Station Facility Owner's Obligations:** Given HAL's intention to be infrastructure manager of the stations, it is appropriate that certain of the additional positive obligations in Part N of the HAL SACs should be reinstated and delivered by HAL, including the requirement to minimise the cost of operations. Although there is a fundamental lack of clarity over how train operators will be charged for stations access and what those charges will relate to, ultimately the train operator will be covering the costs of operating the stations and so HAL should be under a duty to procure services efficiently and perform the station facility owner's duties properly.
- 59.11 **Access Dispute Resolution Rules:** The HAL SACs refer to the "Access Dispute Resolution Rules", being the rules annexed to the HAL Network Code. It is unclear but assumed that this is in fact a reference to the HAL ADRR and not the access disputes resolution rules for the national network. TfL comments in relation to this aspect of the HAL ADRR. It is unclear how HAL intends to implement its own Access Dispute Resolution Rules procedure and how it will be paid for and staffed generally.
- 59.12 **Limit of Liability:** HAL has placed a limit on its liability under Relevant Agreements in Condition L7.5, which is inconsistent with the industry norm. It is not in a position to consider and comment on HAL's proposed limit of liability without having clarity over the charging regime.
- 59.13 **Damage to the Stations:** HAL has introduced a new Condition D12, under which users are required to reimburse HAL for the full cost of complying with its obligations to undertake repair and maintenance works necessary to address damage caused to the stations by a user, its staff or passengers. Given its proposed structure TfL considers HAL should be responsible for all repair and maintenance and this new provision fundamentally undermines the intended structure.

PART 10: ABUSE OF DOMINANT POSITION

60 Introduction

- 60.1 HAL, as the owner and infrastructure manager of the Heathrow Rail Infrastructure, is dominant in the upstream market for access to and management of the Heathrow Rail Infrastructure. HAL is also present on the downstream markets for the supply of public passenger transport services on various point-to-point routes between London Paddington, Ealing Broadway, West Ealing, Hanwell, Southall, Hayes & Harlington and stations on the Heathrow Rail Infrastructure through the provision of Heathrow Express and Heathrow Connect services.
- 60.2 For all the reasons given in Part 4 of this response, TfL considers that in setting its FTAC, HAL is failing to comply with either of the exceptions to the general charging principle set out in paragraph 2 and 3 of schedule 3 of the Rail Regulations 2005. This will only lead to one outcome, the imposition by HAL of an excessively high FTAC on operators in breach of Chapter II, Competition Act 1998, which prohibits abuse of a dominant position.
- 60.3 The proposed FTAC materially exceeds the cost that is directly incurred by HAL in providing the Heathrow Rail Infrastructure service, and indeed, bears no reasonable relation to the economic value of this service. Rather the charges are clearly set too high, unfair and will result in higher prices for passengers and rail companies; and discourage, if not prevent, the entry of new operators to enter the market. Nor do such charges conform to the principles of transparency and non-discrimination.
- 60.4 Furthermore, it is clear that the Heathrow Rail Infrastructure is an "essential facility" under competition law - it is indispensable and objectively necessary for operators (especially those that have made relationship-specific investments) to compete effectively in the downstream markets for the supply of public passenger transport services on the various point-to-point routes. There is no viable alternative link to Heathrow Airport. Any suggestion that the London Underground Piccadilly Line could be or is an actual or potential substitute is clearly unfounded, especially given the incompatibility of the track/tunnelling and signalling specification as well as the route/location of the underground line.
- 60.5 HAL's proposed FTAC is so excessive that not only would it constitute excessive pricing, but it would also constitute a constructive refusal to supply access to an essential facility. HAL's FTAC will only lead to the elimination of effective competition and consumer harm on the downstream market.
- 60.6 TfL considers that by virtue of its dominant position and the proposed FTAC, HAL would be in breach of the competition rules (i.e. specifically the prohibition on abuse of dominance).

61 Vertical integration and discrimination

- 61.1 The rail industry in Great Britain is derived from European Union rules and is designed so that there is no vertical integration between the network owner/manager and the rail operators, in order to provide a 'level playing field' of undistorted competition and avoid discrimination. The infrastructure manager (i.e. Network Rail) and the train operating companies are fully separated. The Heathrow

Rail Infrastructure, however, is an exception to this rule given that it is owned by HAL and not Network Rail. The Heathrow Rail Infrastructure and HEOC are vertically integrated (as they are both owned/operated by HAL), which potentially gives rise to the risk of the infrastructure owner/manager (i.e. HAL) discriminating in favour of its downstream entity (i.e. HEOC) to the detriment of competitors.

