

TRACK ACCESS CONTRACT (FREIGHT SERVICES)

Dated

11 December 2016

Between

NETWORK RAIL INFRASTRUCTURE LIMITED

- and -

FREIGHTLINER LIMITED

Contents

Clause	Page
1. INTERPRETATION	13
1.1 Definitions	13
1.2 Interpretation	20
1.3 Indemnities	22
2. NETWORK CODE AND THE TRACTION ELECTRICITY RULES	22
2.1 Incorporation	22
2.2 Modification to the Network Code or the Traction Electricity Rules	22
2.3 Compliance by other operators	22
3. CONDITIONS PRECEDENT AND DURATION	22
3.1 Effective date	22
3.2 Conditions precedent to Clause 5	23
3.3 Obligations to satisfy conditions precedent to Clause 5	23
3.4 Consequences of non-fulfilment of conditions precedent to Clause 5	23
3.5 Expiry	24
3.6 Suspension and termination	24
4. STANDARD OF PERFORMANCE	24
4.1 General standard	24
4.2 Good faith	24
5. PERMISSION TO USE	24
5.1 Permission to use the Network	24
5.2 Meaning	24
5.3 Permission under Clauses 5.2(e) and 5.2(f)	25
5.4 Changes to Engineering Access Statement and Timetable Planning Rules	25
5.5 Variations to Services	25
5.6 Services	25
5.7 Performance	26
5.8 Stabling	26
5.9 Information to assist submitting an Access Proposal or Train Operator Variation Request	26

6.	OPERATION AND MAINTENANCE OF TRAINS AND NETWORK	26
6.1	General	26
6.2	Trespass, vandalism and animals	26
6.3	Safety	26
6.4	Movements of trains onto and off the Network	27
6.4.1	<i>Suitable access</i>	27
6.4.2	<i>Prompt presentation onto the Network</i>	27
6.5	Use of Railway Code Systems	27
6.5.1	<i>General</i>	27
6.5.2	<i>Provision of train consist data</i>	27
6.5.3	<i>Notification of movement onto and off the Network</i>	28
6.5.4	<i>Network Rail audit</i>	28
6.5.5	<i>Notice of audit</i>	28
6.5.6	<i>Material discrepancy</i>	28
6.5.7	<i>Consent to use information</i>	29
7.	TRACK CHARGES AND OTHER PAYMENTS	29
8.	LIABILITY	29
8.1	Performance Orders in relation to breach	29
8.2	Compensation in relation to breach	29
9.	LOCAL OUTPUTS - PERFORMANCE ORDERS	29
10.	LIABILITY - OTHER MATTERS	30
10.1	Train Operator indemnity	30
10.2	Network Rail indemnity	30
11.	RESTRICTIONS ON CLAIMS	30
11.1	Notification and mitigation	30
11.2	Restrictions on claims by Network Rail	31
11.3	Restrictions on claims by Train Operator	31
11.4	Restriction on claims by both parties	32
11.5	Limitation on liability	32
11.6	Claims Allocation and Handling Agreement	32
11.6.1	<i>General</i>	32
11.6.2	<i>Restriction of application</i>	32
11.6.3	<i>Liability for small claims</i>	32
11.6.4	<i>Further limitation of liability</i>	33

11.6.5	<i>Indexation of the Indemnity Incident Cap</i>	33
11.6.6	<i>Applicable Contract Year for indexation</i>	34
12.	GOVERNING LAW	34
13.	DISPUTE RESOLUTION	34
13.1	ADRR	34
13.2	Unpaid sums	34
13.3	Performance Orders	35
13.3.1	<i>Power to order provisional relief</i>	35
13.3.2	<i>Performance Orders</i>	35
13.3.3	<i>Duties of arbitrator in relation to Performance Orders</i>	35
13.4	Remedies	35
13.5	Exclusion of applications on preliminary points of law	36
14.	CONFIDENTIALITY	36
14.1	Confidential Information	36
14.1.1	<i>General obligation</i>	36
14.1.2	<i>Network Rail - Affiliates</i>	36
14.1.3	<i>Train Operator - Affiliates</i>	36
14.2	Entitlement to divulge	36
14.3	Return of Confidential Information	37
14.4	Retention or destruction of Confidential Information	37
14.5	Ownership of Confidential Information	38
14.6	Network Code and Traction Electricity Rules	38
15.	ASSIGNMENT	38
16.	PAYMENTS, INTEREST AND VAT	38
16.1	Payment	38
16.1.1	<i>No deduction</i>	38
16.1.2	<i>Delivery of invoices</i>	38
16.1.3	<i>Payment and content of invoices and other statements of amounts payable</i>	38
16.1.4	<i>Method of payment</i>	39
16.1.5	<i>Credit notes</i>	39
16.2	Disputed amounts	39
16.2.1	<i>Notification of a dispute</i>	39
16.2.2	<i>Payment in full</i>	39

16.2.3	<i>Right to withhold payment of disputed amount</i>	39
16.3	Interest	40
16.3.1	<i>Amounts not paid by due date</i>	40
16.3.2	<i>Amounts paid which were not properly due</i>	40
16.4	VAT	40
16.4.1	<i>Payment of VAT</i>	40
16.4.2	<i>Reimbursement of VAT</i>	40
16.4.3	<i>VAT credit note to be issued on repayment</i>	41
17.	FORCE MAJEURE EVENTS	41
17.1	Meaning of Force Majeure Event	41
17.2	Nature and extent of relief for force majeure	42
17.3	Entitlement to force majeure relief	42
17.4	Procedure for claiming relief	42
17.5	Force Majeure Notices and Reports	43
17.5.1	<i>Force Majeure Notice</i>	43
17.5.2	<i>Force Majeure Report</i>	43
17.5.3	<i>Other information</i>	43
17.6	Mitigation	43
17.7	Duration of relief for force majeure	44
17.8	Availability of Performance Order	44
17.9	Disapplication of Force Majeure Events	44
18.	MISCELLANEOUS	45
18.1	Non waiver	45
18.1.1	<i>No waiver</i>	45
18.1.2	<i>Failure or delay in exercising a right or remedy</i>	45
18.2	Variations	45
18.2.1	<i>Amendments to be in writing and to be approved</i>	45
18.2.2	<i>Exceptions</i>	45
18.2.3	<i>No Office of Rail Regulation approval needed</i>	45
18.2.4	<i>Conformed copy of contract</i>	46
18.3	Entire contract and exclusive remedies	46
18.3.1	<i>Entire contract</i>	46
18.3.2	<i>Exclusive remedies</i>	46
18.3.3	<i>Fraud, death and personal injury</i>	46

18.4 Notices	47
18.4.1 <i>Giving of notices</i>	47
18.4.2 <i>Right to modify communication details</i>	47
18.4.3 <i>Deemed receipt</i>	47
18.4.4 <i>Copyees</i>	48
18.5 Counterparts	48
18.6 Survival	48
18.7 Contracts (Rights of Third Parties) Act 1999	48
18.7.1 <i>Application to third parties</i>	48
18.7.2 <i>Application to the Office of Rail Regulation</i>	48
18.7.3 <i>Contract amendments</i>	49
18.7.4 <i>Application of Traction Electricity Rules to other train operators</i>	49
18.8 CTRL	49
SCHEDULE 1: CONTACT PARTICULARS	50
1. Information Request	51
2. Contents of the Information Request	51
3. Agreement of the Information Request	51
3.1 <i>Notification by Network Rail</i>	51
3.2 <i>Failure to agree on provision of specific information</i>	51
3.3 <i>Relevant ADRR Forum resolution</i>	52
3.4 <i>Provision of information by Network Rail</i>	52
4. Parts D and G of the Network Code	52
SCHEDULE 3: COLLATERAL AGREEMENTS	53
SCHEDULE 4: VARIATIONS TO SERVICES	54
PART 1 - GENERAL PROVISIONS	54
1. Definitions	54
1.1 <i>Definitions</i>	54
1.2 <i>Interpretation</i>	58
2. Payment	58
PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE	59
3. Disruption compensation	59
3.1 <i>Category 1 Disruption</i>	59
3.2 <i>Category 2 Disruptions</i>	59

3.3	<i>Category 3 Disruptions</i>	60
3.4	<i>Notification, Disruption Claim Notices and Actual Costs Claim Notices</i>	61
3.5	<i>Planned Disruption Sum on Round Trip</i>	62
3.6	<i>Early notice of potential Actual Cost claims</i>	62
PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE		62
4.	Services rescheduled following a Disruptive Event	62
4.1	<i>Establishing an Alternative Train Slot</i>	62
4.2	<i>Train Operator's response</i>	63
4.3	<i>Rejection of Alternative Train Slot</i>	63
4.4	<i>Measure of performance</i>	63
4.5	<i>Cancellation</i>	63
4.6	<i>Part H of the Network Code</i>	64
5.	Other variations to Planned Services	64
5.1	<i>Non-availability of a Service</i>	64
5.2	<i>Establishing an Alternative Train Slot</i>	64
5.3	<i>Train Operator's response</i>	64
5.4	<i>Rejection of Alternative Train Slot</i>	65
5.5	<i>Measure of performance</i>	65
5.6	<i>Cancellation</i>	65
PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE		66
6.	Restrictions of Use before Possession Notice Date	66
PART 5 – SERVICE VARIATION		66
7.	Service Variation	66
7.1	<i>Service Variation</i>	66
7.2	<i>Network Rail liability</i>	67
7.3	<i>Service Variation Sum on Round Trip</i>	67
7.4	<i>Service Variation / Cancellation</i>	67
PART 6 – NOT USED		67
8.	Not Used	67
PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS		67
9.	Late Notice Actual Costs Claims	67

9.1	<i>Late Notice Actual Costs Claim arising from Relevant Cancellation</i>	67
9.2	<i>Late Notice Actual Costs Claim arising from Relevant Service Variation</i>	68
9.3	<i>Late Notice Actual Costs Claim Notice</i>	68
9.4	<i>Late Notice Actual Costs Claim Process</i>	69
SCHEDULE 5:	SERVICES	70
1.	Definitions	70
1.1	<i>Definitions</i>	70
1.2	<i>Days of the Week</i>	72
2.	Rights and Services	73
2.1	<i>Freight Access Rights</i>	73
2.2	<i>Ancillary Movements</i>	73
2.3	<i>Train Operator Variation Services</i>	73
2.4	<i>Public holidays</i>	74
3.	Network Rail's Flexing Rights	74
3.1	<i>Associations</i>	74
4.	Services	74
4.1	<i>Services</i>	74
4.2	<i>Specified Equipment</i>	74
4.3	<i>Information</i>	75
SCHEDULE 6:	EVENTS OF DEFAULT, SUSPENSION AND TERMINATION	77
1.	Events of Default	77
1.1	<i>Train Operator Events of Default</i>	77
1.2	<i>Notification</i>	77
1.3	<i>Network Rail Events of Default</i>	77
1.4	<i>Notification</i>	78
2.	Suspension	78
2.1	<i>Right to suspend</i>	78
2.2	<i>Contents of Suspension Notice</i>	78
2.3	<i>Effect of a Suspension Notice served by Network Rail</i>	79
2.4	<i>Effect of a Suspension Notice served by the Train Operator</i>	79
2.5	<i>Suspension to be proportionate to breach</i>	79
3.	Termination	80
3.1	<i>Network Rail's right to terminate</i>	80

