

## **PR13 IMPLEMENTATION – PROPOSED SCHEDULE 8 FOR CHARTER OPERATORS**

### **SCHEDULE 8: PERFORMANCE REGIME**

#### **1 Interpretation**

##### *1.1 Definitions*

In this Schedule 8 and its Appendix 8A, unless the context requires otherwise -

<b>“100 Train Operator Miles”</b>	means the distance travelled by the Services operated by the Train Operator on the Network in any Period as recorded in Network Rail’s billing systems (unless there is a manifest error in such figure), divided by 100;
<b>“Adjusted Train Operator Benchmark”</b>	means the Train Operator Benchmark as adjusted in accordance with paragraph 8.1.7;
<b>“Adjustment Fraction”</b>	means the number of Periods or parts of a Period in the first or final Financial Year, divided by 13;
<b>“Applicable Timetable”</b>	means, in respect of a day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D2.1.1 of the Network Code as at 22.00 hours on the day prior to that day, and which is applicable to the Service or other trains;
<b>“Cancellation”</b>	means, in respect of any Service, the failure to operate at all and “Cancelled” shall be construed accordingly;
<b>“Charter Service Variation Sum”</b>	means, in respect of paragraphs 3.4 and 4.4, the amount specified in Appendix 8A as the Charter Service Variation Sum;
<b>“Diversion”</b>	means a Service which operates but which is diverted off its Planned route and for these purposes, running on different lines on the same route shall not constitute such a Diversion;
<b>“ETCS”</b>	means the European Train Control System;
<b>“Failure to Stop”</b>	means a Service which, whether or not it is the subject of a Diversion, fails to call at one or more of the intermediate stations at which it is Planned to call;

<b>“Financial Year”</b>	means a year commencing at 0000 hours on 1 April and ending immediately before 0000 hours on the next succeeding 1 April save that: <ul style="list-style-type: none"> <li>(a) the first such period shall commence on the date upon which all the provisions of this contract come into effect in accordance with Clause 3; and</li> <li>(b) the last such period shall end on the Expiry Date;</li> </ul>
<b>“Initial Planned Service Incident Cap Notice”</b>	has the meaning ascribed to it in paragraph 9.1.1;
<b>“Interim Statement”</b>	means a written summary showing, in respect of Network Rail performance, the information required under paragraph 3.5 and, in respect of Train Operator performance, the information required under paragraph 4.5;
<b>“Joint Cancellation Sum”</b>	means, in the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, the amount specified in Appendix 8A as the Joint Cancellation Sum for that Planned Service Cancellation;
<b>“Minutes Delay”</b>	means the number of minutes of delay in respect of a Trigger of a Recording Point calculated in accordance with paragraph 5;
<b>“Network Rail Annual Cap”</b>	means the Network Rail Annual Cap specified in Appendix 8A, as adjusted in accordance with paragraph 7 and paragraph 8.2 of this Schedule 8, save that in respect of the first and last Financial Year, the Network Rail Annual Cap shall be that specified in Appendix 8A, multiplied by the Adjustment Fraction;
<b>“Network Rail Benchmark” or “NRB”</b>	means the Network Rail Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period;
<b>“Network Rail Cancellation Sum”</b>	means, in the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, the amount specified in Appendix 8A as the Network Rail Cancellation Sum for that Planned Service Cancellation;
<b>“Network Rail</b>	means, in respect of a Planned Service, the rate, expressed as pounds per NR Performance Minute,

<b>Payment Rate”</b>	specified in Appendix 8A as the Network Rail Payment Rate for that Planned Service (as adjusted in accordance with paragraph 7);
<b>“NR Performance Minute”</b>	has the meaning set out in paragraph 3.1;
<b>“Performance Sum”</b>	means an amount for which Network Rail or the Train Operator is liable under paragraphs 3 or 4 following a Period in relation to Minutes Delay in that Period and the preceding Periods, as adjusted in accordance with paragraph 8;
<b>“Period”</b>	means each consecutive period of 28 days during the term of this contract commencing at 0000 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 seven days on reasonable prior notice from Network Rail to the Train Operator;
<b>“Planned”</b>	means entered into the Applicable Timetable;
<b>“Planned Incident”</b>	means an incident described as such in paragraph 6.6;
<b>“Planned Service”</b>	means a passenger carrying Service (excluding any Ancillary Movement) of the Train Operator under this contract which is entered in the Applicable Timetable;
<b>“Planned Service Cancellation”</b>	means the Cancellation or Termination of a Planned Service;
<b>“Planned Service Incident Cap”</b>	means, in respect of a Planned Service (and its associated Ancillary Movements) operated by or on behalf of the Train Operator, the Planned Service Incident Cap selected by the Train Operator in accordance with paragraph 9.1;
<b>“Planned Service Incident Cap Notice”</b>	has the meaning ascribed to it in paragraph 9.1.2;
<b>“Recording Point”</b>	means a location at which Network Rail records the times at which trains arrive, pass or depart that location;
<b>“Recovery Time”</b>	means additional time incorporated into the Applicable Timetable to allow a train to regain time lost earlier in its journey as a result of a Restriction of Use;

