

## SCHEDULE 4: VARIATIONS TO SERVICES

*[Note: as a result of the changes to this Schedule 4, the following consequential changes have been made to Schedule 5:*

*- the following definition of “Revised Base Service” has been inserted in paragraph 1.1 of Schedule 5:*

*““Revised Base Service” has the meaning ascribed to it in Schedule 4;”*

*- paragraph 4.1 of Schedule 5 which lists Services under the contract has been expanded to include the following reference:*

*“(e) any Revised Base Service;”]*

*[Note: as there is a link between Schedules 8 and 4, and Schedule 8 is still being consulted on, as a result of that consultation further consequential amendments may need to be made to this Schedule 4.]*

### PART 1 - GENERAL PROVISIONS

#### 1 Definitions

##### 1.1 Definitions

In this Schedule 4 unless the context otherwise requires:

“**Actual Costs**” means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

- (a) any benefit arising from a Category 3 Disruption including any decrease in Variable Costs as a consequence of a Category 3 Disruption; and
- (b) any Enhanced Planned Disruption Sum due to the Train Operator in connection with the relevant Service affected by a Category 3 Disruption;

“**Actual Costs Claim Notice**” has the meaning specified in paragraph 3.4.3;

“**Applicable Service**” means a Revised Base Service, a Diverted Service or any Service which suffers a Cancellation;

“**Base Service**” means:

- (a) ~~(a)~~—a Planned Service which is not able to operate as Planned; or

(b) ~~(b)~~—a Train Slot in respect of a Level One Right or a Level Two Right which is not able to be entered in the Working Timetable in accordance with those rights;

in either case because of the non-availability of any part of the Network as a result of a Network Rail Early Notice Possession;

“**Category 1 Disruption**” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than ~~{60}~~ minutes;
- (b) the Planned arrival time at Destination of the Revised Base Service differs from that of the Base Service by more than ~~{60}~~ minutes;
- (c) the end to end journey of the Revised Base Service exceeds that of the Base Service by more than ~~{10}~~ miles; or
- (d) the imposition of more demanding length or weight restrictions for the Revised Base Service compared to the Base Service,

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 2 Disruption or a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

“**Category 2 Disruption**” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service;
- (b) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;
- (c) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;
- (d) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5;

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- ~~(ii)~~ (ii) — ~~(ii)~~ a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

“**Category 3 Disruption**” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service and the access from the Origin or to the Destination of the Base Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route);
- (b) ~~(b)~~ there is no Revised Base Service ~~with~~ due to the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
  - (ii) the Revised Base Service does not have an applicable gauge cleared route between the Origin and the Destination where:
    - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
    - (B) the Revised Base Service operates in whole, or in part, at the relevant location within this 60 hour period;
- (c) all or part of the goods planned to be carried by the Base Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination;
- (d) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service; ~~or~~
- (e) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule ~~5~~; 5; or
- (f) the parties agree that there is a requirement for a specified number of the Train Operator’s train crew to acquire knowledge of any diversionary route which may form part of the Revised Base Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Base Service.

provided that the relevant variation arises as a direct result of a Network Rail Early Notice Possession;

“**Category 3 Disruption Trigger**” means where the ~~difference between the aggregate of the Enhanced Planned Disruption Sums due to the Train Operator for all Revised Base Services attributable to~~ Train Operator incurs Actual Costs as a consequence of any Category 3 Disruption arising from a single Network Rail Early Notice Possession ~~and the Train Operator’s Actual Costs for those relevant Revised Base Services attributable to such Category 3 Disruptions is more than £[•]~~;

“**Criteria**” means the criteria set out in paragraph 3.32 of the document entitled “Final Conclusions - Compensation for Possessions” and published by ORR on 18 August 2008;

“**Disruption Claim Notice**” has the meaning specified in paragraph 3.4.2;

“**Disruptive Event**” has the meaning ascribed to it in Part H of the Network Code;

“**Early Notice Possession**” means any Restriction of Use of all or part of the Network notified in all material respects to a Train Operator in accordance with ~~sections 4, 5 or 7~~ of the Rules of the Route prior to the Possession Notice Date;

“**Electricity for Traction**” has the meaning ascribed to it in Schedule 5;

“**Enhanced Planned Disruption Sum**” means £~~[•]~~959<sup>1</sup>;

“**Freight Capacity Charge**” has the meaning ascribed to it in Schedule 7;

“**Late Notice Actual Costs**” means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

(a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and

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<sup>1</sup> This figure is based on 2006/7 prices and will be revised to 2009/10 prices in line with the Final Determination.

