

*ORR's proposed amendments to the drafting proposed by the industry*

## **Appendix 1: Our Proposed changes to schedule 4**

### **SCHEDULE 4: VARIATIONS TO SERVICES**

*[Note: The amendments to this Schedule 4 assume that the current proposals to amend Part G of the Network Code as put forward by ISG are accepted.]*

*[Note: The ORR indicated that it may consider additional amendments to paragraph 7 in light of the Schedule 8 review going on in parallel.]*

#### **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 Planned Service which is not able to operate as Planned; or
- (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;

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~~[“Cancellation Sum” has the meaning specified in Schedule 8;]~~

“**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

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- (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) there is no Revised Base Service with the applicable gauge cleared route between the Origin and the Destination for more than 60 hours;
- (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 ~~[and such additional locomotive(s) need to be procured from a third party which is not an Affiliate of the Train Operator]<sup>1</sup>~~; or
- (e) a diesel locomotive ~~[procured from a third party which is not an Affiliate of the Train Operator]<sup>2</sup>~~ 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 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 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 £[•];

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

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<sup>1</sup> ~~Network Rail and EWS proposal.~~

<sup>2</sup> ~~Network Rail and EWS proposal.~~

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**“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 £[●];

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

*“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;

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

**“Normal Planned Disruption Sum”** means £[●];

**“Operator Early Notice Possession”** means any Early Notice Possession 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; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or

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- (c) 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;

**“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;

**“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 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.

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**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;
- (b) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (c) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (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,

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum or one Late Notice Cancellation Sum in respect of an Applicable Service.

**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:

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- (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 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>3</sup>

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.

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

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<sup>3</sup> This is currently envisaged to be a "one way arrangement" – this is subject to the final flat rate sums agreed.

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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, 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*



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

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- (b) subject to Part H of the Network 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) 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.

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

*4.5 Cancellation*

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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 paragraphs 8 and 9 of Schedule 8 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.~~

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.

**5 Other variations to Planned Services**

5.1 *Non-availability of a Service*

This paragraph 4 applies if, for any reason other than:

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- (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, 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*

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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 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 paragraphs 8 and 9 of Schedule 8 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.

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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.

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

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 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

## **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;

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- (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 [ ] 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 [ ] 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.

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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.