<b>“Restriction of Use”</b>	means any restriction of use of all or any part of the Network for the purposes of, or in connection with, inspection, maintenance, renewal or repair of the Network or any other works carried out in relation to the Network or any other railway asset or any other works in relation to it;
<b>“RPI”</b>	has the meaning given to it in Schedule 7;
<b>“Service Characteristics”</b>	means, in relation to any Service, the characteristics of that Service specified in any Train Operator Variation Request;
<b>“Service Incident”</b>	means an incident which arises from, is caused by or results from a Planned Service or any of its associated Ancillary Movements;
<b>“Termination”</b>	means, in respect of any Service, the operation of such train in such a way that it – <ul style="list-style-type: none"> <li>(a) fails to reach its Planned final destination station; or</li> <li>(b) commences at a point other than its Planned station start point and does not call at its Planned station start point</li> </ul> and which is not a Cancellation;
<b>“Third Party Train Cancellation”</b>	means the Cancellation or Termination of any train excluding any Ancillary Movements and excluding any Planned Service;
<b>“Third Party User”</b>	means the operator (including the Train Operator) of any train excluding any Ancillary Movements and excluding any Planned Service;
<b>“Third Party User Cancellation Minutes”</b>	means, in respect of a Third Party Train Cancellation, the number of minutes specified in Appendix 8A as the Third Party User Cancellation Minutes;
<b>“TO Performance Minute”</b>	has the meaning set out in paragraph 4.1;
<b>“Train Mile”</b>	has the meaning given to it in Schedule 7;
<b>“Train Operator Annual Cap”</b>	means the Train Operator Annual Cap specified in Appendix 8A, as adjusted in accordance with paragraph 7 and paragraph 8.2 of this Schedule 8, save that in respect of the first and last Financial Year, the Train Operator Annual Cap shall be that specified in Appendix 8A, multiplied by the Adjustment Fraction;

<b>“Train Operator Benchmark” or “TOB”</b>	means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period, as specified in Appendix 8A and adjusted in accordance with paragraph 8;
<b>“Train Operator Payment Rate”</b>	means, in relation to delay caused to a Third Party User, the rate, expressed as pounds per TO Performance Minute, specified in Appendix 8A (as adjusted in accordance with paragraph 7);
<b>“Trigger”</b>	means the act of a train arriving at, passing or departing from a Recording Point;
<b>“Week”</b>	means a period of seven days beginning on Sunday and ending on the immediately following Saturday (both days inclusive), save that where that period of seven days would otherwise fall within two Periods (“Period A” and “Period B”) for the purposes of this Schedule each of the following shall constitute a Week – <ul style="list-style-type: none"> <li>(a) Sunday to the last day of Period A (both days inclusive); and</li> <li>(b) the first day of Period B to the immediately following Saturday (both days inclusive).</li> </ul>

1.2 For the purposes of Schedule 8 events in respect of a Service shall be treated as occurring on the day on which the Service was Planned to depart from its point of origin.

## **2 General principles and performance information**

- 2.1 In respect of Cancellation, this Schedule 8 shall only apply to any Planned Service Cancellation for which Network Rail is responsible or jointly responsible with the Train Operator and which occurs after 22:00 on the day before such Planned Service is due to run.
- 2.2 Each of the Train Operator and Network Rail shall use all reasonable endeavours to keep the other of them informed of any known or anticipated delay to, or Cancellation, Termination or Diversion of, Planned Services or any Ancillary Movements associated therewith.
- 2.3 Each of Network Rail and the Train Operator shall take reasonable steps to avoid and mitigate the effects of:
  - (a) any incidents upon the Planned Services; and
  - (b) any Service Incident affecting other trains.
- 2.4 Network Rail shall use recordings made using the Performance Monitoring System for the purposes of this Schedule 8 including the times at which the Services and other trains Trigger Recording Points. Where appropriate Network Rail may require the Train Operator, in respect of Services only, to make the relevant entry, to record such times on the Performance Monitoring System. Network Rail and the Train Operator shall each comply with and be bound by the provisions of the Performance Data Accuracy Code referred to in Part B of the Network Code and the provisions of that Code shall apply to this contract. Accordingly, the provisions of this Schedule 8 concerning the recording of train performance information or which refer to information regarding train performance (including references to the time at which a train Triggers a Recording Point), and the rights and remedies of the Train Operator in respect of the same, shall be subject to and interpreted in accordance with the provisions of that Code.
- 2.5 In respect of each Trigger of a Recording Point Network Rail shall use its reasonable endeavours to record separately, as unexplained delay, those minutes of delay of three minutes or more included in Minutes Delay for which it is unable to identify the incident(s) which caused that delay. The Train Operator shall co-operate with Network Rail on request by providing all such information as it has in its possession regarding the identification of the incident(s) which caused that delay.
- 2.6 All unexplained delay recorded in accordance with paragraph 2.5 shall, notwithstanding the provisions of paragraph 6.3(b) be allocated between the parties as follows –
  - (a) any Minutes Delay or Cancellation Minutes in respect of Service Incidents arising either off the Network or at stations at which the Train Operator's Services are Planned to call shall be included in the TO Performance Minutes; and
  - (b) any Minutes Delay to a Service or Planned Service Cancellation arising on the Network and which are not allocated to the Train Operator

