

Third Supplemental Agreement

between

NETWORK RAIL INFRASTRUCTURE LIMITED

as Network Rail

and

FREIGHTLINER LIMITED

as Train Operator

Relating to the Track Access Contract (Freight Services) dated 11 December 2016

Revision and Amendment of Schedule 8

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THIS THIRD SUPPLEMENTAL AGREEMENT is dated

2017 and made

BETWEEN:

- (1) **Network Rail Infrastructure Limited** ("Network Rail"), a company registered in England under number 2904587 having its registered office at 1 Eversholt Street, London, NW1 2DN; and
- (2) **Freightliner Limited** (the "Train Operator"), a company registered in England under number 03707899 having its registered office at 3rd Floor, 90 Whitfield Street, Fitzrovia London W1T 4EX

WHEREAS:

- (A) The Parties entered into a Track Access Contract (Freight Services) dated 11 December 2016 in a form approved by the Office of Rail and Road pursuant to section 17 of the Act (which Track Access Contract is hereafter referred to as "the Contract").
- (B) The parties now propose to amend the Contract in the manner and on the terms described below.

IT IS HEREBY AGREED AS FOLLOWS:

1 INTERPRETATION

In this Supplemental Agreement:

- a) Words and expressions defined in, and rules of interpretation set out in the Contract, shall have the same meaning and effect when used in this Supplemental Agreement except where the context requires otherwise; and
- b) "Effective Date" means the later of:
 - i. the date upon which the Office of Rail and Road issues its approval, pursuant to Section 22 of the Act, of the terms of this Supplemental Agreement; and
 - ii. 0200 Hours 30 January 2018.

2 EFFECTIVE DATE AND TERM

The amendments made to Schedule 8 of the Contract, as set out in this Supplemental Agreement, shall have effect from the Effective Date and shall cease to have effect at 01:59hrs on the Expiry Date;

3 AMENDMENTS TO SCHEDULE 8

Schedule 8 of the Contract shall be deleted and replaced by the version that is contained in Appendix 1 to this Supplemental Agreement;

4 EFFECT OF THIS SUPPLEMENTAL AGREEMENT ON THE CONTRACT

The Contract, as amended by this Supplemental Agreement, shall remain in full force and effect in accordance with its terms. During the period in which the amendments made by this Supplemental Agreement are to have effect, all references in the Contract to "the contract", "herein", "hereof", "hereunder" and other similar expressions shall, unless the context requires otherwise, be read and construed as a reference to the Contract as amended by this Supplemental Agreement.

5 THIRD PARTY RIGHTS

No person who is not a party to this Supplemental Agreement shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Supplemental Agreement.

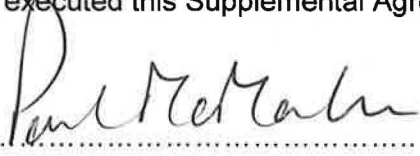
6 LAW

This Supplemental Agreement shall be governed by, construed and given effect to, in all respects in accordance with, English Law.

7 COUNTERPARTS

This Supplemental Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into this Supplemental by signing either of such counterparts.

IN WITNESS whereof the duly authorised representatives of Network Rail and the Train Operator have executed this Supplemental Agreement on the date first above written.

SIGNED by 

Paul McMahon
Duly authorised for and on behalf of
NETWORK RAIL INFRASTRUCTURE LIMITED

SIGNED by 

FOC MD
Duly authorised for and on behalf of
FREIGHTLINER LIMITED

SCHEDULE 8: PERFORMANCE REGIME

1. Definitions

In this Schedule 8 unless the context otherwise requires:

"100 Train Operator Miles" means the distance travelled by the Services operated by the Train Operator on the Network in any Charging Period as recorded in Network Rail's billing systems (unless there is a manifest error in such figure), divided by 100;

"Actual Mileage t" has the meaning ascribed to it in paragraph 10.1.4(a);

"Adjusted MDNR" has the meaning ascribed to it in paragraph 6.2.1;

"Adjusted MDTO" has the meaning ascribed to it in paragraph 4.2.1;

"Adjusted Train Operator Benchmark" means the Train Operator Benchmark as adjusted in accordance with paragraph 10.1.7;

"Adjustment Fraction" means the number of Charging Periods or parts of a Charging Period in the first or final Financial Year, divided by 13;

"Aggregate Net Liability" has the meaning ascribed to it in paragraph 9.1.7;

"Annual Contract Mileage" has the meaning ascribed to it in paragraph 10.2.2(a);

"Annual Contract Mileage Variation" has the meaning ascribed to it in paragraph 10.2.2(b);

"Attributable to both the Train Operator and Network Rail" means, in respect of any delay to or cancellation of a Service or a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules, that both the Train Operator and Network Rail are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of "Attributable to the Train Operator" or "Attributable to Network Rail");

"Attributable to Network Rail" means, in respect of any delay to or cancellation of a Service or any other matter:

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail;
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network; or
- (e) prior to the implementation of any ETCS Amendments in accordance with paragraph 12, any delay to or cancellation of a Service occurring on the Network or that prevents that Service accessing the Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication directly caused by the Deliberate Act of the Train Operator) that has been allocated as

the responsibility of the Train Operator in the Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules

and which excludes any such delay to or cancellation of a Service or any other matter arising as a result of a Planned Incident, in all cases having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules;

“Attributable to the Train Operator” means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment (with the exception of those failures, defects or miscommunications contemplated in subparagraph (e) of the definition of “Attributable to Network Rail”) relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
 - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
 - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
 - (i) any delay to or cancellation of a Service Attributable to the Train Operator;
 - (ii) any Train Operator Omission; or

- (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

- (a) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules; and
- (b) ignoring any delay or cancellation under paragraph (d) of the definition of "Attributable to Network Rail";