- 61.2 It is not clear from HAL's proposals whether the FTAC will be applied in a non-discriminatory manner (i.e. whether it will apply to all train operating companies operating on the Heathrow Rail Infrastructure, including HEOC). Such vertical integration potentially gives rise to the risk of cross-subsidisation between HAL and HEOC. Such cross-subsidisation could allow HEOC to reduce its costs, allowing it to offer lower fares to passengers (whilst maintaining its margins) and thereby minimise the impact of the FTAC. This therefore gives HEOC a potential advantage over its non-vertically integrated competitors who would not benefit from such cross-subsidisation (i.e. MTR Crossrail, once it takes over from Heathrow Connect (and TfL as a consequence)). These non-vertically integrated competitors would likely be obliged to pass the FTAC onto their passengers in the form of higher fares or more likely be forced to significantly reduce their margins in order to set competitive fares and continue to attract customers to their services. However, reduced profitability as a result of reduced margins would in turn only impact their ability to invest in innovation and ensure continued improved services for customers, hampering their ability to compete effectively in the marketplace.
- 61.3 As a result, the FTAC has the potential to have a discriminatory effect in favour of HAL/HEOC, as third party operators will effectively be paying a higher (i.e. non-subsidised) FTAC than HEOC.

62 **Reduced on-rail competition**

- 62.1 As a wider point, TfL notes that effective on-rail competition results in benefits for passengers and the taxpayer. The CMA recently undertook a detailed policy project into the potential benefits of increased on-rail competition in its 'Competition in passenger rail services in Great Britain' consultation. The CMA's evidence indicated that greater on-rail competition would be likely to deliver, for passengers and taxpayers, downward pressure on fares and upward pressure on service and innovation (e.g. greater incentives to enhance service quality and to innovate, operational efficiencies at the train operator level, more effective use of network capacity and cost savings in network operation).
- 62.2 HAL's proposed FTAC could potentially impair TfL's ability to run the Crossrail services to stations on the Heathrow Rail Infrastructure as an effective competitor to HEOC for all the reasons outlined above, especially if TfL has to pass on the FTAC to passengers in the form of higher fares and/or has to operate a more limited service than planned to minimise its FTAC payments to HAL (i.e. because it is a fixed 'per movement' charge) or even not run a service at all. Furthermore, the proposed FTAC is likely to dissuade any new applicants from applying to HAL to operate an open access service to stations on the Heathrow Rail Infrastructure. Therefore, HAL's proposed FTAC is likely to reduce on-rail competition on routes to and from stations on the Heathrow Rail Infrastructure, thereby preventing the many benefits that greater on-rail competition could otherwise provide to passengers and taxpayers (as identified above).

Schedule 1 Glossary

TfL's response to the Consultation uses a number of defined terms, the definitions of which are set out below:

Defined term	Meaning
1993 Act	Railways Act 1993 (as amended);
2013 SACs	National Station Access Conditions 2013 and Annexes;
Airport RAB	Heathrow airport's regulated asset base;
BAA	BAA plc;
BRB	British Railways Board;
CAA	Civil Aviation Authority;
CCOS	Crossrail central operating section;
CMA	the UK's Competition and Markets Authority;
Consultation	HAL's "moving to a regulated railway" consultation, together with associated documents published on 01 July 2015;
Crossrail Act	Crossrail Act 2008 (as amended);
CTA	Central Terminal Area;
Deed of Undertaking	the deed of undertaking in connection with the Crossrail project between the Secretary of State for Transport, BAA Limited, HAL and HEOC (as amended);
DfT	the Department for Transport;
directly incurred costs	the cost that is directly incurred as a result of operating the train service (as defined in the Rail Regulations 2005);
Documentation	(together) the HAL ADRR, HAL Annexes, HAL Network Code, HAL Network Statement, HAL SACs, HAL Station Access Agreement and HAL Track Access Contract;
EMGPTA	Equivalent Million Gross Tonne-km Per Annum;
ESTA	Electricity Supply Tariff Area;
Exemptions Order	Railways (Heathrow Express) (Exemptions) Order 1994 (as amended);
Extension Response	the letter from HAL dated 22 July 2015 in response to TfL's