3.2	<i>Train Operator's right to terminate</i>	81
3.3	<i>Contents of Termination Notice</i>	81
3.4	<i>Effect of Termination Notice</i>	81
3.5	<i>Unilateral right of termination</i>	82
3.6	<i>Contents of unilateral termination notice</i>	82
3.7	<i>Effect of unilateral termination notice</i>	82
4.	Consequence of termination	82
4.1	<i>Directions regarding location of Specified Equipment</i>	82
4.2	<i>Failure to comply with directions</i>	82
4.3	<i>Evidence of costs</i>	83
SCHEDULE 7:	TRACK CHARGES AND OTHER PAYMENTS	84
1.	Definitions	84
2.	Track Charges and Invoices	93
2.1	<i>Obligation on Train Operator to pay</i>	93
2.2	<i>Variable Charges</i>	94
2.3	<i>Freight Capacity Charge and Freight Capacity Charge Wash-Up</i>	96
2.4	<i>Traction Electricity Charge</i>	99
2.5	<i>Not used.</i>	104
2.6	<i>Incident Cap Access Charge Supplement</i>	104
2.7	<i>Price Variation</i>	105
2.8	<i>Incremental Costs</i>	106
2.9	<i>Office of Rail Regulation's Qualifying Modification Criteria</i>	109
2.10	<i>Efficiency Benefit Share</i>	109
2.11	<i>Not used.</i>	111
2.12	<i>Coal Spillage Reduction Investment Charge</i>	111
3.	Freight Charging Review	113
4.	Route-Level Efficiency Benefit Share Mechanism	113
APPENDIX 1 – REBS ROUTES TABLE		119
APPENDIX 2 – ROUTE-LEVEL EFFICIENCY BENEFIT SHARE MECHANISM OPT-OUT NOTICE		120
APPENDIX 3 – “METERED TRAINS M” FOR THE PURPOSES OF PARAGRAPH 2.4.1.1 OF PART 2		122
SCHEDULE 8: PERFORMANCE REGIME		123
1. Definitions		123

2.	General	128
2.1	<i>Performance monitoring system recordings</i>	128
2.2	<i>Liability for Short Notice Service</i>	128
2.3	<i>Mitigation of delays</i>	129
2.4	<i>Calculation of Minutes Delay</i>	129
3.	Diagnosis of delays	129
3.1	<i>Attributing delays</i>	129
3.2	<i>Delays Attributable to both the Train Operator and Network Rail</i>	129
3.3	<i>Unexplained delays Attributable to Network Rail</i>	129
3.4	<i>Unexplained delays Attributable to the Train Operator</i>	129
3.5	<i>Identifying delaying incidents</i>	129
3.6	<i>Performance statements</i>	130
4.	Minutes Delay in respect of Train Operator performance	130
4.1	<i>Prescribed delay period</i>	130
4.2	<i>Train Operator performance against TOB</i>	130
5.	Cancellations of or delays to Restrictions of Use Attributable to the Train Operator	131
6.	Minutes Delay in respect of Network Rail performance	131
6.1	<i>Cancellations</i>	131
6.2	<i>Network Rail performance against NRB</i>	132
	<i>In respect of each Charging Period:</i>	132
7.	Prolonged Disruption	133
7.1	<i>Prolonged Disruption Sum calculation</i>	133
7.2	<i>Subsequent Prolonged Disruption</i>	133
7.3	<i>Network Rail liability</i>	134
8.	Cancellation	134
8.1	<i>Cancellation</i>	134
8.2	<i>Network Rail liability</i>	134
8.3	<i>Late presentation of Service</i>	135
9.	Payment	135
9.1	<i>Aggregate Net Liability of Network Rail and the Train Operator for Performance Sums</i>	135
9.2	<i>Issue of invoice or credit note</i>	136
9.3	<i>Resolution of disputes</i>	136
10.	Reviews of Benchmarks, Network Rail Cap and Train Operator Cap	137

10.1	<i>Adjustments to the Train Operator Benchmark</i>	137
10.2	<i>Adjustments to the Network Rail Cap and Train Operator Cap</i>	141
11.	Selection by the Train Operator of the Incident Cap	143
11.1	<i>Selection by the Train Operator of the Incident Cap</i>	143
11.2	<i>Level of Incident Cap and Incident Cap Access Charge Supplement Rate</i>	143
12.	ETCS Amendments	144
12.1	<i>Circumstances in which ETCS Amendments can be made</i>	144
APPENDIX 1:	PERFORMANCE	146
APPENDIX 2:	CALCULATION OF MINUTES DELAY	148
APPENDIX 3:	PERFORMANCE STATEMENTS	149
SCHEDULE 9:	LIMITATION ON LIABILITY	152
1.	Definitions	152
2.	Application	152
3.	Limitation on Network Rail's liability	152
4.	Limitation on Train Operator's liability	153
5.	Disapplication of limitation	153
6.	Exclusion of legal and other costs	153
7.	Exclusion of certain Relevant Losses	153
8.	Continuing breaches	153
9.	Final determination of claims	154
SCHEDULE 10:	NETWORK CODE AND TRACTION ELECTRICITY RULES MODIFICATIONS	155
1.	Automatic effect	155
1.1	<i>General</i>	155
1.2	<i>Retrospective effect</i>	155
2.	Modification notice	155
2.1	<i>Meaning</i>	155
2.2	<i>Contents of modification notice</i>	155
3.	Adaptation procedure	155
3.1	<i>Application</i>	155
3.2	<i>Negotiation of Adaptations</i>	156
3.3	<i>Agreed adaptations - notice to the Office of Rail Regulation</i>	156
3.4	<i>Agreed adaptations - Office of Rail Regulation's consent</i>	156

3.5	<i>Agreed requisite adaptations - Office of Rail Regulation's refusal of consent</i>	156
3.6	<i>Requisite adaptations - failure to agree or submit</i>	157
3.7	<i>Notice of determined requisite adaptations</i>	157
3.8	<i>Effect of requisite adaptations</i>	157
4.	Procedural matters	157
4.1	<i>More than one notice</i>	157
4.2	<i>Differences etc as to requisite adaptations</i>	157
4.3	<i>Co-operation and information</i>	157
4.4	<i>Office of Rail Regulation's criteria</i>	158
4.5	<i>Procedural modifications</i>	158
4.6	<i>Dates</i>	158
4.7	<i>Requirement for prior consultation</i>	158
4.8	<i>Consolidated contract</i>	159
4.9	<i>Saving</i>	159
5.	Definitions	159
SCHEDULE 11:	CTRL	161
1.	Definitions	161
1.1	<i>Definitions</i>	161
1.2	<i>Interpretation</i>	162
2.	CTRL	162
2.1	<i>CTRL Compensation</i>	162
2.2	<i>Network Change</i>	162

THIS CONTRACT is made the 11th day of December 2016.

BETWEEN:

- (1) Network Rail Infrastructure Limited, a company registered in England under number 2904587 having its registered office at 1 Eversholt Street, London, NW1 2DN ("Network Rail"); and
- (2) Freightliner Limited, a company registered in England under number 3118392 having its registered office at 3rd Floor, The Podium, 1 Eversholt Street, London, NW1 2FL (the "Train Operator").

WHEREAS:

- (A) Network Rail is the owner of the Network; and
- (B) Network Rail grants to the Train Operator permission to use the Network on the terms and conditions of this contract.

IT IS AGREED AS FOLLOWS:

1. INTERPRETATION

1.1 Definitions

In this contract, unless the context otherwise requires:

"Access Agreement" has the meaning ascribed to it in Part A of the Network Code;

"Access Dispute Resolution Rules" and **"ADRR"** have the meaning ascribed to them in Part A of the Network Code;

"Access Proposal" has the meaning ascribed to it in Part D of the Network Code;

"Act" means the Railways Act 1993;

"Affected Party" has the meaning ascribed to it in Clause 17.1;

"Affiliate" means, in relation to any company:

- (a) a company which is either a holding company or a subsidiary of such company; or
- (b) a company which is a subsidiary of a holding company of which such company is also a subsidiary,

and for these purposes **"holding company"** and **"subsidiary"** have the meanings ascribed to them in section 736 of the Companies Act 1985;

"Alternative Train Slot" means, in relation to any Train Slot in the Working Timetable which becomes unavailable, an alternative Train Slot established under paragraphs 4 or 5 of Schedule 4;

"Ancillary Movements" has the meaning ascribed to it in Part D of the Network Code;

“Applicable System” means any system other than Railway Code Systems which the parties may agree to use for the safe planning and operation of Train Slots over the Network;

“associate” has the meaning ascribed to it in section 17 of the Act;

“Cancellation” has the meaning ascribed to it in paragraph 8.1 of Schedule 8;

“Cancellation Sum” means the Cancellation Sum specified in Appendix 1 to Schedule 8, as adjusted under paragraph 2.7.2 of Schedule 7;

“Charging Period” means each period of 28 days which coincides with a Network Rail accounting period save that:

- (a) the first period and the last period may be of less than 28 days if:
 - (i) the date of signature of this contract does not coincide with the first day of one of Network Rail’s accounting periods; or
 - (ii) the Expiry Date does not coincide with the last day of one of Network Rail’s accounting periods; and
- (b) the duration of the first and last such period in any Financial Year may be varied so as to coincide with the duration of Network Rail’s accounting periods by notice from Network Rail to the Train Operator;

“Claims Allocation and Handling Agreement” means the agreement of that name approved by ORR;

“Class A Local Output” has the meaning ascribed to it in Part L of the Network Code;

“Collateral Agreements” means the agreements and arrangements listed in Schedule 3;

“Confidential Information” means information relating to the affairs of one party to this contract or any of its Affiliates which has been provided by any such person to the other party under or for the purposes of this contract, or any matter or thing contemplated by this contract or to which this contract relates, the disclosure of which is likely materially to compromise or otherwise prejudice the commercial interests of any such person;

“contract” means this document including all schedules and appendices to it, the Network Code and the Traction Electricity Rules;

“Contract Year” means each yearly period commencing on the commencement date and subsequently on each anniversary of such date, except that for the purposes of clause 11.6.5 and the indexation in the definition of the Liability Cap in Schedule 9, the yearly period shall commence on the date of this contract;

“CTRL” means Channel Tunnel Rail Link;

“D-x” has the meaning ascribed to it in Part D of the Network Code;

“Decision Criteria” has the meaning ascribed to it in Part D of the Network Code;

“Default Interest Rate” is two percent above the base lending rate of Barclays Bank PLC, as varied from time to time;

“Destination” means, in relation to a Service:

- (a) the location on the Network at which that Service is Planned to terminate;
or
- (b) if the location at which that Service is Planned to terminate is not on the Network, the location on the Network which:
 - (i) will enable the train operating that Service to leave the Network;
and
 - (ii) is the most appropriate location for such train to use to terminate that Service on the Network;

“Diverted Service” means a Service, as such term is defined in paragraph 1.2 of Schedule 4, operated using an Alternative Train Slot established under paragraphs 4 or 5 of Schedule 4;

“Empty Service” means a Service which does not convey:

- (a) loaded wagons; or
- (b) empty passenger rolling stock;

“Engineering Access Statement” means the Engineering Access Statement in force in respect of the Network on the Commencement Date, as from time to time amended or replaced under Part D of the Network Code;

“Environmental Condition” has the meaning ascribed to it in Part E of the Network Code;