"Baseline Annual Contract Mileage" has the meaning ascribed to it in paragraph 10.1.1;

"Baseline Network Mileage" has the meaning ascribed to it in paragraph 10.1.1;

"Benchmarks" means the Train Operator Benchmark and the Network Rail Benchmark;

"Cancellation" has the meaning ascribed to it in paragraph 8.1;

"Cancellation Threshold" has the meaning ascribed to it in Appendix 1;

"Contract Miles" has the meaning ascribed to it in Schedule 7;

"Deliberate Act" means any act or omission committed by the Train Operator which

(a) is a serious and substantial departure from good industry practice; and

(b) shows a material disregard for any harmful, foreseeable and avoidable consequences that would be reasonably likely to result from such act or omission.

but shall not include an act or omission arising solely by way of an error of judgement or mistake unless such error of judgement or mistake is repeated on more than one occasion; and in the case of a Relevant Staff Member where such error of judgement or mistake occurs at least 6 months after the Relevant Staff Member has received training on operational control of the relevant ETCS Equipment.

"Disruption Sum" means the Disruption Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

"Enhanced Planned Disruption Sum" has the meaning ascribed to it in Schedule 4;

"Empty Third Party Train" means any empty passenger train or any Ancillary Movement;

"ETCS" means the European Train Control System;

"ETCS Amendments" means any amendments made to this Schedule 8 (including the adjustment of the Network Rail Benchmark and the Train Operator Benchmark) and to any other provisions of this contract in accordance with paragraph 12 as a consequence of the introduction of ETCS NTC Mode on any part of the Network that is used by the Train Operator provided that the Train Operator's Specified Equipment has triggered the ETCS NTC Mode Reliability Target;

“ETCS Equipment” means the line replaceable units or equipment specified and described in Appendix 4, including all parts of such ETCS Equipment

“ETCS Final Amendments” means any amendments made to this Schedule 8 (including the adjustment of the Network Rail Benchmark and the Train Operator Benchmark) and to any other provisions of this contract, in accordance with paragraph 12 as a consequence of the introduction of ETCS Level 2 Mode on any part of the Network that is used by the Train Operator provided that the Train Operator’s Specified Equipment has triggered the ETCS Level 2 Mode Reliability Target;

“ETCS Level 2 Mode” means a level of ETCS application that allows movement authority to be passed to the train by GSM-R radio whilst track based detection systems continue to be used to support safe train separation;

“ETCS Level 2 Mode Reliability Target” means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF;

“ETCS NTC Mode” means a level of ETCS application that allows the operation of the Specified Equipment with the National Train Control System;

“ETCS NTC Mode Reliability Target” means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF across all track access contracts that include this definition;

“Financial Year t” has the meaning ascribed to it in paragraph 10.1.4;

“Financial Year t-1” means the Financial Year preceding Financial Year t;

“Financial Year t+1” has the meaning ascribed to it in paragraph 10.1.7;

“Full Cancellation” means, in relation to a Third Party Train, a cancellation of a train resulting in the train not operating at all;

“Incident Cap” in respect of each Financial Year, means the Incident Cap selected by the Train Operator in accordance with paragraph 11.1;

“Incident Cap Notice” has the meaning ascribed to it in paragraph 11.1.2;

“Initial Incident Cap Notice” has the meaning ascribed to it in paragraph 11.1.1;

“Late Notice Cancellation” means any Service which, pursuant to paragraph 5.6.1 of Schedule 4, is treated as a Cancellation for the purposes of paragraph 8.1(d);

“Late Notice Cancellation Sum” means the Late Notice Cancellation Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

“MDNR” has the meaning ascribed to it in paragraph 6.2.1(b);

“MDTO” has the meaning ascribed to it in paragraph 4.2.1(b);

“Minutes Delay” means, in respect of a Trigger of a Recording Point, the number of minutes delay in respect of that Trigger calculated in accordance with Appendix 2;

“Mission Failure” means any irrecoverable incident that is deemed to have occurred as a result of ETCS functional failure where the Train Operator has taken all reasonable steps to correct such functional failure but has been unsuccessful, the occurrence of which during any operational day or before the start of the operational day, results in the Cancellation of the Service. Mission Failures are a sub-set of the Service Affecting Failures;

“MTBMF” or **“Mean Time Between Mission Failures”** means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Mission Failures;

“MTBSAF” or **“Mean Time Between Service Affecting Failures”** means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Service Affecting Failures;

“National Train Control System” means the traditional system used by Network Rail to control trains on its network using non-train based equipment which includes but is not limited to fixed signalling and track circuits;

“Network Rail Benchmark” or **“NRB”** means, in relation to each Charging Period within the relevant Financial Year, the Network Rail Benchmark in Minutes Delay per 100 Train Operator Miles specified in Appendix 1;

“Network Rail Cap” means the Network Rail Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Network Rail Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8;

“Network Rail Charging Period Limit” means 1/13th of the Network Rail Cap;

“Network Rail Payment Rate” means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

“Normal Planned Disruption Sum” has the meaning ascribed to it in Schedule 4;

“Other Train Operator Train” means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract;

“Part Cancellation” means, in relation to a Third Party Train, a cancellation of a train resulting in the train either not commencing at its Origin or not arriving at its Destination;

“Performance Data Accuracy Code” has the meaning ascribed to it in Part B of the Network Code;

“Performance Sum” means an amount for which the Train Operator or Network Rail is liable under one of paragraphs 4 and 6 following a Charging Period in relation to Minutes Delay in that Charging Period and the preceding Charging Periods, as adjusted in accordance with paragraph 10;

“Planned Incident” means an incident in connection with a Restriction of Use to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Working Timetable;