(b) any Late Notice Cancellation Sum or Service Variation Sum (as the case may be) due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

“Late Notice Actual Costs Claim Notice” has the meaning specified in paragraph 9.3;

“Late Notice Actual Costs Claim Trigger” means:

(a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or

(b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

“Late Notice Cancellation” has the meaning ascribed to it in Schedule 8;

“Late Notice Cancellation Sum” has the meaning ascribed to it in Schedule 8;

“Level One Right” has the meaning ascribed to it in Schedule 5;

“Level Two Right” has the meaning ascribed to it in Schedule 5;

“Modification Notice” means a notice given by ORR to the parties which sets out:

(a) the modifications to be made to the Specified Provisions and to any other provisions of this contract which require modification as a result of the modifications to the Specified Provisions to the extent that, in ORR’s opinion, it is necessary or appropriate for such modifications to be made having regard to the Criteria; and

(b) the date or dates from which the modifications referred to in paragraph (a) are to have effect;

“Network Rail Early Notice Possession” means any Early Notice Possession other than an Operator Early Notice Possession;

“**Normal Planned Disruption Sum**” means £~~[•]~~360<sup>2</sup>;

“**Operator Early Notice Possession**” means any Early Notice Possession to the extent:

(a) ~~(a)~~—required as a result of any damage to the Network or Environmental Damage which in each case:

(i) ~~(i)~~—arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and

(ii) ~~(ii)~~—Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator; or

(b) ~~(b)~~—requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or

(c) ~~(e)~~—required in connection with a Network Change proposed by the Train Operator under Condition G3 of the Network Code.

“**Original Service**” means a Planned Service which:

(a) is affected by a Disruptive Event as described in paragraph 4.1; or

(b) is not able to operate because of the non-availability of any part of the Network as described in paragraph 5.1;

“**Planned Disruption Sum**” means a Normal Planned Disruption Sum or an Enhanced Planned Disruption Sum;

“**Possession Notice Date**” means, in respect of each Service, the day which is 84 days before the day on which the Service is Planned to depart its Origin;

[“Relevant Cancellation” has the meaning specified in paragraph 9.1;](#)

[“Relevant Service Variation” has the meaning specified in paragraph 9.2;](#)

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<sup>2</sup> [This figure is based on 2006/7 prices and will be revised to 2009/10 prices in line with the Final Determination.](#)

“**Revised Base Service**” means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D3 or D4.8 of the Network Code;

“**Round Trip**” means a Service and any associated Empty Services and Ancillary Movements;

“**Service Variation**” has the meaning attributed to it in paragraph 7.1;

“**Specified Provisions**” means (a) the definitions of “Category 1 Disruption”, “Category 2 Disruption”, “Category 3 Disruption”, “Category 3 Disruption Trigger”, “Normal Planned Disruption Sum” and “Enhanced Planned Disruption Sum”, (b) paragraphs 3.1 to 3.3, (c) paragraphs 9.1, 9.2 and 9.4 and (d) the quantum of the Late Notice Cancellation Sum specified in Appendix 1 of Schedule 8;

“**Variable Charge**” has the meaning ascribed to it in Schedule 7; and

“**Variable Costs**” means the Train Operator’s costs which vary as a result of a Category 3 Disruption, a Relevant Cancellation or a Relevant Service Variation (as the case may be) arising directly from changes in train mileage including staff, maintenance, fuel or electricity costs, the Variable Charge and the Freight Capacity Charge.

## 1.2 Interpretation

References in this Schedule to a “**Service**”, except in the definition of “Round Trip”, shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

## 2 Payment

Subject to and in accordance with this Schedule 4 and paragraph 9 of Schedule 8, Network Rail shall, in respect of each Charging Period, pay or procure payment of:

- (a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;

- (b) [a Late Notice Cancellation Sum in respect of each Late Notice Cancellation and, where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;](#)
- (c) ~~(b)~~ a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) ~~(e)~~ an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (e) ~~(d)~~ an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph [3.3.3 and in accordance with paragraph 3.3.3,](#)

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum or [one Cancellation Sum or one Late Notice Cancellation Sum](#) in respect of an Applicable Service, [whether under this Schedule 4 or under Schedule 8 or otherwise.](#)

