

## SCHEDULE 4: RULES OF THE ROUTE, RULES OF THE PLAN AND RESTRICTIONS OF USE

~~[Note: The drafting does not address how open access passenger operators will be treated if they elect not to have the full rights to compensation for all types of Restrictions of Use.]~~

### PART 1 NOT USED

### PART 2 NOT USED

## PART 3: COMPENSATION FOR RESTRICTIONS OF USE

### 1 Definitions

#### 1.1 *Defined terms*

In this Part 3 and its Appendices, unless the context otherwise requires:

- “Applicable Timetable”** means, in respect of any day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D1.6.1 as at 22:00 hours on the day prior to that day;
- “Bi-annual Timetable”** means either of the following:
- (a) the Corresponding Day Timetable for all days in the period from and including the Principal Change Date up to but excluding the immediately following Subsidiary Change Date; or
  - (b) the Corresponding Day Timetable for all days from and including the Subsidiary Change Date up to but excluding the immediately following Subsidiary Change Date or Principal Change Date, as the case may be;
- “Cancellation Minutes”** shall have the meaning ascribed to it in Schedule 8;
- “Cap”** shall have the meaning ascribed to it in Schedule 8;
- “Corresponding Day”** means, in respect of any day (the **“first day”**):
- (a) a day which is contained in the same Timetable Period as the first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or
  - (b) if no day is found under paragraph (a) above, then a day which is contained in the equivalent Timetable

	<p>Period for the time of year, in the year immediately preceding the Timetable Period which includes the first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or</p> <p>(c) if no day is found under paragraph (a) or (b) above, such other day as the parties may agree or as may be determined in accordance with paragraph 12.2;</p>
<b>“Corresponding Day Timetable”</b>	means, in relation to a Corresponding Day, the First Working Timetable or such other timetable as may be agreed between the parties or otherwise determined in accordance with paragraph 12.2;
<b>[“CTRL Possession”</b>	shall have the meaning ascribed to it in Part 4 or Part 6 of this Schedule 4 as appropriate;]
<b>“Day 42 Statement”</b>	shall have the meaning ascribed to it in paragraph 13.1(a);
<b>“Disrupted”</b>	means: <ul style="list-style-type: none"> <li>(a) cancelled;</li> <li>(b) diverted off the Route over which it was scheduled to run in the Corresponding Day Timetable; and/or</li> <li>(c) starting or finishing short in comparison with the Service as timetabled in the Corresponding Day Timetable;</li> </ul>
<b>“First Restriction”</b>	shall have the meaning ascribed to it in paragraph 2.12(a)(i);
<b>“First Restriction Period”</b>	shall have the meaning ascribed to it in paragraph 2.12(a)(ii);
<b>“First Working Timetable”</b>	means, in respect of any day, the version of the Working Timetable for that day provided by Network Rail in accordance with Condition D3.2.7, as amended pursuant to Condition D3.2.9;
<b>“Further Restriction”</b>	shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(B);
<b>“High Speed Diversion”</b>	means a situation in which a Train is diverted between successive Monitoring Points such that it travels a longer distance at a higher average speed than that normally scheduled and arrives at its destination at a time later than that specified in the First Working Timetable;
<b>“Monitoring Point”</b>	shall have the meaning ascribed to it in Schedule 8;
<b>“Network Rail Restriction of Use”</b>	means any Restriction of Use other than an Operator Restriction of Use, a CTRL Possession or, if applicable, a Thameslink Possession;

<b>“Notification Factor” or “NF”</b>	shall have the meaning ascribed to it in paragraph 9;
<b>“Operator Restriction of Use”</b>	means a Restriction of Use of the type referred to in paragraph 2.3;
<b>“Over-run”</b>	shall have the meaning ascribed to it in paragraph 2.12(a);
<b>“Period”</b>	means each consecutive period of 28 days during the term of this contract commencing at 00:00 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;
<b>“Public Holiday”</b>	means any day other than Saturday or Sunday on which the banks in the City of London are not open for business;
<b>“Recovery Allowance”</b>	means an allowance for additional time incorporated in the First Working Timetable or (where the Train Operator requests that the allowance is not incorporated in the First Working Timetable and Network Rail complies with that request) the Applicable Timetable to allow a Train to regain time lost during an earlier part of its journey;
<b>“Restriction of Use”</b>	<p>means, in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:</p> <ul style="list-style-type: none"> <li>(a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day; and/or</li> <li>(b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;</li> </ul>
<b>“Restriction of Use Day”</b>	means a day on which a Network Rail Restriction of Use is taken or deemed to be taken;
<b>“RoU Claim Notice”</b>	means a notice issued by either party pursuant to paragraph 2.8;
<b>“RoU Direct Costs”</b>	<p>means the aggregate amount of:</p> <ul style="list-style-type: none"> <li>(a) bus and taxi hire costs;</li> <li>(b) publicity costs;</li> <li>(c) train planning and diagramming costs; and</li> <li>(d) other costs directly related to the organisation and management of the Train Operator’s response to a Type 2 Restriction of Use,</li> </ul> <p>reasonably incurred by the Train Operator as a result of a</p>

	Type 2 Restriction of Use, adjusted by:
	(i) adding any increase in RoU Variable Costs; and
	(ii) deducting any decrease in RoU Variable Costs;
<b>“RoU Liability”</b>	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 RoU Variable Costs but net of any benefit arising from the taking of a Restriction of Use including any decrease in RoU Variable Costs) as a consequence of a Type 3 Restriction of Use or any Restriction(s) of Use covered by an SPD Claim;
<b>“RoU Losses”</b>	means any RoU Direct Costs or RoU Liability (as applicable);
<b>“RoU Trigger Date”</b>	means, in respect of any Period, the later to occur of the following:
	(a) the date on which Network Rail issues a Day 42 Statement; and
	(b) in the event of any dispute in respect of Network Rail’s Day 42 Statement, the date on which such dispute is agreed or determined;
<b>“RoU Variable Costs”</b>	means any Train Operator costs which vary as a result of a Restriction of Use or where applicable an Over-run arising directly from changes in train mileage including maintenance, fuel or <del>the Traction Electricity Charge</del> <del>electricity costs</del> , the Variable Track Usage Charge and the Capacity Charge;
<b>“SPD Claim”</b>	has the meaning specified in paragraph 2.10(c);
<b>“SPD Notice”</b>	means a notice issued by either party pursuant to paragraph 2.10(a);
<b>“SPD Period”</b>	means the period <del>of any 3 or 7 (as the case may be) consecutive Periods in which it is agreed or determined that Sustained Planned Disruption has occurred in respect of the Train Operator, together with any subsequent consecutive Period up to but excluding the first Period to occur in respect of which it is agreed or determined that the test for Sustained Planned Disruption is not satisfied in respect of the Train Operator; for which a claim is being made in an SPD Claim which is consistent with the requirements of paragraph 2.10(d);</del>
<b>“SPD Cost Threshold No.1”</b>	means $[\pounds 500,000]/[\pounds 250,000]^1$ ;
<b>“SPD Cost Threshold No.2”</b>	means $[\pounds 1,000,000]/[\pounds 500,000]^2$ ;

<sup>1</sup> ~~The lower threshold shall only apply in respect of the following small operators: Chiltern, Merseyrail, C2C and non-franchised passenger operators. The difference between formulaic costs compensation and reasonably incurred costs where this is more than £0.5m over 3 consecutive Periods or £1m over 7 consecutive Periods will apply to all train operators except Chiltern, Merseyrail, C2C, London Overground Rail Operations Limited and open access operators for whom the values of £0.25m over 3 consecutive Periods and £0.5m over 7 consecutive Periods will be used.~~

<sup>2</sup> Ibid.