“Environmental Damage” has the meaning ascribed to it in Part E of the Network Code;

“European licence” has the meaning ascribed to it in section 6(2) of the Act;

“Event of Default” means a Train Operator Event of Default or a Network Rail Event of Default;

“Exercised” has the meaning ascribed to it in Part D of the Network Code;

“Expiry Date” means Principal Change Date 2026;

“Financial Year” means a year commencing at 0000 hours on 1 April and ending immediately before 0000 hours on the next succeeding 1 April save that:

- (a) the first such period shall commence on the date upon which all the provisions of this contract come into effect in accordance with Clause 3; and
- (b) the last such period shall end on the Expiry Date;

“Force Majeure Event” has the meaning ascribed to it in Clause 17.1;

“Force Majeure Notice” has the meaning ascribed to it in Clause 17.1;

“Force Majeure Report” has the meaning ascribed to it in Clause 17.1;

“Incident Cap Access Charge Supplement” means the charge calculated in accordance with paragraph 2.6 of Schedule 7;

“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;

“Indemnity Incident Cap” means the sum calculated in accordance with Clause 11.6.5;

“Innocent Party” means, in relation to a breach of an obligation under this contract, the party who is not in breach of that obligation;

“Insolvency Event”, in relation to either of the parties, has occurred where:

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph:
 - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there were substituted “£100,000” or such higher figure as the parties may agree in writing from time to time; and
 - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;
- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or sued out against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed); or
- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above, unless:
 - (i) in any case, a railway administration order (or application for such order) has been made or such order (or application) is made within

14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to the party in question under section 60, 61 or 62 of the Act and for so long as any such order (or application) remains in force or pending; or

- (ii) in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely recourse to all appropriate measures and procedures;

“Intermediate Point” means, in relation to a Service:

- (a) a location on the Network at which that Service is Planned to call; or
- (b) if the location at which that Service is Planned to call is not on the Network, a location on the Network which:
 - (i) will enable the train operating that Service to be accepted off and presented onto the Network; and
 - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;

“Liability Cap” has the meaning ascribed to it in paragraph 1 of Schedule 9;

“Local Output” has the meaning ascribed to it in Part L of the Network Code;

“Longstop Date” means the date agreed between Freightliner Limited and Network Rail;

“Network” means the network of which Network Rail is the network operator and which is situated in England, Wales and Scotland provided that the track and associated installations between Milepost 3 and Rochdale Junction on the route from Thorpes Bridge Junction via Oldham Mumps to Rochdale Junction shall be excluded;

“Network Code” means the document now known as the Network Code and formerly known as the Railtrack Track Access Conditions 1995;

“Network Rail Event of Default” has the meaning ascribed to it in paragraph 1.3 of Schedule 6;

“New Working Timetable” has the meaning ascribed to it in Part D of the Network Code;

“Nominated Location” means, in relation to a Service, any of the Origin, Destination, Intermediate Point and such other location where railway vehicles operating that Service under the control of the Train Operator will move onto and off the Network;

“Non-affected Party” has the meaning ascribed to it in Clause 17.1;

“Office of Rail Regulation” has the meaning ascribed to it under Section 15 of the Railways and Transport Safety Act 2003, and “ORR” shall be construed accordingly;

“Office of Rail Regulation’s LOC Criteria” has the meaning ascribed to it in Part L of the Network Code;

“Operating Constraints” means:

- (a) the Engineering Access Statement;
- (b) the Timetable Planning Rules; and
- (c) the Working Timetable and all appendices to the Working Timetable including the sectional appendices as defined in the Working Timetable and all supplements to the sectional appendices;

“Origin” means, in relation to a Service:

- (a) the location on the Network at which that Service is Planned to commence; or
- (b) if the location at which that Service is Planned to commence is not on the Network, the location on the Network which:
 - (i) will enable the train operating that Service to be presented onto the Network; and
 - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;

“Performance Order” has the meaning ascribed to it in Clause 13.3.2;

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

“Planned” means entered in the Working Timetable;

“Railway Code Systems” means necessary systems within the meaning of the Systems Code;

“regulated access agreement” means an access agreement as that term is defined in section 83 of the Act;

“relevant ADRR Forum” means the Forum, having the meaning ascribed to it in the ADRR, to which a Relevant Dispute is allocated for resolution in accordance with the ADRR;

“Relevant Dispute” means any difference between the parties arising out of or in connection with this contract;

“Relevant Force Majeure Event” has the meaning ascribed to it in Clause 17.1;

“Relevant Losses” means, in relation to:

- (a) a breach of this contract; or
- (b) in the case of Clause 10, any of the matters specified in Clause 10.1(a), (b) or (c) or Clause 10.2(a), (b) or (c) (each a **“breach”** for the purpose of this definition),

all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

“Relevant Obligation” has the meaning ascribed to it in Clause 17.1;

“Restriction of Use” means any restriction of use of all or any part of the Network for the purposes of, or in connection with, inspection, maintenance,

renewal or repair of the Network or any other works carried out in relation to the Network or any other railway asset or any other works in relation to it;

“Rolled Over Access Proposal” has the meaning ascribed to it in Part D of the Network Code;

“safety authorisation” has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

“safety certificate” has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

“Safety Obligations” means all applicable obligations concerning health and safety (including any duty of care arising at common law, and any obligation arising under statute, statutory instrument or mandatory code of practice) in Great Britain;

“Service Characteristics” means, in relation to a Service, the characteristics of that Service:

- (a) specified in the Rights Table (as defined in Schedule 5); or
- (b) where not specified in the Rights Table, specified in an Access Proposal, Rolled Over Access Proposal, Train Operator Variation Request, or in a proposal by the Train Operator of an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4, and accepted by Network Rail;

“Service Variation Sum” means the Service Variation Sum of £596, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

“Services” means the services for the carriage of goods by railway specified in paragraph 4.1 of Schedule 5;

“Short Notice Service” means a Service in respect of which the Train Operator Variation Request for the Train Slot to which it relates is made to Network Rail later than 1000 hours on day A and which would, if the request were accepted, be planned to operate between 1000 hours on day A and 0001 hours on day C; for the purposes of this definition:

- (a) day A is the first day (excluding Saturdays and Sundays);
- (b) day B is the second day (excluding Sundays); and
- (c) day C is the third day,

of any three consecutive days from (and including) the day on which the request is made;

“SNRP” has the meaning ascribed to it in the Railways (Licensing of Railway Undertakings) Regulations 2005;

“Specified Equipment” means the railway vehicles which the Train Operator is entitled to use in the provision of Services on the Network, as specified in paragraph 4 of Schedule 5;

“Stabling” means the parking or laying up of the Specified Equipment or such other railway vehicles as the Train Operator is permitted by this contract to use on the Network, such parking or laying up being necessary or reasonably required for giving full effect to the movements of Specified Equipment required for the provision of the Services;

“Suspension Notice” means a notice in writing served by the relevant party on the other party under paragraph 2 of Schedule 6;

“Systems Code” means the Code of Practice relating to the Management and Development of Railway Information Systems as from time to time approved by ORR under Network Rail’s network licence;

“Termination Notice” means a notice in writing served by the relevant party on the other party under paragraph 3 of Schedule 6;

“the Regulator” means the officer who was appointed by the Secretary of State under section 1 of the Act for the purpose of carrying out the functions assigned or transferred to him by or under the Act, which functions were subsequently transferred to the Office of Rail Regulation by virtue of section 16(1) of the Railways and Transport Safety Act 2003;

“Timetable Participant” has the meaning ascribed to it in Part D of the Network Code;

“Timetable Planning Rules” means the Timetable Planning Rules in force in respect of the Network on 1st April 2015 as from time to time amended or replaced under Part D of the Network Code;

“Track Charges” means the charges payable by or on behalf of the Train Operator to Network Rail, as set out in Schedule 7 or under the Traction Electricity Rules;

“Traction Electricity Rules” means the document known as the Traction Electricity Rules published by Network Rail on its website and as may be amended from time to time;

“Train Operator Event of Default” has the meaning ascribed to it in paragraph 1.1 of Schedule 6;

“Train Operator Variation” has the meaning ascribed to it in Part D of the Network Code;

“Train Operator Variation Request” has the meaning ascribed to it in Part D of the Network Code;

“Train Slot” has the meaning ascribed to it in Part D of the Network Code;

“Value Added Tax” means value added tax as provided for in the Value Added Tax Act 1994, and any tax similar or equivalent to value added tax or any turnover tax replacing or introduced in addition to them, and **“VAT”** shall be construed accordingly;

“Week” means a period of seven days commencing at 0000 hours on Sunday and ending immediately before 0000 hours on the next succeeding Sunday;

“Working Day” has the meaning ascribed to it in Part A of the Network Code; and

“Working Timetable” has the meaning ascribed to it in Part A of the Network Code.

1.2 Interpretation

In this contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) any one gender includes the other;
- (c) all headings are for convenience of reference only and shall not be used in the construction of this contract;
- (d) reference to an item of primary or secondary legislation is to that item as amended or replaced from time to time;
- (e) reference to a contract, instrument or other document is to that contract, instrument or other document as amended, novated, supplemented or replaced from time to time;
- (f) reference to a party is to a party to this contract, its successors and permitted assigns;
- (g) reference to a recital, Clause or Schedule is to a recital, clause or schedule of or to this contract; reference in a schedule to a Part of or an Appendix to a schedule is to a part of or an appendix to the schedule in which the reference appears; reference in a Part of a Schedule to a paragraph is to a paragraph of that part; reference to a Part of an appendix is to a part of the appendix in which the reference appears; and reference in a schedule to a Table is a reference to the table included in or annexed to that schedule;
- (h) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (i) references to the word “person” or “persons” or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;
- (j) “otherwise” and words following “other” shall not be limited by any foregoing words where a wider construction is possible;
- (k) the words “including” and “in particular” shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (l) words and expressions defined in the Railways Act 1993, the Railways and Other Guided Transport Systems (Safety) Regulations 2006 and Network Rail’s network licence shall, unless otherwise defined in this contract, have the same meanings in this contract;
- (m) any reference to the term “possession”, either by itself or as part of any composite definition, shall be construed as a reference to a Restriction of Use;
- (n) words and expressions defined in the Network Code shall have the same meanings in this contract;

- (o) if there is any conflict of interpretation between this contract and the Network Code, the Network Code shall prevail;
- (p) references to “the Agreement” or “this Agreement” shall be construed as references to “the contract” or “this contract”;
- (q) references to the Office of Rail Regulation or ORR shall, where the context so requires, be construed as references to the “Regulator”;
- (r) words and expressions defined in the Traction Electricity Rules shall have the same meanings in this contract; and
- (s) if there is any conflict of interpretation between this contract (not including the Traction Electricity Rules) and the Traction Electricity Rules, the following order of precedence shall apply: (1) the Traction Electricity Rules; and (2) this contract (not including the Traction Electricity Rules).

1.3 Indemnities

Indemnities provided for in this contract are continuing indemnities in respect of the Relevant Losses to which they apply, and hold the indemnified party harmless on an after tax basis.

2. NETWORK CODE AND THE TRACTION ELECTRICITY RULES

2.1 Incorporation

The Network Code and the Traction Electricity Rules are incorporated in and form part of this contract.

2.2 Modification to the Network Code or the Traction Electricity Rules

If either the Network Code or the Traction Electricity Rules or both are modified at any time, Schedule 10 shall have effect.