under this Schedule (including paragraph 2.6(a)) shall be included in the NR Performance Minutes.

2.7

- (a) Network Rail shall provide to the Train Operator through the Performance Monitoring System as soon as reasonably practicable, and in any event no later than the following Working Day, the information recorded or provided to it under paragraphs 2.4 or 2.5.
- (b) the Train Operator shall be deemed to have agreed the information recorded by Network Rail and Network Rail shall be deemed to have agreed the information recorded by the Train Operator except, in either case, to the extent that it has, within two clear Working Days of the information being provided, notified the other that it disputes the information. Any such notification shall specify the reasons for the dispute, so as to assist resolution of the dispute. The parties shall endeavour to resolve each such dispute within two Working Days of its notification.

2.8 Within 5 Working Days of a Trigger occurring, Network Rail shall be entitled to re-allocate responsibility to the Train Operator for each minute of delay included in Minutes Delay where further information becomes available to Network Rail which would otherwise result in responsibility for the relevant incident being allocated to the Train Operator in accordance with paragraph 6.4. Paragraph 2.7(b) shall apply to the allocation of responsibility under this paragraph 2.8.

2.9 Network Rail shall have no liability to the Train Operator under the terms of this Schedule in respect of Minutes Delay to a Planned Service or a Planned Service Cancellation to the extent that it is caused, in either case, by that Planned Service being presented to Network Rail on the Network after the time Planned for such presentation. In such circumstances, Network Rail shall use its reasonable endeavours to facilitate the movement of the Planned Service as expeditiously as possible subject to

- (a) any access rights which it may have granted to third parties; and
- (b) any Restrictions of Use of the Network in the Applicable Engineering Access Statement or the Applicable Timetable Planning Rules.

### 3 Network Rail performance

3.1 The performance minutes allocated to Network Rail in respect of any Planned Service (the “**NR Performance Minutes**”) shall be equal to the sum of –

- (a) the number of Minutes Delay caused to that Planned Service by one or more Service Incidents for which Network Rail is allocated responsibility under paragraphs 2.6(b) and 6.3; and/or
- (b) 50% of the number of Minutes Delay caused to that Planned Service by one or more Service Incidents for which Network Rail is allocated joint responsibility with the Train Operator under paragraph 6.5.

3.2.1 The NR Performance Minutes shall be converted into a per 100 Train Operator Miles figure (the “**Adjusted NR Performance Minutes**”) using the formula below:

$$\text{Adjusted NR Performance Minutes} = \frac{\text{NR Performance Minutes}}{100 \text{ Train Operator Miles}}$$

3.2.2 The Adjusted NR Performance Minutes calculated in accordance with paragraph 3.2.1 shall then be compared with the NRB and:

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

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

where:

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

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

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

where CPCM has the meaning ascribed to it in paragraph 3.2.2(a); and

- (c) if the Adjusted NR Performance Minutes figure is equal to NRB, neither party shall be liable to the other for a Performance Sum under this paragraph 3.2.