Defined term	Meaning
	request for an extension to the period of the Consultation;
FTAC	the “fixed track access charge” (or investment recovery charge) which HAL proposes to levy using the exception to the general charging principle set out in schedule 3 of the Rail Regulations 2005;
GLA Act	Greater London Authority Act 1999 (as amended);
HAL	Heathrow Airport Limited;
HAL ADRR	the draft of the HAL Access Dispute Resolution Rules annexed to the HAL Network Code issued by HAL as part of the Consultation;
HAL Annexes	the draft station-specific annexes for each of the stations on the Heathrow Rail Infrastructure, issued by HAL as part of the Consultation;
HAL Network Code	the draft of the HAL Network Code issued by HAL as part of the Consultation;
HAL Network Statement	the draft of the HAL Network Statement issued by HAL as part of the Consultation;
HAL SACs	the draft of the proposed HAL Station Access Conditions issued by HAL as part of the Consultation;
HAL Station Access Agreement	the draft of the template Station Access Agreement which HAL proposes to enter into for use of its stations infrastructure, issued by HAL as part of the Consultation;
HAL Stations Documentation	together, the HAL Station Access Agreement, HAL SACs and HAL Station Annexes;
HAL Track Access Contract	the draft of the template Track Access Contract (Passenger Services) which HAL proposes to enter into for use of its track infrastructure, issued by HAL as part of the Consultation;
Heathrow Rail Infrastructure	the Heathrow spur and associated station infrastructure;
HEOC	Heathrow Express Operating Company Limited;
Letter	the Consultation covering letter from Simon Earles dated 1 July 2015 to certain consultees;
MMC	Monopolies and Mergers Commission;

Defined term	Meaning
MTR Crossrail	MTR Corporation (Crossrail) Limited;
Network Rail	Network Rail Infrastructure Limited;
OMRC	operations, maintenance and renewals charges;
ORR	the Office of Rail Regulation (soon to be known as the Office of Rail and Road);
QX	Qualifying Expenditure;
Rail RAB	a rail-specific regulatory asset base for Heathrow airport;
Rail Regulations 2005	Railways Infrastructure (Access and Management) Regulations 2005 (as amended);
Rail Regulations 2015	The Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2015 (which are in a draft form as at the date of this response);
RfL	Rail for London Limited;
ROGS	Railways and Other Guided Transport Systems (Safety) Regulations 2006 (as amended);
SoS	Secretary of State for Transport;
Sponsors	TfL and DfT;
TfL	Transport for London; and
VUC	Variable Usage Charge.

Schedule 2 Missing information

- 1 Information essential to the Consultation includes (but is not limited to):
 - 1.1 Information relating to charging set out in Part 4 and Part 5 of this response;
 - 1.2 Missing information in HAL Annexes;
 - 1.3 Detailed delineation of station boundaries;
 - 1.4 Railways Systems Code (HAL promised on 19 May 2015 that this would form part of the Consultation);
 - 1.5 Emergency Access Code (HAL promised on 19 May 2015 that this would form part of the Consultation);
 - 1.6 Performance Data Accuracy Code (HAL promised on 19 May 2015 that this would form part of the Consultation);
 - 1.7 Detailed descriptions of assets, their values and rationale for assumed asset lives (including, for example, the reason for some assets have zero asset lives);
 - 1.8 Information on asset depreciation assumptions (for example in respect of in-year and in-period RAB additions, and historic additions);
 - 1.9 Information and rationale for inflation and indexation assumptions;
 - 1.10 Confirmation that values used to calculate the IRC are consistent with the aviation RAB as reported in HAL's 31/3/2015 regulatory accounts or a reconciliation of any differences;
 - 1.11 Rationale for the cost of capital used in the calculation of the IRC;
 - 1.12 Information on efficiency assumptions employed and/or a rationale for not applying efficiency assumptions;
 - 1.13 Detailed cost information by station;
 - 1.14 Models estimating 'costs directly incurred' (short- and/or long-run marginal/incremental costs) in respect of all railway assets;
 - 1.15 Derivations for Schedule 4 and 8 parameters;
 - 1.16 Details of projected operations and maintenance expenditure and how these are allocated to the 'opex', 'pass-through' and 'variable usage' categories and how the per path charges are generated;
 - 1.17 Details of cash flows in respect of: HEx/Heathrow Connect rail revenue, HEx/Heathrow Connect rail opex, Rail asset funding – General rail infrastructure and HEx/Heathrow Connect specific assets; and Access charges levied on Rail Operators; and

- 1.18 Details of cash flows through the aviation regulatory framework to generate a contribution to or subsidy requirement from aeronautical charges, for each of: today; September 2015 (or when regulatory framework in place); and May 2018 (or when a non-Heathrow operator starts services).
- 2 Information necessary to the effective operation of access contracts includes (but is not limited to:
- 2.1 Engineering Access Statement;
 - 2.2 Timetable Planning Rules;
 - 2.3 Railway Operational Code;
 - 2.4 Heathrow rail standards and rules;
 - 2.5 HAL's maintenance and renewals plan;
 - 2.6 Operational resilience plan;
 - 2.7 Strategic Capacity Statement;
 - 2.8 Sectional Appendix;
 - 2.9 Asset Management Plan;
 - 2.10 Business Plan (as required under the Rail Regulations 2015); and
 - 2.11 Delay Attribution Guide (or equivalent).