“SPD Revenue Threshold No.1”	means [●]; <sup>3</sup>
“SPD Revenue Threshold No.2”	means [●]; <sup>4</sup>
<b>“SPD Termination Notice”</b>	<u>has the meaning specified in paragraph 2.10(c);</u>
<b>“Sustained Planned Disruption”</b>	or means a circumstance where:
<b>“SPD”</b>	<ul style="list-style-type: none"> <li>(a) the aggregate of the compensation <u>payable in respect of a Service Group</u> calculated in accordance with paragraph 3 for <u>anyany</u> Restrictions of Use during: <ul style="list-style-type: none"> <li>(i) 3 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.1; or</li> <li>(ii) 7 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.2,</li> </ul> and that the difference between the RoU Liability calculated in accordance with paragraph 8 and the compensation calculated in accordance with paragraph 3 <u>and paragraph 4</u> for such Restrictions of Use during that period <u>would beis</u> more than £10,000; or </li> <li>(b) in respect of <u>anyany</u> Restrictions of Use during <u>any</u>: <ul style="list-style-type: none"> <li>(i) 3 consecutive Periods the difference between the Train Operator’s RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator’s costs calculated under paragraph 4 <u>would beis</u> more than SPD Cost Threshold No. 1; or</li> <li>(ii) 7 consecutive Periods the difference between the Train Operator’s RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator’s costs calculated under paragraph 4 <u>would beis</u> more than SPD Cost Threshold No. 2;</li> </ul> </li> </ul>
<b>“Service Code”</b>	shall have the meaning ascribed to it in Schedule 8;
<b>“Service Group”</b>	shall have the meaning ascribed to it in Schedule 8;
<b>[“Thameslink Possession”</b>	shall have the meaning ascribed to it in Part 4;]
<b>“Train”</b>	shall have the meaning ascribed to it in Schedule 8;
<b>“Train–Bus–Train Pattern”</b>	means a situation where:

<sup>3</sup> The methodology for calculating the threshold will be set out in the Criteria and Procedures. The SPD Revenue Thresholds will be ~~either (i) 20% and 15% over 3 and 7 Periods respectively of the defined Service Group\_ or (ii) the difference between formulaic cost compensation and reasonably incurred costs where this is more than £0.5m over 3 consecutive Periods or £1m over 7 consecutive Periods which would apply to all train operators except Chiltern, MerseyRail C2C and open access operators for whom the values of £0.25m over 3 consecutive Periods and £0.5m over 7 consecutive Periods will be used.~~

<sup>4</sup> Ibid.

- (a) a Restriction of Use occurs on any section of track between:
  - (i) successive Monitoring Points; or
  - (ii) the station of origin and the next Monitoring Point; and
- (b) the Train Operator uses a substitute bus or other alternative road service between any pair of stations situated:
  - (i) between or including such successive Monitoring Points; or
  - (ii) at or between the station of origin and the next Monitoring Point;

~~“Tri-annual Timetable”~~

~~means either of the following:~~

~~(a) the Corresponding Day Timetable for all days in the period from and including the Principal Change Date up to but excluding the immediately following Subsidiary Change Date; or~~

~~(b)(c) the Corresponding Day Timetable for all days from and including the Subsidiary Change Date up to but excluding the immediately following Subsidiary Change Date or Principal Change Date, as the case may be;~~

**“Type 1 Restriction of Use”**

means any single Restriction of Use which does not fall within the definition of Type 2 Restriction of Use or Type 3 Restriction of Use;

**“Type 2 Restriction of Use”**

means:

- (a) a single Restriction of Use of more than 60 consecutive hours (excluding any part of that Restriction of Use which occurs during a Public Holiday); and
- (b) which results in a Service being Disrupted

but excluding any Restriction of Use which falls within the definition of Type 3 Restriction of Use;

**“Type 3 Liability Claim”**

has the meaning specified in paragraph 2.7(b);

**“Type 3 Restriction of Use”**

means a single Restriction of Use of more than 120 consecutive hours (including any part of that Restriction of Use which occurs during a Public Holiday);

**“Unplanned Over-run Period”**

shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(A);

**“Viable Transfer Point”**

a station normally served by the services operated by the Train

Operator, and equipped to enable the efficient and safe transfer of trainloads of passengers to and from alternative modes of transport, and/or services operated by other Train Operators, and which the parties have agreed, and set out in Annex B, shall be used for the purpose of providing Replacement Bus Services, and for calculating Equivalent Bus Miles Compensation in accordance with the provisions of paragraph "4 Cost Compensation for Network Rail Restrictions of Use";

**"Week"**

means a period commencing at 00:00:00 hours on any Saturday and ending at 23:59:59 hours on the next following Friday; and

**"White Period"**

means any period during which the taking of a Restriction of Use would not result in any compensation being payable in accordance with paragraph 3.

**1.2** *Suspension Notices*

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of Clause 3.6 and not of this Schedule 4. A Restriction of Use shall only be treated as a Restriction of Use to the extent that it involves a Restriction of Use of all or any part of the Routes which is not covered by the restriction under that Suspension Notice.

**1.3** *Possession*

Any reference in this contract to the term "possession", whether on its own or in composite, should be construed as "Restriction of Use" as defined in this Part 3.

**1.4** *White Period*

In respect of any Type 1 Restriction of Use, Type 2 Restriction of Use or Type 3 Restriction of Use, where a Restriction of Use starts before and/or ends after a White Period, the entire length of the Restriction of Use shall be taken into account when counting the cumulative total hours.

**2** **Application of this Part**

**2.1** *Entry into effect*

This Part 3 shall apply in respect of Restrictions of Use.

**2.2** *Applicable Rules of the Route and the Network Code*

The provisions of this Part 3 shall be without prejudice to:

- (a) Network Rail's right to take Restrictions of Use under or pursuant to the Applicable Rules of the Route;
- (b) the establishment of any amended Working Timetable under Part H of the Network Code; and

- (c) any rights pursuant to the Network Code that the Train Operator may have to challenge any decision of Network Rail.

### 2.3 *Operator Restriction of Use*

Network Rail shall not be obliged to make any payments to the Train Operator for any one or more Restrictions of Use to the extent:

- (a) required as a result of any damage to the Network or Environmental Damage which in each case:
  - (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) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator;
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
- (c) required in connection with a Network Change proposed by the Train Operator under Condition G3.

### 2.4 *Network Rail payments*

Subject to paragraph 2.3, Network Rail shall make payments to the Train Operator (in accordance with the procedure in paragraph 13) in respect of Restrictions of Use calculated on the following basis:

- (a) for each Network Rail Restriction of Use, in accordance with paragraphs 2.5 to 2.7 and 2.10 where applicable; and
- (b) for each CTRL Possession and Thameslink Possession, in accordance with Part 4.

### 2.5 *Type 1 Restriction of Use*

Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 1 Restriction of Use.

### 2.6 *Type 2 Restriction of Use*

- (a) Except where paragraph 2.6(c) applies, Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 2 Restriction of Use.
- (b) If either party reasonably believes or expects that the difference between RoU Direct Costs calculated in accordance with paragraph 6 and the costs calculated under paragraph 4 would exceed ~~the costs calculated under paragraph 4 by more than~~ £10,000 then that party will be entitled to require that the costs be calculated in accordance with paragraph 6 by serving an RoU Claim Notice within the time periods set out in paragraph 2.8.
- (c) Following a request in accordance with paragraph 2.6(b), if it is agreed or determined that the difference between RoU Direct Costs calculated in accordance with paragraph 6 and exceeds the costs calculated under paragraph 4 exceeds by more than £10,000 then the relevant party shall make payments to the other (in



accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 6.