- 3.3 In the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, Network Rail shall, in respect of that Planned Service be liable to pay to the Train Operator (in substitution for and to the exclusion of any liability under paragraph 3.4) the Network Rail Cancellation Sum. In the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, then in respect of that Planned Service Network Rail shall be liable to pay to the Train Operator (in substitution for and to the exclusion of any liability under paragraph 3.4) the Joint Cancellation Sum.
- 3.4 If a Planned Service is the subject of a Diversion or Failure to Stop due to a Service Incident for which Network Rail is allocated responsibility under paragraph 6.3 and, as a result, the Train Operator incurs, in relation to such Planned Service, additional costs which but for the Diversion or Failure to Stop it would not have incurred, Network Rail shall, in addition to any liability under paragraph 3.2, pay the Train Operator the Charter Service Variation Sum in respect of the Planned Service provided that the Train Operator shall have notified to and supplied Network Rail with evidence (to its reasonable satisfaction) of such costs on or before the end of the Period following the Period in which such Service Incident occurred.
- 3.5 Within five Working Days after the end of each Week, Network Rail shall provide the Train Operator with an Interim Statement showing in respect of each Planned Service which was Planned to depart from its point of origin during that Week and for which Network Rail is liable to make payment under this paragraph 3 either –
- (a) the Performance Sum calculated in accordance with paragraph 3.2; or
  - (b) whether it is a Planned Service Cancellation for which Network Rail is liable to the Train Operator under paragraph 3.3.

Any unresolved dispute under paragraph 2.7 in relation to a Planned Service the subject of an Interim Statement shall be indicated as such on the Interim Statement. Within two Working Days of receipt of the Interim Statement the Train Operator shall sign and return a copy thereof to Network Rail and indicate on the copy any aspects of the Interim Statement which it disputes, giving reasons for any dispute. Save to the extent that any disputes are so notified or if the Train Operator fails to sign and return to Network Rail a copy of the Interim Statement, the Train Operator shall be deemed to have agreed the contents of the Interim Statement.

#### 4 Train operator performance

- 4.1 The performance minutes allocated to the Train Operator in respect of any Third Party User (the “**TO Performance Minutes**”) shall be calculated as follows:

$$\text{TO Performance Minutes} = (A + B) + (C + D)$$

where –

- A = the total number of Minutes Delay in respect of all Triggers by each train operated by that Third Party User caused by one or more Service Incidents for which the Train Operator is allocated responsibility under paragraphs 2.6(a) and 6.4; and
- B = 50% of the total number of Minutes Delay in respect of all Triggers by each train operated by that Third Party User caused by one or more Service Incidents for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5;
- C = the Third Party User Cancellation Minutes in respect of each Third Party Train Cancellation due to a Service Incident for which the Train Operator is allocated sole responsibility under paragraphs 2.6(a) and 6.4, provided that there shall be disregarded any Minutes Delay caused as a result of such Service Incident occurring after the time at which the train of the Third Party User arrives at the point on or off the Network where it subsequently becomes a Third Party Train Cancellation; and
- D = 50% of the Third Party User Cancellation Minutes in respect of each Third Party Train Cancellation due to a Service Incident for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5 provided that there shall be disregarded any Minutes Delay caused as a result of such Service Incident occurring after the time at which the train of the Third Party User arrives at the point on or off the Network where it subsequently becomes a Third Party Train Cancellation.
- 4.2 For the avoidance of doubt, in the event of a Planned Service Cancellation for which the Train Operator is allocated sole responsibility under paragraph 6.4, then in respect of that Cancellation the Train Operator shall only be liable to pay Network Rail the applicable charge under paragraph 5.1 of Part 2 of Schedule 7 and in the event of a Planned Service Cancellation for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5, then in respect of that Planned Service the Train Operator shall be liable to pay Network Rail 50% of the applicable charge under Schedule 7.
- 4.3.1 For the purposes of this paragraph 4.3, the TO Performance Minutes arising in respect of a Planned Service (and its associated Ancillary Movements) shall be capped at the Planned Service Incident Cap, so that any such minutes in excess of the Planned Service Incident Cap shall be disregarded.

4.3.2 The TO Performance Minutes shall be converted into a per 100 Train Operator Miles figure (the “**Adjusted TO Performance Minutes**”) using the formula below:

$$\text{Adjusted TO Performance Minutes} = \frac{\text{TO Performance Minutes}}{100 \text{ Train Operator Miles}}$$

4.3.3 The Adjusted TO Performance Minutes calculated in accordance with paragraph 4.3.2 shall then be compared with the TOB and:

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

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

where:

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

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

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

where CPCM has the meaning ascribed to it in paragraph 4.3.3(a); and

- (c) if the Adjusted TO Performance Minutes figure is equal to TOB, neither party shall be liable to the other for a Performance Sum under this paragraph 4.3.