Schedule 3 HAL letters from 2006 on investment recovery charge

Schedule 4 The Network Rail and HS1 Limited approaches to directly incurred costs

1 This 0 sets out the Network Rail and HS1 Limited approaches to the calculation of the directly incurred costs. In both cases, such directly incurred costs are ascertainable and transparent and justifiable from an economic perspective. The position for Network Rail and HS1 Limited is set out below.

2 Network Rail

2.1 Network Rail’s “directly incurred” costs are recovered through the following charges:

Charge	Payable by	Recovers
Variable usage charge	All operators	Maintenance and renewal costs which vary with traffic
Electrification asset usage charge	All operators of electric vehicles	Maintenance and renewal costs of electrification assets that vary with traffic
Capacity charge	All operators	Expected increase in performance regime (delay and cancellation) costs incurred by Network Rail as a result of increased traffic on the network
Coal spillage charge	All freight operators of coal services	The additional costs incurred through spillage of coal on infrastructure
Traction electricity charge	All operators who run electrically powered services	Charges for supplying and consuming electricity for traction (including operations, maintenance and renewals)

2.2 Network Rail recovers any element of its revenue requirement not recovered by the charges levied for the “directly incurred” costs above (or offset by other single till income) through the imposition of:

2.2.1 the FTAC which is levied on Franchised Passenger Operators; and

2.2.2 a grant from the DfT.

2.3 TfL notes that HAL has used the term FTAC in the context of its proposed arrangements. Somewhat confusingly, HAL has proposed this as its equivalent of an investment recovery charge and not the fixed costs of the railway which would arise even if no trains were to operate on it.

- 2.4 Under the Network Rail model, the fixed track access charge is considered to be a mark-up. The market ability to pay can be readily assessed by virtue of the DfT's role as the franchising authority and the High Level Output Specification / Statement of Funds Available process set out in the 1993 Act.

3 **HS1 Limited**

- 3.1 The OMRC for use of the HS1 infrastructure are made up of four elements:
- 3.1.1 **OMRCA1:** this is the variable costs reflecting wear and tear of additional trains on the track. This mainly relates to track costs;
 - 3.1.2 **OMRCA2:** this is the avoidable costs on a long run incremental cost basis where the costs of infrastructure specific to a class of operator, that would be avoided in the event that that class of operator ceased operating services, are allocated to that particular class of operator. Avoidable costs are net of the costs which would be incurred to mothball assets if a specific class of operator ceased to operate on HS1. Mothballing costs are included in common costs;
 - 3.1.3 **OMRCB:** the common costs (also termed the long term costs of the operating phase of the project). OMRCB includes, for example, head office costs, and infrastructure costs that vary with the length of track but not the volume of traffic; and
 - 3.1.4 **OMRCC:** the pass through costs. These are common costs that are largely beyond HS1's control, such as insurance and business rates. For this category of cost there is an annual wash-up process to adjust for differences between actual and forecast costs.
- 3.2 OMRCA1 and OMRCA2 are the "directly incurred" costs recovered under the general charging principle. OMRCB and OMRCC are considered to be the long term costs of operating the project and are recovered under an exception to the general charging principle set out in the Rail Regulations 2005.

4 **HAL's proposal – directly incurred costs**

- 4.1 As noted in paragraph 29, the default charges for access to railway infrastructure (i.e. for the provision of the "minimum access package" should reflect the directly incurred costs. Any charges over and above this must be justified by reference to an exception to the general charging principle set out in the Rail Regulations 2005.
- 4.2 It is neither clear nor transparent how HAL is proposing to charge for use of the Heathrow Rail Infrastructure. HAL has not made clear what element of the overall "common costs charge" constitutes the directly incurred costs. It is also not clear how charges have been allocated between track and stations (as noted in paragraph 40, TfL is firmly of the view that track and station access costs should be distinct). HAL has not set out in the HAL

Network Statement the directly incurred costs either for the existing HEOC or Heathrow Connect services. Overall, HAL has not provided nearly enough clarity or transparency over the proposed charging arrangements and how they will be calculated to allow consultees to provide a considered response. This is unacceptable.