“Prolonged Disruption” means the operation of Services in accordance with the Working Timetable on any part of the Network (for which there is no reasonably practicable diversionary route) being prevented for more than one Week as a result of any event or circumstance Attributable to Network Rail, but excluding from such events and circumstances Restrictions of Use, strikes, any kind of industrial action (on the part of any person) and the direct effects of the weather;

“Prolonged Disruption Amount” means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraphs and 2.7.1 and 2.7.2 of Schedule 7;

“Prolonged Disruption Sum” means the Prolonged Disruption Sum calculated in accordance with paragraph 7;

“Railway Operational Code” has the meaning ascribed to it in Part H of the Network Code;

“Recording Point” means a location at which Network Rail records the times at which trains arrive at, pass or depart from that location;

“Recovery Time” means additional time incorporated in the Working Timetable to allow a train to regain time lost in delay during an earlier part of its journey;

“Relevant Staff Member” means the person(s) appointed from time to time by the Train Operator to be in operational control of the relevant Specified Equipment;

“Relevant Train Operator Mileage” has the meaning ascribed to it in paragraph 10.1.1;

“Service Affecting Failures” means an independent failure(s) that disrupts or delays a Service.;

“Service Operating Hours” means the hours accumulated by Specified Equipment fitted with ETCS Equipment whilst operational. In the case of such Specified Equipment powered by diesel engines ‘operational’ means when the diesel engine is running and in the case of such Specified Equipment powered by electricity ‘operational’ means when the pantograph or collector shoe is connected to the overhead catenary or third rail as applicable;

“Service Variation” has the meaning ascribed to it in Schedule 4;

“Third Party Train” means a train other than a train operated by the Train Operator under this contract;

“Third Party Train Mileage” has the meaning ascribed to it in paragraph 10.1.1;

“Total Actual Operated Mileage” has the meaning ascribed to it in paragraph 10.1.1;

“Traffic Growth” has the meaning ascribed to it in paragraph 10.1.1;

“Traffic Reduction” has the meaning ascribed to it in paragraph 10.1.1;

“Train Operator Benchmark” or **“TOB”** means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Charging Period, as specified in Appendix 1 and adjusted in accordance with paragraph 10.1;

“Train Operator Cap” means the Train Operator Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Train Operator Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8;

“Train Operator Charging Period Limit” means 1/13th of the Train Operator Cap;

“Train Operator Payment Rate” means the Train Operator Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7; and

“Train Operator Omission” means any failure of or defect in or damage to the Network (excluding fair wear and tear) arising from:

- (a) the improper operation of trains under this contract;

- (b) a breach of the Train Operator's Safety Obligations or of the terms of this contract; or
- (c) any act or omission of the Train Operator's staff or agents, contractors or sub-contractors in breach of this contract;

"Trigger" means the act of a train arriving at, passing or departing from a Recording Point.

2. General

2.1 Performance monitoring system recordings

For the purposes of this Schedule 8, Network Rail shall use recordings made using the Performance Monitoring System, including the times at which Services and Third Party Trains Trigger a Recording Point. In respect of Services only, and where appropriate, Network Rail may require the Train Operator to make the relevant entry to record such times on the Performance Monitoring System. Network Rail and the Train Operator shall each comply with and be bound by the Performance Data Accuracy Code, and the provisions of the Performance Data Accuracy Code shall apply to this Schedule 8.

2.2 Liability for Short Notice Service

Network Rail shall, notwithstanding that it shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code.

2.3 Mitigation of delays

The parties shall take reasonable steps to avoid and mitigate the effects of any incidents which cause delay to or cancellation of any trains, and any failure to take such steps shall be regarded as a separate incident.

2.4 Calculation of Minutes Delay

Appendix 2 (Calculation of Minutes Delay) shall have effect.

3. Diagnosis of delays

3.1 Attributing delays

Network Rail shall, using the information recorded under paragraph 2.1, identify whether each minute of delay included in Minutes Delay in respect of a Service or Third Party Train is:

- (a) Attributable to the Train Operator;
- (b) Attributable to Network Rail; or
- (c) Attributable to both the Train Operator and Network Rail.

3.2 Delays Attributable to both the Train Operator and Network Rail

If a delay is Attributable to both the Train Operator and Network Rail, the associated Minutes Delay shall be allocated equally to the Train Operator and to Network Rail.

3.3 *Unexplained delays Attributable to Network Rail*

If the cause of the delay to or cancellation of a Service which occurs on the Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to Network Rail.

3.4 *Unexplained delays Attributable to the Train Operator*

If the cause of the delay to or cancellation of a Service which occurs off the Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to the Train Operator.

3.5 *Identifying delaying incidents*

The parties shall co-operate with each other by providing all such information to one another as is reasonably practicable regarding the identification of the incidents which cause delay to or cancellation of any Service or Third Party Train.

3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

4. Minutes Delay in respect of Train Operator performance

4.1 *Prescribed delay period*

4.1.1 For the purposes of this paragraph 4, the aggregate Minutes Delay to Third Party Trains Attributable to the Train Operator arising as a result of any one incident or event shall be capped at the Incident Cap, so that any such minutes in excess of the Incident Cap shall be disregarded.

4.1.2 Any Full Cancellation of a Third Party Train (other than an Empty Third Party Train) which is Attributable to the Train Operator shall equate to 30 Minutes Delay and any Part Cancellation of a Third Party Train (other than an Empty Third Party Train) which is Attributable to the Train Operator shall equate to 15 Minutes Delay.