4.4 If –

- (a) any service operated by a Third Party User is the subject of a Diversion or Failure to Stop but does not become a Third Party Train Cancellation for which Third Party User Cancellation Minutes are allocated to the Train Operator under paragraph 4.1; or

- (b) Network Rail has to postpone a Restriction of Use or has to keep open any part of the Network beyond the time at which such part of the Network is generally open to passenger carrying movements

due to a Service Incident for which the Train Operator is allocated responsibility under paragraph 6.4 and, as a result, Network Rail incurs additional costs which, but for the Service Incident it would not have incurred, the Train Operator shall, in addition to any liability under paragraph 4.2, pay Network Rail the Charter Service Variation Sum in respect of the Planned Service provided that Network Rail shall have notified to and supplied the Train Operator with evidence (to its reasonable satisfaction) of such costs on or before the end of the Period following the Period in which such Service Incident occurred.

- 4.5 Within five Working Days after the end of each Week, Network Rail shall provide the Train Operator with an Interim Statement listing all Service Incidents during that Week for which the Train Operator is allocated responsibility under paragraph 6.4 or joint responsibility with Network Rail under paragraph 6.5 and showing, for each such Service Incident, the TO Performance Minutes. Any unresolved dispute under paragraph 2.7 in relation to any such Service Incident shall be indicated as such on the Interim Statement. Within two Working Days of receipt of the Interim Statement the Train Operator shall sign and return a copy thereof to Network Rail and indicate on the copy any aspects of the Interim Statement which it disputes, giving reasons for any dispute. Save to the extent that any disputes are so notified or if the Train Operator fails to sign and return to Network Rail a copy of the Interim Statement, the Train Operator shall be deemed to have agreed the contents of the Interim Statement.

## **5 Calculation of minutes delay**

5.1 Subject to paragraph 5.2 the Minutes Delay for a Planned Service in respect of a Trigger of a Recording Point shall be equal to –

- (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train so Triggers the Recording Point is later than the time at which that train is Planned so to Trigger the Recording Point; and
- (b) in respect of each other recorded Trigger by a train, the lesser of –
  - (i) the number of minutes in respect of the Trigger calculated as in paragraph 5.1(a) above; and
  - (ii) the greater of  $((A1-A2) + B)$  and zero

where –

A1 is the number of minutes, between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);

A2 is the Planned time between such Triggers; and

B is any Recovery Time between such Triggers.

5.2 The Minutes Delay calculated in accordance with paragraph 5.1 shall be allocated to the incident(s) causing those Minutes Delay as described in paragraph 6. Any minutes of delay which are included in any Minutes Delay and which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall for the purposes of this Schedule 8 be deemed to be zero.

## **6 Allocation of responsibility**

- 6.1 For the purposes of this Schedule 8 responsibility for each minute of delay included in Minutes Delay, each Third Party Train Cancellation, each Diversion, each Failure to Stop and each Planned Service Cancellation shall be allocated according to the responsibility for the incident which caused such Minutes Delay, Third Party Train Cancellation, Diversion, Failure to Stop or Planned Service Cancellation as established in accordance with the following provisions of this paragraph 6.
- 6.2 In assessing the causes of any Minutes Delay, Third Party Train Cancellation, Diversion, Failure to Stop or Planned Service Cancellation there shall be taken into account all incidents contributing thereto including –
- (a) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents contributing thereto;
  - (b) where a train is affected by the cancellation of or delay to an Ancillary Movement, the incident(s) giving rise to that cancellation or delay; and
  - (c) where a Restriction of Use overruns, due to the start of such Restriction of Use being delayed by a late running train (including a Planned Service or an Ancillary Movement associated therewith), the incident(s) giving rise to that late running.
- 6.3 Subject to paragraph 6.5, Network Rail shall be allocated responsibility for an incident other than a Planned Incident if that incident is –
- (a) caused by breach by Network Rail of any of its obligations under this contract or any of its obligations in its safety authorisation which are relevant to the operation of the Services;
  - (b) caused by failures of or delays to Services arising on the Network which are not allocated to the Train Operator under this contract; or
  - (c) caused by acts or omissions of Network Rail's staff or Network Rail's contractors in breach of this contract.
- 6.4 Subject to paragraph 6.5, the Train Operator shall be allocated responsibility for an incident other than a Planned Incident if that incident is –
- (a) caused by breach by the Train Operator of any of its obligations under this contract or any of its obligations in its safety certificate which are relevant to the operation of the Services;
  - (b) caused by circumstances within the control of the Train Operator (whether or not the Train Operator is at fault) in its capacity as an operator of trains under this contract; or
  - (c) caused (whether or not the Train Operator is at fault) by any defect in or other failure by the Specified Equipment to comply with the Planned Service Characteristics of a Service whether or not such Specified Equipment is owned by the Train Operator; or

- (d) caused by acts, or omissions of the Train Operator's staff, customers, contractors (including any associates or associate sub-contractors of the Train Operator) in connection with this contract, or passengers using the Services; or
- (e) caused by circumstances arising –
  - (i) off the Network and which are not caused by Network Rail in breach of its obligations under this contract; or
  - (ii) in connection with the operation of any station, light maintenance depot or other facility to which the Train Operator has been granted access for the purpose of the operation of the relevant Service; or
  - (iii) under a connection agreement to which Network Rail is a party in relation to a light maintenance depot or other facility referred to under (ii) above.