2.3 Compliance by other operators

Except where ORR has directed otherwise in the exercise of its powers under the Act or the Network Code, and except in relation to London Underground Limited and Heathrow Express Operating Company Limited to the extent that such persons are not party to the Network Code, Network Rail shall ensure that all operators of trains having permission to use any track comprised in the Network agree to comply with the Network Code.

3. CONDITIONS PRECEDENT AND DURATION

3.1 Effective date

The provisions of this contract take effect from the later of the signature of this contract and the Commencement Date other than clause 1, clause 11.6.5, paragraph 2.7 and paragraph 3 of Schedule 7, the definition of Liability Cap in paragraph 1 of Schedule 9, Schedule 13 and Schedule 14, including any

relevant definitions, which are used in any of these provisions and which are defined elsewhere in this contract, which shall take effect from the signature of this contract.

3.2 Conditions precedent to Clause 5

Clause 5 shall take effect when the following conditions precedent have been satisfied in full:

- (a) to the extent required by the Act and/or the Railways (Licensing of Railway Undertakings) Regulations 2005, the Train Operator is authorised to be the operator of trains for the provision of the Services by:
 - (i) a licence granted under section 8 of the Act; and/or
 - (ii) a European licence and corresponding SNRP;
- (b) Network Rail is authorised by a licence granted under section 8 of the Act to be the operator of the Network or is exempt from the requirement to be so authorised under section 7 of the Act;
- (c) each of the Collateral Agreements is executed and delivered by all the parties to each such agreement and is unconditional in all respects (save only for the fulfilment of any condition relating to this contract becoming unconditional);
- (d) each of the parties has, as necessary, a valid safety certificate or safety authorisation as required by the Railways and Other Guided Transport Systems (Safety) Regulations 2006 and has established and is maintaining a safety management system which meets the requirements of those Regulations; and
- (e) the provisions of this contract, other than Clause 5, have taken effect in accordance with Clause 3.1.

3.3 Obligations to satisfy conditions precedent to Clause 5

Each party shall use all reasonable endeavours to secure that the following conditions precedent are satisfied as soon as practicable, and in any event not later than the Longstop Date:

- (a) in the case of Network Rail, the conditions precedent contained in Clause 3.2(b) and, insofar as within its control, Clauses 3.2(c) and 3.2(d); and
- (b) in the case of the Train Operator, the conditions precedent contained in Clause 3.2(a) and, insofar as within its control, Clauses 3.2(c) and 3.2(d).

3.4 Consequences of non-fulfilment of conditions precedent to Clause 5

If the conditions precedent set out in Clause 3.2 have not been satisfied in full on or before the Longstop Date:

- (a) this contract shall lapse save for the obligations of confidence contained in Clause 14 which shall continue in force; and
- (b) neither party shall have any liability to the other except in respect of any breach of its obligations under this contract.

3.5 Expiry

This contract shall continue in force until the earliest of:

- (a) lapse under Clause 3.4;
- (b) termination under Schedule 6; and
- (c) 2359 hours on the Expiry Date.

3.6 Suspension and termination

Schedule 6 shall have effect.

4. STANDARD OF PERFORMANCE

4.1 General standard

Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:

- (a) network owner and operator (in the case of Network Rail); and
- (b) train operator (in the case of the Train Operator).

4.2 Good faith

The parties to this contract shall, in exercising their respective rights and complying with their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith.

5. PERMISSION TO USE

5.1 Permission to use the Network

Network Rail grants the Train Operator permission to use the Network.

5.2 Meaning

References in this contract to permission to use the Network shall, except where the context otherwise requires, be construed to mean permission:

- (a) to use the track comprised in the Network for the provision of the Services using the Specified Equipment;
- (b) to use the track comprised in the Network in order to implement any plan established under Part H of the Network Code;
- (c) to make Ancillary Movements;
- (d) to Stable, which shall be treated, for the purposes of Part D of the Network Code, as the use of a Train Slot;
- (e) for the Train Operator and its associates to enter upon the Network with or without vehicles; and
- (f) for the Train Operator and its associates to bring things onto the Network and keep them there,

and such permission is subject, in each case and in all respects to:

- (i) the Network Code; and
- (ii) the Operating Constraints.

5.3 Permission under Clauses 5.2(e) and 5.2(f)

In relation to the permissions specified in Clauses 5.2(e) and 5.2(f):

- (a) the Train Operator shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of Network Rail, which consent shall not be unreasonably withheld or delayed;
- (b) the Train Operator shall remove any vehicle or other thing so brought onto any part of the Network when reasonably directed to do so by Network Rail; and
- (c) whilst exercising any rights conferred by Clauses 5.2(e) and 5.2(f), the Train Operator shall, and shall procure that its associates shall, comply with such reasonable restrictions or instructions as Network Rail shall specify.

5.4 Changes to Engineering Access Statement and Timetable Planning Rules

Changes to the Engineering Access Statement and the Timetable Planning Rules are subject to regulatory protection (including appeals) in accordance with Part D of the Network Code.

5.5 Variations to Services

Schedule 4 shall have effect.

5.6 Services

Schedule 5 shall have effect.

5.7 Performance

Schedule 8 shall have effect.

5.8 Stabling

Without prejudice to Network Rail's obligations, if any, under Schedule 5 to provide Stabling, Network Rail shall use all reasonable endeavours to provide such Stabling facilities as are necessary or expedient for or in connection with the provision of the Services in accordance with the Working Timetable.

5.9 Information to assist submitting an Access Proposal or Train Operator Variation Request

Schedule 2 shall have effect.

6. OPERATION AND MAINTENANCE OF TRAINS AND NETWORK

6.1 General

Without prejudice to the other provisions of this contract:

- (a) the Train Operator shall maintain and operate the Specified Equipment used on the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Network in accordance with the permission to use under this contract; and
- (b) Network Rail shall maintain and operate the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Network using the Specified Equipment in accordance with the permission to use under this contract.

6.2 Trespass, vandalism and animals

Without prejudice to the other provisions of this contract, each of the parties shall use all reasonable endeavours (including participating in such consultation and joint action as is reasonable in all the circumstances) to reduce:

- (a) trespass;
- (b) vandalism; and
- (c) intrusions on to the Network by animals,

in each case as may affect either the provision of the Services or those parts of the Network on which the Services are provided.

6.3 Safety

In relation to Safety Obligations:

- (a) the Train Operator shall comply with any reasonable request by Network Rail in relation to any aspect of the Train Operator's operations which affects or is likely to affect the performance of Network Rail's Safety Obligations; and
- (b) Network Rail shall comply with any reasonable request by the Train Operator in relation to any aspect of Network Rail's operations which affects or is likely to affect the performance of the Train Operator's Safety Obligations.

6.4 Movements of trains onto and off the Network

6.4.1 *Suitable access*

In order that railway vehicles under the control of the Train Operator be promptly:

- (a) accepted off the Network; and/or
- (b) presented onto the Network,

the Train Operator shall ensure that in respect of each Nominated Location suitable access has been granted to it in relation to such location by the party which controls the relevant facility connected to the Network at the Nominated Location.

6.4.2 *Prompt presentation onto the Network*

Where railway vehicles under the control of the Train Operator will move onto and off the Network, the parties shall ensure that in respect of each Nominated Location they will facilitate (to the extent they are able) the prompt presentation of such railway vehicles onto and off the Network.

6.5 Use of Railway Code Systems

6.5.1 *General*

The parties shall:

- (a) use the Railway Code Systems and any other Applicable System in their dealings with each other in connection with matters provided for in this contract; and
- (b) comply with the Systems Code.

6.5.2 *Provision of train consist data*

Without prejudice to Clause 6.5.1, the Train Operator shall:

- (a) provide to Network Rail such train consist data as shall be necessary to enable Network Rail to calculate the amount of Track Charges; and

- (b) ensure that such data is true and accurate as far as is reasonable in the circumstances.

6.5.3 Notification of movement onto and off the Network

The Train Operator shall notify Network Rail of any movement onto the Network and off the Network of any railway vehicle under the control of the Train Operator by promptly making a full and accurate train release or acceptance entry to the appropriate Railway Code Systems or Applicable System.

6.5.4 Network Rail audit

Subject to Clauses 6.5.5 and 6.5.6, Network Rail may:

- (a) carry out checks and inspections necessary to establish whether the Train Operator is complying with its obligations under this Clause 6.5; and
- (b) carry out such inspections of the books and records kept by or on behalf of the Train Operator in connection with the Services as Network Rail may reasonably consider to be necessary for such purpose.

6.5.5 Notice of audit

Network Rail shall:

- (a) give to the Train Operator reasonable written notice of the checks and inspections to be carried out in accordance with Clause 6.5.4; and
- (b) ensure that the checks and inspections are carried out between 0900 hours and 1700 hours on a Working Day.

6.5.6 Material discrepancy

If any such check or inspection carried out by Network Rail in accordance with Clauses 6.5.4 and 6.5.5 reveals a material discrepancy in information previously supplied to Network Rail by the Train Operator:

- (a) the Train Operator shall pay the reasonable costs incurred by Network Rail in carrying out the checks and inspections in accordance with Clauses 6.5.4 and 6.5.5; and
- (b) Network Rail shall:
 - (i) make the appropriate and consequent adjustments to the Track Charges; and
 - (ii) provide to the Train Operator evidence of such costs as the Train Operator may reasonably request.

6.5.7 *Consent to use information*

The Train Operator consents to the use by Network Rail of any data or information supplied by the Train Operator in the course of complying with its Safety Obligations, for the purpose of:

- (a) monitoring the Train Operator's performance of its obligations under this contract; and
- (b) calculating the amount of Track Charges.

7. TRACK CHARGES AND OTHER PAYMENTS

Schedule 7 shall have effect.

8. LIABILITY

8.1 Performance Orders in relation to breach

In relation to any breach of this contract:

- (a) the Innocent Party shall be entitled to apply under Clause 13.3 for a Performance Order against the party in breach; and
- (b) if a Performance Order is made, the party against whom it has been made shall comply with it.

8.2 Compensation in relation to breach

In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

9. LOCAL OUTPUTS - PERFORMANCE ORDERS

If:

- (a) a breach of contract is a failure by Network Rail to achieve a Local Output; or
- (b) in the Train Operator's opinion, Network Rail is likely to fail to achieve a Local Output applicable to the Train Operator,

then:

- (i) the Train Operator shall be entitled to apply under Clause 13.3 for a Performance Order, where applicable on an anticipatory basis; and
- (ii) if a Performance Order is made, Network Rail shall comply with it.

10. LIABILITY - OTHER MATTERS

10.1 Train Operator indemnity

The Train Operator shall indemnify Network Rail against all Relevant Losses resulting from:

- (a) a failure by the Train Operator to comply with its Safety Obligations;
- (b) any Environmental Damage arising directly from the acts or omissions of the Train Operator or the proper taking by Network Rail under Condition E2 of the Network Code of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct result of the acts or omissions of the Train Operator; and
- (c) any damage to the Network arising directly from the Train Operator's negligence.

10.2 Network Rail indemnity

Network Rail shall indemnify the Train Operator against all Relevant Losses resulting from:

- (a) a failure by Network Rail to comply with its Safety Obligations;
- (b) any Environmental Damage to the Network arising directly from any acts or omissions of the British Railways Board prior to 1 April 1994 and any Environmental Damage arising directly from the acts or omissions of Network Rail; and
- (c) any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this contract arising directly from Network Rail's negligence.