## 2.7 *Type 3 Restriction of Use*

- (a) Except where paragraph 2.7(c) applies, Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 3 Restriction of Use.
- (b) If either party reasonably believes or expects that the difference between RoU Liability calculated in accordance with paragraph 7 ~~and would exceed~~ the costs and losses calculated under paragraphs 3 and 4 ~~would exceed by more than~~ £10,000 then that party will be entitled to require that the costs and losses be calculated in accordance with paragraph 7 instead by serving an RoU Claim Notice within the time periods set out in paragraph 2.8 (a “Type 3 Liability Claim”).
- (c) Following a request in accordance with paragraph 2.7(b), if it is agreed or determined that the difference between RoU Liability calculated in accordance with paragraph 7 ~~and exceeds~~ the costs and losses calculated under paragraphs 3 and 4 ~~exceeds by more than~~ £10,000 then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 7.

## 2.8 *RoU Claim Notice*

- (a) Either party wishing to make a request pursuant to Clause 2.6(b) or Clause 2.7(b) must notify the other that a Restriction of Use is a Type 2 Restriction of Use or a Type 3 Restriction of Use and that the circumstances in paragraph 2.6(b) or 2.7(b) (as applicable) apply within ~~{56}~~ days of the RoU Trigger Date relating to the Period in which that Restriction of Use commences.
- (b) The notice referred to in paragraph 2.8(a) must, if provided by the Train Operator, include details of the estimate of the RoU Direct Costs or RoU Liability (as applicable) which the Train Operator has incurred in respect of the relevant Restriction of Use.

## 2.9 *Changes to Restrictions of Use*

- (a) Where a single Restriction of Use falls within the definition of one type of Restriction of Use and there is a change which means that no Restriction of Use occurs or that the Restriction of Use occurs as another type of Restriction of Use, then that Restriction of Use shall be treated, for the purposes of the calculation and payment of compensation, as if it had always been the latter type of Restriction of Use (or, where applicable, as if it had not been a Restriction of Use).
- (b) For the purposes of paragraph 2.9(c), a Restriction of Use shall be deemed to be taken if and to the extent that it results in any difference between timetables of the type referred to in the definition of “Restriction of Use” when notified, whether or not the restriction giving rise to that Restriction of Use was subsequently cancelled in whole or in part.
- (c) Where a change to a Restriction of Use reduces the impact of the Restriction of Use and accordingly changes its type or means that there is no Restriction of Use in accordance with paragraph 2.9(a), the Train Operator may, within 28 days of the date on which the change to the Restriction of Use was notified to the Train Operator by Network Rail, serve a notice on Network Rail which sets out any costs to which

the Train Operator is already committed or has already incurred and any costs associated with responding to the Restriction of Use (both before and after the change). The Train Operator shall be entitled to recover such costs provided that such costs are reasonable and were properly committed or incurred in the circumstances. For the purposes of this Clause 2.9(c), references to “costs” shall mean those categories of costs which the Train Operator would have been entitled to recover under this Schedule 4 for that type of Restriction of Use which the Restriction of Use was classified as prior to its change.

## 2.10 Sustained Planned Disruption

- (a) If either party reasonably believes that a Sustained Planned Disruption has occurred then that party will be entitled to require that the costs and losses for the Restrictions of Use for the relevant services during the relevant SPD Period ~~when the Sustained Planned Disruption is reasonably believed to have occurred~~ be calculated in accordance with paragraph 8 by serving a notice on the other (an “SPD Notice”) in accordance with paragraph 2.10(b).
- (b) Unless otherwise agreed in writing, an SPD Notice must be served no later than the day falling ~~{56}~~ days after the issue of the Day 42 Statement which followed the end of the relevant SPD Period ~~period of 3 Periods or, where applicable, 7 Periods during which the Sustained Planned Disruption is reasonably believed to have occurred~~ and must include a short explanation of why it reasonably believes a Sustained Planned Disruption has occurred and a statement of when the SPD Period commenced.
- ~~(c)~~ Following the issue of an SPD Notice, either party may serve a notice (an “SPD Termination Notice”) stating that it reasonably believes that the relevant Sustained Planned Disruption is no longer occurring, such notice to include a short explanation of why the party serving it reasonably believes that the Sustained Planned Disruption has ceased and stating the Period in which such cessation has occurred. A party receiving an SPD Termination Notice shall within 30 days of its receipt by notice to the serving party either accept or reject the SPD Termination Notice and where it rejects the notice it shall include with its rejection notice a short explanation of why it reasonably believes the Sustained Planned Disruption is continuing. If the parties fail to reach agreement within 30 days after service of a rejection notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify the other that the dispute resolution procedure set out in paragraph 13.3 is to apply (save that references to paragraph 13.2 shall be construed as being references to this paragraph).
- ~~(e)~~(d) Following the issue of an SPD Notice the party that issued that notice must serve a claim (an “SPD Claim”):
  - (i) no later than the day falling ~~112~~{56} days after the issue of the Day 42 Statement ~~which followed the first Period after the Sustained Planned Disruption where no Sustained Planned Disruption is reasonably believed to have occurred for the last Period in the relevant SPD Period~~; or
  - (ii) where an SPD Period has Sustained Planned Disruption is reasonably believed to have exceeded 13 consecutive Periods in length or upon the termination or expiry of this Access Agreement, whichever comes first, unless otherwise agreed in writing, no later than the day falling ~~{112}~~ days

after the issue of the Day 42 Statement which followed the 13<sup>th</sup> consecutive Period ~~for the termination or expiry of this Access Agreement (as applicable)~~};

whichever is the earlier.

~~(d)~~(e) Provided a party has issued an SPD Notice in accordance with paragraph 2.10(b), nothing in paragraph 2.10(~~de~~) shall prevent that party from issuing more than one SPD Claim in respect of the same Sustained Planned Disruption, provided that:

- (i) each such SPD Claim relates to a different period within the said SPD Period (so there is no double-counting)~~Sustained Planned Disruption~~; and
- (ii) no SPD Claim can be issued after the last day for serving notice specified under paragraph 2.10(~~de~~).

~~(e)~~(f) An SPD Claim must include details of when and why that party reasonably believes that a Sustained Planned Disruption has occurred and in particular:

- (i) if the claim is made by the Train Operator, such details as may reasonably be available of the RoU Liability which the Train Operator has incurred or reasonably expects to incur in respect of the relevant Restrictions of Use during the SPD Period; or
- (ii) if the claim is made by Network Rail, the reasons why Network Rail reasonably believes that the Train Operator has been overcompensated or may be overcompensated by more than the relevant amount.

~~(f)~~(g) Following the ~~service~~issue of an SPD Claim, if and to the extent it is agreed or determined that a Sustained Planned Disruption has occurred in the period covered by the claim during the relevant SPD Period~~then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 8 in respect of the SPD Period (or where applicable the part of the SPD Period) covered by the SPD Claim.~~

~~(g)Once a Sustained Planned Disruption has occurred it shall be treated as continuing for such number of consecutive Periods as exist until the first Period after the Sustained Planned Disruption where no Sustained Planned Disruption is reasonably believed to have occurred.~~

## 2.11 *Early notice of RoU Losses*

The parties may at any time engage in discussions on any matter likely to result in payments in respect of any RoU Losses and shall use reasonable endeavours to agree whether such RoU Losses calculated in accordance with paragraph 6, 7 or 8 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such RoU Losses. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it thinks such RoU Losses will arise or mitigating actions should be contemplated. Following any agreement or determination that such RoU Losses are likely to arise in connection with one or more future Restrictions of Use 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 Restriction(s) of Use 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 Restriction(s) of Use. Unless otherwise agreed, the timescales for claiming RoU Losses shall still apply.