4.2 *Train Operator performance against TOB*

4.2.1 In respect of each Charging Period:

- (a) the Minutes Delay to Third Party Trains which are Attributable to the Train Operator; and
- (b) that portion of Minutes Delay to Third Party Trains which are Attributable to both the Train Operator and Network Rail which is allocated to the Train Operator (the aggregate Minutes Delay under (a) and (b) being referred to as "**MDTO**"),

in each case as adjusted in accordance with paragraph 4.1, shall be converted into a per 100 Train Operator Miles figure (the "**Adjusted MDTO**") using the formula below:

$$\text{Adjusted MDTO} = \frac{\text{MDTO}}{100 \text{ Train Operator Miles}}$$

4.2.2 The Adjusted MDTO calculated in accordance with paragraph 4.2.1 shall then be compared with the TOB and:

- (a) if the Adjusted MDTO is less than TOB, Network Rail shall be liable to the Train Operator for a Performance Sum equal to:

$$((\text{TOB} - \text{the Adjusted MDTO}) \times \text{Train Operator Payment Rate}) \times \left(\frac{\text{CPCM}}{100} \right)$$

where:

CPCM means the total number of Contract Miles operated by the Train Operator in the relevant Charging Period;

- (b) if the Adjusted MDTO exceeds TOB, the Train Operator shall be liable to Network Rail for a Performance Sum equal to:

$$((\text{the Adjusted MDTO} - \text{TOB}) \times \text{Train Operator Payment Rate}) \times \left(\frac{\text{CPCM}}{100} \right)$$

where CPCM has the meaning ascribed to it in paragraph 4.2.2(a); and

- (c) if the Adjusted MDTO is equal to TOB, neither party shall be liable to the other for a Performance Sum under this paragraph 4.2.

5. Cancellations of or delays to Restrictions of Use Attributable to the Train Operator

If a Restriction of Use is cancelled or the commencement of a Restriction of Use is delayed, in either case for a reason Attributable to the Train Operator, then, in respect of the cancellation of or delay to such Restriction of Use, the Train Operator shall be liable to pay Network Rail a sum equal to:

- (a) in the case of a cancellation of a Restriction of Use, the Disruption Sum; or
- (b) in the case of a delay to the commencement of a Restriction of Use, one quarter of the Disruption Sum multiplied by the number of hours by which the commencement is delayed, up to a maximum of four hours. For the purposes of this paragraph 5(b) part of an hour shall be treated as an entire hour.

6. Minutes Delay in respect of Network Rail performance

6.1 Cancellations

For the purposes of this paragraph 6, in respect of any Service which is a Cancellation:

- (a) if the Service is a Cancellation as defined in paragraph 8.1(a), there shall not be any Minutes Delay in respect of the Service Attributable to Network Rail;
- (b) if the Service is a Cancellation as defined in paragraph 8.1(b), there shall be disregarded any Minutes Delay in respect of the Service after the first 12 hours aggregate of Minutes Delay; and
- (c) if the Service is a Cancellation as defined in paragraph 8.1(c), there shall be disregarded any Minutes Delay in respect of the Service after the time at which the Service arrives at the point on or off the Network where it subsequently becomes a Cancellation.

6.2 Network Rail performance against NRB

In respect of each Charging Period:

6.2.1

- (a) the Minutes Delay to Services which are Attributable to Network Rail; and
- (b) that portion of Minutes Delay to Services which are Attributable to both the Train Operator and Network Rail which is allocated to Network Rail (the aggregate Minutes Delay under (a) and (b) being referred to as “**MDNR**”),

in each case as adjusted in accordance with paragraph 6.1, shall be converted into a per 100 Train Operator Miles figure (the “**Adjusted MDNR**”) using the following formula:

$$\text{Adjusted MDNR} = \frac{\text{MDNR}}{100 \text{ Train Operator Miles}}$$

6.2.2 the Adjusted MDNR calculated in accordance with paragraph 6.2.1 shall then be compared with the NRB and:

- (a) if the Adjusted MDNR is less than NRB, the Train Operator shall be liable to Network Rail for a Performance Sum equal to:

$$((\text{NRB} - \text{the Adjusted MDNR}) \times \text{Network Rail Payment Rate}) \times \left(\frac{\text{CPCM}}{100} \right)$$

where:

CPCM means the total number of Contract Miles operated by the Train Operator in the relevant Charging Period;

- (b) if the Adjusted MDNR exceeds NRB, Network Rail shall be liable to the Train Operator for a Performance Sum equal to:

$$((\text{the Adjusted MDNR} - \text{NRB}) \times \text{Network Rail Payment Rate}) \times \left(\frac{\text{CPCM}}{100} \right)$$

where CPCM has the meaning ascribed to it in paragraph 6.2.2(a); and

- (c) if the Adjusted MDNR is equal to NRB, neither party shall be liable to the other for a Performance Sum under this paragraph 6.2.

7. Prolonged Disruption

7.1 Prolonged Disruption Sum calculation

In respect of each Week during which any Prolonged Disruption continues, the Prolonged Disruption Sum shall be calculated in accordance with the following formula:

$$\text{Prolonged Disruption Sum} = \text{PDA} \times \text{S} \times \text{M}$$

where:

PDA is the Prolonged Disruption Amount;

- S is one quarter of the number of Services operated during the four Weeks immediately before the first Week of the Prolonged Disruption over that part of the Network subject to the Prolonged Disruption; and
- M is the multiplier set out in the table below in respect of that Week of the Prolonged Disruption:

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2
Week 4	3
Week 5 to 13	2
Week 14 to 26	1.5

7.2 *Subsequent Prolonged Disruption*

No Prolonged Disruption Sum shall be payable in respect of Week 27 or any subsequent Week of a Prolonged Disruption.

7.3 *Network Rail liability*

7.3.1 Subject to paragraph 7.3.2 below, Network Rail shall be liable in any Charging Period for the Prolonged Disruption Sum in respect of each Prolonged Disruption of a Service Planned to depart its Origin in that Charging Period.

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement.