11. RESTRICTIONS ON CLAIMS

11.1 Notification and mitigation

A party wishing to claim under any indemnity provided for in this contract:

- (a) shall notify the other party of the relevant circumstances giving rise to that claim as soon as reasonably practicable after first becoming aware of those circumstances (and in any event within 365 days of first becoming so aware); and
- (b) subject to Clause 11.1(c), shall take all reasonable steps to prevent, mitigate and restrict the circumstances giving rise to that claim and any Relevant Losses connected with that claim; but
- (c) shall not be required to exercise any specific remedy available to it under this contract.

11.2 Restrictions on claims by Network Rail

Any claim by Network Rail against the Train Operator for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from a cancellation of or a delay in commencement to a Restriction of Use; and
- (b) shall exclude payments to any person under or in accordance with the provisions of any Access Agreement other than any such payments which are for obligations to compensate for damage to property, and so that any claim for indemnity under this contract for such payments for damage to property, in relation to any incident, shall be limited to:
 - (i) the maximum amount for which the Train Operator would be liable for such damage in accordance with the Claims Allocation and Handling Agreement; less
 - (ii) any other compensation which the Train Operator has an obligation to pay for such damage;
- (c) shall exclude loss of revenue in respect of permission to use any part of the Network under or in accordance with any Access Agreement with any person; and
- (d) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which Network Rail would not have incurred as network owner and operator but for the relevant breach; and
 - (ii) give credit for any savings to Network Rail which result or are likely to result from the incurring of such amounts.

11.3 Restrictions on claims by Train Operator

Any claim by the Train Operator against Network Rail for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains (other than delays or cancellations in circumstances in which there has been a failure to achieve a Class A Local Output); and
- (b) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which the Train Operator would not have incurred as train operator but for the relevant breach; and
 - (ii) give credit for any savings to the Train Operator which result or are likely to result from the incurring of such amounts.

11.4 Restriction on claims by both parties

Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

- (a) do not arise naturally from the breach; and
- (b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:
 - (i) at the time of the making of this contract; or
 - (ii) where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,

as the probable result of the breach.

11.5 Limitation on liability

Schedule 9 shall have effect so as to limit the liability of the parties to one another under the indemnities in Clauses 8.2 and 10, but:

- (a) does not limit any liability arising under Schedules 4, 7 or 8 or under the Traction Electricity Rules;
- (b) in relation to a failure to perform an obligation under the Network Code, only to the extent (including as to time and conditions) that the Network Code so provides; and
- (c) subject to Clause 18.3.3.

11.6 Claims Allocation and Handling Agreement

11.6.1 General

Clauses 16 and 17 of the Claims Allocation and Handling Agreement provide that claims between parties to it are limited to specified amounts unless the parties expressly contract otherwise.

11.6.2 Restriction of application

Except as otherwise expressly provided in this contract, Clauses 16 and 17 of the Claims Allocation and Handling Agreement shall not apply as between the parties to this contract if and to the extent that the giving of any right or remedy as provided for under this contract would be prevented or restricted by Clauses 16 and 17 of the Claims Allocation and Handling Agreement.

11.6.3 Liability for small claims

Nothing in this contract shall affect the application as between the parties of the provisions of the Claims Allocation and Handling Agreement which relate

to liability for small claims equal to or below the Threshold (as defined in that agreement).

11.6.4 Further limitation of liability

In relation to any claim or claims made by a party to which Schedule 9 applies (“Indemnity Claim”) in addition to the limitations on liability that apply under Schedule 9 the liability of the parties to one another shall also be limited so that:

- (a) for any Indemnity Claim that relates to or results from a single incident, event or circumstance then the other party shall not be liable to make payments that over any period of time exceed an amount equal to the Indemnity Incident Cap;
- (b) if under Clause 11.6.4 (a) the Indemnity Incident Cap is exceeded then any Indemnity Claim shall be extinguished to the extent that it relates to such excess and the other party shall have no further liability for that excess; and
- (c) any Indemnity Claim (or any part of an Indemnity Claim) that is extinguished under Clause 11.6.4 (b) shall not be taken into account when calculating the amount of Relevant Losses in respect of any Indemnity Claim that is admitted or determined in a Contract Year under Schedule 9.

11.6.5 Indexation of the Indemnity Incident Cap

The Indemnity Incident Cap for the first Contract Year shall mean the sum of £5,447,732 and in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{RPI_n}{RPI_1} \right]$$

where:

- (i) C_1 is the sum of £5,447,732;
- (ii) C_n is the Indemnity Incident Cap in the nth subsequent Contract Year;
- (iii) RPI_n is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n; and
- (iv) RPI_1 is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the first month of the first Contract Year.

11.6.6 Applicable Contract Year for indexation

For the purposes of determining the Indemnity Incident Cap under Clause 11.6.5, the applicable Contract Year shall be the Contract Year in which the relevant incident, event or circumstance begins to occur.

12. GOVERNING LAW

This contract shall be governed by and construed in accordance with the laws of England and Wales.

13. DISPUTE RESOLUTION

13.1 ADRR

A Relevant Dispute shall be referred for resolution in accordance with the Access Dispute Resolution Rules in force at the time of the reference (the “**ADRR**”), as modified by this Clause 13, unless:

- (a) any Part of the Network Code or the Traction Electricity Rules provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;
- (b) any Part of Schedules 7 or 8 provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply; or
- (c) Clause 13.2 applies.

13.2 Unpaid sums

If either party fails to pay:

- (a) any invoice issued to it under this contract in respect of Track Charges; or
- (b) any other sum which has fallen due in accordance with any provision of this contract,

then, subject to Clause 16.1.1:

- (i) the amount invoiced or sum due, as referred to in Clause 13.2(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any invoice or other sum due);
- (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and

- (iii) the dispute resolution procedures in Clauses 13.1 and 13.3 to 13.5 shall not apply to proceedings commenced under this Clause 13.2.

13.3 Performance Orders

13.3.1 Power to order provisional relief

For the purposes of section 39 of the Arbitration Act 1996, should any Relevant Dispute be allocated in accordance with the ADRR to arbitration under Chapter F of the ADRR, the arbitrator shall have power to order on a provisional basis any relief which he would have power to grant in a final award including Performance Orders.

13.3.2 Performance Orders

A Performance Order:

- (a) is an order made under Clause 13.3.3(b), relating to a Relevant Dispute, whether by way of interim or final relief; and
- (b) may be applied for by Network Rail or the Train Operator in the circumstances set out in Clauses 8.1 and 9, subject to the qualifications in Clause 17.8,

and an application for a Performance Order shall be without prejudice to any other remedy available to the claimant under this contract (whether final or interim and whether by way of appeal under the Network Code or otherwise).

13.3.3 Duties of arbitrator in relation to Performance Orders

Without prejudice to any additional remedies that may be ordered by the arbitrator under Clause 13.4, where a dispute is allocated in accordance with the ADRR to arbitration and a party has applied for a Performance Order, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that:

- (a) the arbitrator shall decide as soon as possible whether the application is well founded or not; and
- (b) if the arbitrator decides that the application is well founded, he shall be required to make an interim or final declaration to that effect and, in that event, the arbitrator may also make any interim or final order directing any party to do or to refrain from doing anything arising from such declaration which he considers just and reasonable in all the circumstances.

13.4 Remedies

The powers exercisable by the arbitrator as regards remedies shall include:

- (a) the powers specified in sections 48(3) to (5) of the Arbitration Act 1996;
- (b) the powers specified in the ADRR;

- (c) the power to make Performance Orders; and
- (d) the power to order within the same reference to arbitration any relief specified in Clause 13.4(a), (b) and (c) consequent upon, or for the breach of, any interim or final Performance Order previously made.

13.5 Exclusion of applications on preliminary points of law

Any recourse to any Court for the determination of a preliminary point of law arising in the course of the arbitration proceedings is excluded.

14. CONFIDENTIALITY

14.1 Confidential Information

14.1.1 General obligation

Except as permitted by Clause 14.2, all Confidential Information shall be held confidential during and after the continuance of this contract and shall not be divulged in any way to any third party without the prior written approval of the other party.

14.1.2 Network Rail - Affiliates

Except as permitted by Clause 14.2, Network Rail shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

14.1.3 Train Operator - Affiliates

Except as permitted by Clause 14.2, the Train Operator shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

14.2 Entitlement to divulge

Either party, and its Affiliates, and its and their respective officers, employees and agents, shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:

- (a) to ORR;
- (b) to the Secretary of State;
- (c) to any Affiliate of either party;
- (d) to any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;

- (e) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;
- (f) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance, upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
- (g) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
- (h) to the extent required by the Act, the Railways (Licensing of Railway Undertakings) Regulations 2005, any other applicable law, the rules of any recognised stock exchange or regulatory body or any written request of any taxation authority;
- (i) to the extent that it has become available to the public other than as a result of a breach of confidence; and
- (j) under the order of any court or tribunal of competent jurisdiction (including the Allocation Chair or any relevant ADRR Forum, each as defined in the ADRR).

14.3 Return of Confidential Information

Each of Network Rail and the Train Operator shall promptly return to the other party any Confidential Information requested by the other party if such request:

- (a) is made on or within two months after the Expiry Date or, if this contract lapses or is terminated earlier, is made within two months after the date on which this contract lapses or is terminated;
- (b) is reasonable; and
- (c) contains a sufficient description of the relevant Confidential Information to enable such information to be readily identified and located.

14.4 Retention or destruction of Confidential Information

If Network Rail or the Train Operator, as the case may be, has not received a request to return any Confidential Information to the other party under and within the time limits specified in Clause 14.3, it may destroy or retain such Confidential Information.

14.5 Ownership of Confidential Information

All Confidential Information shall be and shall remain the property of the party which supplied it to the other party.

14.6 Network Code and Traction Electricity Rules

Nothing in this Clause 14 restricts the right of Network Rail to disclose information to which this Clause 14 applies to the extent that it is permitted or required to do so under the Network Code or the Traction Electricity Rules.

15. ASSIGNMENT

Neither party may assign, transfer, novate or create any encumbrance or other security interest over the whole or any part of its rights and obligations under this contract except to the extent approved by ORR following consultation with the other party, and subject to the conditions (if any) of ORR's approval.

16. PAYMENTS, INTEREST AND VAT

16.1 Payment

16.1.1 No deduction

All amounts due or payable by either party under this contract shall be paid free and clear of any deduction, withholding or set off, except:

- (a) as may be required by law; or
- (b) as expressly provided in this contract.

16.1.2 Delivery of invoices

All invoices or statements of amounts payable issued under any provision of this contract shall be delivered by hand at, or sent by prepaid first class post or by facsimile transmission (with confirmation copy by prepaid first class post) to, the address for service for the recipient specified in Schedule 1 and shall be deemed to have been received by the addressee in accordance with Clause 18.4.3.

16.1.3 Payment and content of invoices and other statements of amounts payable

Each invoice and statement of amounts payable shall, unless otherwise stated in this contract:

- (a) be paid within 28 days of the date of its receipt; and
- (b) contain such detail as to the constituent elements of the amounts stated to be payable as shall be necessary or expedient so as to enable the person to whom it is given to understand and check it.