## 2.12 Over-runs

- (a) For the purposes of this paragraph 2.12, an over-run ("Over-run") occurs where:
- (i) there is a Restriction of Use which is not an Operator Restriction of Use (the "First Restriction");
  - (ii) following the end of the relevant period of difference between timetables referred to in sub-paragraphs (a) and (b) of the definition of Restriction of Use which served to establish the existence of that Restriction of Use (the "First Restriction Period"), there is either:
    - (A) a further period of at least one hour during which Services are Disrupted due to (1) any incident attributed under Schedule 8 to circumstances arising from any restriction of operation of the Network which are a consequence of the First Restriction or (2) any act or omission in connection with any activities planned or undertaken which are directly attributable to the First Restriction (including any failure to remove the First Restriction by the time scheduled for its removal in the Applicable Rules of the Route) but excluding any act or omission by the Train Operator for which it would be allocated responsibility under this Contract (the "Unplanned Over-run Period"); and/or
    - (B) a further Restriction of Use is taken which is at the same location as all or part of the First Restriction and directly connected with or attributable to any activities undertaken or planned to be undertaken under the First Restriction (a "Further Restriction" ),
- in each case without there being any intervening period between the First Restriction and the relevant Unplanned Over-run Period or Further Restriction, which is not either a White Period, Unplanned Over-run Period or a Further Restriction.
- (b) Where a Restriction of Use is subject to one or more Over-runs, then the entire duration from the start of the First Restriction to the end of the last Over-run in respect of the Restriction of Use shall be treated as making up a single Restriction of Use.
- (c) Where there is an Over-run which results in a Service being Disrupted which:
- (i) is not part of either a Type 2 or Type 3 Restriction of Use;
  - (ii) lasts for more than one hour; and
  - (iii) results in the Train Operator incurring costs in the category of RoU Direct Costs in relation to the Over-run in excess of £10,000,

then the Unplanned Over-run Period element of that Over-run (but not the relevant First Restriction Period or the period of any Further Restriction) shall for the

purposes only of calculating RoU Direct Costs be deemed to constitute a Type 2 Restriction of Use.

- (d) For the purposes of calculating RoU Liability under paragraph 7 (when it is agreed or determined that the requirements of paragraph 2.7(c) are satisfied) or paragraph 8 when there is agreed or determined to be a Sustained Planned Disruption, the amount of the RoU Liability shall be calculated:
  - (i) including costs, direct losses and expenses (including loss of revenue and any increase in RoU Variable Costs) reasonably incurred or reasonably expected to be incurred by the Train Operator as a consequence of any Unplanned Over-run Period; and
  - (ii) offsetting any benefit as a consequence of the Unplanned Over-run Period including:
    - (A) any reduction in RoU Variable Costs;
    - (B) any payments made as result of paragraph 2.12(c); and
    - (C) any payments received by the Train Operator under Schedule 8.
- (e) This paragraph 2.12 shall not result in any Unplanned Over-run Period being subject to either revenue loss compensation for Network Rail Restrictions of Use under paragraph 3 or costs compensation for Network Rail Restrictions of Use under paragraph 4.

### **3 Revenue loss compensation for Network Rail Restrictions of Use**

#### **3.1 *Basis for calculations***

For each Period and for each Service Group, Network Rail shall calculate the compensation payable in respect of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying, in accordance with paragraphs 3.2 and 3.3, the formulae in paragraphs 3.4, 3.5 and 3.6. For the purposes of determining for this paragraph 3 to which Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

#### **3.2 *Separate calculations***

In applying the formula in paragraph 3.4, Network Rail shall calculate the compensation payable separately in respect of all:

- (a) Network Rail Restrictions of Use which are taken into account in the First Working Timetable; and

- (b) Network Rail Restrictions of Use which are not so taken into account but are taken into account in the Applicable Timetable.

### 3.3 *Meaning of T1 and T2*

In paragraph 3.4:

- (a) where Network Rail is making the calculation for the purpose of paragraph 3.2(a), T1 shall mean the Corresponding Day Timetable and T2 shall mean the First Working Timetable for the Restriction of Use Day; and
- (b) where Network Rail is making the calculation for the purpose of paragraph 3.2(b), T1 shall mean the First Working Timetable for the Restriction of Use Day and T2 shall mean the Applicable Timetable for the Restriction of Use Day.

### 3.4 *Formula*

The formula referred to in paragraph 3.1 is as follows:

$$RP = \Sigma((WACM + NREJT) \bullet BF \bullet MRE \bullet NF)$$

where:

- (a)  $\Sigma$  is the sum across all Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) WACM is the weighted average of Cancellation Minutes for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$WACM = (CM - NRPP) \bullet \Sigma \frac{(MPW \bullet CS)}{SS}$$

where:

CM is the Cancellation Minutes for the Service Group in question specified in column J of Appendix 1 to Schedule 8;

NRPP is the Network Rail performance point for the Service Group in question specified in column B of Appendix 1 to Schedule 8;

$\Sigma$  is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to the Monitoring Point, as specified in column O of Appendix 1 to Schedule 8;

CS is the number by which the number of stops at that Monitoring Point scheduled for that day in T2 is less than SS as a result of the Network Rail Restriction of Use; and

SS is the number of stops at the Monitoring Point scheduled for that day in T1;

- (c) NREJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group, for the Restriction of Use Day, being Services which are not cancelled, calculated according to the following formula:

$$NREJT = EJT \bullet (1 - \Sigma \frac{(MPW \bullet CS)}{SS})$$

where:

$\Sigma$ , MPW, CS and SS have the meanings ascribed to them in paragraph 3.4(b) above;  
and

EJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group calculated according to the following formula:

if no Train in that Service Group is scheduled in T2 for that day, then EJT shall equal 0;

if otherwise,

EJT is the lesser of:

(i) the number of minutes specified as the Cap for the Service Group in column K of Appendix 1 to Schedule 8; and

(ii)  $AJT \bullet ((u-v)/v)$ ,

provided always that if v equals or is greater than u, EJT shall equal 0;

where:

AJT is the average Journey Time for Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the Journey Times scheduled in T1 in respect of such Trains divided by the aggregate number of Journeys scheduled in T1 in respect of such Trains;

u is the average speed of Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the number of miles scheduled to be run in T1 by such Trains divided by the aggregate of the Journey Times scheduled in T1 in respect of such Trains; and

v is the speed to which the average speed of Trains in the Service Group scheduled for that day in T2 is reduced as a result of the Network Rail Restrictions of Use (calculated by reference to the aggregate of the number of miles which such Trains are scheduled to run in T2 divided by the aggregate of the end to end Journey Times scheduled in T2 in respect of such Trains),

and for the purposes of this paragraph 3.4:

“Journey”

means the journey of the Train scheduled in the relevant timetable from its station of origin to its destination station; provided that if a Train crosses a Service Group boundary then in respect of each Service Group the Train's station of origin and destination station shall respectively mean the station at which the Train commences that part of its journey in that Service Group and the station at which it ends that part of its journey in that Service Group; and that where any Train splits to become more than one Train then that part of the Train's journey up to the station where it splits shall be treated as one

journey and each Train into which the Train splits shall be treated as making a separate journey; and

“Journey Time”

shall be calculated in respect of each journey by reference to the difference in minutes between the time of departure from the station of origin and the time of arrival at the destination station;

- (d) BF is the busyness factor, as calculated for each Service Group according to the following formula:

$$BF = \frac{\sum (MPW \bullet SS)}{AS}$$

where:

AS is the average number of stops at the Monitoring Point (being the Monitoring Point referred to in the definition of MPW) per day scheduled in the Tri-annual Timetable; and

MPW and SS have the meanings ascribed to them in paragraph 3.4(b); and

- (e) MRE is the marginal revenue effect specified in column C of Appendix 1 to Schedule 8, as indexed according to the relevant provisions of Schedule 8.