8. **Cancellation**

8.1 *Cancellation*

“**Cancellation**” means any Service:

- (a) which does not depart from its Origin within 12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within 12 hours after the time at which it is Planned to depart and arrives at its Destination more than 12 hours after the

time at which it is Planned to arrive, and in respect of which no Diverted Service has been agreed; or

- (c) which departs from its Origin within 12 hours after the time at which it is Planned to depart but does not arrive at its Destination, and in respect of which no Diverted Service has been agreed,

in each case where at least 6 hours of the delay to the Service is Attributable to Network Rail; or

- (d) in respect of which Network Rail:
 - (1) nominates an Alternative Train Slot for a reason which is Attributable to Network Rail under paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such Train Slot and:
 - (i) does not propose a different Alternative Train Slot; or
 - (ii) proposes a different Alternative Train Slot and this is not accommodated by Network Rail as a Train Operator Variation; or
 - (2) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

8.2 *Network Rail liability*

8.2.1 Subject to paragraphs 8.2.2, 8.2.3 and 8.3 below, and paragraphs 4.5, 5.6 and 7.4 of Schedule 4, Network Rail shall be liable in any Charging Period for the Cancellation Sum in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

8.2.2 Network Rail shall not be liable under this paragraph 8 for any Cancellation Sum in respect of:

- (a) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement; or
- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

8.2.3 In respect of any Cancellation which is a Late Notice Cancellation, Network Rail shall not be liable for the Cancellation Sum in respect of that Late Notice Cancellation pursuant to paragraph 8.2.1 above but shall instead be liable for the Late Notice Cancellation Sum in respect of that Late Notice Cancellation.

8.3 *Late presentation of Service*

Network Rail shall have no liability to the Train Operator under the terms of this Schedule 8 where a Service is presented to Network Rail after the time at which it is Planned to depart its Origin to the extent such late presentation leads to:

- (a) a Cancellation as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code; or
- (b) a conflict with any restrictions on the use of the Network contained in the Timetable Planning Rules.

9. Payment

9.1 *Aggregate Net Liability of Network Rail and the Train Operator for Performance Sums*

9.1.1 The Aggregate Net Liability of Network Rail for a Performance Sum in respect of any Charging Period shall not exceed the Network Rail Charging Period Limit.

9.1.2 Subject to paragraph 9.1.3, if Network Rail would otherwise be liable for a Performance Sum which exceeds the Network Rail Charging Period Limit, then the amount by which such claim exceeds the Network Rail Charging Period Limit shall be taken into account when calculating Network Rail's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.3 In respect of any Financial Year, the Aggregate Net Liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.

9.1.4 The Aggregate Net Liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.

9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit shall be taken into account when calculating the Train Operator's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.6 In respect of any Financial Year, the Aggregate Net Liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.

9.1.7 In this paragraph 9.1, the "**Aggregate Net Liability**" of a party means, in respect of a Charging Period or Financial Year, its liability after setting off the liability of the other party to it under the same provisions in respect of the same period.

9.2 *Issue of invoice or credit note*

9.2.1 In respect of each Charging Period, subject to paragraph 9.1, the liabilities of the Train Operator and of Network Rail for any Performance Sums (as such Performance Sums may be adjusted under paragraph 10), Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums shall be set off against each other, and Network Rail shall issue an invoice or credit note as appropriate in respect of the balance, if any, within 28 days after the end of such Charging Period.

9.2.2 The invoice or credit note issued under paragraph 9.2.1 shall show:

- (a) any Performance Sums, Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums for which Network Rail or the Train Operator is liable; and
- (b) any matter referred to in Appendix 3 which the Train Operator or Network Rail has disputed under paragraph 3 of Appendix 3 and which is still in dispute.

9.3 *Resolution of disputes*

9.3.1 Without prejudice to Clause 13, Part B of the Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.

9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

10. **Reviews of Benchmarks, Network Rail Cap and Train Operator Cap**

10.1 *Adjustments to the Train Operator Benchmark*

10.1.1 In this paragraph 10:

"Baseline Annual Contract Mileage" means the amount determined in accordance with paragraph 10.2.3;

"Baseline Network Mileage" means the amount determined in accordance with paragraph 10.1.3;

"Relevant Train Operator Mileage" means, in respect of any Financial Year, the aggregate mileage travelled by all empty coaching stock and freight services operated by the Train Operator under this contract during that Financial Year as recorded in Network Rail's billing systems (unless there is a manifest error in such figure);

"Third Party Train Mileage" means the aggregate mileage travelled by all passenger services, empty coaching stock and freight services on the Network during the Financial Year in question as recorded in Network Rail's billing systems (unless there is a manifest error in such figure), excluding the Relevant Train Operator Mileage;

"Total Actual Operated Mileage" means, in respect of any Financial Year, the aggregate of:

- (a) the Relevant Train Operator Mileage for that Financial Year; and
- (b) the Third Party Train Mileage for that Financial Year;

"Traffic Growth" means the amount (if any) by which the Actual Mileage t exceeds the Baseline Network Mileage, expressed as a percentage of the Baseline Network Mileage; and

“Traffic Reduction” means the amount (if any) by which the Actual Mileage t is less than the Baseline Network Mileage, expressed as a percentage of the Baseline Network Mileage.

10.1.2 The Train Operator Benchmark that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Train Operator Benchmark specified in Appendix 1 as adjusted in accordance with this paragraph 10.1.

10.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Baseline Network Mileage, as specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.1.3(b).
- (b) If, in accordance with paragraph 10.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year $t+1$ and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 10.1, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

10.1.4 Within 28 days after the last day of each Financial Year (**“Financial Year t ”**), Network Rail shall determine:

- (a) the Total Actual Operated Mileage for Financial Year t (the **“Actual Mileage t ”**); and
- (b) the difference (whether positive or negative) between the Actual Mileage t and the Baseline Network Mileage, in each case expressed as a percentage of the Baseline Network Mileage.

