

RAILWAYS ACT 1993

ACCESS CHARGES REVIEW 2008

**REVIEW NOTICE:
FREIGHT TRACK ACCESS CHARGES**

TO:

- (1) the persons whose names are set out in Annex 1 to this Review Notice (the “**Train Operators**”);
- (2) Network Rail Infrastructure Limited (“**Network Rail**”); and
- (3) the Secretary of State for Transport, the Scottish Ministers and the Treasury.

1 GENERAL

- 1.1 This review notice (the “**Review Notice**”) is given in accordance with paragraph 4 of Schedule 4A to the Railways Act 1993 (the “**Act**”).
- 1.2 The Office of Rail Regulation (“**ORR**”) has undertaken a review of:
 - (a) the amounts payable by Network Rail and each of the Train Operators to each other under each of the access agreements listed in Annex 1 to this Review Notice (the “**Track Access Agreements**”); and
 - (b) the times at which, and the manner in which, those amounts are payable, (the “**Review**”).
- 1.3 The ORR’s conclusions on the Review, and its reasons for those conclusions, are:
 - (a) set out in a document entitled “Periodic review 2008 - Determination of Network Rail’s outputs and funding for 2009-14” and published by the ORR on 30 October 2008 (the “**Review Document**”); and

(b) hereby incorporated into this Review Notice.

- 1.4 By publishing this Review Notice and serving it on each of the addressees, the ORR is now initiating the implementation of the Review.

2 Proposed Relevant Changes

- 2.1 For or in connection with giving effect to the ORR's conclusions on the Review, the ORR proposes to direct the parties to each of the Track Access Agreements to amend each Track Access Agreement on the terms specified in Annexes 2 and 3 to this Review Notice (the "**proposed relevant changes**").
- 2.2 The ORR proposes that, subject to paragraph 3, the proposed relevant changes will come into operation on and from 1 April 2009.

3 Regulated Amendments

If, before the proposed relevant changes come into operation in relation to any Track Access Agreement, such Track Access Agreement is amended in a manner which is:

- (a) approved by the ORR under section 22 of the Act; or
- (b) directed by the ORR under section 22A or section 22C of the Act,

(each a "**regulated amendment**"), then:

- (i) the proposed relevant changes shall come into operation in relation to that Track Access Agreement subject to the regulated amendments; and
- (ii) if there is any conflict between the proposed relevant changes and the regulated amendments, the regulated amendments shall take precedence.

4 Objections

4.1 Subject to paragraph 4.2, any person specified in paragraph (4)(a) or (b) of Schedule 4A to the Act may make objections with respect to:

- (a) any of the proposed relevant changes; or
- (b) the date on which it is proposed that any such proposed relevant changes should come into operation.

4.2 Any objection made under paragraph 4.1 must be:

- (a) made in writing;
- (b) received by the ORR on or before 5 February 2009; and
- (c) addressed to the ORR as follows:

John Thomas
Office of Rail Regulation
One Kemble Street
London WC2B 4AN

5 Definitions and Interpretation

5.1 In this Review Notice, unless the context otherwise requires:

- (a) references to “this Review Notice” include the Annexes to this Review Notice;
- (b) references to the singular include the plural and *vice versa*;
- (c) words and phrases defined in:
 - (i) the Act;
 - (ii) the Network Code (formerly known as the Railtrack Track Access Conditions 1995 (as amended)); or
 - (iii) each Track Access Agreement,

shall have the same meanings in this Review Notice; and

(d) any general rules of interpretation contained in:

(i) Condition A1 of the Network Code; or

(ii) each Track Access Agreement,

shall also apply to this Review Notice.

BILL EMERY

FOR AND ON BEHALF OF

THE OFFICE OF RAIL REGULATION

Dated 18 December 2008

ANNEX 1

TRAIN OPERATORS AND TRACK ACCESS AGREEMENTS

Train Operator	Original Date of Track Access Agreement
Advenza Freight Limited	16 October 2003
Colas Rail Limited (formerly AMEC Spie Rail (UK) Limited)	21 December 2006
Direct Rail Services Limited	31 January 2003
English Welsh & Scottish Railway Limited	9 February 2006
Fastline Limited	24 January 2005
Freightliner Limited	17 December 2007
Freightliner Heavy Haul Limited	26 September 2007
Freight Europe (UK) Limited	30 November 2007
GB Railfreight Limited	29 January 2008
Société Nationale des Chemins de Fer Français	15 August 2007
West Coast Railway Company Ltd	7 December 2005
Serco Limited	30 September 2008

ANNEX 2

STANDARD AMENDMENTS

Explanatory Note:

In order to give effect to the ORR's conclusions on the Review, amendments need to be made to Schedules 4 (Rules of the Route, Rules of the Plan and Restrictions of Use), 7 (Track Charges) and 8 (Performance Regime) to each Track Access Agreement and any consequential amendments to definitions in each Track Access Agreement.

*This Annex 2 sets out the standard form proposed relevant changes to be made to Schedules 4, 7 and 8 and clause 1 of each Track Access Agreement (the "**standard amendments**").*

In some Track Access Agreements, some of the provisions which are to be amended are not in standard form. Where this is the case, Part 1 of Annex 3 to this Review Notice sets out how the standard amendments will need to be modified, or certain other bespoke amendments will be required.

In certain instances, where this is appropriate because of the nature of the amendments, the standard amendments for an individual Train Operator (e.g. Schedule 8 for Direct Rail Services Limited) are set out in this Annex 2.

In certain instances, the publication of certain proposed relevant changes would or might, in the opinion of the ORR, seriously and prejudicially affect the interests of each Train Operator and/or Network Rail for the purpose of section 71(2) of the Act; they are therefore not being published. Where this is the case, such proposed relevant changes will be attached to Part 2 of Annex 3 to this Review Notice and will be sent only to the parties to the relevant Track Access Agreement, the Secretary of State for Transport, the Scottish Ministers and the Treasury.

Save as otherwise specified in Annex 3 to this Review Notice, the following amendments shall be made to the Track Access Agreements:

1 Definitions in each Track Access Agreement

- 1.1 In clause 1.1 of each Track Access Agreement that does not contain a definition of the term “relevant ADRR Panel”, insert the following new definition in alphabetical order:

“**“relevant ADRR Panel”** has the meaning ascribed to it in Part A of the Network Code;”.

- 1.2 In clause 1.1 of each Track Access Agreement:

- (a) delete the definition of “Incident Cap Access Charge Supplement Rate” and replace it with the following:

“**“Incident Cap Access Charge Supplement Rate”** means, in relation to any Financial Year, the rate determined in accordance with paragraph 11.1 of Schedule 8, as adjusted under paragraph 2.7.2 of Schedule 7;” and

- (b) delete the definition of “Service Variation Sum” and replace it with the following:

“**“Service Variation Sum”** means the Service Variation Sum of £544, as adjusted under paragraph 2.7.2 of Schedule 7;”.

2 Schedule 4 to each Track Access Agreement

Schedule 4 to each Track Access Agreement shall be deleted and replaced in its entirety by the Schedule set out in Appendix 1 to this Annex 2.

3 Schedule 5 to each Track Access Agreement

- 3.1 In clause 1.1 of Schedule 5 to each Track Access Agreement, insert the following new definition in alphabetical order:

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

3.2 In paragraph 4.1(d) of Schedule 5 to each Track Access Agreement, replace “.” with “; and”.

3.3 In paragraph 4.1 of Schedule 5 to each Track Access Agreement, insert the following:

“(e) any Revised Base Service.”.

4 Schedule 7 to each Track Access Agreement

Schedule 7 to each Track Access Agreement shall be deleted and replaced in its entirety by the Schedule set out in Appendix 2 to this Annex 2.

5 Schedule 8 to each Track Access Agreement

5.1 Schedule 8 to each Track Access Agreement (other than the Track Access Agreement between Network Rail and Direct Rail Services Limited) shall be deleted and replaced in its entirety by the Schedule set out in Appendix 3 to this Annex 2. Each of the amounts (specific to each Train Operator) to be inserted in Appendix 1 to Schedule 8 opposite the references to “Train Operator Cap” and “Network Rail Cap” is attached separately (see Part 2 of Annex 3 to this Review Notice).

5.2 Schedule 8 to the Track Access Agreement between Network Rail and Direct Rail Services Limited shall be deleted and replaced in its entirety by the Schedule set out in Appendix 4 to this Annex 2. Each of:

(a) the amounts (specific to Direct Rail Services Limited) to be inserted opposite the references to “Train Operator Cap”, “Cancellation Charge Access Charge Supplement” and “Network Rail Cap” in Appendix 1 to such Schedule 8; and

(b) the amount (specific to Direct Rail Services Limited) to be inserted in paragraph (c) of the provision headed “Cancellation Sum” in Appendix 1 to such Schedule 8,

is attached separately (see Part 2 of Annex 3 to this Review Notice).

Appendix 1 to Annex 2

Schedule 4

SCHEDULE 4: VARIATIONS TO SERVICES

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;

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

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than 60 minutes;

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

provided that:

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

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

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

provided that:

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

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

“Category 3 Disruption Trigger” means where the Train Operator incurs Actual Costs as a consequence of any Category 3 Disruption arising from a single Network Rail Early Notice Possession;

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

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

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

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

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

“**Enhanced Planned Disruption Sum**” means £1059;

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

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

- (a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and
- (b) any Late Notice Cancellation Sum or Service Variation Sum (as the case may be) due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

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

“**Late Notice Actual Costs Claim Trigger**” means:

- (a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or
- (b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

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

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

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

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

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

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

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

“**Normal Planned Disruption Sum**” means £397;

“**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
- (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;

“Relevant Cancellation” has the meaning specified in paragraph 9.1;

“Relevant Service Variation” has the meaning specified in paragraph 9.2;

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

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

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

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

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

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

1.2 *Interpretation*

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

2 **Payment**

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

- (a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (b) a Late Notice Cancellation Sum in respect of each Late Notice Cancellation and, where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (c) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (e) an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph 3.3.3 and in accordance with paragraph 3.3.3,

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

PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE

3 Disruption compensation

3.1 Category 1 Disruption

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

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

3.2 Category 2 Disruptions

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

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

3.3 Category 3 Disruptions

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

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

- 3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.
- 3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of an Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:
- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Actual Costs Claim Notice; or
 - (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
 - (c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Network Rail shall:
 - (i) (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; and

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

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

- 3.4.1 The Train Operator shall notify Network Rail of any Network Rail Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Network Rail Early Notice Possession.
- 3.4.2 The Train Operator must notify Network Rail of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a “**Disruption Claim Notice**”).
- 3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail:
 - (a) no later than the day falling 56 days after the end of the occurrence of the Network Rail Early Notice Possession giving rise to a Category 3 Disruption; or
 - (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant Network Rail Early Notice Possession (an “**Actual Costs Claim Notice**”).
- 3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Network Rail Early Notice Possession, provided that:

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

3.5 *Planned Disruption Sum on Round Trip*

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

3.6 *Early notice of potential Actual Cost claims*

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Network Rail Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Network Rail Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Network Rail Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

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

4 Services rescheduled following a Disruptive Event

4.1 Establishing an Alternative Train Slot

Where there is a Disruptive Event:

- (a) to the extent that there is appropriate capacity available on the relevant part of the Network; and
- (b) subject to Part H of the Network Code and the Railway Operational Code,

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

4.2 Train Operator's response

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

- (a) 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*

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 paragraph 2 of Schedule 4 and paragraphs 8 and 9 of Schedule 8 shall apply.

4.5.2 Where an Alternative Train Slot is:

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

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

4.6 *Part H of the Network Code*

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

5 Other variations to Planned Services

5.1 Non-availability of a Service

This paragraph 5 applies if, for any reason other than:

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

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

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

5.2 Establishing an Alternative Train Slot

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

5.3 Train Operator's response

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

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

5.4 *Rejection of Alternative Train Slot*

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

5.5 *Measure of performance*

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

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

5.6 *Cancellation*

5.6.1 Where:

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

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

5.6.2 Where an Alternative Train Slot is:

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

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

PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE

6 Restrictions of Use before Possession Notice Date

Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Network Rail nominates that any part of the Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have no liability to the Train Operator under Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

PART 5 – SERVICE VARIATION

7 Service Variation

7.1 Service Variation

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

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Network Rail (as defined in Schedule 8); and
- (b) has one or more of the following effects:
 - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;

- (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;
- (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
- (iv) the use of at least one additional locomotive for the Diverted Service over the number for the Original Service or use of a diesel locomotive for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for that Original Service as shown in Schedule 5;
- (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours;
- (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours; and
- (vii) while the Train Operator has Bid for the original Train Slot in accordance with Part D of the Network Code, the nomination and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Spot Bid because an act or omission of Network Rail resulted in the original Bid not being Planned in accordance with Part D.

7.2 *Network Rail liability*

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

7.3 *Service Variation Sum on Round Trip*

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

7.4 *Service Variation / Cancellation*

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

PART 6 – MODIFICATION PROVISION

8. *Modifications to Specified Provisions*

8.1 If at any time after 1 April 2010:

(a) and before 1 October 2010, Network Rail determines that the Criteria for making modifications to the Specified Provisions have been met, it shall notify ORR (copied to the Train Operator) promptly in accordance with paragraph 8.3; or

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

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

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

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

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

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

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

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

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

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

- 8.7 This contract shall have effect with the modifications specified in a Modification Notice from the date specified by ORR in that notice. A Modification Notice shall not have retrospective effect.
- 8.8 No Modification Notice shall have effect unless:
- (a) ORR has first consulted the parties and such other persons, if any, as it considers appropriate in relation to the terms of the proposed Modification Notice;
 - (b) in the consultations referred to in paragraph 8.8(a), ORR has made available to the consultees such drafts of the proposed Modification Notice as it considers are necessary so as properly to inform them of the contents and terms of the proposed Modification Notice;
 - (c) ORR has given each consultee the opportunity to make representations in relation to the proposed Modification Notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on such proposed Modification Notice;
 - (d) ORR has notified the consultees as to its conclusions in relation to the proposed Modification Notice (including by providing to each consultee a copy of the text of the proposed Modification Notice) and its reasons for those conclusions; and
 - (e) ORR has served a modification notice, in substantially similar terms to the Modification Notice (save to the extent ORR has set out during its consultation process its reasons for adopting a different approach) on any operator whose access agreement in relation to track includes a similar provision to this paragraph 8 on or about the same date.

PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS

9. *Late Notice Actual Costs Claims*

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

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

(a) either:

- (i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or
- (ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
- (iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and

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

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

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

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

(a) either:

- (i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:
 - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
 - (B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or
 - (ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or
 - (iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Original as shown in Schedule 5; or
 - (iv) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

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

9.3 *Late Notice Actual Costs Claim Notice*

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

9.4 *Late Notice Actual Costs Claim Process*

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

- (a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall also pay such Late Notice Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Late Notice Actual Costs Claim Notice; or
- (b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Network Rail shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue

such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

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

Appendix 2 to Annex 2

Schedule 7

SCHEDULE 7: TRACK CHARGES

1. Definitions

In this Schedule 7 unless the context otherwise requires:

“2008 Final Determinations” means the document entitled “Periodic Review 2008: Determination of Network Rail’s outputs and funding for 2009-14” published by ORR on 30 October 2008;

“access charges review” has the meaning attributed to it in paragraph 1(1) of Schedule 4A to the Act;

“Adjustment Factor” means the factor calculated in accordance with paragraph 2.7.2;

“Baseline Coal Spillage Charge Rate” has the meaning attributed to it in paragraph 2.11.1;

“Baseline Points Failures” means the number of points failures attributable to coal spillage identified in a list published by Network Rail in December 2008;

“Coaching Stock Miles” means, in relation to coaching stock, the Contract Miles travelled by that coaching stock;

“Coaching Stock Weight” means, in relation to coaching stock, the gross weight of that coaching stock, measured in tonnes;

“Coal Spillage Charge” means the amount payable in respect of item 6 in the formula specified in paragraph 2.2.1;

“Coal Spillage Charge Rate” means, in respect of each Coal Vehicle, the coal spillage charge rate per KGTM determined in accordance with paragraph 2.11.1, as adjusted in accordance with paragraph 2.7.2;

“Coal Spillage Charge Variation Notice” means a notice given by ORR to the parties which sets out:

- (a) any variation to the Coal Spillage Charge Rate, which may have retrospective effect; and
- (b) the date from which such variation is to have effect;

“Coal Spillage Investment” has the meaning attributed to it in paragraph 2.12.3(b);

“Coal Spillage Reduction Investment Charge” means the amount payable in respect of item 7 in the formula specified in paragraph 2.2.1;

“Coal Spillage Reduction Investment Charge Rate” means, in respect of each Coal Vehicle used in a Service, the coal spillage charge rate per KGTM set out in the Track Usage Price List until it is varied in accordance with paragraph 2.12;

“Coal Vehicle” means any vehicle in respect of which the applicable Commodity is coal;

“Commodity” means the commodity applying to each Service as shall be agreed between the Train Operator and Network Rail by reference to the classes of commodity in the Track Usage Price List;

“Contract Miles” means, in relation to a train, or a portion of a train, the actual distance in miles travelled by that train, or that portion of a train, on the Network as specified in the Rights Table or as otherwise agreed by the Train Operator and Network Rail;

“Contributing Train Operator” means, in relation to any Qualifying Modification, the train operator which:

- (a) has requested that Network Rail make the modification to the Operating Constraints; and

(b) continues to utilise the modification;

“CSR Deductions” means any amounts applied by Network Rail from the amounts received by Network Rail from all freight train operators in respect of the Coal Spillage Investment Charge for the purpose described in paragraph 2.12.2;

“CSR Rebate” has the meaning attributed to it in paragraph 2.12.6;

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

- (a) whether the Total CSR Fund Balance (if any) shall be carried forward or whether a CSR Rebate shall be made;
- (b) any variation to the Coal Spillage Reduction Investment Charge Rate, which may have retrospective effect; and
- (c) the date from which the variation referred to in paragraph (b) above is to have effect;

“Efficiency Benefit Share” means the amount determined in accordance with paragraph 2.10;

“Electrification Asset Usage Charge” means the electrification asset usage charge calculated in accordance with paragraph 2.4.12, as adjusted in accordance with paragraph 2.7.2;

“Empty Wagon Miles” means, in relation to an empty wagon, the Contract Miles travelled by that empty wagon;

“Empty Wagon Weight” means, in relation to an empty wagon, the tare weight of that wagon, measured in tonnes;

“ESI Vehicle” means any vehicle in respect of which the applicable Commodity is electricity supply industry coal;

“Freight Capacity Charge” means the charge calculated in accordance with paragraph 2.3;

“Freight Capacity Rate” means, in respect of each Service, the freight capacity rate corresponding to the day (or days) of the week on which that Service is operated, as set out in the List of Capacity Charge Rates and adjusted in accordance with paragraph 2.7.2;

“Freight Only Line Charge Rate” means, in respect of each ESI Vehicle and/or SNF Vehicle used in a Service, the freight only line charge rate per KGTM for that ESI Vehicle and/or SNF Vehicle (as applicable), as set out in the Track Usage Price List and adjusted in accordance with paragraph 2.7.2;

“Freight Services” means the services for the carriage of goods by railway on the Network;

“FY CSR Fund” has the meaning attributed to it in paragraph 2.12.3;

“Geographic Area g” means, for the purposes of performing the calculations set out in paragraph 2.4, the relevant geographic section of the Network as set out in Appendix 1;

“Gross Tonne Miles” or **“GTM”** means, in respect of each locomotive, loaded wagon, empty wagon or coaching stock, the Locomotive Miles, Loaded Wagon Miles, Empty Wagon Miles or Coaching Stock Miles multiplied by the relevant Locomotive Weight, Loaded Wagon Weight, Empty Wagon Weight or Coaching Stock Weight respectively;

“Incremental Costs” means all reasonable additional costs properly and reasonably incurred by Network Rail in respect of any modification referred to in paragraph 2.8, being the additional reasonable costs (if any) to Network Rail in respect of its obligation to maintain and operate the Network, but excluding:

- (a) any loss of income on the part of Network Rail; and

(b) freight-specific fixed and common costs for which Network Rail has already received funding from the Secretary of State, or any other body or person;

“IIEC Adjustment Factor” means the factor calculated in accordance with paragraph 2.7.4;

“Indexed Figures” means the Variable Rate, the Traction Electricity Rate, the Electrification Asset Usage Charge, the Freight Capacity Rate, the Incident Cap Access Charge Supplement Rate, the Train Operator Bonus Payment Rate, the Train Operator Compensation Payment Rate, the Network Rail Bonus Payment Rate, the Network Rail Compensation Payment Rate, the Service Variation Sum, the Train Operator Cap, the Disruption Sum, the Normal Planned Disruption Sum, the Enhanced Planned Disruption Sum, the Network Rail Cap, the Cancellation Sum, the Late Notice Cancellation Sum, the Prolonged Disruption Amount, the Freight Only Line Charge Rate and the Coal Spillage Charge Rate;

“KGTm” means 1000 Gross Tonne Miles;

“kWh” means kilowatt hours;

“List of Capacity Charge Rates” means the document entitled “List of Capacity Charge Rates” published by Network Rail on or about 18 December 2008;

“Loaded Wagon Miles” means, in relation to a loaded wagon, the Contract Miles travelled by that loaded wagon;

“Loaded Wagon Weight” means, in relation to a loaded wagon, the gross weight of that loaded wagon, measured in tonnes;

“Locomotive Miles” means, in relation to a locomotive, the Contract Miles travelled by that locomotive;

“Locomotive Weight” means, in relation to a locomotive, the gross weight of that locomotive, measured in tonnes;

“New Registered Equipment” means a type of railway vehicle or vehicle commodity combination not incorporated in the Track Usage Price List;

“ORR’s Qualifying Modification Criteria” means the criteria issued by ORR as described in paragraph 2.9.1;

“Points Failure Variation” has the meaning attributed to it in paragraph 2.11.4;

“QM Threshold” means a level of costs in relation to a modification to the Operating Constraints determined in accordance with ORR’s Qualifying Modification Criteria;

“Qualifying Modification” means a modification to the Operating Constraints in excess of their level as at 1 April 2001, which:

- (a) exceeds the QM Threshold; and
- (b) in respect of which a Contributing Train Operator has paid Network Rail Incremental Costs under paragraph 2.8 or its equivalent in the relevant access agreement;

“Qualifying Modification Benefit Charge” means, in relation to any Qualifying Modification, a charge which shall:

- (a) take account of:
 - (i) the use made or to be made of the Qualifying Modification, where such modification increased the capacity of the Network; or
 - (ii) in any other case, the benefit which is likely to be derived from the Qualifying Modification by the Train Operator compared to the benefit derived from such modification by the Contributing Train Operator; and

(b) reflect any relevant guidance in relation to the funding of modifications to the Operating Constraints published in ORR's Qualifying Modification Criteria;

"Relevant Points Failure" has the meaning attributed to it in paragraph 2.11.3(a);

"Relevant Year t" means the Financial Year for the purposes of which any calculation falls to be made;

"Relevant Year t-1" means the Financial Year preceding Relevant Year t, and similar expressions shall be construed accordingly;

"route type k" means route type k as identified by type of electrification (OLE or DC) in the Track Usage Price List;

"RPI" has the meaning ascribed to it in paragraph 2.7.2;

"SNF Vehicle" means any vehicle in respect of which the applicable Commodity is spent nuclear fuel;

"S_t" has the meaning ascribed to it in paragraph 2.4.2;

"Total CSR Fund" means, at any given time, the aggregate of all amounts received by Network Rail from all freight train operators in respect of the Coal Spillage Investment Charge, less any CSR Deductions;

"Total CSR Fund Balance" has the meaning attributed to it in paragraph 2.12.3(c);

"Track Usage Price List" means the document entitled "Track Usage Price List" published by Network Rail on or about 18 December 2008;

"Traction Electricity Charge" means the charge calculated in accordance with paragraph 2.4.1;

“Traction Electricity Consumption Rates List” means the document entitled “Traction Electricity Consumption Rates List” published by Network Rail on or about 18 December 2008 and specifying freight and passenger traction electricity consumption rates by train category i;

“Traction Electricity Rate” means, for each Service, such amount as Network Rail shall specify for the purpose of each Financial Year as reflecting, so far as reasonably practicable, the actual cost to Network Rail of providing traction electricity to the Train Operator, calculated using the consumption rates set out in the Traction Electricity Consumption Rates List and subject to:

- (a) the agreement of the Train Operator to those amounts, such agreement not to be unreasonably withheld or delayed; and
- (b) the consent of ORR,

as adjusted in accordance with paragraph 2.7.4;

“train category” means train type i used on the relevant route;

“Train Mile” means, in relation to a train, or a portion of a train, a mile travelled by that train, or that portion of a train, on the Network;

“Variable Charge” means the charge calculated in accordance with the formula set out in paragraph 2.2.1, summed across all Services; and

“Variable Rate” means, in respect of each locomotive type, empty wagon type, loaded wagon type and coaching stock type (to be determined by Commodity) used in respect of each Service, the variable track usage charge rate per KGTM set out in the Track Usage Price List or determined in accordance with paragraph 2.2, as adjusted from time to time in accordance with paragraph 2.7.2.

2. Track Charges

2.1 *Obligation on Train Operator to pay*

2.1.1 In respect of each Charging Period, the Train Operator shall pay or procure payment of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incremental Costs, the Incident Cap Access Charge Supplement, the Qualifying Modification Benefit Charge and any amount of S_t payable by the Train Operator, in each case in accordance with this Schedule 7. The charges will be rounded to the nearest penny. Where a calculation ends up exactly half way between whole numbers it will be adjusted upward.

2.1.2 No Track Charges shall be payable by the Train Operator in respect of a Train Slot when the train has not reached its Planned Destination for a reason which is Attributable to Network Rail.

2.1.3 Network Rail shall issue to the Train Operator an invoice as soon as practicable, or as otherwise agreed, following the expiry of each Charging Period in respect of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incident Cap Access Charge Supplement and any Incremental Costs or Qualifying Modification Benefit Charge which is or are payable in respect of that Charging Period. If, at the time that Network Rail issues any invoice pursuant to the first sentence of this paragraph 2.1.3, any Efficiency Benefit Share or amount of S_t is payable by Network Rail to the Train Operator, that invoice shall also reflect that Efficiency Benefit Share or amount of S_t payable by Network Rail.

2.2 *Variable Charges*

2.2.1 The Variable Charge in respect of each Service in each Charging Period shall be calculated in accordance with the following formula:

$$\text{Variable Charge} = 1 + 2 + 3 + 4 + 5 + 6 + 7$$

where:

- 1 means, in respect of each locomotive, the Variable Rate for the relevant locomotive type multiplied by the KGTM for that locomotive type relating to the relevant Service;
- 2 means, in respect of each empty wagon, the Variable Rate for the relevant empty wagon type multiplied by the KGTM for that empty wagon type relating to the relevant Service;
- 3 means, in respect of each loaded wagon, the Variable Rate for the relevant loaded wagon type multiplied by the KGTM for that loaded wagon type relating to the relevant Service;
- 4 means, in respect of each unit of coaching stock, the Variable Rate for the relevant coaching stock type multiplied by the KGTM for that coaching stock type relating to the relevant Service;
- 5 means, in respect of each ESI Vehicle and each SNF Vehicle, the Freight Only Line Charge Rate for that ESI Vehicle or SNF Vehicle (as the case may be) multiplied by the KGTM for that ESI Vehicle or SNF Vehicle (as the case may be) relating to the relevant Service;
- 6 means, in respect of each Coal Vehicle, the Coal Spillage Charge Rate multiplied by the KGTM for that Coal Vehicle relating to the relevant Service; and
- 7 means, in respect of each Coal Vehicle, the Coal Spillage Reduction Investment Charge Rate multiplied by the KGTM for that Coal Vehicle relating to the relevant Service.