## **PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE**

### **3 Disruption compensation**

#### *3.1 Category 1 Disruption*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for a Normal Planned Disruption Sum in respect of each Category 1 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

#### *3.2 Category 2 Disruptions*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or



- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

### 3.3 *Category 3 Disruptions*

3.3.1 Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for ~~a~~an Enhanced Planned Disruption Sum in respect of each Base Service affected by a Category 3 Disruption which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.<sup>+</sup>

3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of an Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Actual Costs Claim Notice; or
- (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall:
- (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith

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<sup>+</sup>—This is currently envisaged to be a “one way arrangement”—this is subject to the final flat rate sums agreed.

until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and

(ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or

(c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Network Rail shall:

(i) ~~3.3.3 Following the issue of an Actual Costs Claim Notice, if it is agreed or determined (in accordance with Clause 13) that the Category 3 Disruption Trigger is satisfied then Network Rail shall~~ (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause ~~13.13; and~~

(ii) pay to the Train Operator such Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

#### 3.4 *Notification, Disruption Claim Notices and Actual Costs Claim Notices*

3.4.1 The Train Operator shall notify Network Rail of any Network Rail Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Network Rail Early Notice Possession.

3.4.2 The Train Operator must notify Network Rail of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a “**Disruption Claim Notice**”).

3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail:

- (a) no later than the day falling 56 days after the end of the occurrence of the Network Rail Early Notice Possession giving rise to a Category 3 Disruption; or
- (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this ~~Access Agreement~~contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),

whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant Network Rail Early Notice Possession (an “**Actual Costs Claim Notice**”).

3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Network Rail Early Notice Possession, provided that:

- (a) each such Actual Costs Claim Notice relates to a different period covered by the relevant Network Rail Early Notice Possession; and
- (b) no Actual Costs Claim Notice can be issued after the last day for serving notice specified under paragraph 3.4.3.

### 3.5 *Planned Disruption Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Planned Disruption Sum in respect of any Round Trip.

### 3.6 *Early notice of potential Actual Cost claims*

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other

reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Network Rail Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Network Rail Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Network Rail Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

### **PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE**

#### **4 Services rescheduled following a Disruptive Event**

##### *4.1 Establishing an Alternative Train Slot*

Where there is a Disruptive Event:

(a) ~~(a)~~—to the extent that there is appropriate capacity available on the relevant part of the Network; and

(b) ~~(b)~~—subject to Part H of the Network Code and the Railway Operational Code,

Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally Bid in respect of any Service which is affected by the Disruptive Event and notify the Train Operator of it.

##### *4.2 Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Train Operator shall promptly by notice to Network Rail either:

(a) ~~(a)~~—accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train

Operator shall be treated as a Spot Bid made by the Train Operator for the Alternative Train Slot which has been accepted by Network Rail); or

(b) ~~(b)~~ reasonably reject the Alternative Train Slot nominated by Network Rail.

#### 4.3 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 4.2(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Spot Bid.

#### 4.4 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Spot Bid under paragraph 4.3, then:

(a) ~~(a)~~ Network Rail shall permit the Train Operator to make the relevant movement in accordance with that Alternative Train Slot;

(b) ~~(b)~~ the Service Characteristics of the Planned Service shall be those of the original Train Slot; and

(c) ~~(e)~~ the performance of the movement shall be measured accordingly.

#### 4.5 *Cancellation*

##### 4.5.1 Where:

(a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 4.1;

(b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3; or

(c) the Train Operator proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8 and ~~Network Rail shall be liable for the Late~~

~~Notice Cancellation Sum in respect of that Cancellation in accordance with paragraphs 8.2.3~~[paragraph 2 of Schedule 4 and paragraphs 8](#) and 9 of Schedule ~~8.8~~[shall apply.](#)

4.5.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 4.2(a); or
- (b) accepted as a Spot Bid under paragraph 4.3,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

4.6 *Part H of the Network Code*

This paragraph 4 is subject to the rights and obligations of the parties under Part H of the Network Code [and the Railway Operational Code](#).