10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of the Traffic Growth or Traffic Reduction (as the case may be), Network Rail shall:

- (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing of:
 - (i) the Actual Mileage t ;
 - (ii) the Baseline Network Mileage;
 - (iii) Network Rail’s calculation of the Traffic Growth or Traffic Reduction (as the case may be) in accordance with paragraph 10.1.4(b); and
 - (iv) Network Rail’s determination of the Adjusted Train Operator Benchmark;
- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar

provision to this paragraph 10.1) such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations and determinations under this paragraph 10.1; and

- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing that the same Adjusted Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1.

10.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determination under paragraph 10.1.5(a)(iv).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 10.1.7.
- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for resolution in accordance with the ADRR save that the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall (i) have regard to any relevant criteria and/or policy statement most recently issued by ORR and/or any guidance issued by ORR in relation to the matter referred for resolution and (ii) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 10.1 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 10.1 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 10.1.6(c), and to be bound by the determination, even if, either:

- (A) pursuant to paragraph 10.1.6(a), the Train Operator has notified Network Rail that it agrees with Network Rail's determination notified pursuant to paragraph 10.1.5(a)(iv); and/or
- (B) the determination of the relevant ADRR Forum differs from Network Rail's determination pursuant to paragraph 10.1.5(a)(iv) with which the Train Operator agreed.

10.1.7 The Train Operator Benchmark in respect of each Charging Period within the Financial Year immediately following Financial Year t ("**Financial Year t+1**") and, subject to paragraph 10.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

$$ATOB = TOB \times [(Ta \times CF)+1]$$

where:

ATOB means the Adjusted Train Operator Benchmark;

TOB means the current Train Operator Benchmark;

Ta means the Traffic Growth or Traffic Reduction (as applicable) for Financial Year t, provided that:

- (i) in the case of Traffic Growth, for the purposes of this formula "Ta" shall be a positive figure so that the TOB is increased to reflect the Traffic Growth; and
- (ii) in the case of Traffic Reduction, for the purposes of this formula "Ta" shall be a negative figure so that the TOB is decreased to reflect the Traffic Reduction;

CF is 1.044 (being the "congestion factor").

10.1.8 When the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7 then, subject to paragraph 10.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 10.1.7.

10.1.9 If a reference is made to a relevant ADRR Forum in accordance with paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the relevant ADRR Forum makes its determination pursuant to paragraph 10.1.6(c). Following the relevant ADRR Forum's determination pursuant to paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the Adjusted Train Operator Benchmark as determined, as the case may be, by (i) the relevant ADRR Forum or (ii) following the relevant ADRR Forum's determination pursuant to paragraph 10.1.6(c), the parties in accordance with this paragraph 10.1.

10.1.10 Promptly following any adjustment to the Train Operator Benchmark under this paragraph 10.1, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
 - (b) any payments already made in respect of Performance Sums,
- in each case relating to the Charging Periods in Financial Year t+1.

10.1.11 Any statement issued by Network Rail pursuant to paragraph 10.1.10 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 9.2.

10.2 *Adjustments to the Network Rail Cap and Train Operator Cap*

10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraphs 2.7.1 and 2.7.2 of Schedule 7, provided that no adjustment shall be made to the Network Rail Cap or the Train Operator Cap pursuant to the following subparagraphs of this paragraph 10.2 prior to 1 April 2015.

10.2.2 Within 28 days after the last day of Financial Year t, Network Rail shall notify the Train Operator in writing of:

- (a) the total number of Contract Miles operated by the Train Operator during Financial Year t (the “**Annual Contract Mileage**”);
- (b) Network Rail’s determination as to whether or not the Annual Contract Mileage for Financial Year t exceeds or is less than the Baseline Annual Contract Mileage by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual Contract Mileage (the “**Annual Contract Mileage Variation**”); and
- (c) if Network Rail determines that there has been an Annual Contract Mileage Variation, Network Rail’s proposal for an adjusted Network Rail Cap and/or Train Operator Cap in respect of Financial Year t+1, in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the Baseline Annual Contract Mileage specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.2.3(b).
- (b) If, in accordance with paragraph 10.2.2(b), Network Rail determines that there has been an Annual Contract Mileage Variation, then the Baseline Annual Contract Mileage for Financial Year t+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Contract Mileage pursuant to this paragraph 10.2.3(b) shall be the Annual Contract Mileage for the Financial Year t in which the Annual Contract Mileage Variation has occurred.

10.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the parties shall endeavour to agree whether the

Network Rail Cap and/or the Train Operator Cap should be adjusted in accordance with this paragraph 10.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2 shall be subject to the prior approval of ORR.

10.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Cap and/or the Train Operator Cap, the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.

10.2.6 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, either:

- (i) the parties fail to reach agreement; or
- (ii) prior to the expiry of that 56 day period both parties agree that agreement is unlikely to be reached prior to expiry of that period,

the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine the matter. The parties agree to abide by any determination issued by ORR.

10.2.7 Any adjustment to the Network Rail Cap and/or the Train Operator Cap shall take effect only when it has been approved by ORR and, unless otherwise specified by ORR, any such adjustment shall take effect from 1 April in Financial Year t+1.

10.2.8 Promptly following any adjustment to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
- (b) any payments already made in respect of Performance Sums,

in each case relating to the Charging Periods in Financial Year t+1.

10.2.9 Any statement issued by Network Rail pursuant to paragraph 10.2.8 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 9.2.