### 3.5 *High Speed Diversions*

Where there is a High Speed Diversion and WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero then the following formula shall apply:

$$ANRP = \frac{TDR_{SG} \bullet (CM - NRPP) \bullet MRE \bullet BF \bullet NF}{TDT_{SG}}$$

where:

ANRP is the additional Network Rail payment;

TDR<sub>SG</sub> is, in respect of each Service Group and each Restriction of Use Day on which a High Speed Diversion applies, the number of Trains in the Service Group scheduled in T2 to be subject to the High Speed Diversion;

TDT<sub>SG</sub> is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3; and

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4.

In such a situation, the Train Operator shall provide Network Rail with evidence, either that the High Speed Diversion has been common for the Services in question in the past or that the High Speed Diversion would arise as a result of a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

### 3.6 *Train-Bus-Train Patterns*



If any Service Group on any day is subject to a Train-Bus-Train Pattern on account of a Network Rail Restriction of Use, and where WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero, then Network Rail shall pay to the Train Operator an additional payment calculated as follows:

$$\text{ANRP} = \frac{\text{TTS}_{\text{SG}}}{\text{TTR}_{\text{SG}}} \bullet (\text{CM} - \text{NRPP}) \bullet \text{DV} \bullet \text{MRE} \bullet \text{BF} \bullet \text{NF}$$

where:

ANRP is the additional Network Rail payment;

TTSSG is the total number of Trains scheduled in T2 to be run in the Service Group for that Restriction of Use Day to terminate at a destination other than that shown for those Trains due to a Train-Bus-Train Pattern in T1;

TTR<sub>SG</sub> is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3;

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4; and

DV shall have the value of 0.125,

provided that if:

TTR<sub>SG</sub> is less than TTS<sub>SG</sub> then  $\frac{\text{TTS}_{\text{SG}}}{\text{TTR}_{\text{SG}}}$  shall be deemed to have the value of one.

In such a situation the Train Operator shall provide Network Rail with evidence, either that the Train-Bus-Train Pattern resulting from the Network Rail Restriction of Use is an arrangement that has been commonly used in the past by that Train Operator on the Services in question, or that it has arisen due to a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

## 4 Costs compensation for Network Rail Restrictions of Use

### 4.1 Basis for calculations

For each Period and for each Service Group, Network Rail shall calculate the compensation payable in respect of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying the formulae in paragraph 4.2. For the purposes of determining for this paragraph 4 to which Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code<sup>5</sup>, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that

<sup>5</sup>—The references to Service Codes depends on further work by Faber Mansell.

Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

#### 4.2 Cost compensation formula

The formula referred to in paragraph 4.1 is as follows:

$$\text{Cost compensation} = \sum (\text{RRBC} + \text{TMC})$$

where:

- (a)  $\sum$  is the sum across all applicable Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) RRBC is the rail replacement bus cost, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$\text{RRBC} = \text{EBM} \times \text{EBMPR}$$

EBM is the number of estimated bus miles for the Operator; and

EBMPR is the payment rate per EBM, which is £[•]<sup>5</sup>.

If there is full bus replacement

$$\text{EBM} = \text{EBMW} \times \text{FBRmiles}$$

If there is partial bus replacement

$$\text{EBM} = \text{EBMW} \times 0.5 \times \text{PBRmiles} \times \text{ITS}$$

where:

EBMW is the weighting applicable to the affected section of route, as set out in Annex B to this Part 3 of Schedule 4;

FBRmiles is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which full bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;

PBRmiles is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which partial bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;

ITS is 1 or the percentage of trains stopping at intermediate stations for those cases where EBMW = 50%, and

where:

EBM is the number of estimated bus miles for the Operator; and

~~EBMPR is the payment rate per EBM, which is £[●]<sup>6</sup>;~~

~~and~~

~~$EBM = \sum (RL \times TA \times EBMW [ \times ITS ])$~~

~~where:~~

~~RL is the length of route, in miles, over which train services are affected;~~

~~TA is the number of trains affected, compared to the Corresponding Day Timetable;~~

~~EBMW is the weighting applicable to the affected route, as set out in Annex B to this Part 3 of Schedule 4; and~~

~~ITS is 1 or the percentage of trains stopping at intermediate stations for those cases where EBMW = 50%.~~

~~and~~

- (c) TMC is the cost or saving resulting from train mileage change, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$TMC = TM \times TMPR$$

where:

TM is the change in train mileage; and

TMPR is the payment rate per train mile, as stipulated in Annex C to this Part 3 of Schedule 4.

## ~~5 Estimated Bus Miles change mechanism~~ <sup>7</sup>Estimated Bus Miles change mechanism<sup>6</sup>

### 5.1 *Circumstances in which parties agree to amend Annex B*

Either party may by notice to the other propose that Annex B be amended in accordance with this paragraph 5.

### 5.2 *Procedure for amendments to Annex B*

- (a) The party who wishes to amend Annex B shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:
- (i) where such change relates to a forthcoming timetable change, on or before the first day of the month which falls 6 months before the relevant Principal Change Date or Subsidiary Change Date on which that timetable change is due to occur; and

<sup>65</sup> ~~It is anticipated that there will be two rates – one for London and the SE and one for the rest of the Network.~~ There will be two rates – one for London and SE and one for the rest of the Network.

- (ii) in any other case prior to the date from which it proposes such change shall have effect.
- (b) Any notice under sub-paragraph 5.2(a) shall specify as far as possible that party's proposed amendments to Annex B. Promptly following the service of any such notice the parties shall endeavour to agree whether Annex B should be amended in accordance with this paragraph 5 and if so the amendments.
- (c) If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
  - (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
  - (ii) each of the parties shall abide by the rules and procedures established by the expert; and
  - (iii) the parties shall direct the expert to have regard to any relevant criteria issued by the Office of Rail Regulation.
- (d) Any amendment to Annex B shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph 5, the parties shall use all reasonable endeavours to ensure that ORR is furnished with such amendment and sufficient information and evidence as it shall require to determine whether or not to approve the amendment.
- (e) Any amendment to Annex B shall apply with effect from:
  - (i) the relevant Principal Change Date or Subsidiary Change Date (where paragraph 5.2 (a) (i) applies); or
  - (ii) subject to paragraph 5.2 (d) the date proposed by the party requesting the change in accordance with paragraph 5.2 (a) (ii) (unless otherwise agreed by the parties or determined by the expert in relation to the change).

### 5.3 *Costs of implementing amendment*

~~Network Rail shall~~ The party proposing the amendment to Annex B shall (subject to any determination of an expert as to costs, where a matter is referred to that expert under paragraph 5.2(c)) ~~be entitled to pay [90]~~<sup>8</sup> percent of costs incurred by or on behalf of the other party ~~Network Rail~~ in assessing and implementing the~~any~~ amendments to Annex B, provided that those costs shall be the minimum reasonably necessary ~~for Network Rail~~ to assess and implement that amendment.

<sup>7,6</sup> In due course ORR expects to include some guidance in its Criteria and Procedures on the circumstances when it would usually expect to approve changes under this paragraph.