## **5 Other variations to Planned Services**

5.1 *Non-availability of a Service*

This paragraph ~~4~~[5](#) applies if, for any reason other than:

- (a) a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified in all material respects prior to the Possession Notice Date; and
- (b) the circumstances envisaged by paragraph 4,

Network Rail nominates that any part of the Network will not be available for a Planned Service to operate at the Planned time and such non-availability is:

- (i) Attributable to Network Rail (as defined in Schedule 8); and
- (ii) known about in sufficient time for an alternative Service to be Bid into the Working Timetable as a new Planned Service.

5.2 *Establishing an Alternative Train Slot*

To the extent that there is appropriate capacity available on the relevant part of the Network, and subject to Parts D and H of the Network Code and the Decision Criteria, Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally Bid and notify the Train Operator of it.

### 5.3 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph [4.2](#),[5.2](#), the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Spot Bid made by the Train Operator for the Alternative Train Slot which has been accepted by Network Rail); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

### 5.4 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 5.3(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Spot Bid.

### 5.5 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Spot Bid under paragraph 5.4, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

## 5.6 Cancellation

### 5.6.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 5.2;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 5.3(b) and does not propose a different Alternative Train Slot under paragraph 5.4; or
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph ~~4.4~~5.4 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule ~~8~~, paragraph 2 of Schedule 4 shall apply and Network Rail shall be liable for the Late Notice Cancellation Sum in respect of that Cancellation in accordance with paragraphs 8.2.3 and 9 of Schedule 8.

### 5.6.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 5.3(a); or
- (b) accepted as a Spot Bid under paragraph 5.4,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

## **PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE**

### **6 Restrictions of Use before Possession Notice Date**

~~If~~Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Network Rail nominates that any part of the Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have no liability to the Train Operator under ~~this Part 3~~



Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

## **PART 5 – SERVICE VARIATION**

### **7 Service Variation**

#### *7.1 Service Variation*

For the purposes of this Schedule 4, “**Service Variation**” means a variation to any Service which:

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Network Rail (as defined in Schedule 8); and
- (b) has one or more of the following effects:
  - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;
  - (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;
  - (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
  - (iv) the use of at least one additional locomotive for the Diverted Service over the number for the Original Service or use of a diesel locomotive for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for that Original Service as shown in Schedule 5;
  - (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than ~~+~~12 hours;

- (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than ~~1~~12 hours; and
- (vii) while the Train Operator has Bid for the original Train Slot in accordance with Part D of the Network Code, the nomination and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Spot Bid because an act or omission of Network Rail resulted in the original Bid not being Planned in accordance with Part D.

## 7.2 *Network Rail liability*

Subject to paragraphs 7.3 and 7.4, Network Rail shall be liable in any Charging Period for a Service Variation Sum in respect of each Service Variation relating to a Service Planned to depart its Origin in that Charging Period.

## 7.3 *Service Variation Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Service Variation Sum in respect of any Round Trip.

## 7.4 *Service Variation / Cancellation*

Network Rail shall not be liable to the Train Operator for a Service Variation Sum if, following the Service Variation, the Train Operator is entitled to a Late Notice Cancellation Sum in respect of the Diverted Service.

## **PART 6 – MODIFICATION PROVISION**

### 8. *Modifications to Specified Provisions*

#### 8.1 *If at any time after 1 April 2010:*

- (a) *and before 1 October 2010, Network Rail determines that the Criteria for making modifications to the Specified Provisions have been met, it shall notify*

ORR (copied to the Train Operator) promptly in accordance with paragraph 8.3; or

(b) and before 1 August 2010, the Train Operator considers that the Criteria for making modifications to the Specified Provisions may have been met, it shall notify Network Rail (with a copy to ORR) and Network Rail shall determine whether the Criteria have been met and whether it should make a reference to ORR pursuant to paragraph 8.1(a).

8.2 Without prejudice to paragraph 8.1(a), Network Rail shall at any time after 1 April 2010 but before 1 October 2010 provide a notice to ORR and the Train Operator in accordance with paragraph 8.3 setting out its determination as to whether or not the Criteria for making modifications to the Specified Provisions have been met and where it determines that the Criteria have been met it shall notify ORR under paragraph 8.1(a) at the same time.

8.3 Any notice issued by Network Rail under paragraph 8.1(a) and/or 8.2 shall set out its reasons, supported by evidence either:

(a) explaining why it has determined that the Criteria have been met; or

(b) explaining why it has determined that the Criteria have not been met.