11. Selection by the Train Operator of the Incident Cap

11.1 Selection by the Train Operator of the Incident Cap

11.1.1 On or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap it wishes to apply (the "**Initial Incident Cap Notice**"), and the Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in the column adjacent to the Incident Cap selected by the Train

Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

- 11.1.2 The Train Operator may change the level of Incident Cap previously selected by it (either in the Initial Incident Cap Notice or any subsequent Incident Cap Notice issued pursuant to this paragraph 11.1.2) with effect from 1 April in any Financial Year by notifying Network Rail in writing of the level of Incident Cap it wishes to apply for that Financial Year (the “**Incident Cap Notice**”). Any such Incident Cap Notice must be served by the Train Operator on Network Rail by no later than 6 weeks prior to 1 April in the Financial Year from which the Train Operator wishes the new level of Incident Cap to apply, and the Incident Cap Access Charge Supplement Rate applicable for that and each subsequent Financial Year shall be the rate set out in the column adjacent to the Incident Cap selected by the Train Operator in the Incident Cap Notice until it is replaced by a different level of Incident Cap selected by the Train Operator pursuant to this paragraph 11.1.2.

11.2 Level of Incident Cap and Incident Cap Access Charge Supplement Rate

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps:

Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period)
1, 000 minutes	0.1041
2, 000 minutes	0.0473
3, 000 minutes	0.0292
4, 000 minutes	0.0215
5, 000 minutes	0.0152
6, 000 minutes	0.0104
7, 000 minutes	0.0066
8, 000 minutes	0.0037
9, 000 minutes	0.0008
10, 000 minutes	0.0007
No Incident Cap	None

12. **ETCS Amendments and ETCS Final Amendments**

12.1 *Circumstances in which ETCS Amendments and ETCS Final Amendments can be made*

- (a) Either party may by notice to the other propose ETCS Amendments or ETCS Final Amendments.
- (b) ORR may make ETCS Amendments or ETCS Final Amendments, subject to complying with paragraph 12.3.

12.2 *ETCS Amendments and ETCS Final Amendments agreed by the parties*

- (a) A party that wishes to make ETCS Amendments or ETCS Final Amendments shall serve a notice on the other party that:
 - (i) specifies as far as possible the proposed ETCS Amendments or proposed ETCS Final Amendments and the date from which they are to have effect; and
 - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments or proposed ETCS Final Amendments and setting out the reasons for making them; and
 - (iii) gives broad effect to the principle that the liability of the parties under this Schedule 8 (all other things being equal) is no greater after the implementation of any ETCS Amendments or ETCS Final Amendments than it was prior to the implementation of those ETCS Amendments or ETCS Final Amendments.
- (b) The party receiving a notice under paragraph 12.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, and in any event within 20 Working Days following service of a response pursuant to paragraph 12.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments or proposed ETCS Final Amendments and the date on which they are to have effect.
- (d) If:
 - (i) the parties agree to make ETCS Amendments or ETCS Final Amendments pursuant to paragraph 12.2(c); or
 - (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 12.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,they shall notify ORR.

12.3 *ORR right to approve, determine or make ETCS Amendments or ETCS Final Amendments*

- (a) If ORR:
 - (i) receives a notification under paragraph 12.2(d); or
 - (ii) proposes to make ETCS Amendments or ETCS Final Amendments itself,

then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments or ETCS Final Amendments it shall:

- (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments or ETCS Final Amendments; and
 - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments or ETCS Final Amendments shall have effect.
- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 12.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

12.4 Amendments to sub-paragraph (e) of the definition of "Attributable to Network Rail" as a consequence of ETCS Amendments

With effect from the implementation of any ETCS Amendments in accordance with paragraphs 12.2 and/or 12.3, sub-paragraph (e) of the definition of "Attributable to Network Rail" in paragraph 1 shall be replaced with the following wording:

"any delay or cancellation occurring on or off the Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication of such ETCS Equipment when operating in NTC Mode or directly caused by the Deliberate Act of the Train Operator) that has been allocated as the responsibility of the Train Operator in the Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules."

12.5 Amendments to Schedule 8 as a consequence of ETCS Final Amendments

With effect from the implementation of any ETCS Final Amendments in accordance with paragraphs 12.2 and/or 12.3, the amendments to Schedule 8 listed in Appendix 5 shall have effect.

12.6 Amendments to Schedule 8 as a consequence of ETCS Amendments or Final Amendments

The parties acknowledge and agree that any amendments made to Schedule 8 pursuant to this paragraph 12 (including and changes to the Train Operator Benchmark and the Network Rail Benchmark) must also apply to any other operator whose Access Agreement in relation to track includes a provision similar to this paragraph 12 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 12.2(d)(ii) even if, either:

- (A) pursuant to paragraph 12.2, the Train Operator has notified Network Rail that it agrees with Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments; and/or
- (B) the determination of any ETCS Amendments or ETCS Final Amendments by ORR differs from Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments with which the Train Operator agreed.

APPENDIX 1: PERFORMANCE

Train Operator Performance

Train Operator Payment Rate £43.44 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator

Train Operator Cap

Disruption Sum £2,126

Network Rail Performance

Network Rail Payment Rate £19.13 per Minutes Delay to Services which are Attributable to Network Rail

Network Rail Cap

Prolonged Disruption Amount means an amount equal to the Late Notice Cancellation Sum

Benchmarks

Train Operator Benchmark

Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to each Charging Period shall be 2.37 Minutes Delay per 100 Train Operator Miles.

Network Rail Benchmark

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be 7.20 Minutes Delay per 100 Train Operator Miles;

Cancellation Sum

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,813 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,835 for each Cancellation equal to or above the Cancellation Threshold; and
- (c) the "**Cancellation Threshold**" in any Charging Period shall be 0.41 per cent of the total number of Services operated by the Train Operator in that Charging Period.

Late Notice Cancellation Sum

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,566.

Baseline Network Mileage

The Baseline Network Mileage shall be 351,602,955.

Baseline Annual Contract Mileage

The Baseline Annual Contract Mileage shall be 10,449,519.