2.2.2 No Variable Rate in respect of any New Registered Equipment shall have effect unless that Variable Rate has been:

- (a) determined in accordance with the procedure set out in the following provisions of this paragraph 2.2; or
- (b) agreed between the parties,

and ORR shall have given its consent to that Variable Rate.

2.2.3 Upon receipt of a notice given by the Train Operator to Network Rail of the introduction of New Registered Equipment to the Network for which no Variable Rate has been determined by ORR, Network Rail shall:

- (a) propose the Variable Rate in respect of that New Registered Equipment; and
- (b) notify the Train Operator and ORR of the proposed Variable Rate for that New Registered Equipment within 14 days of receipt of that notice given by the Train Operator.

2.2.4 Where:

- (a) ORR has determined the Variable Rate for the New Registered Equipment (taking account of Network Rail's proposal under paragraph 2.2.3) and has notified the parties of the Variable Rate to apply to the New Registered Equipment; or
- (b)
 - (i) Network Rail has failed to notify the Train Operator and ORR of the proposed Variable Rate for the New Registered Equipment under paragraph 2.2.3; and
 - (ii) ORR has determined the Variable Rate in consultation with the Train Operator, Network Rail and all other freight train operators, and notified the parties of the Variable Rate to apply to the New Registered Equipment,

the relevant Variable Rate shall be deemed to have been incorporated into the Track Usage Price List with effect from the date determined in accordance with paragraph 2.2.12.

2.2.5 If ORR has not published or determined the Variable Rate:

- (a) in respect of any type of Specified Equipment by the date of signature of this contract; or
- (b) in respect of New Registered Equipment in accordance with paragraph 2.2.4,

then the Variable Rate in respect of that type of Specified Equipment or New Registered Equipment shall be deemed to be £1.82 per KGTM until ORR subsequently determines a new Variable Rate.

2.2.6 Either party shall be entitled to refer a determination by ORR as to the Variable Rate to an arbitrator for determination pursuant to Part C of the Access Dispute Resolution Rules. Unless the parties otherwise agree, paragraphs C1.24 to C1.30 inclusive of those rules shall not apply to the arbitration.

2.2.7 The remit of the arbitrator shall be to determine the amount of the Variable Rate which shall apply to the relevant New Registered Equipment or Specified Equipment.

2.2.8 In determining the matter referred to him under paragraph 2.2.6, the arbitrator shall be required by the parties to reach a decision which is fair and reasonable to them, having regard to:

- (a) the matters in respect of which duties are imposed on ORR by section 4 of the Act; and
- (b) the criteria which ORR shall have most recently published (and identified as such) in relation to the relevant equipment.

2.2.9 The parties shall procure that the decision of the arbitrator shall be delivered to ORR within 7 days after the date of the decision.

2.2.10 No decision of an arbitrator appointed under paragraph 2.2.6 shall have effect without the consent of ORR.

2.2.11 If ORR gives its consent to the decision of an arbitrator appointed under paragraph 2.2.6, the Variable Rate shall have effect in accordance with paragraph 2.2.12.

2.2.12 Promptly after the Variable Rate has been either (a) determined by ORR under paragraph 2.2.4, or (b) determined by an arbitrator appointed under paragraph 2.2.6 and approved by ORR in accordance with 2.2.10, Network Rail shall:

- (i) retrospectively apply that Variable Rate:
 - (A) in respect of the relevant Specified Equipment, from the date of signature of this contract; and
 - (B) in respect of the relevant New Registered Equipment, from the date of introduction of that New Registered Equipment,

in each case so as to recalculate the amount of the Variable Charge that would have been payable in respect of the period from the date of signature of this contract or the date of introduction of the relevant New Registered Equipment to the date on which the above Variable Rate is determined by ORR or, as the case may be, an arbitrator appointed under paragraph 2.2.6 and approved by ORR; and

- (ii) issue an adjusting invoice or credit note.

2.3 *Freight Capacity Charge*

The Freight Capacity Charge shall be calculated in accordance with the following formula or such other method that the parties may agree with the object of

calculating a Freight Capacity Charge that is not materially different from that calculated in accordance with the following formula:

$$\text{Freight Capacity Charge} = \sum (\text{FCR}_{\text{mf}} \times \text{CM}_{\text{mf}}) + (\text{FCR}_{\text{w}} \times \text{CM}_{\text{w}})$$

where:

FCR_{mf} means the Freight Capacity Rate in respect of Services operated during the period from Monday to Friday (both inclusive) as set out in the List of Capacity Charge Rates;

CM_{mf} means Contract Miles in respect of Services operated during the period from Monday to Friday (both inclusive);

FCR_{w} means the Freight Capacity Rate in respect of Services operated on Saturday and/or Sunday, as set out in the List of Capacity Charge Rates;

CM_{w} means Contract Miles in respect of Services operated on Saturday and/or Sunday; and

\sum means the summation across all Services.

2.4 *Traction Electricity Charge*

2.4.1 If the Train Operator procures the supply of electricity from or through Network Rail (whether as its agent or otherwise) for the purpose of running trains under this contract, the Traction Electricity Charge shall be calculated in accordance with the following formula:

$$\text{Traction Electricity Charge} = \sum (\text{TER}_i \times \text{KGTM}_i)$$

where:

KGTM_i means 1000 Gross Tonne Miles for train category i ;

TER_i means the Traction Electricity Rate for train category i; and

Σ means the summation across all Services using traction electricity.

Traction Electricity Reconciliation

2.4.2 Within 90 days after the end of each Relevant Year t, Network Rail shall calculate a supplementary amount (“S_t”), payable by or to the Train Operator, which is derived from the following formula:

$$S_t = \sum E_{gt} \cdot \frac{(A_{gt} - M_{gt})}{M_{gt}}$$

where:

Σ means the summation across all relevant train categories i and all Geographic Areas g for Relevant Year t, as appropriate;

E_{gt} is part of the Traction Electricity Charge payable by the Train Operator for each applicable Geographic Area g in Relevant Year t, determined in accordance with the following formula:

$$E_{gt} = \sum TER_{it} \cdot KGTM_{igt}$$

where:

KGTM_{igt} means 1000 Gross Tonne Miles for train category i in Geographic Area g in Relevant Year t; and

TER_{it} means the Traction Electricity Rate for train category i in Relevant Year t;

A_{gt} means the total actual electricity consumption (in kWh), if any, in Geographic Area g in Relevant Year t of trains operated by or on behalf of all train operators, assessed by Network Rail (as accurately as possible) as

being the appropriate proportion of the electricity consumption billed to Network Rail by its electricity suppliers in that area for traction electricity consumed in accordance with the terms of purchase of traction electricity entered into by Network Rail; and

M_{gt} means the total modelled electricity consumption in Geographic Area g in Relevant Year t which is derived from the following formula:

$$M_{gt} = \sum C_i \cdot UE_{igt}$$

where:

\sum means the summation across all train categories i and Geographic Areas g for Relevant Year t , as appropriate;

C_i means the calibrated modelled consumption rate (in kWh per Train Mile in relation to passenger electric multiple units and kWh per Gross Tonne Mile in relation to locomotive-hauled units and all freight traffic) for train category i , shown in the Traction Electricity Consumption Rates List; and

UE_{igt} means the actual volume of usage (in electrified Train Miles in relation to passenger electric multiple units or Gross Tonne Miles in relation to locomotive-hauled units and all freight traffic), if any, of trains operated in Relevant Year t by or on behalf of all train operators in train category i , in Geographic Area g ,

provided that, if:

- (a) any train operator is charged by Network Rail for its traction electricity consumption based on that train operator's actual metered traction

electricity consumption plus an amount in respect of the associated transmission and distribution losses (“**metered traction electricity**”); and

- (b) that train operator’s access contract in relation to track provides that no supplementary amount substantially equivalent to S_t shall apply to that train operator in respect of that metered traction electricity,

then the values of M_{gt} and A_{gt} shall be calculated excluding:

- (i) in the case of M_{gt} , that train operator’s actual volume of usage of metered traction electricity; and
- (ii) in the case of A_{gt} , the metered traction electricity consumption so charged to that train operator.

2.4.3 Network Rail shall, within 90 days after the end of Relevant Year t , provide to the Train Operator:

- (a) a statement of the amount S_t (whether of a positive or negative amount);
- (b) such background workings as may reasonably be required for a proper understanding of the calculation; and
- (c) a certificate of the auditors of Network Rail confirming the accuracy of the calculation.

2.4.4 Within 30 days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in paragraph 2.4.3, the amount S_t shall be invoiced for payment as provided under this contract. If the amount S_t is positive, the invoice shall be issued by Network Rail and payable by the Train Operator. If the amount S_t is negative, the invoice shall be issued by the Train Operator and payable by Network Rail.

Introduction of On-Train Metering

- 2.4.5 If the Train Operator wishes to propose the introduction of on-train metering to measure traction electricity consumption in a vehicle or vehicles of a vehicle type that the Train Operator operates for the purposes of being invoiced by Network Rail for traction electricity, it shall notify Network Rail of any required changes to the contract in connection with that proposal.
- 2.4.6 Any notice under paragraph 2.4.5 shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.
- 2.4.7 Promptly following any response served by Network Rail under paragraph 2.4.6, the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and if so the amendments.
- 2.4.8 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 parties shall notify ORR. If ORR elects to determine the matter, the parties shall furnish ORR with such information and evidence as ORR shall require to determine the matter and shall abide by any determination issued by ORR. If ORR does not so elect, 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 and/or policy statement most recently issued by the Office of Rail Regulation.

2.4.9 Any amendment to the contract in connection with the proposal referred to in paragraph 2.4.5 shall take effect only when it has been approved by ORR. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph 2.4 (other than a determination by ORR pursuant to paragraph 2.4.8), the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.

2.4.10 Any amendment to the contract in connection with the proposal referred to in paragraph 2.4.5 shall apply with effect from, subject to paragraph 2.4.9, the date proposed by the Train Operator (unless otherwise agreed by the parties or determined by the ORR or the expert in relation to the proposal).

2.4.11 **Traction Electricity Procurement Arrangements**

- (a) By no later than 31 January in any Financial Year, the Train Operator may notify Network Rail that the Train Operator wishes to enter into arrangements with Network Rail for the procurement of traction electricity on substantially the same basis as set out in paragraph 4.2 of Schedule 7 to the model agreement entitled “Track Access Contract (Passenger Services)” most recently published by ORR (as amended from time to time with the approval of ORR) (the “**EC4T Procurement Arrangements**”).
- (b) Promptly following receipt by Network Rail of notification pursuant to paragraph 2.4.11(a), the parties shall endeavour to agree the EC4T Procurement Arrangements and the changes to this Schedule 7 which are required to reflect those EC4T Procurement Arrangements. Any such agreed changes shall be subject to the prior approval of ORR and, unless otherwise specified by ORR,

shall take effect from the first 1 April falling immediately following such approval.

- (c) If this contract is amended pursuant to this paragraph 2.4.11, the Train Operator shall not be entitled to further amend this contract to revert to the traction electricity procurement arrangements that were in force prior to such amendment.

2.4.12 Electrification Asset Usage Charge

The Electrification Asset Usage Charge is an amount for electrification asset usage which is derived from the following formula:

$$\text{Electrification Asset Usage Charge} = \sum (EV_{tk} \cdot UV_{tk})$$

where:

\sum means the summation across all Services using electric traction;

EV_{tk} means an amount in respect of the Electrification Asset Usage Charge per electrified KGTM on route type k for a Charging Period in Relevant Year t, where, in relation to the Relevant Year commencing on 1 April 2009, EV_{tk} shall have, in respect of each electrified KGTM on each route type k, the value per electrified KGTM on route type k for the Electrification Asset Usage Charge set out in the Track Usage Price List; and

UV_{tk} means the actual number of electrified KGTM on route type k in the relevant Charging Period in Relevant Year t operated by or on behalf of the Train Operator.

2.5 NOT USED

2.6 *Incident Cap Access Charge Supplement*

The Incident Cap Access Charge Supplement shall be calculated in accordance with the following formula:

Incident Cap Access Charge Supplement = CMCP x ICACSR

where:

CMCP means the sum of the Contract Miles operated in a Charging Period; and

ICACSR means the Incident Cap Access Charge Supplement Rate.

2.7 Price Variation

2.7.1 The Indexed Figures shall remain in force until the day preceding 1 April 2010.

2.7.2 On 1 April in each Financial Year, commencing 1 April 2010, the Indexed Figures from the previous Financial Year (other than the Traction Electricity Rate) shall each 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:

$$\text{Adjustment Factor} = 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}}$$

where:

RPI_{t-1} means the average value of the monthly figures of the General Index of Retail Prices All Items measured by CHAW (“RPI”) for the 12 months up to and including the month of December immediately preceding the relevant 1 April; and

RPI_{t-2} 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.

2.7.3 If RPI for any month of December shall not have been published on or before the following March, or there is a material change in the base composition of RPI, then the parties may agree to such other index as they deem appropriate with the

object of placing both parties in the position in which they would have been had there been no change in the base composition of RPI.

2.7.4 On 1 April in each Financial Year, commencing 1 April 2010, the indexed Traction Electricity Rate from the previous Financial Year shall be varied by multiplying it by an IIEC Adjustment Factor calculated as follows:

$$\text{IIEC Adjustment Factor} = 1 + \frac{(\text{IIEC}_{t-1} - \text{IIEC}_{t-2})}{\text{IIEC}_{t-2}}$$

this calculation to be rounded to three decimal places,

where:

t is the relevant Financial Year in respect of which the Adjustment Factor is being calculated;

IIEC_{t-1} is the mean value of the Index of Industrial Electricity Costs published or determined in respect of the Financial Year t-1; and

IIEC_{t-2} is the mean value of the Index of Industrial Electricity Costs published or determined in respect of the Financial Year which precedes the Financial Year referred to above.