8.4 If ORR disagrees with Network Rail's determination notified to ORR pursuant to paragraph 8.2, ORR shall be entitled to proceed, following such consultation as it considers appropriate with Network Rail and the Train Operator, as if Network Rail had determined that the Criteria have been met and made a notification to ORR pursuant to paragraph 8.1(a).

8.5 ORR shall not be entitled to proceed to determine to what extent modifications by means of a Modification Notice shall be made unless it has first consulted the parties and such other persons, if any, as it considers appropriate (including any other operator whose access agreement in relation to track includes a similar provision to this paragraph 8) and taken into account their representations to determine whether it is appropriate to proceed.

8.6 If at any time following receipt of a notice pursuant to paragraphs 8.1 or 8.2 ORR gives notice to either or both of the parties that it requires from either or both of them any information to inform its determination as to what modifications should be made to the Specified Provisions and any other provisions of this contract which require modification as a result of the modifications to the Specified Provisions:

(a) the party of whom the request is made shall provide the requested information to ORR in accordance with any timescales specified by ORR in its notice and to the standard required by ORR; and

(b) if that party fails to provide any information requested by ORR in accordance with paragraph 8.6(a) and has not provided ORR with an explanation which is satisfactory to ORR for its failure to do so, taking into account, to the extent applicable, any revised timescales within which that party has agreed with ORR that it shall provide the requested information, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to that matter without the information in question and the party in default shall have no grounds for complaint on the basis that ORR's decision did not take into account the information requested but not supplied.

8.7 This contract shall have effect with the modifications specified in a Modification Notice from the date specified by ORR in that notice. A Modification Notice shall not have retrospective effect.

8.8 No Modification Notice shall have effect unless:

(a) ORR has first consulted the parties and such other persons, if any, as it considers appropriate in relation to the terms of the proposed Modification Notice;

(b) in the consultations referred to in paragraph 8.8(a), ORR has made available to the consultees such drafts of the proposed Modification Notice as it considers are necessary so as properly to inform them of the contents and terms of the proposed Modification Notice;

(c) ORR has given each consultee the opportunity to make representations in relation to the proposed Modification Notice and has taken into account all

such representations (other than those which are frivolous or trivial) in making its decision on such proposed Modification Notice;

(d) ORR has notified the consultees as to its conclusions in relation to the proposed Modification Notice (including by providing to each consultee a copy of the text of the proposed Modification Notice) and its reasons for those conclusions; and

(e) ORR has served a modification notice, in substantially similar terms to the Modification Notice (save to the extent ORR has set out during its consultation process its reasons for adopting a different approach) on any operator whose access agreement in relation to track includes a similar provision to this paragraph 8 on or about the same date.

## **PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS**

### **9. Late Notice Actual Costs Claims**

#### **9.1 Late Notice Actual Costs Claim arising from Relevant Cancellation**

If, pursuant to paragraph 5.6.1, Network Rail is liable for a Late Notice Cancellation Sum in respect of a Cancellation (a “**Relevant Cancellation**”), and:

(a) either:

(i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or

(ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or

(iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and

(b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Cancellation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

## 9.2 *Late Notice Actual Costs Claim arising from Relevant Service Variation*

If, pursuant to paragraph 7, Network Rail is liable for a Service Variation Sum in respect of a Service Variation (other than a Service Variation which arises from a variation to a Service which the Train Operator has accepted under paragraph 4) (a **“Relevant Service Variation”**), and:

(a) either:

(i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:

(A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and

(B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or

(ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or

(iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Original as shown in Schedule 5; or

(iv) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and

(b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

### 9.3 Late Notice Actual Costs Claim Notice

In respect of a claim for Late Notice Actual Costs arising under paragraphs 9.1 or 9.2 above, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail no later than the day falling 56 days after the occurrence of the Relevant Cancellation or Relevant Service Variation (as the case may be), and such claim must include details of the estimate of the Late Notice Actual Costs which are attributable to the Relevant Cancellation or Relevant Service Variation (as the case may be) (a "Late Notice Actual Costs Claim Notice").

### 9.4 Late Notice Actual Costs Claim Process

Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of a Late Notice Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

(a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall also pay such Late Notice Actual Costs to the Train

Operator within 56 days of receipt by Network Rail of the relevant Late Notice Actual Costs Claim Notice; or

(b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall:

(i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

(ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or

(c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Network Rail shall:

(i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

(ii) pay to the Train Operator such Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).



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Split/Merged cell	
Padding cell	

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