- 4.3 As described in paragraphs 2 and 3 of this 0, there are existing models on the wider Great Britain railway of how track access costs are paid and – importantly – what constitute the “directly incurred” costs. This principle arises from European law, as implemented into English law under the Rail Regulations 2005. HAL is not meeting this fundamental requirement in its proposal. Indeed, its proposal would result in MTR Crossrail paying for services which it does not use and discriminates against MTR Crossrail in favour of HAL’s incumbent operator, HEOC.
- 4.4 The absence of a charge for directly incurred costs means that there is no element of HAL’s charging structure that reflects the incremental “wear and tear” on the track infrastructure as a result of a particular operator’s train service.
- 4.5 On Network Rail’s infrastructure this is reflected in the VUC. The operating, maintenance and renewal costs that vary with traffic are disaggregated for passenger vehicles to a vehicle class level and for freight vehicles disaggregated further to reflect commodity type and whether the vehicle is laden or tare. The allocation to passenger vehicles is based on characteristics that influence the impact on the track (e.g. axle load, unsprung mass), the variable usage charge therefore provides operators with price signals to use and develop ‘track friendly’ vehicles.
- 4.6 On HS1 Limited’s infrastructure the OMRCA1 costs (the variable costs reflecting wear and tear of additional trains on the common track) are allocated based on EMGPTA weighting per train.
- 4.7 In procuring the new rolling stock for the operation of the Crossrail service, one of the factors taken into account by TfL in the specification of the train was its impact on the rail infrastructure. In procuring a lighter train, the impact on the railway would be reduced and therefore the track access charges would be lower. The Bombardier class 345 train is 80 tons lighter than a Siemens/CAF class 332 train (the train used by HEOC) and the wear and tear on curved track is expected to be considerably better than might be inferred just from the weight differential. TfL has estimated using Network Rail’s VUC methodology that the rate for a class 345 unit would be at least 35% less than that for a class 332 of comparable length. To not take into account the relative characteristics of the rolling stock in question is discriminatory in favour of the incumbent operator.
- 4.8 Under HAL’s proposed structure of charges, no benefit would accrue to the operator of the class 345 units. TfL considers this to be in contravention of the charging principles in the Rail Regulations 2005, discriminatory in favour of HEOC and generally unfair.

Schedule 5 Application of the duties of ORR to the HAL consultation

- 1 As mentioned in paragraph 28, HAL will be aware that ORR is required to exercise its functions in making any determination or deciding an appeal or otherwise under the Rail Regulations 2005 in a manner which it considers is best calculated to achieve the general duties described set out in the 1993 Act.
- 2 TfL notes that if HAL implements its proposals without substantial amendment, TfL would need to consider the impact on:
 - 2.1 fare levels to/from Heathrow airport (and within London more widely);
 - 2.2 service levels to/from Heathrow airport;
 - 2.3 other TfL or TfL-procured services;
 - 2.4 investment on other projects elsewhere in London;
 - 2.5 the funding which it receives from the DfT (and whether this may also need to be increased); and
 - 2.6 the environment.
- 3 The Appendix to this Schedule 5 sets out the current differences in fares, which TfL would need to consider if HAL's proposals are implemented and noting that the Mayor of London is responsible for the setting of fares across services operated or contracted by TfL.
- 4 In relation to those duties described in paragraph 28, TfL's preliminary thoughts on how the ORR may be minded to exercise its duties are as follows:
 - 4.1 ***Improvements in railway service performance:*** "railway service performance" is defined in section 4(9) of the 1993 Act as including "(a) reliability, (b) the avoidance or mitigation of passenger overcrowding and (c) that journey times are as short as possible". TfL considers that the introduction of the Crossrail services onto the Heathrow Rail Infrastructure will improve railway service performance in all of these areas. Anything which could prejudice the introduction of the Crossrail services may lead to:
 - 4.1.1 decreased customer choice;
 - 4.1.2 worsened reliability;
 - 4.1.3 potentially increased overcrowding for passengers on other services (such as the Piccadilly line); and
 - 4.1.4 increased journey times (or at best similar journey times as present, rather than the decreases envisaged by Crossrail services).

Further, due to the way that HAL is proposing to structure its charges (primarily fixed charges) and the way that these charges are adjusted for additional services, there is no incentive on HAL to improve performance.