<sup>8</sup> ~~This figure will mirror the percentage figure used in paragraph 17.4 of Schedule 8, which at present is 90%. The figure in paragraph 17.4 of Schedule 8 is being consulted on at the moment and, if it changes, any amendment will also need to be reflected here.~~

## **6 RoU Direct Costs compensation for Type 2 Restrictions of Use**

### *6.1 Compensation arrangements*

- (a) Following receipt of an RoU Claim Notice in respect of a Type 2 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Direct Costs compensation to be paid by one party to the other in respect of such Type 2 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 6.1(a) has been agreed or determined (and has been compared against any amounts calculated under paragraph 4 together with any other amounts paid or due to the Train Operator from Network Rail in relation to such Restriction of Use) then, in the event of:
  - (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Direct Costs actually incurred by the Train Operator less any amounts calculated under paragraph 4 which have already been paid or are due for such Restriction of Use and any other amounts in respect of any RoU Direct Costs received by the Train Operator from Network Rail in respect of such Restriction of Use; or
  - (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator which was calculated under paragraph 4 and the RoU Direct Costs actually incurred by the Train Operator in respect of such Restriction of Use.
- (c) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 6 and paragraph 10 to be payable in respect of any Type 2 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.

## **7 RoU Liability compensation for Type 3 Restrictions of Use**

### *7.1 Compensation arrangements*

- (a) Following receipt of an RoU Claim Notice in respect of a Type 3 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by one party to the other in respect of the Type 3 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 7.1(a) has been agreed or determined (and has been compared against the aggregate of any amounts calculated under paragraphs 3 and 4 together with any other amounts paid or due to the Train Operator from Network Rail in relation to such Restriction of Use) then, in the event of:
  - (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts calculated under paragraphs 3 and 4 which have already been paid or are due for such

Restriction of Use and any other amounts received by the Train Operator from Network Rail in respect of such Restriction of Use; or

- (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator which was calculated under paragraphs 3 and 4 and the RoU Liability actually incurred by the Train Operator in respect of such Restriction of Use.
- (c) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 7 and paragraph 10 to be payable in respect of any Type 3 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.

## **8 Sustained Planned Disruption payments**

### **8.1 *Payment arrangements***

- (a) Following an agreement or determination that a Sustained Planned Disruption has occurred during an SPD Period, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by one party to the other in respect of the Restrictions of Use during the relevant SPD Period and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 8.1(a) has been agreed or determined (and has been compared against the aggregate of any amounts calculated under paragraphs 3 and 4 together with any other amounts paid or due to the Train Operator from Network Rail in respect of such Restriction of Use) then, in the event of:
  - (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator in respect of the Restrictions of Use during the relevant SPD Period shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts calculated under paragraphs 3 and 4 which have already been paid or are due for Restrictions of Use during the relevant SPD Period and any other amounts received by the Train Operator from Network Rail in respect of such Restrictions of Use; or
  - (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator for Restrictions of Use during the relevant SPD Period and the RoU Liability actually incurred by the Train Operator during the same SPD Period.
- (c) Following any agreement or determination of an amount to be paid by one party to the other in respect of a Sustained Planned Disruption that amount shall (subject to the terms of any compensation arrangements agreed in writing between the parties) be due and payable by one party to the other in accordance with paragraph 13.1.

(d) Where a Sustained Planned Disruption applies due to a circumstance which it is agreed or determined affects a part only of the Train Operator's services (including

whether by reference to geographic location or Service Group), then in agreeing or determining the RoU Liability in respect of that SPD the RoU Liability in respect of the part of the Train Operator's services not affected by that circumstance shall (unless otherwise proven) be presumed to be equal to the payments made under paragraphs 3 and 4 of this Schedule 4- in respect of those other services

## **9 Notification Factors**

### **9.1 Early notification**

The Notification Factor in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column C of Annex A to this Part 3 if and to the extent that:

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or
- (b)
  - (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and
  - (ii) subject to paragraph 9.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
  - (iii) where paragraph 9.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition [D4.8.3], the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

### **9.2 Notification by Revision Notification Date**

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column D of Annex A to this Part 3 if and to the extent that paragraph 9.1 does not apply, and:

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by the Revision Notification Date; and
- (b)
  - (i) the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
  - (ii) where paragraph 9.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

### **9.3 Late Notification**

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column E of Annex A to this Part 3 if and to the extent paragraphs 9.1 and 9.2 do not apply but the Network Rail Restriction of Use is reflected in the Applicable Timetable, and includes where paragraph 9.1(b) or paragraph 9.2 would have been applicable but for a failure by Network Rail to fulfil the terms of paragraph 9.1(b)(ii) or paragraph 9.2(b)(i) respectively, notwithstanding the Train Operator having given a Revised Bid in accordance with Condition D4.8.3.

## **10 Dispute resolution**

If the Train Operator and Network Rail fail to reach agreement as required under paragraph 2.6 (c), 2.7 (c), 2.10 (gf), 2.11, 6, 7 or 8 within 28 days following provision of the RoU Claim Notice, either party may notify the other that the dispute resolution procedure set out in paragraph 13.3 is to apply. Such procedure shall then apply in accordance with its terms (save that references to paragraph 13.2 shall be construed as being references to this paragraph 10).

## **11 Schedule 8 application**

If and to the extent that a Network Rail Restriction of Use is not reflected in the Applicable Timetable for the Restriction of Use Day, the amount of compensation (if any) shall be calculated in accordance with Schedule 8 (to the exclusion of any compensation under this Schedule 4 except as provided in paragraph 2.12).

## **12 Restriction of Use Day and Corresponding Day**

### *12.1 Information provision*

In respect of any Restriction of Use Day for which compensation may be payable in a Period under paragraphs 3 and 4, Network Rail shall accurately record such information as it uses and as may properly and reasonably be required to make the calculations required under paragraphs 3 and 4 (including the determination of NF and the relevant version of the Working Timetable referred to in paragraph 9.1(b)(ii) or paragraph 9.2(b)(i). Network Rail shall maintain that information until the compensation payable under paragraphs 3 and 4 in respect of that Period is finally agreed or determined and provide such information to the Train Operator at its reasonable request.

### *12.2 Corresponding Day*

- (a) If, for the purpose of identifying a Corresponding Day, no day is found under paragraph (a), (b) or (c) of the definition “Corresponding Day” and the parties have failed to reach agreement on the Corresponding Day by the date falling eight Weeks before the relevant Passenger Change Date then either party may require that the identification of the Corresponding Day be resolved by the relevant ADRR Panel.
- (b) The relevant ADRR Panel’s remit shall be that it shall:
  - (i) reach a decision which is fair and reasonable; and
  - (ii) identify the day in either any version of the Working Timetable or any Draft Timetable notified to the Train Operator on or before the end of the Drafting Period in either case which has been produced in accordance with the Network Code as at the Restriction of Use Day and which most closely reflects the Services which would have been scheduled on the first day (as



that term is used in the definition of Corresponding Day [save that in respect of any Restriction of Use lasting more than two Timetable Periods, the first day may occur in any year preceding the Timetable Period]) but for Restrictions of Use reflected in the First Working Timetable for the first day; or

- (iii) where a Corresponding Day cannot be identified in accordance with paragraph 12.2(b)(ii) above, determine a notional Corresponding Day. The relevant ADRR Panel may have regard, where appropriate, to any pattern of services which may reasonably be expected to be operated during the relevant period when the Restriction of Use is being taken in the event of the permanent absence of any Corresponding Day.
- (c) If either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that Condition C6.3 of those rules shall not apply).