16.1.4 Method of payment

All payments shall be made by direct debit mandate or standing order mandate, CHAPS transfer, BACS transfer or other electronic or telegraphic transfer to a London clearing bank or such other financial institution as may be approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

16.1.5 Credit notes

Where a credit note has been issued in accordance with any provision of this contract, the party in receipt of the credit note shall be entitled to apply the amount specified in it against any amount payable by it under this contract or any future invoice or statement of amounts payable it may receive under this contract.

16.2 Disputed amounts

16.2.1 Notification of a dispute

Except as otherwise provided in this contract, within 14 days of receipt of an invoice or statement of amounts payable issued under any provision of this contract, the recipient shall notify the issuer of any aspects of the invoice or statement which it disputes, giving reasons for any dispute. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement.

16.2.2 Payment in full

Subject to Clause 16.2.3 and except as otherwise provided in this contract, where any amount contained in an invoice in accordance with Schedule 7 is in dispute under Clause 16.2.1:

- (a) the Train Operator shall pay the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice;
- (b) payment of the disputed amount shall be without prejudice to the determination of whether such amount is properly due or not; and
- (c) Clause 16.3.2 shall apply.

16.2.3 Right to withhold payment of disputed amount

If:

- (a) any amount which is payable under any provision of this contract other than Schedule 7 is in dispute under Clause 16.2.1; or
- (b) an invoice or statement of amounts payable under any provision of this contract contains an error and the recipient of such invoice or statement has notified the issuer of any aspects of the invoice or statement which contain an error and which it disputes under Clause 16.2.1,

then:

- (i) the undisputed amount shall be paid in accordance with Clause 16.1.3, or as otherwise provided for in this contract;
- (ii) the disputed balance, or such part of it as has been agreed or determined to be payable, shall be paid or set off, as the case may be, within 35 days after the end of the Charging Period in which the dispute is resolved or determined; and
- (iii) Clause 16.3.1 shall apply also in respect of the disputed balance, or such part of it as has been agreed or determined to be payable.

16.3 Interest

16.3.1 Amounts not paid by due date

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under this contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (as well after judgment as before), except to the extent that late payment arises from any failure by the invoicing party to comply with Clause 16.1.2 or Clause 16.1.3(b).

16.3.2 Amounts paid which were not properly due

Where a disputed amount is paid under Clause 16.2.2 and it is subsequently determined that such amount, or part of it, was not properly due, the payee shall repay the disputed amount, or relevant part, to the payer together with interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the date of actual payment until the date of actual repayment (as well after judgment as before).

16.4 VAT

16.4.1 Payment of VAT

Where any taxable supply for VAT purposes is made under or in connection with this contract by one party to the other the payer shall, in addition to any payment required for that supply, pay such VAT as is chargeable in respect of it.

16.4.2 Reimbursement of VAT

Where under this contract one party is to reimburse or indemnify the other in respect of any payment made or cost incurred by the other, the first party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other party (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.

16.4.3 VAT credit note to be issued on repayment

Where under this contract any rebate or repayment of any amount is payable by one party to the other, and the first party is entitled as a matter of law or of HM Revenue and Customs practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made, and the first party shall issue an appropriate VAT credit note to the other party.

17. FORCE MAJEURE EVENTS

17.1 Meaning of Force Majeure Event

In this Clause 17:

“Affected Party” means, in relation to a Force Majeure Event, the party claiming relief under this Clause 17 by virtue of that Force Majeure Event, and **“Non-affected Party”** shall be construed accordingly;

“Force Majeure Event” means, subject to Clause 17.9, any of the following events (and any circumstance arising as a direct consequence of any of the following events):

- (a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war, revolution, riot, insurrection, civil commotion, demonstration or sabotage;
- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure;
- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and
- (g) strike or other industrial action which is a single circumstance and which also is a strike or industrial action in sectors of the economy other than the railway industry;

“Force Majeure Notice” means a notice to be given by the Affected Party to the other party stating that a Force Majeure Event has occurred;

“Force Majeure Report” means a report to be given by the Affected Party to the other party following the giving of a Force Majeure Notice;

“Relevant Force Majeure Event” means a Force Majeure Event in relation to which an Affected Party is claiming relief under this Clause 17; and

“Relevant Obligation” means an obligation under this contract in respect of which a Force Majeure Event has occurred and the Affected Party has claimed relief under this Clause 17.

17.2 Nature and extent of relief for force majeure

Force majeure relief under this Clause 17:

- (a) extinguishes the obligation of the Affected Party to indemnify the other party under Clause 8.2 in respect of Relevant Losses sustained as a result of the failure of the Affected Party to perform a Relevant Obligation; but
- (b) is not available in respect of:
 - (i) any obligation to pay money under Schedules 4, 7 and 8 or the Traction Electricity Rules; or
 - (ii) any other obligation to do or refrain from doing any other thing provided for in this contract; and
- (c) is only available in relation to a failure to perform an obligation under the Network Code to the extent (including as to time and conditions) that the Network Code so provides.

17.3 Entitlement to force majeure relief

An Affected Party is entitled to force majeure relief if and to the extent that:

- (a) performance of the Relevant Obligation, including as to the achievement of a Local Output, has been prevented or materially impeded by reason of a Force Majeure Event;
- (b) it has taken all reasonable steps, taking account of all relevant circumstances (including as to whether the event in question could reasonably have been anticipated):
 - (i) to avoid the occurrence of the Force Majeure Event; and
 - (ii) to minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform the Relevant Obligation; and
- (c) except in the case of Clause 17.1(f), none of the Affected Party, its officers, employees or agents caused the Force Majeure Event.

17.4 Procedure for claiming relief

Without prejudice to Clause 17.3, an Affected Party is only entitled to claim force majeure relief under this Clause 17 if it complies with the obligations to

give Force Majeure Notices, Force Majeure Reports and provide other information under Clause 17.5 and to perform its obligations under Clause 17.6.

17.5 Force Majeure Notices and Reports

17.5.1 Force Majeure Notice

In relation to any Relevant Force Majeure Event:

- (a) as soon as reasonably practicable after the Affected Party becomes aware, or ought reasonably to have become aware, that such Force Majeure Event qualifies for relief under this Clause 17 (and, in any event, within 72 hours of becoming aware of such circumstances), the Affected Party shall give a Force Majeure Notice; and
- (b) the Force Majeure Notice shall include detailed particulars (to the extent available) of the Relevant Force Majeure Event and its consequences, its effects on the Affected Party, the Relevant Obligations, the likely duration of such consequences and effects and the remedial measures proposed by the Affected Party to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects.

17.5.2 Force Majeure Report

Following the giving of a Force Majeure Notice:

- (a) the Affected Party shall give a Force Majeure Report as soon as practicable, and in any event within 7 days of service of the Force Majeure Notice; and
- (b) the Force Majeure Report shall constitute a full report on the Relevant Force Majeure Event, amplifying the information provided in the Force Majeure Notice and containing such information as may reasonably be required by the Non-affected Party, including the effect which the Relevant Force Majeure Event is estimated to have on the Affected Party's performance of the Relevant Obligations.

17.5.3 Other information

The Affected Party shall promptly give the Non-affected Party all other information concerning the Relevant Force Majeure Event and the steps which could reasonably be taken, and which the Affected Party proposes to take, to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects as may reasonably be requested by the Non-affected Party from time to time.

17.6 Mitigation

The Affected Party shall, promptly upon becoming aware of the occurrence of a Force Majeure Event in respect of which it intends to claim relief, use all reasonable endeavours to:

- (a) minimise the effects of such Force Majeure Event on the performance of the Relevant Obligations; and
 - (b) minimise the duration of such Force Majeure Event,
- and shall keep the Non-affected Party fully informed of the actions which it has taken or proposes to take under this Clause 17.6.

17.7 Duration of relief for force majeure

The right of an Affected Party to relief under Clause 17.2 shall cease on the earlier of:

- (a) the date on which its performance of the Relevant Obligations is no longer prevented or materially impeded by the Relevant Force Majeure Event; and
- (b) the date on which such performance would no longer have been prevented or materially impeded if the Affected Party had complied with its obligations under Clause 17.6.

17.8 Availability of Performance Order

If, and to the extent that, a breach of this contract has been caused by a Relevant Force Majeure Event, the Non-affected Party shall not be entitled to a Performance Order except to secure performance by the Affected Party of its obligations under this Clause 17.

17.9 Disapplication of Force Majeure Events

If the Office of Rail Regulation's LOC Criteria so provide:

- (a) a Local Output may be established on the assumption that one or more Force Majeure Events specified in Clause 17.1(a) to (g) shall not apply to such Local Output; and
- (b) if a Local Output is established in the manner specified in Clause 17.9(a):
 - (i) the Local Output shall specify which Force Majeure Events are assumed not to apply; and
 - (ii) no relief shall be available under Clause 17.2 by reference to such Force Majeure Events in respect of any claim in relation to that Local Output (or any Performance Order made in respect of that Local Output).

18. MISCELLANEOUS

18.1 Non waiver

18.1.1 No waiver

No waiver by either party of any failure by the other to perform any obligation under this contract shall operate or be construed as a waiver of any other or further default, whether of a like or different character.

18.1.2 Failure or delay in exercising a right or remedy

The failure to exercise or delay in exercising a right or remedy under this contract shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies, and no single or partial exercise of any right or remedy under this contract shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

18.2 Variations

18.2.1 Amendments to be in writing and to be approved

No amendment of any provision of this contract shall be effective unless:

- (a) such amendment is in writing and signed by, or on behalf of, the parties; and
- (b) if it is an amendment which
 - (i) requires ORR's approval under section 22 of the Act; or
 - (ii) is made under section 22A or 22C of the Act or Schedule 4A to the Act

the amendment has been so approved or directed by ORR, as applicable.

18.2.2 Exceptions

Clause 18.2.1(b) does not apply to amendments of the following kinds:

- (a) an amendment made by virtue of a general approval issued by ORR under section 22 of the Act; and
- (b) a modification made by virtue of Clause 18.4.2.

18.2.3 No Office of Rail Regulation approval needed

Modifications of the following kinds do not require ORR's approval under section 22 of the Act and so are not subject to Clause 18.2.1(b):

- (a) modifications effected by virtue of any of the Schedules to this contract; and

- (b) modifications effected by virtue of the Network Code or the Traction Electricity Rules,

unless the relevant provision expressly states that it requires the approval of ORR.

18.2.4 Conformed copy of contract

Network Rail shall produce and send to the Train Operator and to ORR a conformed copy of this contract within 28 days of the making of any amendment or modification to it (including any modification made by virtue of Schedule 10).

18.3 Entire contract and exclusive remedies

18.3.1 Entire contract

Subject to Clause 18.3.3:

- (a) this contract contains the entire agreement between the parties in relation to the subject matter of this contract;
- (b) each party acknowledges that it has not been induced to enter into this contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in this contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to any such matter; and
- (c) neither party shall have any right to rescind or terminate this contract either for breach of contract or for misrepresentation or otherwise, except as expressly provided for in this contract.