6.5 Network Rail and the Train Operator shall be allocated joint responsibility for –

- (a) any incident caused by or in connection with any incident arising at or in a station which is not within the reasonable control of either party; or
- (b) any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 6.3 or 6.4.

6.6 An incident in connection with a Restriction of Use shall be treated as a Planned Incident to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Applicable Timetable.

## 7 Payment terms and supplementary provisions

- 7.1.1 The aggregate of any and all sums for which each party is liable under this Schedule in relation to Planned Services which were Planned to depart from their point of origin during a Period and which had been agreed under paragraph 7.1.1 shall be set off against each other and the balance, if any, shall be invoiced by Network Rail to the Train Operator or, as the case may be, shall be the subject of a credit note issued by Network Rail to the Train Operator within 14 days after the end of the Period and shall be payable within 28 days after the end of the Period.
- 7.1.2 In respect of any Financial Year, the liability of Network Rail under this paragraph 7.1 shall not exceed the Network Rail Annual Cap.
- 7.1.3 In respect of any Financial Year, the liability of the Train Operator under this paragraph 7.1 shall not exceed the Train Operator Annual Cap.
- 7.1.4 Where any amount which is the subject of this Schedule is in dispute –
- the undisputed amount shall be accounted for in accordance with paragraph 7.1.1 (and shall be subject to set off accordingly);
  - the disputed balance (“disputed balance”) shall be accounted for in the calculations made under paragraph 7.1.1 for the Period in which the dispute is resolved or otherwise determined (and shall be subject to set off accordingly); and
  - the disputed balance shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the date on which the disputed balance would but for such dispute have been due to be so accounted for until the date of such account.
- 7.2 On 1 April in each Financial Year, commencing with 1 April 2015, each of the Network Rail Payment Rate, Train Operator Payment Rate, Network Rail Annual Cap and Train Operator Annual Cap, Network Rail Cancellation Sum, Joint Cancellation Sum and the Charter Service Variation Sum respectively which in each case applied in the immediately preceding Financial Year shall be adjusted by multiplying them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula –

$$\text{Adjustment Factor} = \left(1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}}\right) \cdot (1 + \text{TRUEUP}_{t-1})$$

where –

- RPI<sub>t-1</sub> means the average value of the monthly figures of RPI for the 12 months up to and including the month of December immediately preceding the relevant 1 April; and
- RPI<sub>t-2</sub> means the average value of the monthly figures of RPI for the 12 months up to and including the month of December which is 16 months before the relevant 1 April.



(c)  $TRUEUP_{t-1} = \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} - \frac{(RPI_{t-2} - RPI_{t-3})}{RPI_{t-3}}$

where:

RPI<sub>t-3</sub> means the average value of the monthly figures of RPI for the 12 months up to and including the month of December which is 28 months before the relevant 1 April.

- 7.3 Each Service shall be allocated an eight character code in the Performance Monitoring System (being a different code to that which applies to services of the Train Operator operated under any other access agreement) to allow for monitoring of each Planned Service and its associated Ancillary Movements.

## **8 Reviews of Benchmarks, Network Rail Annual Cap and Train Operator Annual Cap**

### *8.1 Adjustments to the Train Operator Benchmark*

#### 8.1.1 In this paragraph 8:

**“Baseline Annual Train Mileage”** means the amount determined in accordance with paragraph 8.2.3;

**“Baseline Network Mileage”** means the amount determined in accordance with paragraph 8.1.3;

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

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

**“Total Actual Operated Mileage”** means, in respect of any Financial Year, the aggregate of:

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

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

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

8.1.2 The Train Operator Benchmark that shall apply from 1 April in each Financial Year in relation to each Period in that Financial Year shall be the Train Operator Benchmark specified in Appendix 8A as adjusted in accordance with this paragraph 8.

#### 8.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2012/2013, as specified in Appendix 8A, unless it is adjusted in accordance with paragraph 8.1.3(b).

- (b) If, in accordance with paragraph 8.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year t+1 and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 8, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

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

8.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 8.1.4, of the Traffic Growth or Traffic Reduction (as the case may be), Network Rail shall:

- (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 8) in writing of:
  - (i) the Actual Mileage t;
  - (ii) the Baseline Network Mileage;
  - (iii) Network Rail’s calculation of the Traffic Growth or Traffic Reduction (as the case may be) in accordance with paragraph 8.1.4(b); and
  - (iv) Network Rail’s determination of the Adjusted Train Operator Benchmark;
- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 8) such background data and workings as may reasonably be required for a proper understanding of Network Rail’s calculations and determinations under this paragraph 8; and
- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 8) in writing that the same Adjusted

Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 8.