### **13 Payment procedures**

#### **13.1 *Network Rail Restrictions of Use***

- (a) Within 14 days after the end of each Period, Network Rail shall provide to the Train Operator a statement (the “Day 42 Statement”) showing:
  - (i) all Network Rail Restrictions of Use taken during that Period;
  - (ii) any compensation calculated in accordance with paragraphs 3 and/or 4 payable by Network Rail in respect of the Network Rail Restrictions of Use identified; and
  - (iii) following any agreement or determination in the Period referred to in paragraph 13.1(a) of any RoU Losses in respect of a Type 2 Restriction of Use, a Type 3 Restriction of Use or a Sustained Planned Disruption (as applicable), any payment to be made by one party to the other,in sufficient detail to enable the Train Operator to make an informed assessment thereof.
- (b) The aggregate liabilities of Network Rail and the Train Operator, in respect of any and all compensation for which either is liable to the other under this Part 3 and under Part 5 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance (if any) shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of that Period.

#### **13.2 *Disputes***

Within 10 days of receipt of a statement from Network Rail under paragraph 13.1, the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of the statement.

#### **13.3 *Dispute resolution***

The procedure for resolving disputes notified under paragraph 13.2 shall be as follows:

- (a) within seven days of service of any notice under paragraph 13.2, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (b) if, within seven days of that meeting (the “first meeting”), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within seven days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;
- (c) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;
- (d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the relevant ADRR Panel; and
- (e) if either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that paragraph C6.3 of those rules shall not apply).

13.4 *Payments in the event of a dispute*

Where any amount under paragraph 13.1 is in dispute:

- (a) the undisputed amount shall be paid in accordance with paragraph 13.1;
- (b) the disputed amount shall be paid within 28 days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and
- (c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date on which such amount would but for such dispute have been due to be paid until the date of payment.

**14 Indexation**

~~14.1 The formula applicable to this paragraph 14 is: EBMPR and the TMPR (as defined in paragraph 4.2) shall be adjusted in respect of Periods in Relevant Year<sup>9</sup> t in accordance with the following formula:~~

$$R_t = R_{t-1} \left( 1 + \frac{RPI_{t-1}}{100} \right)$$

where:

$R_t$  is the relevant rate in the Relevant Year t;

$R_{t-1}$  is the relevant rate in the Relevant Year t-1; and

$RPI_{t-1}$  means the percentage change (whether of a positive or negative value) in the Retail Prices Index<sup>10</sup> published or determined with respect to November in the Relevant Year t-1 and the index published or determined with respect to November in the Relevant Year t-2;<sup>7</sup>

<sup>9</sup> ~~To be defined in the agreement and not by reference to schedule 7.~~

<sup>10</sup> ~~Ibid.~~

but so that in relation to the Relevant Year commencing on [1 April 2009]<sup>14</sup>,  $R_t$  shall have the relevant value specified in the relevant column (either E or I) of Appendix 1 of Schedule 8 and in the next following Relevant Year  $R_{t+1}$  shall have the same value.

14.2 Each of the EBMPR and TMPR (respectively defined in paragraph 4.2) shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 so that in relation to the Relevant Year commencing on [1 April 2009],  $R_t$  shall have the value specified in:

(a) paragraph 4.2 in respect of the EBMPR; and

(b) in Annex C to this Part 3 of Schedule 4 in respect of TMPR,

and in the next following Relevant  $R_{t+1}$  shall respectively have the same value.

14.3 Each of the SPD Cost Threshold No.1 and SPD Cost Threshold No.2 shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 but so that in relation to the Relevant Year commencing on [1 April 2009],  $R_t$  shall have the relevant value specified in paragraph 1.1 of this Schedule 4 and in the next following Relevant Year  $R_{t+1}$  shall respectively have the same value.

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<sup>14</sup>—To be confirmed.

**Annex A to Part 3 of Schedule 4 – Notification discount factors**

<b>Service Group Description</b>	<b>Service Group Code</b>	<b>Type</b>	<b>To FWT</b>	<b>FWT to ITWTT</b>	<b>from ITWTT</b>
<b>First Trans Penine Express</b>					
North Trans Pennine	EA01	All Trains	0.55	0.7	0.85
South Trans Pennine	EA02	All Trains	0.55	0.7	0.85
North West	EA03	All Trains	0.55	0.7	0.85
<b>National Express East Anglia</b>					
Great Eastern Inners	EB01	Peak/Off Peak	0.55	0.7	0.85
Southend & Soutminster	EB02	Peak/Off Peak	0.55	0.7	0.85
Great Eastern Outers	EB03	Peak/Off Peak	0.55	0.7	0.85
Anglia Inter City	EB04	Peak/Off Peak	0.45	0.65	0.85
Anglia Locals	EB05	All Trains	0.55	0.7	0.85
West Anglia Outers	EB06	Peak/Off Peak	0.55	0.7	0.85
West Anglia Inners	EB07	Peak/Off Peak	0.55	0.7	0.85
<b>Northern Rail</b>					
Tyne, Tees & Wear	ED01	All Trains	0.55	0.7	0.85
Lancashire & Cumbria	ED02	All Trains	0.55	0.7	0.85
West & North Yorkshire Inter Urban	ED04	All Trains	0.55	0.7	0.85
West & North Yorkshire Local	ED05	All Trains	0.55	0.7	0.85
South & East Yorkshire Inter Urban	ED06	All Trains	0.55	0.7	0.85
South & East Yorkshire Local	ED07	All Trains	0.55	0.7	0.85
North Manchester	ED08	Peak/Off Peak	0.55	0.7	0.85
Merseyrail City Lines	ED09	All Trains	0.55	0.7	0.85
South Manchester	ED10	Peak/Off Peak	0.55	0.7	0.85
<b>Heathrow Connect</b>					
Heathrow Local Service	EE01	Peak/Off Peak	0.55	0.7	0.85
Hayes & Harlington Shuttle	EE02	All Trains	0.55	0.7	0.85
<b>First Great Western</b>					
London - Bristol	EF01	All Trains	0.45	0.65	0.85
London - South Wales	EF02	All Trains	0.45	0.65	0.85
London - Cotswolds	EF03	All Trains	0.45	0.65	0.85
London - West Of England	EF04	All Trains	0.45	0.65	0.85
Outer Thames Valley - London	EF05	Peak/Off Peak	0.55	0.7	0.85
Inner Thames Valley	EF06	Peak/Off Peak	0.55	0.7	0.85
Reading & Oxford Suburban	EF07	All Trains	0.55	0.7	0.85
Thames Valley Branches	EF08	All Trains	0.55	0.7	0.85
North Downs	EF09	All Trains	0.55	0.7	0.85
Bristol Suburban	EF10	All Trains	0.55	0.7	0.85
Devon	EF11	All Trains	0.55	0.7	0.85
Plymouth & Cornwall	EF12	All Trains	0.55	0.7	0.85
South Wales - South Coast	EF13	All Trains	0.55	0.7	0.85
<b>First Capital Connect</b>					
Bedford Mainline	EG01	Peak/Off Peak	0.55	0.7	0.85
Brighton Mainline	EG02	Peak/Off Peak	0.55	0.7	0.85
South London	EG03	Peak/Off Peak	0.55	0.7	0.85
Northern Inners	EG04	Peak/Off Peak	0.55	0.7	0.85
Northern Outers	EG05	Peak/Off Peak	0.55	0.7	0.85
<b>Arriva CrossCountry</b>					
CrossCountry Inter City	EH01	All Trains	0.55	0.7	0.85