- 4.2 **Protect the users of rail services:** the imposition of an investment recovery charge and other elements of the charging structure as envisaged by HAL could result in the users of rail services being prejudiced.
- 4.3 **Promote the use of the railway network:** “promoting the use of the railway network... to the greatest extent it considers economically practicable” will require ORR to reach a view on economics. Whilst the Heathrow Rail Infrastructure may be relatively small in size, it nevertheless is a significant and important piece of railway infrastructure as it connects to a major worldwide air transport hub. A regulatory and charging framework needs to take into account the capacity of the Heathrow Rail Infrastructure – but needs to do this with regard to the wider rail network and encourage efficient use of capacity in this wider context. At present, the Heathrow Rail Infrastructure is considerably under-utilised and TfL considers the charging framework should incentivise efficient use of capacity on the Heathrow Rail Infrastructure in an economically practicable manner.
- 4.4 **Integrated system of transport:** The construction of Crossrail will actively promote an integrated system of passenger transport and the use of more than one passenger operator’s services (this is a key element of the Mayor of London’s transport strategy (see below)). There will be key interchanges across much of London (with services operated by London Underground, London Overground and Docklands Light Railway) and from mainline rail stations such as Paddington, Liverpool Street, Farringdon, Stratford and Abbey Wood. Of course, the Crossrail services will also form part of an integrated system of passenger transport services by linking into air services at Heathrow, through connections at Farringdon to Gatwick and Luton airports and through connections at Liverpool Street to Stansted airport. TfL therefore considers that steps should be taken to encourage the introduction of the Crossrail services. The current regulatory and charging proposals by HAL are likely to have an adverse impact on the integration of transport across London and further afield.
- 4.5 **Sustainable development:** HAL’s proposals could lead to a lower number of journeys to Heathrow by public transport. Passengers could be forced onto the roads to reach the airport and London’s roads will become more congested. This would not contribute to the achievement of sustainable development – particularly in the context of the development of the proposed third runway and the likely increase in passenger numbers to the airport. The development of a third runway would not be sustainable without a rail service which offers sufficient capacity and frequency to transport passengers to the airport. Crossrail trains will provide increased capacities and increased frequencies over current services to encourage sustainable development in west London.
- 4.6 **Efficiency and economy:** TfL is of the view that promoting “*efficiency and economy*” would not be incentivised where HAL is able to recover an amount significantly in excess of its costs of operating the Heathrow Rail Infrastructure. It is unclear from the Consultation how the access charges paid for use of the Heathrow Rail Infrastructure relate to the aviation charges paid by users of the airport and whether the access charges will

result in aviation charges being subsidised and/or HAL's profits being increased. The fact that the proposed charges do not increase or decrease depending on the level of the services means that train operators and HAL will have little or no incentive to look for efficiencies which will benefit passengers. The charging structure also has perverse incentives that should be considered in terms of the impact of rolling stock on the infrastructure. As the new Crossrail trains have substantially less impact on the infrastructure than the existing HEOC trains, this should mean that the Crossrail operator pays less by way of access charges (please see paragraph 4.7 of Schedule 5 Schedule 5). The regime proposed by HAL pays no attention to lighter and more efficient rolling stock and therefore is actively encouraging less efficient and economic practices from operators.

- 4.7 **Promotion of competition:** The introduction of Crossrail services to Heathrow will add valuable competition to the provision of rail services from central London to Heathrow and provide a cheaper and more convenient service than the current HEOC service. The charging structure may discourage future competition (from further Crossrail services or otherwise) as the charges would be disproportionately large compared to other rail infrastructure.
- 4.8 **Use of services by more than one passenger operator:** As noted in paragraph 4.4 above, Crossrail actively promotes the use of the services of more than one passenger operator through its connection with mainline rail services and those of other TfL-procured services. See also the point in paragraph 4.7 above regarding competition.
- 4.9 **Planning business with a reasonable degree of certainty:** TfL reminds HAL that ORR would need to take into account HAL's position as a provider of station services and network services (falling within the definition of "railway services" set out in section 82 of the 1993 Act). To implement the charging arrangements and wider documentation as proposed by HAL in accordance with the Consultation, would not allow TfL or its concessionaires to plan their business with a reasonable degree of assurance, particularly given proposals for charges to be reviewed and reallocated each year at HAL's seemingly unconstrained discretion (both in relation to the use of track and station infrastructure). Please also see paragraph 37 on this point.
- 4.10 **Protects the interests of passengers:** As a provider of services for the carriage of passengers by railway through its concessionaires, TfL considers ORR would exercise its duties in a way which protects its passengers from the exceptionally high charges (by any estimate) for accessing the Heathrow Rail Infrastructure. In connection with this point are the principles of charging described in the Rail Regulations 2005 referred to in paragraph 30 of this response which TfL considers ORR would also take into account in exercising this duty.

- 4.11 **Guidance and funds of the Secretary of State:** The Secretary of State has issued guidance to the ORR under the 1993 Act⁶ which is relevant in the context of both guidance and funds available to the Secretary of State. Paragraph 13 of the guidance appears to be relevant in the context of funding that the Secretary of State can commit⁷. This imposition of a charging structure as proposed by HAL (including in relation to an investment recovery charge) would be contrary to the guidance of the Secretary of State as it could, in particular, impose additional expenditure requirements on the Secretary of State (through its funding of TfL). These charges have not been previously agreed nor budgeted for by the Secretary of State on the basis of previous assurances as to costs of access by HAL to the DfT and to TfL.
- 4.12 **Functions of the Mayor of London and TfL:** The Mayor of London has a general transport duty to develop and implement policies⁸ for the promotion and encouragement of safe, integrated, economic and efficient transport facilities and services to, from and within Greater London⁹. TfL is required to exercise its functions for the purpose of facilitating the discharge of the general transport duty as well as for the purpose of securing or facilitating the implementation of the transport strategy¹⁰. Further, the GLA Act requires the Mayor of London to ensure the determination of the level and structure of fares to be charged for public transport services provided by TfL or under an agreement with TfL, routes and levels of service provision¹¹. If the current proposals by HAL are accepted by ORR and, for example, an investment recovery charge (by way of the FTAC) is imposed, this:
- 4.12.1 is likely to impact on the ability of the Mayor and TfL to implement the Mayor's transport strategy;
 - 4.12.2 will impact on the Mayor's ability to set fares for the Crossrail services; and
 - 4.12.3 will affect the ability of the Mayor/TfL to promote and encourage integrated, economic and efficient transport services.
- 4.13 **Value for money:** The charging arrangements set out in the Consultation are not value for money. HAL has already had ample opportunity over