APPENDIX 2: CALCULATION OF MINUTES DELAY

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
 - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
 - (b) in respect of each other recorded Trigger, the lesser of:
 - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
 - (ii) the greater of $((A1-A2) + B)$ and zero,where:
 - A1 is the number of minutes between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);
 - A2 is the Planned time between the Triggers mentioned in (A) above; and
 - B is any Recovery Time between such Triggers.
2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

APPENDIX 3: PERFORMANCE STATEMENTS

Interim statements provided by Network Rail

1. As soon as reasonably practicable after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), Network Rail shall provide to the Train Operator the following interim statements:
 - (a) an interim statement listing all incidents which:
 - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
 - (ii) are Attributable to the Train Operator;
 - (iii) are wholly or partly MDTO (as calculated in accordance with paragraph 4.2.1 of this Schedule 8); and
 - (iv) wholly or partly caused Minutes Delay for any Third Party Train, including the aggregate number of Minutes Delay in respect of Third Party Trains for each such incident;
 - (b) an interim statement listing all incidents which:
 - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
 - (ii) are Attributable to Network Rail; and
 - (iii) are wholly or partly MDNR (as calculated in accordance with paragraph 6.2.1 of this Schedule 8);
 - (c) an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable;
 - (d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and
 - (e) an interim statement listing:
 - (i) the total Contract Miles; and
 - (ii) the total number of Services,in each case operated by the Train Operator during that Charging Period.

Interim statements provided by the Train Operator

2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, the Train Operator shall provide to Network Rail the following interim statements:

- (a) an interim statement listing all Cancellations occurring during that Week for which the Train Operator considers it is entitled to a Cancellation Sum, and any Late Notice Cancellations for which the Train Operator considers it is entitled to a Late Notice Cancellation Sum, in each case under paragraph 8 of this Schedule 8;
- (b) an interim statement listing all Prolonged Disruptions occurring or continuing during that Week for which the Train Operator considers it is entitled to a Prolonged Disruption Sum under paragraph 7 of this Schedule 8; and
- (c) an interim statement listing all Service Variations arising during that Week for which the Train Operator considers it is entitled to a Service Variation Sum under Schedule 4.

Dispute of interim statement

- 3. Within two Working Days of receipt of any interim statement under paragraph 1 or 2 of this Appendix the recipient shall notify the provider of the interim statement of any reason why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.
- 4. Within the next five Working Days after notification of any dispute under paragraph 3, nominated representatives of the parties shall meet and attempt to resolve that dispute.
- 5. If any matter is still in dispute ten Working Days after the meeting held under paragraph 4 above, either party may refer such matter for resolution under paragraph 9.3.1 of this Schedule 8.

Deemed agreement

- 6. Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph 3 that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

Further interim statement

- 7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:
 - (a) Attributable to the Train Operator;
 - (b) Attributable to Network Rail; or
 - (c) Attributable to both the Train Operator and Network Rail,but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.
- 8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing

the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

Statement of adjustment

9. If Condition B3.3 of the Network Code (Adjustment to prior results) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.
10. Any statement issued by Network Rail under paragraph 9 shall be accompanied by an adjusting invoice or credit note.

APPENDIX 4: ETCS EQUIPMENT

European Vital Computer (EVC)
European Vital Computer
EVC fan
Driver Machine Interface (DMI)
Single DMI
DMI switch
ETCS Loudspeaker
Train Interface Unit (TIU)
Cabinets (EVC, NVC, JRU housings)
Safe relays module
Braking Activation Device
Balise Antenna
Eurobalise Antenna
Juridical Recorder Unit (JRU)
JRU
JRU health indicator
Non-Vital Computer (NVC)
Non-Vital Computer
GSM-R roof antennas
Odometry System
Radar type I (Siemens)

Radar type II (Deuta)
Odometry Pulse Generator type I
Odometry Pulse Generator type II (if applicable)
Control and Maintenance Workstations
Maintenance laptop SW
Power Supply Units (PSU)
DC-DC converter
Overvoltage protection
Mini circuit breaker
Interface Equipment
Additional speed display
Cab holdover button
ETCS acknowledge button
ETCS isolation switch
Klip station
AWS/TPWS Equipment
TPWS Control Unit 4th generation
TPWS Driver Machine Interface 4th generation
TPWS full isolation indicator
AWS visual indicator unit
AWS audible indicator and speech unit
AWS isolation/fault indicator
Cables, connections, labelling and other miscellaneous items
Cables

Brackets
Sundries
Junction boxes

APPENDIX 5: AMENDMENTS TO SCHEDULE 8 AS A CONSEQUENCE OF ETCS FINAL AMENDMENTS

1. From the effective date of any ETCS Final Amendments agreed in accordance with paragraph 12, the following amendments to Schedule 8 shall also take effect:

- (i) Paragraph 1: Definition of "Attributable to Network Rail";

delete "; or" from the end of sub-paragraph (d) and replace with a full-stop.

delete sub-paragraph (e) in its entirety.

- (ii) Paragraph 1: Definition of "Attributable to the Train Operator";

delete the following wording from sub-paragraph (iii):

"(with the exception of those failures, defects or miscommunications contemplated in sub-paragraph (e) of the definition of "Attributable to Network Rail")"

- (iii) Paragraph 1: Delete the following definitions:

"Deliberate Act"

"ETCS"

"ETCS Amendments"

"ETCS Final Amendments"

"ETCS Level 2 Mode"

"ETCS Level 2 Mode Reliability Target"

"ETCS NTC Mode"

"ETCS NTC Mode Reliability Target"

"Mission Failure"

"MTBMF"

"MTBSAF"

"National Train Control System"

"Relevant Staff Member"

"Service Affecting Failures"

"Service Operating Hours"

- (iv). Delete paragraph 12 in its entirety