CrossCountry Local & Provincial	EH02	All Trains	0.55	0.7	0.85
<b>London Midland</b>					
West Midlands - Snow Hill	EJ01	Peak/Off Peak	0.55	0.7	0.85
Trent Valley	EJ02	All Trains	0.55	0.7	0.85
West Midlands - New Street (Local)	EJ03	Peak/Off Peak	0.55	0.7	0.85
West Midlands Inter Urban	EJ04	All Trains	0.55	0.7	0.85
WCML : London - Northampton	EJ05	Peak/Off Peak	0.55	0.7	0.85
WCML : Branches	EJ06	All Trains	0.55	0.7	0.85
<b>London Overground</b>					
Orbitals	EK01	Peak/Off Peak	0.55	0.7	0.85
London - Watford (D.C Lines)	EK02	Peak/Off Peak	0.55	0.7	0.85
<b>East Midlands Trains</b>					
East Midlands Local	EM01	All Trains	0.55	0.7	0.85
East Midlands Regional	EM02	All Trains	0.55	0.7	0.85
Liverpool - Norwich	EM03	All Trains	0.55	0.7	0.85
East Midlands Inter City	EM04	All Trains	0.45	0.65	0.85
East Midlands Inter Urban	EM05	All Trains	0.45	0.65	0.85
<b>First Scotrail</b>					
Express	HA01	All Trains	0.55	0.7	0.85
East Coast Suburban	HA02	All Trains	0.55	0.7	0.85
South West Rural	HA03	All Trains	0.55	0.7	0.85
Highland Rural	HA04	All Trains	0.55	0.7	0.85
Strathclyde Electric	HA06	Peak/Off Peak	0.55	0.7	0.85
Strathclyde Pte Diesels	HA07	All Trains	0.55	0.7	0.85
Qualifying Sleepers	HA11	All Trains	0.55	0.7	0.85
<b>National Express East Coast</b>					
Anglo-Scottish	HB01	All Trains	0.45	0.65	0.85
West Yorkshire	HB02	All Trains	0.45	0.65	0.85
West Yorkshire (Kings X - Bradford - Hull)	HB04	All Trains	0.45	0.65	0.85
Anglo Scot (Aberdeen - Inverness)	HB05	All Trains	0.45	0.65	0.85
<b>Merseyrail</b>					
Northern Lines	HE01	All Trains	0.55	0.7	0.85
Wirral Lines	HE02	All Trains	0.55	0.7	0.85
<b>Virgin West Coast</b>					
Euston - Birmingham/Wolverhampton	HF01	All Trains	0.45	0.65	0.85
Euston - North Wales	HF02	All Trains	0.45	0.65	0.85
Euston - Manchester	HF03	All Trains	0.45	0.65	0.85
Euston - Liverpool	HF04	All Trains	0.45	0.65	0.85
Euston - Carlisle/Scotland	HF06	All Trains	0.45	0.65	0.85
Birmingham - Scotland	HF08	All Trains	0.45	0.65	0.85
<b>Arriva Trains Wales</b>					
South, West & Central Wales	HL02	All Trains	0.55	0.7	0.85
Wales - England	HL03	All Trains	0.55	0.7	0.85
Cambrian	HL04	All Trains	0.55	0.7	0.85
Cardiff Valleys	HL05	Peak/Off Peak	0.55	0.7	0.85
Marches	HL06	All Trains	0.55	0.7	0.85
North Wales Rural	HL07	All Trains	0.55	0.7	0.85
Inter Urban North Wales	HL08	All Trains	0.55	0.7	0.85
<b>Chiltern</b>					
Met	HO01	Peak/Off Peak	0.55	0.7	0.85
Birmingham	HO02	Peak/Off Peak	0.55	0.7	0.85
Joint	HO03	Peak/Off Peak	0.55	0.7	0.85

<b>c2c</b>					
London - Southend/Shoeburyness	HT01	Peak/Off Peak	0.55	0.7	0.85
<b>Southeastern</b>					
Kent Coast (Off Peak)	HU01	All Trains	0.55	0.7	0.85
Kent Link (Off Peak)	HU02	All Trains	0.55	0.7	0.85
Kent Rural	HU03	All Trains	0.55	0.7	0.85
Kent Coast (Peak)	HU04	All Trains	0.55	0.7	0.85
Kent Link (Peak)	HU05	All Trains	0.55	0.7	0.85
<b>Southern</b>					
Rural	HW01	All Trains	0.55	0.7	0.85
London - Sussex Coast (Peak)	HW02	All Trains	0.55	0.7	0.85
London - Sussex Coast (Off Peak)	HW03	All Trains	0.55	0.7	0.85
South London Lines (Off Peak)	HW04	All Trains	0.55	0.7	0.85
South London Lines (Peak)	HW05	All Trains	0.55	0.7	0.85
Rugby - Brighton	HW06	All Trains	0.45	0.65	0.85
Victoria - Gatwick Airport	HW07	Peak/Off Peak	0.45	0.65	0.85
<b>South West Trains</b>					
Main Suburban	HY01	Peak/Off Peak	0.55	0.7	0.85
Brighton - Portsmouth - Reading	HY02	All Trains	0.55	0.7	0.85
Waterloo - West England	HY03	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Farnham/Alton	HY04	Peak/Off Peak	0.55	0.7	0.85
Windsor Inners	HY05	Peak/Off Peak	0.55	0.7	0.85
Windsor Outers	HY06	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Portsmouth	HY07	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Weymouth	HY08	Peak/Off Peak	0.55	0.7	0.85

## Annex B to Part 3 of Schedule 4 – Lookup Table for EBM Weights

[This Annex will be agreed bilaterally between Network Rail and the relevant train operator] |

## Annex C to Part 3 of Schedule 4 – Payment Rate per train mile

[This annex contains information which is confidential as between Network Rail and the relevant train operator]



## **PART 4: CTRL AND THAMESLINK**

[Customised arrangements to be submitted for approval]

## PART 5: ACCESS CHARGE SUPPLEMENT FOR RESTRICTIONS OF USE

- 1 The Train Operator shall pay or procure the payment to Network Rail of an Access Charge Supplement for Restrictions of Use (ACSRU) in respect of each Period equal to 1/13 of the amount specified below (as indexed in accordance with paragraph 2) in respect of the Relevant Year commencing 1 April in which the first day of the relevant Period falls:

Year	£
2009-2010	[ ]
2010-2011	[ ]
2011-2012	[ ]
2012-2013	[ ]
2013-2014	[ ]

Each such payment shall be made within 35 days after the end of the relevant Period.

- 2 Each such amount specified in paragraph 1 shall be adjusted in respect of payments made relating to Periods in the Relevant Year  $t$  in accordance with the following formula:

$$ACSRU_{pt} = ACSRU_t \cdot \frac{(RPI_{t-1})}{RPI[2008]}$$

where:

$ACSRU_{pt}$  is the actual amount payable in the Relevant Year  $t$ ;

$ACSRU_t$  is the relevant amount specified in paragraph 1 of this Part 5 for the Relevant Year  $t$  (before indexation);

$RPI_{t-1}$  means the Retail Prices Index published or determined with respect to November in the Relevant Year  $t-1$ ; and

$RPI[2008]$  means the Retail Prices Index published or determined with respect to November 2008

but so that in relation to the Relevant Year commencing on 1 April 2009,  $ACSRU_t$  shall have the relevant value specified in the relevant column of the table in paragraph 1.

~~3 ORR may at any time carry out and initiate implementation of an access charges review in relation to:~~

~~(a) compensation under Part 3 of this Schedule 4 and the manner in which it is paid; and~~

~~(b) access charge supplements under this Part 5 and the manner in which they are paid.~~