2.7.5 “**Index of Industrial Electricity Costs**” or “**IIEC**” means the index of prices of fuels purchased by the manufacturing industry in Great Britain, electricity purchased by moderately large users, published quarterly by the Department of Business, Enterprise and Regulatory Reform, or:

- (a) if the IIEC for any quarter in any year shall not have been published on or before the last day of the fifth month after the end of such quarter, such index for such period or periods as ORR may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances; or

- (b) if there is a material change in the basis of the IIEC, such other index as ORR may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances.

2.8 *Incremental Costs*

2.8.1 *Where:*

- (a) the Train Operator makes a Bid;
- (b) the operation of the Service Bid for would exceed the Operating Constraints applying as at 1 April 2001;
- (c) the Train Operator notifies Network Rail at the time of making the Bid that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2001 in a manner so as to permit the operation of the Service Bid for under this contract;
- (d) Network Rail is reasonably able to effect such modifications in a timescale that meets the Train Operator's requirements; and
- (e) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed £300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

2.8.2 Network Rail shall, as soon as reasonably practicable following receipt of the Train Operator's Bid under paragraph 2.8.1, notify the Train Operator that:

- (a) it shall effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c); or
- (b) it shall not effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c) for one of the following reasons:

- (i) it is not reasonably able to effect such modification in a timescale that meets the Train Operator's requirements; or
- (ii) the Incremental Costs of such modification are estimated by Network Rail to exceed £300,000 in any Financial Year.

2.8.3 If Network Rail fails to notify the Train Operator under paragraph 2.8.2, it shall be deemed to have accepted the Train Operator's request under paragraph 2.8.1(c).

2.8.4 Where Network Rail notifies the Train Operator under paragraph 2.8.2(a), paragraph 2.8.6 shall apply.

2.8.5 Where Network Rail notifies the Train Operator under paragraph 2.8.2(b), if the Train Operator disputes Network Rail's reasons under paragraphs 2.8.2(b)(i) or (ii), it shall be entitled to refer the matter for expert determination under Part D of the Access Dispute Resolution Rules within 20 Working Days of Network Rail's notice under paragraph 2.8.2(b).

2.8.6 Where Network Rail incurs Incremental Costs pursuant to paragraph 2.8.1, then such Incremental Costs shall be payable to Network Rail by the Train Operator in such amounts as are either:

- (a) agreed between the parties prior to operation of the Service Bid for; or
- (b) if not so agreed between the parties, reasonable in the circumstances.

2.8.7 Where:

- (a) the Train Operator makes a Bid; and
- (b) the operation of the Service Bid for:
 - (i) would exceed the Operating Constraints applying as at 1 April 2001; and

- (ii) is permitted under the Operating Constraints applying as at the date of the Bid by reason of a Qualifying Modification,

then paragraph 2.8.8 shall apply.

2.8.8 The Train Operator shall, if it wishes to operate the Service Bid for under paragraph 2.8.7, pay to Network Rail a Qualifying Modification Benefit Charge of such amount as shall be determined to be reasonable by Network Rail using the criteria and guidance that are applicable to the Qualifying Modification Benefit Charge.

2.8.9 Where:

- (a) the Train Operator pays for Incremental Costs under paragraph 2.8.6 in respect of any modification (in its capacity as a Contributing Train Operator); and
- (b) another freight train operator pays a Qualifying Modification Benefit Charge to Network Rail in respect of such modification,

then Network Rail shall notify the Train Operator of the sum which it proposes to rebate to it and subject to paragraph 2.8.11, make a rebate to the Train Operator in respect of such Incremental Costs equal to the Qualifying Modification Benefit Charge so paid.

2.8.10 If the parties have failed to agree the Incremental Costs in accordance with paragraph 2.8.6 within 20 Working Days of the date of the relevant Bid, either party shall be entitled to refer the determination of the Incremental Costs for expert determination in accordance with Part D of the Access Dispute Resolution Rules.

2.8.11 If the Train Operator disputes:

- (a) the amount of any Qualifying Modification Benefit Charge payable by it under paragraph 2.8.8; or

(b) the amount of any rebate payable to it under paragraph 2.8.9,

within 20 Working Days of the date of its receipt from Network Rail of details of the amount of the charge or rebate respectively, it shall be entitled to refer the matter for expert determination in accordance with Part D of the Access Dispute Resolution Rules.

2.8.12 If a reference for expert determination is made under paragraph 2.8.11, the parties shall serve a written notice on the freight train operator benefiting from the Qualifying Modification:

- (a) notifying such freight train operator of the referral for expert determination; and
- (b) giving to such freight train operator the opportunity to become a party to the proceedings in respect of such expert determination.

2.8.13 If a reference for expert determination is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties shall direct the expert to hold the expert determination under Part D of the Access Dispute Resolution Rules and shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
 - (i) the matters in respect of which duties are imposed on ORR by virtue of section 4 of the Act; and
 - (ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;
- (c) not make an award which is inconsistent with any provisions of the Network Code; and
- (d) give his reasons.

2.8.14 Network Rail undertakes to the Train Operator that, subject to the approval of ORR, in any regulated access agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with a freight train operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.

2.8.15 Where, in relation to any Qualifying Modification, the determination of any Qualifying Modification Benefit Charge, or corresponding rebate of Incremental Costs, is referred to expert determination by any person under the provisions of any regulated access agreement (other than this contract):

- (a) such determination shall be binding on Network Rail and the Train Operator; and
- (b) Network Rail and the Train Operator shall make any necessary adjustments of payments between them under this contract to give effect to such determination.

2.8.16 Network Rail shall be the legal and beneficial owner of all modifications to Operating Constraints effected by or on behalf of Network Rail under this paragraph 2.8.

2.9 Office of Rail Regulation's Qualifying Modification Criteria

2.9.1 ORR may at any time issue criteria:

- (a) specifying how the QM Threshold for any Qualifying Modification shall be determined, which may vary for different types of Qualifying Modification; and
- (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.

2.9.2 ORR's criteria under paragraph 2.9.1(a) above shall not have effect unless ORR has:

- (a) consulted the parties in relation to the issues to be dealt with in such criteria;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 2.9.2(a); and
- (c) notified the parties as to its conclusions in relation to the issues to be dealt with in such criteria and the reasons for those conclusions.

2.10 *Efficiency Benefit Share*

2.10.1 The Efficiency Benefit Share is an amount (which shall not be a negative value) representing a return of Track Charges which shall be identified in the ORR's annual assessment of Network Rail as the "Efficiency Benefit Share", if any, to be rebated to the Train Operator, such amount to be determined in accordance with the methodology and principles set out in paragraphs 27.34 to 27.53 (inclusive) of the 2008 Final Determinations.

2.10.2 If, pursuant to paragraph 2.10.1, the Train Operator is entitled to payment of an Efficiency Benefit Share in respect of Relevant Year t, then, subject to paragraph 2.10.3, such payment shall be made by Network Rail to the Train Operator as a lump sum payment within 28 days after the end of the Charging Period in which it is determined by the ORR that such payment should be made.

2.10.3 If, in respect of any Relevant Year t, an Efficiency Benefit Share is payable in accordance with paragraph 2.10.2 and this contract has either commenced or expired or otherwise been terminated during the course of that Relevant Year t, the Train Operator shall be entitled to a pro rata payment of the Efficiency Benefit Share payable in respect of that Relevant Year t. Such pro rata payment (which shall be payable in accordance with paragraph 2.10.2) shall be calculated as follows:

$$\text{Pro rata Efficiency Benefit Share} = \left(\frac{\text{EBS}}{13} \right) \times \text{CP}$$

where:

EBS means the total amount of the Efficiency Benefit Share that would have been payable to the Train Operator in respect of the whole of the Relevant Year t in question had this contract been in force for the entire Relevant Year t; and

CP means the number of Charging Periods during that Relevant Year t either:

- (a) where this contract commences during the course of that Relevant Year t, following commencement of this contract; or
- (b) where this contract expires or is otherwise terminated during the course of that Relevant Year t, prior to the expiry or other termination of this contract,

provided that, in each case:

- (i) if this contract commences, expires or is otherwise terminated on or before the fourteenth day of a Charging Period, such Charging Period shall not be included in the calculation of 'CP'; and
- (ii) if this contract commences, expires or is otherwise terminated on or after the fifteenth day of a Charging Period, such Charging Period shall be included in the calculation of 'CP'.

2.10.4 Any such payment of an Efficiency Benefit Share ("**EBS payment**") shall be made on the basis that it is to be treated as a rebate of Track Charges for the purposes of VAT unless the parties agree that the law relating to VAT at the date of the payment requires some other treatment as agreed between the parties or unless, prior to making such payment, Network Rail has notified the Train Operator that, based on advice that Network Rail

has received from HM Revenue and Customs, this paragraph 2.10.4 applies. Where this paragraph 2.10.4 applies, the relevant EBS payment is to be treated as being outside the scope of VAT, then paragraphs (a) to (e) inclusive below shall apply, and the EBS payment may be made accordingly:

- (a) the provisions of this contract relating to VAT on rebates or repayments shall be disapplied in relation only to EBS payments and subject to paragraph (e) below;
- (b) no VAT will be charged on the EBS payment;
- (c) in respect of the Track Charges paid or payable by the Train Operator to Network Rail (disregarding the EBS payment) in respect of the period to which the EBS payment relates, Network Rail will account for VAT (where required by law to do so) and will not seek to reclaim any such VAT, except in either case as provided under paragraph (e) below;
- (d) the Train Operator will treat the EBS payment as being outside the scope of VAT; and
- (e) if the treatment of an EBS payment as being outside the scope of VAT is challenged such that the Train Operator is required to account for VAT to HM Revenue and Customs on the EBS payment, then (subject to the Train Operator promptly notifying Network Rail of that fact) the preceding paragraphs (a) to (d) inclusive will (at the election of the Train Operator) cease to apply to the EBS payment and Network Rail will account to the Train Operator for the amount of VAT on the EBS payment and issue the Train Operator with a VAT credit note in respect of that amount.

2.10.5 Network Rail will indemnify the Train Operator in respect of any liability it may incur to HM Revenue and Customs (other than the obligation to

account to HM Revenue and Customs for the amount of the VAT credit set out in paragraph 2.10.4(e)) as a result of having treated the EBS payment as being outside the scope of VAT in accordance with paragraph 2.10.4.

2.11 Coal Spillage Charge

2.11.1 The Coal Spillage Charge Rate in respect of each Coal Vehicle used in a Service shall be the coal spillage charge rate per KGTM set out in the Track Usage Price List (as such rate may be adjusted in accordance with paragraph 2.7.2, the “**Baseline Coal Spillage Charge Rate**”) until it is varied in accordance with this paragraph 2.11, provided that the Coal Spillage Charge Rate as so varied shall never exceed the Baseline Coal Spillage Charge Rate.

2.11.2 If a Coal Spillage Charge Variation Notice is issued by ORR, the Coal Spillage Charge Rate shall be varied in accordance with that Coal Spillage Charge Variation Notice.

2.11.3 Within 28 days of the last day of each Financial Year (other than any Financial Year ending on or prior to 31 March 2009), Network Rail shall:

- (a) identify the number of points failures attributable to coal spillage that have occurred during that Financial Year (each a “**Relevant Points Failure**”);
- (b) compare the number of Relevant Points Failures with the number of Baseline Points Failures; and
- (c) notify the Train Operator and ORR in writing of:
 - (i) the number of Relevant Points Failures; and
 - (ii) the difference (whether positive or negative) between the Baseline Points Failures and the Relevant Points Failures.

2.11.4 If, in any Financial Year (other than the Financial Year ending on 31 March 2009), the number of Relevant Points Failures exceeds or is less than the number

of Baseline Points Failures by, in each case, an amount equal to or greater than 5% of the number of Baseline Points Failures (a “**Points Failure Variation**”), within 84 days of the last day of that Financial Year Network Rail shall, in consultation with the Train Operator and all other freight train operators whose access agreement in respect of track includes a provision similar to this paragraph 2.11:

- (a) endeavour to agree either:
 - (i) a variation to the Coal Spillage Charge Rate (provided that any such variation to the Coal Spillage Charge Rate does not cause the Coal Spillage Charge Rate to exceed the Baseline Coal Spillage Charge Rate); or
 - (ii) that no variation to the Coal Spillage Charge Rate is required; and
- (b) if agreement is reached in accordance with paragraph 2.11.4(a), notify ORR in writing (with a copy to the Train Operator) either:
 - (i) that no variation is required to the Coal Spillage Charge Rate; or
 - (ii) of the level of the proposed variation to the Coal Spillage Charge Rate.

2.11.5 If, within the 84 day period specified in paragraph 2.11.4, Network Rail is unable to reach agreement as to the proposed variation to the Coal Spillage Charge Rate with the Train Operator and all other freight train operators whose access agreement in respect of track includes a provision similar to this paragraph 2.11, Network Rail shall nonetheless notify ORR in writing (with a copy to the Train Operator) either:

- (a) of the variation to the Coal Spillage Charge Rate that Network Rail considers ought to be made in respect of the Points Failure Variation (provided that such proposed variation does not cause the Coal Spillage Charge Rate to exceed the Baseline Coal Spillage Charge Rate); or

- (b) that Network Rail considers that no change is required to the Coal Spillage Charge Rate,

in each case taking into account the representations of those freight train operators who have responded to Network Rail's consultation on this matter.

2.11.6 Any notification to ORR pursuant to either of paragraphs 2.11.4 or 2.11.5 shall be supported by such information and evidence (including any freight train operators' representations, reporters' audit and data from sampling trays) as ORR may require to determine whether or not to approve the proposed variation (if any) to the Coal Spillage Charge Rate or to make an alternative determination as to the level of the variation (if any) to the Coal Spillage Charge Rate.