#### 8.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 8.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determination under paragraph 8.1.5(a)(iv).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 8.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 8, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 8.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 8.1.7.
- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 8.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 8, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 8.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for resolution in accordance with the ADRR save that the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall (i) have regard to any relevant criteria and/or policy statement most recently issued by ORR and/or any guidance issued by ORR in relation to the matter referred for resolution and (ii) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 8 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 8 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 8.1.6(c), and to be bound by the determination, even if, either:

- (A) pursuant to paragraph 8.1.6(a), the Train Operator has notified Network Rail that it agrees with Network Rail's determination notified pursuant to paragraph 8.1.5(a)(iv); and/or
- (B) the determination of the relevant ADRR Forum differs from Network Rail's determination pursuant to paragraph 8.1.5(a)(iv) with which the Train Operator agreed.

8.1.7 The Train Operator Benchmark in respect of each Period within the Financial Year immediately following Financial Year t ("**Financial Year t+1**") and, subject to paragraph 8.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

$$ATO B = TO B \times [(T a \times C F) + 1]$$

where:

ATO B means the Adjusted Train Operator Benchmark;

TO B means the current Train Operator Benchmark;

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

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

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

8.1.8 When the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 8.1.7(a) then, subject to paragraph 8.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 8.1.7.

8.1.9 If a reference is made to a relevant ADRR Forum in accordance with paragraph 8.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the relevant ADRR Forum makes its determination pursuant to paragraph 8.1.6(c). Following the relevant ADRR Forum's determination pursuant to paragraph 8.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the

Adjusted Train Operator Benchmark as determined, as the case may be, by (i) the relevant ADRR Forum or (ii) following the relevant ADRR Forum's determination pursuant to paragraph 8.1.6(c), the parties in accordance with this paragraph 8.

8.1.10 Promptly following any adjustment to the Train Operator Benchmark under this paragraph 8, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

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

8.1.11 Any statement issued by Network Rail pursuant to paragraph 8.1.10 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 7.

## 8.2 *Adjustments to the Network Rail Annual Cap and Train Operator Annual Cap*

8.2.1 The Network Rail Annual Cap and the Train Operator Annual Cap that shall apply from 1 April in each Financial Year in relation to each Period in that Financial Year shall be the Network Rail Annual Cap and the Train Operator Annual Cap, in each case as specified in Appendix 8A and as adjusted in accordance with paragraph 7.2 and this paragraph 8.2, provided that no adjustment shall be made to the Network Rail Annual Cap or the Train Operator Annual Cap pursuant to this paragraph 8.2:

- (a) in respect of any period prior to 1 April 2014; and
- (b) thereafter only if the total number of Train Miles operated by the Train Operator during Financial Year t or the Baseline Annual Train Mileage is 1,000,000 or greater.

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

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

8.2.3

- (a) The Baseline Annual Train Mileage that shall apply from 1 April in each Financial Year shall be the total number of Train Miles operated by the Train Operator during the Financial Year commencing on 1 April 2013 and ending on 31 March 2014, unless it is adjusted in accordance with paragraph 8.2.3(b).
  - (b) If, in accordance with paragraph 8.2.2(b), Network Rail determines that there has been an Annual Train Mileage Variation, then the Baseline Annual Train Mileage for Financial Year t+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Train Mileage pursuant to this paragraph 8.2.3(b) shall be the Annual Train Mileage for the Financial Year t in which the Annual Train Mileage Variation has occurred.
- 8.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, the parties shall endeavour to agree whether the Network Rail Annual Cap and/or the Train Operator Annual Cap should be adjusted in accordance with this paragraph 8.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2 shall be subject to the prior approval of ORR.
- 8.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap, the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.
- 8.2.6 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, either:
- (i) the parties fail to reach agreement; or
  - (ii) prior to the expiry of that 56 day period both parties agree that agreement is unlikely to be reached prior to the expiry of that period,
- the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine the matter. The parties agree to abide by any determination issued by ORR.
- 8.2.7 Any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap shall take effect only when it has been approved by ORR and, unless otherwise specified by ORR, any such adjustment shall take effect from 1 April in Financial Year t.
- 8.2.8 Promptly following any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2, and in order to

give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

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

8.2.9 Any statement issued by Network Rail pursuant to paragraph 8.2.8 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 7.1.