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/3642/sos-guidance-to-orr.pdf

⁷ "13. 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 and capital budgets and to secure value for money from public expenditure. The Secretary of State wishes ORR to note in particular that her statement of funds available to secure the High Level Output Specification (HLOS) represents the maximum level of funding the Government is able to commit, and that **wherever possible she wishes expenditure to be below this level**. Securing value for money, improving industry efficiency and reducing industry unit costs are the most significant challenges facing the rail network. The **Secretary of State will want to secure substantive improvements in each of these areas**.

14. Accordingly, where ORR is taking decisions which may have actual or potential financial consequences for the Secretary of State, the Secretary of State wishes ORR to note particularly that **she does not wish to incur additional expenditure beyond allocated budgets** and that she wishes to be consulted about expenditure which is not, or is low, value for money." (emphasis added)

⁸ The Mayor's current transport strategy was implemented after extensive consultation. The strategy and related documentation can be found here: <https://www.london.gov.uk/priorities/transport/vision-strategy>

⁹ Section 141 of the GLA Act.

¹⁰ Section 154 of the GLA Act.

¹¹ Section 174 of the GLA Act.

almost 20 years to recover a significant proportion of the investment in the Heathrow Rail Infrastructure. Indeed, to date the original investment has been recovered not by parties accessing the Heathrow Rail Infrastructure but through airport landing charges and the operating surplus from the HEOC service. In exercising this duty, ORR will take into account that TfL is the funder/sponsor of Crossrail services and also the representations of the DfT as a co-funder/co-sponsor.

4.14 **Construction of Crossrail:** Section 56(2) of the Crossrail Act defines “Crossrail” as a “railway transport system”. As a result, this provision (and the duties of ORR to facilitate the construction of Crossrail) relate to the construction of the Crossrail railway transport system as a whole and, as such, would include the operation of Crossrail. HAL should note that this is supported by provisions which require ORR to publish reports as to how its functions have been exercised in connection with the operation of Crossrail passenger services¹². Further points to note on ORR duties in relation to Crossrail include:

4.14.1 Crossrail passenger services are defined in section 23(4) as being a service for the carriage of passengers by railway on a line the whole of which, or part of which forms part of the wider railway. This means that “Crossrail” under the Crossrail Act also includes services to Heathrow Airport on the Heathrow Rail Infrastructure;

4.14.2 TfL notes that the business case for the construction of Crossrail as a whole has been predicated for a long time on access to the Heathrow Rail Infrastructure; and

4.14.3 certain funding received for Crossrail has been made on the basis that the Crossrail services will operate to Heathrow.

In considering the exercise of its duties under the 1993 Act, TfL considers that ORR will do so with the objective of facilitating the Crossrail services. The imposition of the access charges regime and the regulatory regime envisaged by HAL, in the context of the significant other inadequacies of the documentation proposed by HAL, do not facilitate Crossrail.

¹² See section 23(1)(b) and section 23(4) of the Crossrail Act.

Appendix to Schedule 5: Fares table

Journey	Ticket Type	Carrier	Price, £
Paddington to Heathrow	Single	Heathrow Express	21.50
Paddington to Heathrow	Single	Heathrow Connect	10.10
Zone 1 to Heathrow	Cash Single anytime	LUL	6.00
Zone 1 to Heathrow	PAYG single peak	TfL	5.10
Zone 1 to Heathrow	PAYG single off peak	TfL	3.10
Ealing Broadway to Heathrow	Single	Heathrow Connect	7.80
Zone 3 to Heathrow	Cash Single anytime	LUL	5.80
Zone 3 to Heathrow	PAYG single peak	TfL	2.80
Zone 3 to Heathrow	PAYG single off peak	TfL	1.50
Hayes and Harlington to Heathrow	Single	Heathrow Connect	6.10
Zone 5 to Heathrow	Cash Single anytime	LUL	4.80
Zone 5 to Heathrow	PAYG single peak	TfL	1.70
Zone 5 to Heathrow	PAYG single off peak	TfL	1.50

6 January 2006

A Ferguson Esq
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MPD3
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Great Minster House
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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 £12.1 m 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

MANOAKES
General Manager Rail

Department for *Transport*

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Web Site: www.dft.gov.uk

26 May 2006

Without prejudice

Dear Mike,

CROSSRAIL ACCESS CHARGE

You wrote on 6 January with a proposal on charging for access by Crossrail services to the rail infrastructure owned by Heathrow Airport Limited (the "**HAL Infrastructure**").