2.11.7 Promptly following the service of a Coal Spillage Charge Variation Notice under this paragraph 2.11, and in order to give effect to any variation to the Coal Spillage Charge Rate specified in that Coal Spillage Charge Variation Notice in accordance with paragraph 2.11.2, 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 each case in respect of the Coal Spillage Charge.

2.11.8 Any statement issued by Network Rail pursuant to paragraph 2.11.7 shall be accompanied by an adjusting invoice (which shall be payable by the Train Operator within 28 days) or credit note.

2.12 Coal Spillage Reduction Investment Charge

2.12.1 If a CSR Variation Notice is issued by ORR, the Coal Spillage Reduction Investment Charge Rate shall be varied in accordance with that CSR Variation Notice.

2.12.2 The purpose of the Coal Spillage Reduction Investment Charge is to enable Network Rail to fund capital investments to reduce coal spillage on the Network, and Network Rail shall only be entitled to apply amounts received in respect of the Coal Spillage Reduction Investment Charge for such purpose.

2.12.3 Within 28 days of the end of each Financial Year, Network Rail shall provide the Train Operator and ORR with details of:

- (a) the total amount received by Network Rail from all freight train operators during that Financial Year in respect of the Coal Spillage Reduction Investment Charge (the “**FY CSR Fund**”);
- (b) the aggregate amount of funding distributed by Network Rail during that Financial Year to reduce coal spillage on the Network (each a “**Coal Spillage Investment**”); and
- (c) the balance (if any) of the FY CSR Fund after:
 - (i) adding the Total CSR Fund Balance for the previous Financial Year if such Total CSR Fund Balance for the previous Financial Year has been carried forward in accordance with paragraph 2.12.4(a); and
 - (ii) deducting the capital cost of any Coal Spillage Investments made during that Financial Year,

(the “**Total CSR Fund Balance**”).

2.12.4 Within 56 days of the last day of each Financial Year Network Rail shall, following consultation with the Train Operator and all other freight train operators whose access agreement in respect of track includes a provision similar to this paragraph 2.12, notify the Train Operator and ORR in writing:

- (a) whether it wishes to carry forward the Total CSR Fund Balance for application to Coal Spillage Investments in the then current Financial Year; and
- (b) whether it considers that the Coal Spillage Reduction Investment Charge should continue to be payable in the then current Financial Year and, if so, whether it considers that any adjustment should be made to the Coal Spillage Reduction Investment Charge Rate.

2.12.5 Network Rail's notice pursuant to paragraph 2.12.4 shall be accompanied by such information and supporting evidence (including any freight train operators' representations and details of any Coal Spillage Investments proposed for the then current Financial Year) as ORR may require to determine whether or not:

- (a) the Total CSR Fund Balance should be carried forward for application in the then current Financial Year; and
- (b) the Coal Spillage Reduction Investment Charge should continue to be payable in the then current Financial Year and, if so, whether or not any adjustment should be made to the Coal Spillage Reduction Investment Charge Rate.

2.12.6 If ORR determines that the Total CSR Fund Balance should not be carried forward and ORR issues a CSR Variation Notice to that effect, the Train Operator shall be entitled to a rebate of amounts paid by the Train Operator in respect of the Coal Spillage Reduction Investment Charge (a "**CSR Rebate**"). The amount of the CSR Rebate payable to the Train Operator shall be an amount which, when expressed as a percentage of the Total CSR Fund Balance, is equal to the proportion borne by the Train Operator's total contribution to the Total CSR Fund.

2.12.7 If ORR determines that the Total CSR Fund Balance should be carried forward and ORR issues a CSR Variation Notice to that effect, Network Rail shall retain the Total CSR Fund Balance for application for Coal Spillage Investments in the then current Financial Year.

2.12.8 Promptly following service of a CSR Variation Notice under this paragraph 2.12, and in order to give effect to the variation to the Coal Spillage Reduction Investment Charge Rate and/or CSR Rebate specified in that CSR Variation Notice, 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 each case in respect of the Coal Spillage Reduction Investment Charge.

2.12.9 Any statement issued by Network Rail pursuant to paragraph 2.12.8 shall be accompanied by an adjusting invoice (which shall be payable by the Train Operator within 28 days) or credit note.

3 Freight Charging Review

3.1 ORR may carry out one or more access charges reviews of all or part of this contract such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation on and from 1 April 2014 or such later date as may be specified in that review.

3.2 In this paragraph 3, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

Appendix 1

Geographic Areas

The following table describes the Geographic Areas g for the purposes of Traction Electricity Charge calculations

ESTA	Traction electricity Geographic Area / Tariff Zone	Description
M	Merseyside	Comprises the Merseyside third rail electrified system between Liverpool, Southport, Ormskirk, Kirkby, Hunts Cross, Ellesmere Port, Chester, New Brighton and West Kirby
N	Midland Main Line	Comprises the overhead line electrified routes from London St Pancras, Farringdon and Moorgate (Midland) to Bedford
O	London Tilbury & Southend	Comprises the overhead line electrified London Tilbury and Southend routes from Fenchurch Street to Shoeburyness via Laindon, Rainham and Chafford Hundred; the route from Barking to Forest Gate Junction; and the route between Gas Factory Junction and Bow Junction
P	Great Eastern	Comprises the electrified Great Eastern Main Line routes from Liverpool Street to Bow Junction, Upminster, Southend Victoria, Southminster, Braintree, Sudbury, Clacton, Walton-on Naze, Harwich Town and Norwich; the West Anglia route from Liverpool Street to Hackney Downs station; the Lea Valley Line between Stratford and Coppermill Junction, and the ac & dc section of the North London Line route between Stratford and York Way neutral section (north of Kings Cross).

ESTA	Traction electricity Geographic Area / Tariff Zone	Description
Q	West Anglia	Comprises the electrified West Anglia routes from Hackney Downs station to Chingford, Enfield Town, Hertford East, Stansted Airport, Cambridge and Kings Lynn and the electrified route between Cambridge Junction (on the East Coast Main Line near Hitchin) and Cambridge
R	East Coast Main Line South	Comprises the electrified East Coast Main Line from Kings Cross to the neutral section at Tallington (between Peterborough and Grantham), the electrified route between Moorgate and Finsbury Park; the electrified route between Canonbury West Junction and Finsbury Park; and the Kings Cross Incline between Camden Road East Junction and Freight Terminal Junction.
A	East Coast Main Line Central	Comprises the electrified East Coast Main Line between the neutral sections at Tallington (between Peterborough and Grantham), South Kirkby and Hambleton Junction (between Doncaster and York).
B	East Coast Main Line North	Comprises the electrified East Coast Main Line between the neutral sections at Hambleton Junction (between Doncaster and York) and Chathill (between Alnmouth and Belford).
C	East Coast Main Line Leeds	Comprises the electrified East Coast Main Line between the neutral section at South Kirkby and Leeds, Bradford and Skipton.
S	Scotland Glasgow	Comprises the electrified routes in Scotland between the neutral sections at Coatbridge, Rutherglen, Bishopston, Lochwinnoch & Carstairs
D	Scotland East	Comprises the electrified routes in Scotland between the neutral sections at Chathill (between Alnmouth and Belford) and Auchengray (between Edinburgh & Carstairs).
E	Scotland North & West	Comprises the electrified routes in Scotland on the North Clyde between the neutral sections at Coatbridge & Rutherglen, the routes from Bishopston neutral section to Gourock & Wemyss Bay and the routes from Lochwinnoch neutral section to Ayr & Largs.

ESTA	Traction electricity Geographic Area / Tariff Zone	Description
F	Scotland WCML	Comprises the electrified routes in Scotland between the neutral sections at Penrith, Carstairs and Auchengray (between Edinburgh & Carstairs).
T	West Coast Main Line South	Comprises the West Coast Main Line routes from Euston to the neutral sections at Berkswell and Nuneaton; the third rail electrified lines from Euston to Watford Junction; the West London Line to the North Pole junction; the North London Line between South Acton and York Way (north of Kings Cross) and the route between the Primrose Hill tunnels and Camden Road
G	West Coast Main Line Central	Comprises the West Coast Main Line routes between Nuneaton and Liverpool bounded by the neutral sections at Nuneaton, Queensville (Stafford), Stone – Colwich, Stone - Norton Bridge, Kidsgrove, Chelford and Weaver Junction.
H	West Coast Main Line West Midlands	Comprises the West Coast Main Line routes around Birmingham between the neutral sections at Berkswell and Queensville (Stafford).
I	West Coast Main Line Manchester	Comprises the West Coast Main Line routes between Manchester and Stone bounded by the neutral sections at Stone – Colwich, Stone - Norton Bridge, Kidsgrove, Chelford
J	West Coast Main Line North	Comprises the West Coast Main Line routes between Weaver Junction and Penrith (neutral sections).
U	Southern	Comprises all third rail electrified routes south from Farringdon, Cannon Street, Charing Cross, London Bridge, Waterloo and Victoria, covering the international route as far as the Network Rail/Eurotunnel boundary; the West London Line to the south of North Pole junction; and the North London Line between Richmond and Acton Central

ESTA	Traction electricity Geographic Area / Tariff Zone	Description
V	Great Western	Comprises the electrified route from Paddington to Heathrow Airport

Appendix 3 to Annex 2

Schedule 8

SCHEDULE 8: PERFORMANCE REGIME

1. Definitions

In this Schedule 8 unless the context otherwise requires:

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

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

“**Adjusted MDNR**” has the meaning ascribed to it in paragraph 6.2.1;

“**Adjusted MDTO**” has the meaning ascribed to it in paragraph 4.2.1;

“**Adjusted Train Operator Benchmark**” means the Train Operator Benchmark as adjusted in accordance with paragraph 10.1.7(a);

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

“**Aggregate Net Liability**” has the meaning ascribed to it in paragraph 9.1.7;

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

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

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

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

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail; or
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

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

“Attributable to the Train Operator” means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);

- (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
 - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
- (i) any delay to or cancellation of a Service Attributable to the Train Operator;
 - (ii) any Train Operator Omission; or
 - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

(aa) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide; and

(bb) ignoring any delay or cancellation under paragraph (d) of the definition of “Attributable to Network Rail”;

“**Baseline Annual Contract Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Baseline Network Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Benchmarks**” means the Train Operator Benchmark and the Network Rail Benchmark;

“**Cancellation**” has the meaning ascribed to it in paragraph 8.1;

“**Cancellation Threshold**” has the meaning ascribed to it in Appendix 1;

“**Contract Miles**” has the meaning ascribed to it in Schedule 7;

“**Disruption Sum**” means the Disruption Sum specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

“**Empty Third Party Train**” means any empty passenger train or any Ancillary Movement;

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

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

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

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

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

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

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

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

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

“Materiality Threshold” has the meaning ascribed to it in paragraph 10.1.4(c);

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

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

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

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

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

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

“Network Rail Charging Period Limit” means $1/13^{\text{th}}$ of the Network Rail Cap;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. General

2.1 Performance monitoring system recordings

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

2.2 Liability for Short Notice Service

Network Rail shall, notwithstanding that it shall have accepted a Bid for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay

arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code.

2.3 *Mitigation of delays*

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

2.4 *Calculation of Minutes Delay*

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

3. **Diagnosis of delays**

3.1 *Attributing delays*

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

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

3.2 *Delays Attributable to both the Train Operator and Network Rail*

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

3.3 *Unexplained delays Attributable to Network Rail*

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

3.4 *Unexplained delays Attributable to the Train Operator*

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

3.5 *Identifying delaying incidents*

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

3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

4. Minutes Delay in respect of Train Operator performance

4.1 *Prescribed delay period*

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

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

4.2 *Train Operator performance against TOB*

4.2.1 In respect of each Charging Period:

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

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

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

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

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

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

where:

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

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

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

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

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

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

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

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

6. Minutes Delay in respect of Network Rail performance

6.1 Cancellations

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

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

6.2 *Network Rail performance against NRB*

In respect of each Charging Period:

6.2.1

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

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

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

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

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

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

where:

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

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

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

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

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

7. Prolonged Disruption

7.1 Prolonged Disruption Sum calculation

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

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

where:

PDA is the Prolonged Disruption Amount;

S is one quarter of the number of Services operated during the four Weeks immediately before the first Week of the Prolonged Disruption over that part of the Network subject to the Prolonged Disruption; and

M is the multiplier set out in the table below in respect of that Week of the Prolonged Disruption:

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2

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

7.2 *Subsequent Prolonged Disruption*

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

7.3 *Network Rail liability*

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

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

8. Cancellation

8.1 *Cancellation*

“**Cancellation**” means any Service:

- (a) which does not depart from its Origin within 12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within 12 hours after the time at which it is Planned to depart and arrives at its Destination more than 12 hours after the time at which it is Planned to arrive, and in respect of which no Diverted Service has been agreed; or

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

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

- (d) in respect of which Network Rail:

- (1) nominates an Alternative Train Slot for a reason which is Attributable to Network Rail under paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such Train Slot and:

- (i) does not propose a different Alternative Train Slot; or

- (ii) proposes a different Alternative Train Slot and this is not accommodated by Network Rail as a Spot Bid; or

- (2) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

8.2 *Network Rail liability*

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

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

- (a) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement; or

- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

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

8.3 *Late presentation of Service*

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

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

9. **Payment**

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

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

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

- 9.1.3 In respect of any Financial Year, the Aggregate Net Liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.
- 9.1.4 The Aggregate Net Liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.
- 9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit shall be taken into account when calculating the Train Operator's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.
- 9.1.6 In respect of any Financial Year, the Aggregate Net Liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.
- 9.1.7 In this paragraph 9.1, the “**Aggregate Net Liability**” of a party means, in respect of a Charging Period or Financial Year, its liability after setting off the liability of the other party to it under the same provisions in respect of the same period.

9.2 *Issue of invoice or credit note*

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

Disruption Sums, Disruption Sums and Prolonged Disruption Sums for which Network Rail or the Train Operator is liable; and

- (b) any matter referred to in Appendix 3 which the Train Operator or Network Rail has disputed under paragraph 3 of Appendix 3 and which is still in dispute.