## 9 Selection by the Train Operator of the Planned Service Incident Cap

### 9.1 Selection by the Train Operator of the Planned Service Incident Cap

9.1.1 On or before the date on which this paragraph 9.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Planned Service Incident Cap it wishes to apply (the “**Initial Planned Service Incident Cap Notice**”), and the Planned Service Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in the column adjacent to the Planned Service Incident Cap selected by the Train Operator in the Initial Planned Service Incident Cap Notice until it is replaced by a different level of Planned Service Incident Cap selected by the Train Operator in a Planned Service Incident Cap Notice issued pursuant to paragraph 9.1.2.

9.1.2 The Train Operator may change the level of Planned Service Incident Cap previously selected by it (either in the Initial Planned Service Incident Cap Notice or any subsequent Planned Service Incident Cap Notice issued pursuant to this paragraph 11.1.2) with effect from 1 April in any Financial Year by notifying Network Rail in writing of the level of Planned Service Incident Cap it wishes to apply for that Financial Year (the “**Planned Service Incident Cap Notice**”). Any such Planned Service Incident Cap Notice must be served by the Train Operator on Network Rail by no later than 6 weeks prior to 1 April in the Financial Year from which the Train Operator wishes the new level of Planned Service Incident Cap to apply, and the Planned Service Incident Cap Access Charge Supplement Rate applicable for that and each subsequent Financial Year shall be the rate set out in the column adjacent to the Planned Service Incident Cap selected by the Train Operator in the Planned Service Incident Cap Notice until it is replaced by a different level of Planned Service Incident Cap selected by the Train Operator pursuant to this paragraph 9.1.2.

### 9.2 Level of Planned Service Incident Cap and Planned Service Incident Cap Access Charge Supplement Rate

For the purposes of paragraph 9.1, the Train Operator shall select one of the following Planned Service Incident Caps:

Planned Service Incident Cap	Planned Service Incident Cap Access Charge Supplement Rate (£ per Train Mile operated in a Period)
1,000 minutes	[TO BE INSERTED]
2,000 minutes	[TO BE INSERTED]
3,000 minutes	[TO BE INSERTED]
4,000 minutes	[TO BE INSERTED]
5,000 minutes	[TO BE INSERTED]

6,000 minutes	[TO BE INSERTED]
7,000 minutes	[TO BE INSERTED]
8,000 minutes	[TO BE INSERTED]
9,000 minutes	[TO BE INSERTED]
10,000 minutes	[TO BE INSERTED]
No Planned Service Incident Cap	

## 10 ETCS Amendments

### 10.1

- (a) Either party may by notice to the other propose that amendments are made to this Schedule 8 (and to any other provisions of this contract as a result of those amendments) as a consequence of the introduction of ETCS on any part of the Network that is used by the Train Operator (“**ETCS Amendments**”).
- (b) ORR may make ETCS Amendments, subject to complying with paragraph 10.3.

### 10.2

- (a) A party that wishes to make ETCS Amendments shall serve a notice on the other party that:
  - (i) specifies as far as possible the proposed ETCS Amendments and the date from which they are to have effect; and
  - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments and setting out the reasons for making them.
- (b) The party receiving a notice under paragraph 10.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, (and in any event within 20 Working Days) following service of a response pursuant to paragraph 10.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments and the date on which they are to have effect.
- (d) If:
  - (i) the parties agree to make ETCS Amendments pursuant to paragraph 10.2(c); or
  - (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 10.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,they shall notify ORR.

### 10.3

- (a) If ORR:
  - (i) receives a notification under paragraph 10.2(d); or
  - (ii) proposes to make ETCS Amendments itself,then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments it shall:

- (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments; and
  - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments shall have effect.
- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 10.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

## APPENDIX 8A

Charter Service Variation Sum: £[\*\*INSERT\*\*]

Joint Cancellation Sum: £[\*\*INSERT\*\*]

Network Rail Cancellation Sum: £[\*\*INSERT\*\*]

Network Rail Payment Rate: £[\*\*INSERT\*\*] per NR Performance Minute

Network Rail Annual Cap: £[\*\*INSERT\*\*]

Network Rail Benchmark (NRB): the NRB in relation to a Period shall be [\*\*INSERT\*\*] Minutes Delay per 100 Train Operator Miles

Train Operator Payment Rate: £[\*\*INSERT\*\*] per TO Performance Minute

Train Operator Annual Cap: £[\*\*INSERT\*\*]

Train Operator Benchmark (TOB): subject to adjustment in accordance with paragraph 8, the TOB in relation to each Period shall be [\*\*INSERT\*\*] Minutes Delay per 100 Train Operator Miles

Third Party User Cancellation Minutes: 35 minutes