18.3.2 Exclusive remedies

Subject to Clause 18.3.3 and except as expressly provided in this contract:

- (a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and
- (b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

18.3.3 Fraud, death and personal injury

Without prejudice to the generality of this Clause 18.3, nothing in this contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

- (a) any liability which either party would otherwise have to the other party, or any right which either party may have to rescind this contract, in respect of any statement made fraudulently by the other party before the execution of this contract;
- (b) any right which either party may have in respect of fraudulent concealment by the other party;
- (c) any right which either party may have in respect of a statement of the kind referred to in section 146 of the Act, whether or not proceedings have been instituted in that respect; or
- (d) any liability which either party may have towards the other party for death or personal injury resulting from its negligence or the negligence of any of its officers, employees or agents.

18.4 Notices

18.4.1 Giving of notices

Any notice to be given under this contract:

- (a) shall be in writing; and
- (b) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by prepaid first class post, recorded delivery or by facsimile transmission (with confirmation copy by prepaid first class post) to, the relevant address or facsimile number set out in Schedule 1.

For the purposes of this Clause 18.4 and Clause 16.1.2, delivery by hand shall include delivery by a reputable firm of couriers.

18.4.2 Right to modify communication details

A party shall be entitled to modify in any respect the communication particulars which relate to it and which are set out in Schedule 1 by giving notice of such modification:

- (a) to the other party as soon as reasonably practicable; and
- (b) to ORR within 14 days of such modification.

18.4.3 Deemed receipt

A notice shall be deemed to have been given and received:

- (a) if sent by hand or recorded delivery, at the time of delivery;
- (b) if sent by prepaid first class post from and to any place within the United Kingdom, three Working Days after posting unless otherwise proven; and

- (c) if sent by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) before 1700 hours on a Working Day, on the day of transmission and, in any other case, at 0900 hours on the next following Working Day.

18.4.4 Copyees

If Schedule 1 specifies any person to whom copies of notices shall also be sent:

- (a) the party giving a notice in the manner required by this Clause 18.4 shall send a copy of the notice to such person at the address for sending copies as specified in Schedule 1, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party under this Clause 18.4; and
- (b) such copy notice shall be sent immediately after the original notice.

18.5 Counterparts

This contract may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into this contract by signing either of such counterparts.

18.6 Survival

Those provisions of this contract which by their nature or implication are required to survive expiry or termination of this contract (including the provisions of Clauses 8 (Liability), 9 (Local Outputs - Performance Orders), 10 (Liability - Other Matters), 11 (Restrictions on Claims), 12 (Governing Law), 13.2 (Unpaid Sums), 14 (Confidentiality), 16 (Payments, Interest and VAT), 17 (Force Majeure Events), paragraph 4 of Schedule 6 (Consequence of Termination) and Schedule 9 (Limitation on liability)), shall so survive and continue in full force and effect, together with any other provisions of this contract necessary to give effect to such provisions.

18.7 Contracts (Rights of Third Parties) Act 1999

18.7.1 Application to third parties

Save as provided in this Clause 18.7 or as expressly provided elsewhere in this contract, no person who is not a party to this contract shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this contract.

18.7.2 Application to the Office of Rail Regulation

ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under this contract.

18.7.3 Contract amendments

Subject to Clause 18.2, Network Rail and the Train Operator shall not, after the Commencement Date enter into any agreement with a third party that requires the consent of any third party in order to amend this contract.

18.7.4 Application of Traction Electricity Rules to other train operators

Any Metered Train Operator, Prospective Metered Train Operator or Modelled Train Operator (as defined in the Traction Electricity Rules) shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce such rights as have been granted to it under the Traction Electricity Rules.

18.8 CTRL

Schedule 11 shall have effect.

SCHEDULE 1: CONTACT PARTICULARS

1. Network Rail's address for service of notices is:

Network Rail Infrastructure Limited

1 Eversholt Street, London, NW1 2DN

Tel: 020 7904 4001

Email: notices@networkrail.co.uk

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY AND SOLICITOR"

and copied to: DIRECTOR FREIGHT

2. The Train Operator's address for the service of notices is:

Freightliner Limited

3rd Floor

The Podium

1 Eversholt Street

London

NW1 2FL

Tel: 020 7200 3970

Fax: 020 7200 3975

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY"

and copied to

The Head of Rail Strategy

Freightliner Limited

3rd Floor

The Podium

1 Eversholt Street

London

NW1 2FL

Tel: 020 7200 3912

Fax: 020 7200 3975

Schedule 2: Information to assist submitting an access proposal or train operator Variation Request

1. Information Request

If the Train Operator considers that:

- (a) it requires information in relation to the Network from Network Rail, including information about the available capacity of the Network;
- (b) the information is not contained in the Operating Constraints and could not reasonably be derived from the Operating Constraints by the Train Operator; and
- (c) the information is reasonably required in connection with an Access Proposal or Train Operator Variation Request it is considering making,

the Train Operator may serve a request on Network Rail for information (an “**Information Request**”).

2. Contents of the Information Request

The Information Request shall contain:

- (a) a list of the specific information which the Train Operator considers reasonably necessary in order for it to inform its decision on whether to submit an Access Proposal or a Train Operator Variation Request and, if so, for which Train Slot; and
- (b) the timescale within which the Train Operator considers it is reasonable for Network Rail to provide the information requested.

3. Agreement of the Information Request

3.1 *Notification by Network Rail*

Network Rail shall, within five Working Days of the service of the Information Request by the Train Operator, notify the Train Operator of:

- (a) the specific information which it is able to provide within the suggested timescale;
- (b) any information which it is not able to provide within the suggested timescale and its alternative timescale for the provision of such information; and
- (c) any information which it is not able to provide at all, giving reasons for such non-provision.

3.2 *Failure to agree on provision of specific information*

Following notification by Network Rail pursuant to paragraphs 3.1(b) or (c), if the parties fail to agree on the information to be provided by Network Rail in

response to the Information Request and the timescales for the provision of such information within five Working Days of such notification by Network Rail, those issues shall be resolved in accordance with the ADRR.

3.3 *Relevant ADRR Forum resolution*

The parties to any dispute referred under paragraph 3.2 above shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum which is to resolve the dispute shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
 - (i) the reasonableness of the Train Operator's request for the specific information; and
 - (ii) the reasonable timescale for the provision of the information in the Information Request;
- (c) not make a determination which is inconsistent with the provisions of the Network Code; and
- (d) provide reasons.

3.4 *Provision of information by Network Rail*

Following agreement or determination of the information to be provided by Network Rail in response to the Information Request and the timescale for the provision of such information, Network Rail shall provide such information to the Train Operator within the timescale so agreed or determined.

4. **Parts D and G of the Network Code**

The provisions of this Schedule 2 shall neither affect nor replace the rights and obligations of the parties contained in:

- (a) Part D of the Network Code concerning the provision of information about changes to the Timetable Planning Rules and/or the Engineering Access Statement; and
- (b) Part G of the Network Code concerning the provision of information about Network Change, as defined in Part G.

SCHEDULE 3: COLLATERAL AGREEMENTS

1. An agreement under which the Train Operator agrees to become a party to the Claims Allocation and Handling Agreement and, for the purpose of Schedule 6, the Claims Allocation and Handling Agreement.
2. An accession agreement to the document entitled Emergency Access Code as approved or directed by ORR and, for the purpose of Schedule 6, the Emergency Access Code.

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 those attributable to limb (f) of a Category 3 Disruption and 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 Freight Access Right as described in subparagraph “(a)” of that definition contained in Schedule 5 which is not able to be entered in the New Working Timetable or 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:

there is no Revised Base Service;

- (a) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;
- (b) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service; or
- (c) 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;

"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 Engineering Access Statement prior to the Possession Notice Date;

"Electricity for Traction" has the meaning ascribed to it in Schedule 5;

"Enhanced Planned Disruption Sum" means £800;

"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;

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

“Normal Planned Disruption Sum” means £300;

“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;

“Originally Requested” has the meaning specified in paragraph 4.1;

“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 D2 or D3 of the Network Code;

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

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

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

“Variable Costs” means the Train Operator’s costs which vary as a result of a Category 3 Disruption, 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 Freight Access Right as described in sub-paragraph “(a)” of that definition contained in Schedule 5 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 Freight Access Right as described in sub-paragraph “(a)” of that definition contained in Schedule 5 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 Freight Access Right as described in sub-paragraph “(a)” of that definition contained in Schedule 5 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 included in an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request ("Originally Requested") 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 Train Operator Variation; 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 Train Operator Variation Request.

4.4 Measure of performance

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Train Operator Variation 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 Train Operator Variation 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 Engineering Access Statement 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 the subject of a Train Operator Variation Request and entered 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 Requested 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 Train Operator Variation); 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 Train Operator Variation Request.

5.5 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Train Operator Variation 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 Train Operator Variation 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 Engineering Access Statement 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 Originally Requested the 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 Service because an act or omission of Network Rail resulted in the Originally Requested Train Slot 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 – NOT USED

8. Not Used

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).

SCHEDULE 5: SERVICES

1. Definitions

1.1 Definitions

In this Schedule 5, unless the context otherwise requires:

“Arrival Window” means the period of time during which a Service shall be Planned to arrive at its Destination;

“Association” means a Special Term linking the planning of two Services at any location or locations;

“Contingent Right” means a right under this Schedule 5 which is not a Firm Right and which is subject to the fulfilment of all competing Exercised Firm Rights and any additional contingency specified in this Schedule 5;;

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

“Day” means any period of 24 hours beginning at 0000 hours and ending immediately before the next succeeding 0000 hours, and any reference in this Schedule to any named day of the week shall be to such period commencing on that named day;

“Days per Week” means in relation to any Service the Days of the week on which the Train Operator has a Firm Right to a Train Slot to operate that Service, expressed as the Days on which the Service is to be Planned to commence from its Origin;

“Departure Window” means the period of time during which the Service shall be Planned to depart from its Origin;

“Dwell Time” means, in relation to any Intermediate Point, the minimum amount of time (expressed in minutes) which a Service is to be Planned to stay at such location;

“Firm Rights” means:

- (a) in the case of a Timetable Participant, a right under its regulated access agreement in respect of the number (or quantum) of Freight Train Slots in any specified period, including, as appropriate, rights to Freight Train Slots in respect of timing (including Minimum Turn Around Time at Origin, Days per Week, Departure Window, Arrival Window, Minimum Turn Around Time at Destination, , Origin, Destination, Routing, Intermediate Points, Standard Specified Equipment (Timing Load), provision of Electricity for Traction, Special Terms, and, where they exceed those contained in the Operating Constraints, Route Availability, Loading Gauge, and a specific Maximum Length of Train, and
- (b) in the case of Network Rail, a right under the Engineering Access Statement or the Timetable Planning Rules,

which, in either case, is not expressed to be a Contingent Right or to be subject to any contingency outside the control of the holder of the right but which is, in a case within paragraph (a) above, subject to:

- (i) the Operating Constraints (except in relation to the length of a Train where a Maximum Length of Train has been agreed);
- (ii) the exercise by Network Rail of any applicable Flexing Right; and
- (iii) the operation of any other provision of the Network Code;

“Flexing Rights” has the meaning ascribed to it in Part D of the Network Code;

“Freight Access Right” means either:

- (a) a Firm Right to a Train Slot relating to a Service in respect of which “F” is noted in the column in the Rights Table headed “Special Terms”, the Service Characteristics of which are set out in the Rights Table; or
- (b) a Contingent Right to a Train Slot relating to a Service in respect of which “C” is noted in the column in the Rights Table headed “Special Terms”, the Service Characteristics of which are set out in the Rights Table.