9.3 *Resolution of disputes*

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

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

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

10.1 *Adjustments to the Train Operator Benchmark*

10.1.1 In this paragraph 10:

“**Baseline Annual Contract Mileage**” means the amount determined in accordance with paragraph 10.2.3;

“**Baseline Network Mileage**” means the amount determined in accordance with paragraph 10.1.3;

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

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

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

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

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

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

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

10.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2007/2008, as specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.1.3(b).
- (b) If, in accordance with paragraph 10.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year $t+1$ and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 10.1, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

- (a) the Total Actual Operated Mileage for Financial Year t (the “**Actual Mileage t**”);
- (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; and
- (c) in respect of Financial Year t, whether the Traffic Growth or, as the case may be, Traffic Reduction is equal to or greater than 2.5% (the “**Materiality Threshold**”).

10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of (X) the Traffic Growth or Traffic Reduction (as the case may be), and (Y) whether or not the Materiality Threshold has been met or exceeded, Network Rail shall:

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

- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations and determinations under this paragraph 10.1; and
- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing that the same Adjusted Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1.

10.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determinations under paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determinations pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 10.1.7.

- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determinations pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
- (A) 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 it sees fit having regard to that timescale;
 - (B) each of the parties shall abide by the rules and procedures established by the expert; and
 - (C) the parties shall direct the expert to (x) 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 to the expert and (y) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 10.1 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 10.1 and, accordingly, each party agrees to participate in any referral to an expert under paragraph 10.1.6(c), and to be bound by the determination of that expert, even if, either:

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

10.1.7 If, in respect of any Financial Year t, it is agreed or determined that the Traffic Growth or, as the case may be, Traffic Reduction is:

- (a) equal to or greater than the Materiality Threshold, then the Train Operator Benchmark in respect of each Charging Period within the Financial Year immediately following Financial Year t (“**Financial Year t+1**”) and, subject to paragraph 10.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

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

where:

ATOB means the Adjusted Train Operator Benchmark;

TOB means the current Train Operator Benchmark;

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

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

(iii) in either case, “Ta” is an amount in excess of the Materiality Threshold; and

CF is 1.5 (being the “congestion factor”); or

(b) less than the Materiality Threshold, then no adjustment shall be made to the then current Train Operator Benchmark.

10.1.8 If the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7(a) then, subject to paragraph 10.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 10.1.7(a). Such Adjusted Train Operator Benchmark shall apply for each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with this paragraph 10.1.

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

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

(a) any invoices and credit notes already issued; and

(b) any payments already made in respect of Performance Sums,

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

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

10.2 Adjustments to the Network Rail Cap and Train Operator Cap

10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraph 2.7.2 of Schedule 7, provided that no adjustment shall be made to the Network Rail Cap or the Train Operator Cap pursuant to this paragraph 10.2 in respect of any period prior to 1 April 2010.

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

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

10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the total number of Contract Miles operated by the Train

Operator during the Financial Year commencing on 1 April 2009 and ending on 31 March 2010, unless it is adjusted in accordance with paragraph 10.2.3(b).

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

10.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the parties shall endeavour to agree whether the Network Rail Cap and/or the Train Operator Cap should be adjusted in accordance with this paragraph 10.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2 shall be subject to the prior approval of ORR.

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

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

- (i) the parties fail to reach agreement; or

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

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

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

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

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

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

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

11. Selection by the Train Operator of the Incident Cap

11.1 Selection by the Train Operator of the Incident Cap

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

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

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

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

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

Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period)
0	0
1, 000 minutes	0.0662
2, 000 minutes	0.0349
3, 000 minutes	0.0253
4, 000 minutes	0.0213
5, 000 minutes	0.0186
6, 000 minutes	0.0163

7, 000 minutes	0.0146
8, 000 minutes	0.0131
9, 000 minutes	0.0119
10, 000 minutes	0.0106

APPENDIX 1: PERFORMANCE

Train Operator Performance

Train Operator Bonus Payment Rate £16.94 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.

Train Operator Compensation Payment Rate £33.89 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.

Train Operator Cap £ [provided separately]

Disruption Sum £1,942

Network Rail Performance

Network Rail Bonus Payment Rate £8.74 per Minutes Delay to Services which are Attributable to Network Rail.

Network Rail Compensation Payment Rate £17.47 per Minutes Delay to Services which are Attributable to Network Rail.

Network Rail Cap £ [provided separately]

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

Benchmarks

Train Operator Benchmark

Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to each Charging Period shall be 2.63 Minutes Delay per 100 Train Operator Miles.

Network Rail Benchmark

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be:

- (a) in relation to each Charging Period within Financial Year 2009/2010, 7.58 Minutes Delay per 100 Train Operator Miles;
- (b) in relation to each Charging Period within Financial Year 2010/2011, 7.14 Minutes Delay per 100 Train Operator Miles;
- (c) in relation to each Charging Period within Financial Year 2011/2012, 6.77 Minutes Delay per 100 Train Operator Miles;
- (d) in relation to each Charging Period within Financial Year 2012/2013, 6.57 Minutes Delay per 100 Train Operator Miles; and
- (e) in relation to each Charging Period within Financial Year 2013/2014 and each subsequent Financial Year, 6.39 Minutes Delay per 100 Train Operator Miles.

Cancellation Sum

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,656 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,416 for each Cancellation equal to or above the Cancellation Threshold; and

- (c) the “**Cancellation Threshold**” in any Charging Period shall be 0.41 per cent of the total number of Services operated by the Train Operator in that Charging Period.

Late Notice Cancellation Sum

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,430.

Baseline Network Mileage

The Baseline Network Mileage shall be 317,782,800.

APPENDIX 2: CALCULATION OF MINUTES DELAY

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
 - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
 - (b) in respect of each other recorded Trigger, the lesser of:
 - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
 - (ii) the greater of $((A1-A2) + B)$ and zero,

where:

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

A2 is the Planned time between the Triggers mentioned in (A) above; and

B is any Recovery Time between such Triggers.

2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

APPENDIX 3: PERFORMANCE STATEMENTS

Interim statements provided by Network Rail

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

- (d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and
- (e) an interim statement listing:
 - (i) the total Contract Miles; and
 - (ii) the total number of Services,in each case operated by the Train Operator during that Charging Period.

Interim statements provided by the Train Operator

2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, the Train Operator shall provide to Network Rail the following interim statements:
 - (a) an interim statement listing all Cancellations occurring during that Week for which the Train Operator considers it is entitled to a Cancellation Sum, and any Late Notice Cancellations for which the Train Operator considers it is entitled to a Late Notice Cancellation Sum, in each case under paragraph 8 of this Schedule 8;
 - (b) an interim statement listing all Prolonged Disruptions occurring or continuing during that Week for which the Train Operator considers it is entitled to a Prolonged Disruption Sum under paragraph 7 of this Schedule 8; and
 - (c) an interim statement listing all Service Variations arising during that Week for which the Train Operator considers it is entitled to a Service Variation Sum under Schedule 4.

Dispute of interim statement

3. Within two Working Days of receipt of any interim statement under paragraph 1 or 2 of this Appendix the recipient shall notify the provider of the interim statement of any reason

why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.

4. Within the next five Working Days after notification of any dispute under paragraph 3, nominated representatives of the parties shall meet and attempt to resolve that dispute.
5. If any matter is still in dispute ten Working Days after the meeting held under paragraph 4 above, either party may refer such matter for resolution under paragraph 9.3.1 of this Schedule 8.

Deemed agreement

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

Further interim statement

7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:
 - (a) Attributable to the Train Operator;
 - (b) Attributable to Network Rail; or
 - (c) Attributable to both the Train Operator and Network Rail,

but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.

8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

Statement of adjustment

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

Appendix 4 to Annex 2

Direct Rail Services Limited Schedule 8

SCHEDULE 8: PERFORMANCE REGIME

1. Definitions

In this Schedule 8 unless the context otherwise requires:

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

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

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

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

“Adjusted Train Operator Benchmark” means the Train Operator Benchmark as adjusted in accordance with paragraph 10.1.7(a);

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

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

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

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

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

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

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail; or
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

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

“Attributable to the Train Operator” means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);

- (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
 - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
- (i) any delay to or cancellation of a Service Attributable to the Train Operator;
 - (ii) any Train Operator Omission; or
 - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

- (aa) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide; and
- (bb) ignoring any delay or cancellation under paragraph (d) of the definition of “Attributable to Network Rail”;

“**Baseline Annual Contract Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Baseline Network Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Benchmarks**” means the Train Operator Benchmark and the Network Rail Benchmark;

“**Cancellation**” has the meaning ascribed to it in paragraph 8.1;

“**Cancellation Threshold**” has the meaning ascribed to it in Appendix 1;

“**Contract Miles**” has the meaning ascribed to it in Schedule 7;

“**Disruption Sum**” means the Disruption Sum specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

“**Empty Third Party Train**” means any empty passenger train or any Ancillary Movement;

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

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

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

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

“**HCS Cancellation**” has the meaning ascribed to it in Appendix 1;

“**HCS Cancellation Sum**” has the meaning ascribed to it in paragraph 12.1;

“HCS Commencement Date” has the meaning ascribed to it in paragraph 12.2;

“HCS Election” has the meaning ascribed to it in paragraph 12.2;

“HCS Notice” has the meaning ascribed to it in paragraph 12.2;

“HCS Service” means, in any Charging Period in respect of which the Train Operator has paid the Cancellation Charge Access Charge Supplement in accordance with Schedule 7, any Service within any of the service groups identified in the definition of HCS Cancellation;

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

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

“Initial HCS Notice” has the meaning ascribed to it in paragraph 12.1;

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

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

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

“Materiality Threshold” has the meaning ascribed to it in paragraph 10.1.4(c);

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

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

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

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

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

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

“Network Rail Charging Period Limit” means $1/13^{\text{th}}$ of the Network Rail Cap;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. General

2.1 Performance monitoring system recordings

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

2.2 Liability for Short Notice Service

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

2.3 Mitigation of delays

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

2.4 Calculation of Minutes Delay

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

3. Diagnosis of delays

3.1 Attributing delays

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

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

3.2 Delays Attributable to both the Train Operator and Network Rail

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

3.3 Unexplained delays Attributable to Network Rail

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

3.4 Unexplained delays Attributable to the Train Operator

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

3.5 Identifying delaying incidents

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

3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

4. Minutes Delay in respect of Train Operator performance

4.1 *Prescribed delay period*

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

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

4.2 *Train Operator performance against TOB*

4.2.1 In respect of each Charging Period:

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

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

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

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

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

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

where:

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

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

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

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

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

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

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

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

6. Minutes Delay in respect of Network Rail performance

6.1 Cancellations

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

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

6.2 Network Rail performance against NRB

In respect of each Charging Period:

6.2.1

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

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

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

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

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

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

where:

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

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

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

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

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

7. Prolonged Disruption

7.1 Prolonged Disruption Sum calculation

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

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

where:

PDA is the Prolonged Disruption Amount;

S is one quarter of the number of Services operated during the four Weeks immediately before the first Week of the Prolonged Disruption over that part of the Network subject to the Prolonged Disruption; and

M is the multiplier set out in the table below in respect of that Week of the Prolonged Disruption:

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

7.2 *Subsequent Prolonged Disruption*

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

7.3 *Network Rail liability*

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

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this

paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement.

8. Cancellation

8.1 Cancellation

“**Cancellation**” means any Service:

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

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

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

(2) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

8.2 *Network Rail liability*

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

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

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

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

8.3 *Late presentation of Service*

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

- (a) a Cancellation as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code; or

- (b) a conflict with any restrictions on the use of the Network contained in the Rules of the Plan.

9. Payment

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

- 9.1.1 The Aggregate Net Liability of Network Rail for a Performance Sum in respect of any Charging Period shall not exceed the Network Rail Charging Period Limit.
- 9.1.2 Subject to paragraph 9.1.3, if Network Rail would otherwise be liable for a Performance Sum which exceeds the Network Rail Charging Period Limit, then the amount by which such claim exceeds the Network Rail Charging Period Limit shall be taken into account when calculating Network Rail's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.
- 9.1.3 In respect of any Financial Year, the Aggregate Net Liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.
- 9.1.4 The Aggregate Net Liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.
- 9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit shall be taken into account when calculating the Train Operator's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.
- 9.1.6 In respect of any Financial Year, the Aggregate Net Liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.
- 9.1.7 In this paragraph 9.1, the "**Aggregate Net Liability**" of a party means, in respect of a Charging Period or Financial Year, its liability after setting off the liability of the other party to it under the same provisions in respect of the same period.

9.2 *Issue of invoice or credit note*

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

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

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

9.3 *Resolution of disputes*

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

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

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

10.1 *Adjustments to the Train Operator Benchmark*

10.1.1 In this paragraph 10:

“**Baseline Annual Contract Mileage**” means the amount determined in accordance with paragraph 10.2.3;

“**Baseline Network Mileage**” means the amount determined in accordance with paragraph 10.1.3;

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

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

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

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

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

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

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

10.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2007/2008, as specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.1.3(b).
- (b) If, in accordance with paragraph 10.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year t+1 and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 10.1, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

- (a) the Total Actual Operated Mileage for Financial Year t (the “**Actual Mileage t**”);
- (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; and
- (c) in respect of Financial Year t, whether the Traffic Growth or, as the case may be, Traffic Reduction is equal to or greater than 2.5% (the “**Materiality Threshold**”).

10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of (X) the Traffic Growth or Traffic Reduction (as the case may be), and (Y) whether or not the Materiality Threshold has been met or exceeded, Network Rail shall:

- (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing of:
 - (i) the Actual Mileage t;
 - (ii) the Baseline Network Mileage;
 - (iii) Network Rail's calculation of the Traffic Growth or Traffic Reduction (as the case may be) in accordance with paragraph 10.1.4(b);
 - (iv) Network Rail's determination as to whether or not the Materiality Threshold has been met or exceeded; and
 - (v) Network Rail's determination of the Adjusted Train Operator Benchmark (if applicable);
- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations and determinations under this paragraph 10.1; and
- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing that the same Adjusted Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1.