For the sake of clarity, we set out below our understanding of your proposal, and then raise certain questions arising from it. Your responses to these questions may give rise to additional questions.

In your letter you propose a £12.1 million annual fixed charge starting on the 1st January 2015 (the "**Charge**"), irrespective of when services commence. The Charge is to be indexed (not to RPI), but the bare reference date when such indexation is to commence is not stated. In addition, you state that the Charge makes no provision for depreciation or return on capital for the investment in the HAL Infrastructure.

You propose that the Charge should not be subject to any periodic review. In paragraph 6 you state that the Charge will however vary at any time in order to recover a *share* of any increase in costs which arise from any changes in law, regulations or guidance. You then state that these costs *could* include increases in staffing levels, changes to maintenance requirements or any upgrades to the HAL Infrastructure due to safety, security, environmental or *any other reasons*.

You state that the cost of supply of traction power has been excluded from the Charge and that these costs shall be paid by Crossrail and Heathrow Express ("**HEX**") directly to Network Rail.

We understand that the charge is calculated on the basis of Crossrail paying a *proportion* of the operating, maintenance, repair and renewal costs of the HAL Infrastructure

In order for the Department for Transport to properly measure the value of this offer there are a number of issues which require clarification:

1. Could you please confirm what index you propose to use for the Charge together with the reference date for the said index.

2. From what point in time is it envisaged that the proposed change of law protection should apply (eg upon signature of the access option or signature of the access contract).
3. Could you please confirm that the examples of increased costs set out in the second sentence of paragraph 6 of your letter are specifically limited to increased costs linked to changes in law, regulations and guidance
4. Could you please confirm exactly what "proportion" of the total operating, maintenance, repair and renewal costs for the HAL network, the Charge represents
5. Could you please provide a breakdown of the Charge, in percentage terms, relating to operating, maintenance, repair and renewal costs that it covers
6. In paragraph 6 of your letter you refer to the recovery from Crossrail of a "share in any increase in costs". What would Crossrail's share be and how do you propose it is to be calculated?
7. Could you please explain exactly what is meant by the reference to "regulations and guidance" in paragraph 6 of your letter.
8. If CAA were to cease to include the HAL Infrastructure or HEX in BAA's regulated asset base, what would be the effect on the Charge?
9. Could you please confirm that BAA does not propose to charge Crossrail for any enhancements it may make to the HAL Infrastructure
10. How does BAA envisage that payment will be made to Network Rail in respect of traction power?
11. In order for us to assess the cost of accessing the HAL network, please confirm that no amount is payable by Network Rail under the electrification works charge referred to in clause 5.2(8) of the Joint Operating Agreement as a result of Crossrail.

We understand that the proposed Charge is based on the risk allocation adopted in the draft access contract circulated by Wragge & Co towards the end of last year. As you will be aware there are a number of risk allocation issues that are of concern to the Office as they have a material impact on the ability of Crossrail to operate the services within a robust contractual framework. Nevertheless, and irrespective of those discussions, once we have received the information requested above, I hope to be in a position to give you response to your proposed Charge as framed within the draft access contract.

5 June 2006



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Without Prejudice

Dear Any10ny,

CrossVail- 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.

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

M A Noakes
General Manager Rail

cc E English
D Fennell

Brian Kogan
Deputy Director, Railway Markets
and Economics



OFFICE OF RAIL REGULATION

10 January 2013

Allan Gregory
Surface Access Director
Heathrow Airport Limited
The Compass Centre
Nelson Road, Hounslow
Middlesex TW6 2GW

Application of the 2005 Regulations in respect of the Heathrow Spur

Thank you for your letter dated 27 November 2012 in which you seek confirmation that the Railways Infrastructure (Access and Management) Regulations 2005 ("the Regulations") apply to the Heathrow Spur, as required by Appendix 3 to the Deed of Undertaking dated 30 May 2008.

Regulation 4 deals with the scope of the Regulations and provides that they apply to infrastructure managers and railway undertakings unless a relevant exemption applies. Heathrow Airport Limited is the infrastructure manager for the Heathrow Spur and Heathrow Express Operating Company Limited is the railway undertaking which operates the Heathrow Express services on the network.

ORR has considered the applicability of the exemptions to Heathrow Airport Limited and Heathrow Express Operating Company Limited and it is our view that the Regulations do apply in each case.

If you have any queries, please do not hesitate to contact me.

Yours sincerely

Page 1 of 1
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