10.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network

Rail's determinations under paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v).

- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determinations pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 10.1.7.

- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determinations pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
 - (A) 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 it sees fit having regard to that timescale;

- (B) each of the parties shall abide by the rules and procedures established by the expert; and
 - (C) the parties shall direct the expert to (x) 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 to the expert and (y) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 10.1 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 10.1 and, accordingly, each party agrees to participate in any referral to an expert under paragraph 10.1.6(c), and to be bound by the determination of that expert, even if, either:
- (A) pursuant to paragraph 10.1.6(a), the Train Operator has notified Network Rail that it agrees with Network Rail’s determinations notified pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v); and/or
 - (B) the determination of the expert differs from any of Network Rail’s determinations pursuant to paragraph 10.1.5(a)(iv) and/or paragraph 10.1.5(a)(v) with which the Train Operator agreed.

10.1.7 If, in respect of any Financial Year t, it is agreed or determined that the Traffic Growth or, as the case may be, Traffic Reduction is:

- (a) equal to or greater than the Materiality Threshold, then the Train Operator Benchmark in respect of each Charging Period within the Financial Year immediately following Financial Year t (“**Financial Year t+1**”) and, subject to paragraph 10.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

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

where:

ATOB means the Adjusted Train Operator Benchmark;

TOB means the current Train Operator Benchmark;

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

- (i) in the case of Traffic Growth, for the purposes of this formula “Ta” shall be a positive figure so that the TOB is increased to reflect the Traffic Growth;
- (ii) in the case of Traffic Reduction, for the purposes of this formula “Ta” shall be a negative figure so that the TOB is decreased to reflect the Traffic Reduction; and
- (iii) in either case, “Ta” is an amount in excess of the Materiality Threshold; and

CF is 1.5 (being the “congestion factor”); or

- (b) less than the Materiality Threshold, then no adjustment shall be made to the then current Train Operator Benchmark.

10.1.8 If the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7(a) then, subject to paragraph 10.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 10.1.7(a). Such Adjusted Train Operator Benchmark shall apply for each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with this paragraph 10.1.

10.1.9 If a reference is made to an expert in accordance with paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the expert makes its determination pursuant to paragraph 10.1.6(c). Following the expert’s determination

pursuant to paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the Adjusted Train Operator Benchmark as determined, as the case may be, by (i) the expert or (ii) following the expert's determination pursuant to paragraph 10.1.6(c), the parties in accordance with this paragraph 10.1.

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

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

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

10.2 Adjustments to the Network Rail Cap and Train Operator Cap

10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraph 2.7.2 of Schedule 7, provided that no adjustment shall be made to the Network Rail Cap or the Train Operator Cap pursuant to this paragraph 10.2 in respect of any period prior to 1 April 2010.

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

- (a) the total number of Contract Miles operated by the Train Operator during Financial Year t (the "**Annual Contract Mileage**");

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

10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the total number of Contract Miles operated by the Train Operator during the Financial Year commencing on 1 April 2009 and ending on 31 March 2010, unless it is adjusted in accordance with paragraph 10.2.3(b).
- (b) If, in accordance with paragraph 10.2.2(b), Network Rail determines that there has been an Annual Contract Mileage Variation, then the Baseline Annual Contract Mileage for Financial Year *t*+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Contract Mileage pursuant to this paragraph 10.2.3(b) shall be the Annual Contract Mileage for the Financial Year *t* in which the Annual Contract Mileage Variation has occurred.

10.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the parties shall endeavour to agree whether the Network Rail Cap and/or the Train Operator Cap should be adjusted in accordance with this paragraph 10.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment

to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2 shall be subject to the prior approval of ORR.

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

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

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

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

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

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

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

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

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

11. Selection by the Train Operator of the Incident Cap

11.1 Selection by the Train Operator of the Incident Cap

- 11.1.1 On or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap it wishes to apply (the “**Initial Incident Cap Notice**”), and the Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in the column adjacent to the Incident Cap selected by the Train Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

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

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

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

Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period)
0	0
1, 000 minutes	0.0662
2, 000 minutes	0.0349
3, 000 minutes	0.0253
4, 000 minutes	0.0213
5, 000 minutes	0.0186
6, 000 minutes	0.0163
7, 000 minutes	0.0146
8, 000 minutes	0.0131
9, 000 minutes	0.0119
10, 000 minutes	0.0106

12. HCS Election by the Train Operator

12.1 On or before the date on which this paragraph 12 takes effect, the Train Operator shall notify Network Rail in writing (an “**Initial HCS Notice**”) as to whether or not it wishes to receive the Cancellation Sum specific to HCS Cancellations and specified in Appendix 1 (the “**HCS Cancellation Sum**”).

12.2 Subject to paragraph 12.3, the Train Operator may elect:

- (a) (where, in accordance with this paragraph 12, the Train Operator has previously elected to receive the HCS Cancellation Sum), not to receive the HCS Cancellation Sum; or

(b) (where, in accordance with this paragraph 12, the Train Operator has previously elected not to receive the HCS Cancellation Sum), to receive the HCS Cancellation Sum

(each an “**HCS Election**”),

with effect from 1 April in any Financial Year, by notifying Network Rail in writing of such HCS Election (an “**HCS Notice**”). Any such HCS Notice must be served by the Train Operator on Network Rail no later than 28 days prior to 1 April in the Financial Year in which the Train Operator wishes the HCS Election specified in that HCS Notice to take effect (the “**HCS Commencement Date**”), and the HCS Election specified in that HCS Notice shall apply to that and each subsequent Financial Year until the Train Operator makes a new HCS Election in accordance with this paragraph 12.

12.3 Once given, an HCS Notice shall be irrevocable in respect of the Financial Year commencing on the HCS Commencement Date.

12.4 Where the Train Operator has elected (whether in the Initial HCS Notice or in any subsequent HCS Notice) to receive the HCS Cancellation Sum and where such election has not been revoked, in each case in accordance with this paragraph 12, the Train Operator shall pay the Cancellation Charge Access Charge Supplement in accordance with Schedule 7 in respect of each Charging Period for which the Train Operator is entitled to receive the HCS Cancellation Sum (whether or not, during any such Charging Period, one or more HCS Cancellations occurs).

13. Modification of the Cancellation Charge Access Charge Supplement

13.1 Notice by Network Rail

Network Rail may give notice to ORR at any time requesting ORR to issue a modification notice to modify the Cancellation Charge Access Charge Supplement.

13.2 Contents of notice

Any notice given by Network Rail under paragraph 13.1 shall state:

- (a) the methodology which Network Rail proposes should be applied to the modification of the Cancellation Charge Access Charge Supplement;
- (b) the reasons for such methodology; and
- (c) any other matters relevant to the proposed modification of the Cancellation Charge Access Charge Supplement.

13.3 Modification of Appendix 1

Subject to paragraph 13.5, if ORR issues to the parties a modification notice following a request under paragraph 13.1, Appendix 1 shall be modified (with respect to the Cancellation Charge Access Charge Supplement only):

- (a) as agreed between the parties;
- (b) as determined in accordance with the procedure set out in paragraph 13.4; or
- (c) as determined by ORR under paragraph 13.5.

13.4 Expert determination

If the parties have failed to reach agreement within 28 days of the date of ORR's notice following a request under paragraph 13.1, either party shall be entitled to refer the matter to expert determination in accordance with Part D of the Access Dispute Resolution Rules, save that:

- (a) the terms of reference to the expert shall be that:
 - (i) the expert shall consider the contents of Network Rail's notice under paragraph 13.1 and ORR's notice following a request under paragraph 13.1 in reaching his decision;
 - (ii) the determination shall be delivered in writing to the parties no later than 56 days after the date of referral of the matter to the expert; and

- (iii) the expert shall establish such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
- (b) each of the parties shall abide by the rules and procedures established by the expert; and
- (c) in the absence of manifest error, and subject to paragraph 13.5, the determination of the expert shall be final and binding on the parties.

13.5 Office of Rail Regulation's consent to modification

13.5.1 Any modification agreed between the parties or determined under paragraph 13.4 shall take effect only if ORR gives its consent to it, and from such date as ORR may determine in such consent.

13.5.2 If ORR does not give its consent to a modification as described in paragraph 13.5.1, it may issue a notice requiring the parties to make a modification to the Cancellation Charge Access Charge Supplement as specified in the notice.

13.5.3 No notice of ORR under paragraph 13.5.2 shall have effect unless ORR has:

- (a) consulted the parties in relation to the issues specified in the notice;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 13.5.3(a); and
- (c) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.

14. Agreement to modify the Cancellation Charge Access Charge Supplement

14.1 Proposal to modify

Either party may by notice to the other propose that the Cancellation Charge Access Charge Supplement be modified in accordance with this paragraph 14 if:

- (a) the modification can be justified on commercial grounds; and

- (b) there has been an increase or decrease of more than ten per cent in the number of Train Slots used by the Train Operator over a period of three consecutive months, relative to the number of Train Slots used by the Train Operator in the three months immediately after the later of:
 - (i) 1 April 2009; and
 - (ii) the date when the Cancellation Charge Access Charge Supplement was last modified in accordance with paragraphs 13 or 14 of this Schedule.

14.2 Timing

A notice under paragraph 14.1 shall be given before 1 February in the Financial Year preceding the Financial Year in which the modification is proposed to have effect.

14.3 Expert determination

If the parties have failed to reach agreement within 28 days of the date of the notice given under paragraph 14.1, either party shall be entitled to refer the matter for expert determination in accordance with Part D of the Access Dispute Resolution Rules, save that:

- (a) the terms of reference to the expert shall be that:
 - (i) the expert shall (A) consider the content of any relevant notice issued under paragraph 14.1 and (B) 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 to the expert; and
 - (ii) the determination shall be delivered in writing to the parties no later than 56 days after the date of referral of the matter to the expert; and
 - (iii) the expert shall establish such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;

- (b) each of the parties shall abide by the rules and procedures established by the expert;
and
- (c) in the absence of manifest error, and subject to paragraph 14.4, the determination of the expert shall be final and binding on the parties.

14.4 Office of Rail Regulation's consent to modification

14.4.1 Any modification agreed between the parties or determined under paragraph 14.3 shall take effect only if ORR gives its consent to it, and from such date as ORR may determine in such consent.

14.4.2 If ORR does not give its consent to a modification as described in paragraph 14.4.1, it may issue a notice requiring the parties to make a modification to the Cancellation Charge Access Charge Supplement as specified in the notice.

14.4.3 No notice of ORR under paragraph 14.4.2 shall have effect unless ORR has:

- (a) consulted the parties in relation to the issues specified in the notice;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 14.4.3(a); and
- (c) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.

APPENDIX 1: PERFORMANCE

Train Operator Performance

Train Operator Bonus Payment Rate £16.94 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.

Train Operator Compensation Payment Rate £33.89 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.

Train Operator Cap £ REDACTED

Disruption Sum £1, 942

Cancellation Charge £ REDACTED

Access Charge Supplement

Network Rail Performance

Network Rail Bonus Payment Rate £8.74 per Minutes Delay to Services which are Attributable to Network Rail.

Network Rail Compensation Payment Rate £17.47 per Minutes Delay to Services which are Attributable to Network Rail.

Network Rail Cap £ REDACTED

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

Benchmarks

Train Operator Benchmark

Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to each Charging Period shall be 2.63 Minutes Delay per 100 Train Operator Miles.

Network Rail Benchmark

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be:

- (a) in relation to each Charging Period within Financial Year 2009/2010, 7.58 Minutes Delay per 100 Train Operator Miles;
- (b) in relation to each Charging Period within Financial Year 2010/2011, 7.14 Minutes Delay per 100 Train Operator Miles;
- (c) in relation to each Charging Period within Financial Year 2011/2012, 6.77 Minutes Delay per 100 Train Operator Miles;
- (d) in relation to each Charging Period within Financial Year 2012/2013, 6.57 Minutes Delay per 100 Train Operator Miles; and
- (e) in relation to each Charging Period within Financial Year 2013/2014 and each subsequent Financial Year, 6.39 Minutes Delay per 100 Train Operator Miles.

Cancellation Sum

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,656 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,416 for each Cancellation equal to or above the Cancellation Threshold;

(c) the Cancellation Sum shall be £ REDACTED for each HCS Cancellation (whether or not such HCS Cancellation is a Cancellation which is below, equal to or above the Cancellation Threshold);

(d) “**HCS Cancellation**” means a Cancellation within any of the following service groups:

- i. 6620;
- ii. 6623;
- iii. 6625;
- iv. 6626;
- v. 6627;
- vi. 6628;
- vii. 6629;
- viii. 6640;
- ix. 6641; and
- x. 6642,

if, in accordance with Schedule 7, the Train Operator has paid the Cancellation Charge Access Charge Supplement for the Charging Period in which the relevant Cancellation occurs; and

(e) the “**Cancellation Threshold**” in any Charging Period shall be 0.41 per cent of the total number of Services operated by the Train Operator in that Charging Period.

Late Notice Cancellation Sum

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,430.

Baseline Network Mileage

The Baseline Network Mileage shall be 317,782,800.

APPENDIX 2: CALCULATION OF MINUTES DELAY

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
 - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
 - (b) in respect of each other recorded Trigger, the lesser of:
 - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
 - (ii) the greater of $((A1-A2) + B)$ and zero,

where:

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

A2 is the Planned time between the Triggers mentioned in (A) above; and

B is any Recovery Time between such Triggers.

2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

APPENDIX 3: PERFORMANCE STATEMENTS

Interim statements provided by Network Rail

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

- (d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and
- (e) an interim statement listing:
 - (i) the total Contract Miles; and
 - (ii) the total number of Services,in each case operated by the Train Operator during that Charging Period.

Interim statements provided by the Train Operator

2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, the Train Operator shall provide to Network Rail the following interim statements:
 - (a) an interim statement listing all Cancellations (including any HCS Cancellations) occurring during that Week for which the Train Operator considers it is entitled to a Cancellation Sum, and any Late Notice Cancellations for which the Train Operator considers it is entitled to a Late Notice Cancellation Sum, in each case under paragraph 8 of this Schedule 8;
 - (b) an interim statement listing all Prolonged Disruptions occurring or continuing during that Week for which the Train Operator considers it is entitled to a Prolonged Disruption Sum under paragraph 7 of this Schedule 8; and
 - (c) an interim statement listing all Service Variations arising during that Week for which the Train Operator considers it is entitled to a Service Variation Sum under Schedule 4.

Dispute of interim statement

3. Within two Working Days of receipt of any interim statement under paragraph 1 or 2 of this Appendix the recipient shall notify the provider of the interim statement of any reason

why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.

4. Within the next five Working Days after notification of any dispute under paragraph 3, nominated representatives of the parties shall meet and attempt to resolve that dispute.
5. If any matter is still in dispute ten Working Days after the meeting held under paragraph 4 above, either party may refer such matter for resolution under paragraph 9.3.1 of this Schedule 8.

Deemed agreement

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

Further interim statement

7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:
 - (a) Attributable to the Train Operator;
 - (b) Attributable to Network Rail; or
 - (c) Attributable to both the Train Operator and Network Rail,

but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.

8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

Statement of adjustment

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

ANNEX 3

BESPOKE AMENDMENTS

PART 1 (MODIFICATIONS TO STANDARD AMENDMENTS AND OTHER BESPOKE AMENDMENTS)

Explanatory Note:

This Annex 3 sets out (i) the modifications which need to be made to the standard amendments to Schedules 4 (Variations to Services), 7 (Track Charges) and 8 (Performance Regime), and (ii) certain other bespoke amendments, in each case required in order to give effect to the ORR's conclusions on the Review in the Track Access Agreements of the Train Operators listed below.

If the name of a Train Operator does not appear in Part 1 of this Annex 3, the ORR proposes that the standard amendments will be made to that Train Operator's Track Access Agreement without modification.

If the name of a Train Operator does appear in Part 1 of this Annex 3, the ORR proposes that the standard amendments will be made to that Train Operator's Track Access Agreement, except to the extent specified in the paragraph of Part 1 of this Annex 3 relating to that Train Operator.

Each Track Access Agreement referred to in this Annex 3, in each case as amended in accordance with Annex 2, shall be further amended on the terms set out in this Annex 3.

1 Paragraph 2.7.4 of Schedule 7 of certain Track Access Agreements

In the first line of paragraph 2.7.4 of Schedule 7 to each of the Track Access Agreements between Network Rail and each of the Train Operators listed in the first column of the table below, delete the reference to “1 April 2010” and insert the date set out in the second column of the table below adjacent to the name of the relevant Train Operator:

Advenza Freight Limited	1 April 2005
Colas Rail (formerly AMEC Spie Rail (UK) Ltd)	1 April 2006
Direct Rail Services Limited	1 April 2005
English Welsh & Scottish Railway Limited	1 April 2006
Fastline Limited	1 April 2005
Freightliner Limited	1 April 2008
Freight Europe (UK) Limited	1 April 2008
Freightliner Heavy Haul Limited	1 April 2008
GB Railfreight Limited	1 April 2008
Société Nationale des Chemins de Fer Français	1 April 2007
West Coast Railway Company Ltd	1 April 2005
Serco Limited	1 April 2009

2 Track Access Agreement between Network Rail and Advenza Freight Limited (the “Advenza TAA”)

2.1 In clause 1.1 of the Advenza TAA, delete the definition of “CTRL”.

2.2 Delete clause 18.8 of the Advenza TAA and replace with “18.8 NOT USED”.

2.3 Delete Schedule 11 to the Advenza TAA in its entirety and replace with “Schedule 11 - NOT USED”.

3 Track Access Agreement between Network Rail and Direct Rail Services Limited (the “DRS TAA”)

3.1 In clause 1.1 of the DRS TAA:

(a) insert the following definition in alphabetical order:

“**Cancellation Charge Access Charge Supplement**” means the cancellation charge access charge supplement specified as an annual amount in Appendix 1 to Schedule 8 which, in any Financial Year, is payable in 13 equal instalments, as such amount is adjusted in accordance with paragraph 2.7.2 of Schedule 7 and paragraphs 13 and 14 of Schedule 8; and

(b) delete the definition of “**CTRL**”.

3.2 Delete clause 18.9 of the DRS TAA in its entirety and replace with “18.9 NOT USED”.

3.3 In paragraph 1 of Schedule 7 to the DRS TAA:

3.3.1 insert the following definition in alphabetical order:

“**ECS Cancellation Sum**” has the meaning ascribed to it in Schedule 8;” and

3.3.2 insert “the Cancellation Charge Access Charge Supplement,” in the definition of “**Indexed Figures**” immediately after the text “the Late Notice Cancellation Sum,”.

3.4 In paragraph 2.1.1 of Schedule 7 to the DRS TAA, insert “, if the Train Operator has elected to receive the EHS Cancellation Sum pursuant to paragraph 12 of Schedule 8, the Cancellation Charge Access Charge Supplement” immediately after the text “the Qualifying Modification Benefit Charge”.

3.5 In paragraph 2.1.3 of Schedule 7 to the DRS TAA, insert “, if the Train Operator has elected to receive the EHS Cancellation Sum pursuant to paragraph 12 of

Schedule 8, the Cancellation Charge Access Charge Supplement” immediately after the text “the Incident Cap Access Charge Supplement”.

3.6 Delete Schedule 11 to the DRS TAA in its entirety and replace with “Schedule 11 - NOT USED”.

4 Track Access Agreement between Network Rail and English Welsh & Scottish Railway Limited (the “EWS TAA”)

4.1 In clause 1.1 of the EWS TAA:

(a) delete the definition of “**CTRL Restriction of Use**”; and

(b) delete the reference to “, other than a CTRL Restriction of Use” in the definition of “**Restriction of Use**”.

4.2 In paragraph 1.1 of Schedule 8 to the EWS TAA, delete the reference to “or CTRL Restriction of Use” in the definition of “**Planned Incident**”.

4.3 In paragraph 2.5 of Schedule 8 to the EWS TAA, delete the reference to “other than a CTRL Restriction of Use for which a remedy has been provided in Schedule 11”.

4.4 In each of paragraphs 1, 2, 3 and 6 of Appendix 3 to Schedule 8 to the EWS TAA, delete the reference to “two Working Days” and replace with a reference to “5 Working Days”.

4.5 Delete Schedule 11 to the EWS TAA in its entirety and replace with “Schedule 11 - NOT USED”.

5 Track Access Agreement between Network Rail and Fastline Limited (the “Fastline TAA”)

5.1 In clause 1.1 of the Fastline TAA, delete the definition of “**CTRL**”.

5.2 Delete clause 18.9 of the Fastline TAA and replace with “18.9 NOT USED”.

5.3 Delete Schedule 11 to the Fastline TAA in its entirety and replace with “Schedule 11 - NOT USED”.

6 Track Access Agreement between Network Rail and Freightliner Limited (the “Freightliner TAA”)

6.1 In clause 1.1 of the Freightliner TAA:

- (a) delete the definitions of “CTRL” and “CTRL Restriction of Use”; and
- (b) delete the reference to “, other than a CTRL Restriction of Use” in the definition of “Restriction of Use”.

6.2 Delete clause 18.8 of the Freightliner TAA and replace with “18.8 NOT USED”.

6.3 The following new Part 8 shall be inserted in Schedule 4 of the Freightliner TAA:

“

1. North London Railway Infrastructure Project (“NLRIP”) Compensation

1.1 Compensation for Locomotives and Train-Crew

Network Rail and the Train Operator agree that compensation in respect of certain costs incurred by the Train Operator as a result of the works to be carried out in respect of the NLRIP as described in Appendix A to this Part 8 (the “NLRIP Works”) will be governed by the provisions of the two letter agreements entered into between Network Rail, the Train Operator and Transport for London on 7 May 2008 (the “Letter Agreements”) in respect of the costs of leasing six class 66 locomotives in the period from 1 April 2009 to 31 March 2011 and the costs for the recruitment, hire and training of train crew to be incurred in the period from 1 April 2008 to 31 December 2011. Save as otherwise set out in the Letter Agreements, the Train Operator acknowledges and agrees that Network Rail shall have no other or further liability to the Train Operator whether under this contract or otherwise in respect of the TfL Loco Payment, the Train-crew Fixed Payment, the Variable Train-crew costs, the Recruitment Costs or the Training Costs for the above periods.

1.2 **Other Compensation**

Network Rail and the Train Operator agree that all other effects arising from the NLRIP Works during the period from 1 April 2009 to 31 March 2011 which are not covered by the Letter Agreements and any effects arising outside of this period shall be dealt with in accordance with Part G of the Network Code in force as at 17 December 2007.

1.3 **Definitions**

Words and expressions used but not defined in this paragraph 1 shall have the meanings given to them in the Letter Agreements.

Appendix A to Part 8 of Schedule 4

Scope of the Works for the North London Railway Infrastructure Project (NLRIP)

NLRIP Works

Stratford to Richmond (NLL)

Platforms and Stations Buildings - Simple refurbishment of existing platforms and platform extensions with all associated system changes.

Major works to extend platforms at Willesden, Kentish Town West, Dalston Kingsland including new bridges and structures.

Major Works at Highbury and Islington, Camden, Cannonbury and Caledonian Road & Barnsbury stations - including building/rebuilding of platforms and the access and interconnection infrastructure to cope with increased passenger flows.

Traction Power between Willesden and Stratford- 25kv Distribution reinforce cement with associated distribution works to match the power requirements from the enhanced service levels. Removal of DC Primrose Hill (excl) to Stratford.

Remodelling of the track layout between Camden Road and Dalston - The work includes Four tracking the P-Way, Telecommunications, E&P, Power Supply, and Civil Works to achieve the 4 min headways required by SLC2(k).. Specific structures work will also be required to provide adequate clearances.

The connection to the ELL at Dalston.

Signalling - Resignalling of the Willesden to Stratford area to reflect the changes in layout required for the additional trains and to reduce headways.

Signalling Migration and Control between Willesden and Stratford - Establishment of a new IECC-based command and control system for the North London Line and the transfer of these signalling and controls to this new control system at Upminster. This will increase operational efficiency and perturbation management capability.

Channelsea Loop - Construction of a freight passing loop to allow trains to be diverted from the main NLL Up line and provide extra capacity to trains running on the NLL.

Clapham Jn to Willesden Jn (WLL)

Latchmere Curve redoubling - Full reinstatement of the second track to allow 4 tph into Clapham Junction from the WLL. This includes removal of existing connections at Clapham Junction and Battersea Park Road and installation of new P-Way from formation up, a new cross over and a double junction, third rail electrification and new signalling and telecommunications.

Euston to Watford (Watford DC)

Willesden Low Level Turnback – Extension of an existing turnback to accommodate 4 car trains.

Gospel Oak to Barking (GOB)

Gospel Oak to Barking - Work to extend the platform at Tottenham South Station.”

6.4 In paragraph 1.1 of Schedule 8 to the Freightliner TAA, delete the references to “or CTRL Restriction of Use” in the definition of “**Planned Incident**”.

6.5 Delete Schedule 11 to the Freightliner TAA in its entirety and replace with “Schedule 11 - NOT USED”.

7 Track Access Agreement between Network Rail and Freightliner Heavy Haul Limited (the “Freightliner Heavy Haul TAA”)

7.1 In clause 1.1 of the Freightliner Heavy Haul TAA, delete the definition of “CTRL”.

7.2 Delete clause 18.8 of the Freightliner Heavy Haul TAA and replace with “18.8 NOT USED”.

7.3 In paragraph 2.2.5(a) of Schedule 7, delete “of signature” and insert “commencement” immediately before “date”.

7.4 Delete Schedule 11 to the Freightliner TAA in its entirety and replace with “Schedule 11 - NOT USED”.

8 Track Access Agreement between Network Rail and GB Railfreight Limited (the “GB Railfreight TAA”)

8.1 In clause 1.1 of the GB Railfreight TAA, delete the definition of “CTRL”.

8.2 Delete clause 18.8 of the GB Railfreight TAA and replace with “18.8 NOT USED”.

8.3 Delete Schedule 11 to the GB Railfreight TAA in its entirety and replace with “Schedule 11 - NOT USED”.

9 Track Access Agreement between Network Rail and Société Nationale des Chemins de Fer Français (the “SNCF TAA”)

9.1 In clause 1.1 of the SNCF TAA, delete the definition of “CTRL”.

9.2 Delete clause 18.8 of the SNCF TAA and replace with “18.8 NOT USED”.

9.3 Delete Schedule 11 to the SNCF TAA in its entirety and replace with “Schedule 11 - NOT USED”.

10 Track Access Agreement between Network Rail and West Coast Railway Company Ltd (the “West Coast TAA”)

10.1 In clause 1.1 of the West Coast TAA, delete the definition of “CTRL”.

10.2 Delete clause 18.8 of the West Coast TAA and replace with “18.8 NOT USED”.

10.3 Delete Schedule 11 to the West Coast TAA in its entirety and replace with “Schedule 11 - NOT USED”.

PART 2 (CONFIDENTIAL INFORMATION)

Explanatory Note:

As explained above, the confidential information is attached to this Review Notice in the following pages. Copies will be sent only to the parties to the relevant Track Access Agreement, the Secretary of State for Transport, the Scottish Ministers and the Treasury. The publication of that information would or might, in the opinion of the ORR, seriously and prejudicially affect the interests of each Train Operator and/or Network Rail for the purpose of section 71(2) of the Act, and it is therefore not being published.