“Freight Train Slot” means a Train Slot intended by a Timetable Participant to be used for the provision of a railway freight service;

“Loading Gauge” has the meaning ascribed to it by Section D2 of the **“Working Manual for Rail Staff - Section 2 - Loading and Conveyance of Freight Traffic”** (as defined for each section of the Network within the various sectional appendices to the Working Timetable) and denoted in the Rights Table by the equivalent W number of the Specified Equipment for the relevant Service;

“Maximum Length of Train” means, in relation to any Service, the train length, excluding the length of a locomotive and brakevan, expressed in standard length units (“SLUs”) of 21 feet, to be used in the compilation of the New Working Timetable, where this exceeds that permitted by the Operating Constraints;

“Minimum Dwell Times at Intermediate Points” means the Dwell Time at any relevant Intermediate Point;

“Minimum Turn Around Time at Destination” means the minimum time (expressed in minutes) that a Service shall be Planned to stay at its Destination;

“Minimum Turn Around Time at Origin” means the minimum time (expressed in minutes) that a Service shall be Planned to stay at its Origin;

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

“Rights Table” means the table annexed to paragraph 4 of this Schedule 5;

“Route Availability” has the meaning ascribed to it in the “Working Manual For Rail Staff - Freight Train Operations”;

“Route Availability Code” means a code between one and ten given to every vehicle and route or part of a route, denoting the maximum permissible axle loading;

“Routing” means the route which Network Rail is to use for a Service in preparing the New Working Timetable or the Working Timetable;

“Service Planning Characteristics” means the various characteristics, including Timing Load, Maximum Length of Train, Route Availability and Loading Gauge to be used in the Planning of a Service;

“Special Terms” means any special characteristic of a Service which is specified as such in a Rights Table;

“Standard Specified Equipment (Timing Load)” means, in relation to a Service, a Timing Load to which the Train Operator has Firm Rights;

“Stanox” means, in relation to an Origin or Destination, a numeric reference used in Network Rail systems to describe such physical location, either part of the Network or a facility adjoining the Network, and **“Origin Stanox”** and **“Destination Stanox”** shall be construed accordingly;

“Timetable Period” has the meaning ascribed to it in Part D of the Network Code;

“Timing Load” means, in relation to a Service, the timing reference code as defined in the Working Timetable which details the maximum speed and particular combination of traction type, for which, where appropriate, Network Rail has agreed to provide electricity for traction purposes for that Service, and trailing weight, together with whether any vehicles may be conveyed to which local speed restrictions will apply;

“Train Operator Variation Services” means Services in relation to which Train Operator Variation Requests are made by the Train Operator pursuant to paragraph 2.3

1.2 Days of the Week

With respect to Services, the following convention shall be used to denote days of the Week:

M - Monday;

T - Tuesday;

W - Wednesday;

Th - Thursday;

F - Friday;

S - Saturday;

SUN - Sunday;

EWD - Monday to Saturday inclusive;

O indicates Services are run on that day alone (e.g. MFO - Monday and Friday only); and

X indicates Services are run on days other than the day or days shown with the exception of Sunday (e.g. MX - Monday excepted).

2. Rights and Services

2.1 Freight Access Rights

The Train Operator shall be entitled to the Freight Access Rights.

2.2 Ancillary Movements

2.2.1 Subject to paragraph 2.2.2 below, any Ancillary Movement not entered in the New Working Timetable by D-26 shall be treated as a Train Operator Variation Request.

2.2.2 The Train Operator has Firm Rights to make Ancillary Movements of Specified Equipment to the extent necessary or reasonably required to give full effect to the other Firm Rights of the Train Operator, including movements:

- (a) to and from maintenance depots for the purpose of maintaining rolling stock;
- (b) for driver training purposes; and
- (c) which do not convey loaded wagons or empty passenger rolling stock.

2.2.3 For the purposes of paragraph 2.2.2, Ancillary Movements shall not include movements of rolling stock for the purpose of testing in furtherance of vehicle acceptance procedures.

2.3 Train Operator Variation Services

2.3.1 Train Operator Variation Services are services for which the Train Operator has made a Train Operator Variation Request in accordance with Part D of the Network Code and which Train Operator Variation Request Network Rail has been:

- (a) accepted or been deemed to have accepted; or
- (b) modified, and that modification has either been accepted or been deemed to have been accepted by the Train Operator.

2.3.2 The duration of any Train Operator Variation Service shall not exceed twelve months.

2.3.3 For the purposes of paragraph 2.3.1, Train Operator Variation Services:

- (a) shall not include Services for the purpose of testing under vehicle acceptance procedures; but
- (b) shall include Services for the purpose of testing rolling stock (including testing for the purpose of mileage accumulation) which has secured an engineering acceptance certificate and a certificate of interim operation.

2.3.4 For the purpose of this paragraph 2.3, where Train Operator Variation Requests for successive Train Operator Variation Services each having substantially the same characteristics are accepted, such Train Operator Variation Services shall be aggregated for the purpose of ascertaining whether the period of twelve months has been exceeded.

2.3.5 Paragraphs 2.3.1 to 2.3.4 shall not apply to any Service to which a Freight Access Right applies that has been the subject matter of a Train Operator Variation Request.

2.4 *Public holidays*

Not Used

3. Network Rail's Flexing Rights

3.1 *Associations*

Where Associations are shown as Special Terms in the Rights Table relating to a Freight Access Right as described in sub-paragraph "(a)" of that definition, Network Rail's Flexing Rights shall not be used to break such Associations.

4. Services

4.1 *Services*

The Services under this contract comprise:

- (a) the Services having the Service Characteristics set out in the Rights Table;
- (b) any Diverted Services;
- (c) Ancillary Movements;
- (d) any Train Operator Variation Services; and
- (e) any Revised Base Service.

4.2 *Specified Equipment*

4.2.1 Subject to paragraph 4.2.2, the Train Operator has, in relation to a Service, a Firm Right to use any equipment registered with Network Rail's rolling stock library which has performance characteristics identical to or better than the Standard Specified Equipment (Timing Load) specified in the Rights Table for such Service.

4.2.2 No rolling stock, may be used unless and until it has achieved vehicle and route acceptance necessary for its use on the Network.

4.3 *Information*

The parties make no representations regarding the data set out in columns headed “For information – not part of contract” in the Rights Table and rows entitled “Non-contractual Comments” in the Rights Table. Such data does not form part of this contract and is included in the Rights Table for convenience and information only.

Rights Table

[illegible]

SCHEDULE 6: EVENTS OF DEFAULT, SUSPENSION AND TERMINATION

1. Events of Default

1.1 *Train Operator Events of Default*

The following are Train Operator Events of Default:

- (a) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services in accordance with Clause 3.2(a);
- (b) an Insolvency Event occurs in relation to the Train Operator;
- (c) (i) any breach by the Train Operator of this contract, its Safety Obligations or any of the Collateral Agreements; or
(ii) any event or circumstance which is reasonably likely to result in any such breach,

which, by itself or taken together with any other such breach, event or circumstance, Network Rail reasonably considers constitutes a threat to the safe operation of any part of the Network;
- (d) any Track Charges or other amount due by the Train Operator to Network Rail under this contract remain unpaid for more than seven days after their due date;
- (e) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to Network Rail; and
- (f) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators.

1.2 *Notification*

The Train Operator shall notify Network Rail promptly on becoming aware of the occurrence of a Train Operator Event of Default.

1.3 *Network Rail Events of Default*

The following are Network Rail Events of Default:

- (a) Network Rail ceases to be authorised to be the operator of the Network by a licence granted under section 8 of the Act unless exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to Network Rail;

- (c) (i) any breach by Network Rail of this contract, its Safety Obligations or any of the Collateral Agreements; or
 - (ii) any event or circumstance which is reasonably likely to result in any such breach,
- which, by itself or taken together with any other such breach, event or circumstance the Train Operator reasonably considers constitutes a threat to the safe operation of the Services or any Ancillary Movements; and
- (d) any breach of this contract or any material breach of any of the Collateral Agreements by Network Rail which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Train Operator.

1.4 Notification

Network Rail shall notify the Train Operator promptly on becoming aware of the occurrence of a Network Rail Event of Default.

2. Suspension

2.1 Right to suspend

- 2.1.1 Network Rail may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.
- 2.1.2 The Train Operator may serve a Suspension Notice where a Network Rail Event of Default has occurred and is continuing.

2.2 Contents of Suspension Notice

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;
- (c) in the case of a Suspension Notice served on the Train Operator, reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Network or any parts of it;
- (d) in the case of a Suspension Notice served on Network Rail, details of any necessary suspension of the Services; and
- (e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:
 - (i) the steps reasonably required to remedy the Event of Default; and

- (ii) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure to pay Track Charges or other amounts due, seven days shall be a reasonable grace period).

2.3 *Effect of a Suspension Notice served by Network Rail*

Where Network Rail has served a Suspension Notice on the Train Operator:

- (a) the Train Operator shall comply with any reasonable restrictions imposed on it by the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from Network Rail to the Train Operator under paragraph 2.5.4;
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Network Code.

2.4 *Effect of a Suspension Notice served by the Train Operator*

Where the Train Operator has served a Suspension Notice on Network Rail:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Network to provide the Services to the extent specified in the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to Network Rail under paragraph 2.5.4; and
- (c) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Network Code.

2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Train Operator Event of Default relates.

2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of the Network Rail Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Network Rail Event of Default relates.

2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:

- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
- (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.

2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3, whether in whole or in part, and it is reasonable for the suspension effected by the Suspension Notice to be revoked, whether in whole or in part, the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

3. Termination

3.1 *Network Rail's right to terminate*

Network Rail may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 2.5.3;
- (c) where the Train Operator Event of Default specified in paragraph 1.1(a) has occurred and is continuing; or
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by Network Rail is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

3.2 *Train Operator's right to terminate*

The Train Operator may serve a Termination Notice on Network Rail:

- (a) where Network Rail fails to comply with its obligations under paragraph 2.5.3;
- (b) where the Network Rail Event of Default specified in paragraph 1.3(a) has occurred and is continuing; or
- (c) where the Network Rail Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

3.3 *Contents of Termination Notice*

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
 - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Train Operator to pay Track Charges or other amounts due, seven days is a reasonable grace period).

3.4 *Effect of Termination Notice*

Where Network Rail or the Train Operator has served a Termination Notice on the other:

- (a) the service of the Termination Notice shall not affect the parties' continuing obligations under this contract up to the date of termination, which date shall be determined in accordance with paragraph 3.4(c);
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied; and
- (c) this contract shall terminate on the later of:
 - (i) the date and time specified in the Termination Notice for the contract to terminate (or such later date and time as the party which

served the Termination Notice notifies to the other before the date and time so specified); and

- (ii) the date on which a copy of the Termination Notice is given to ORR.

3.5 *Unilateral right of termination*

The Train Operator may at any time serve a notice on Network Rail to terminate this contract (a “**unilateral termination notice**”). In such circumstances, the Train Operator shall send a copy of the unilateral termination notice to ORR.

3.6 *Contents of unilateral termination notice*

The unilateral termination notice shall specify a date and time on which termination of this contract is to take effect (which shall not be earlier than 12 months from the date on which the unilateral termination notice is served on Network Rail).

3.7 *Effect of unilateral termination notice*

Where the Train Operator has served a unilateral termination notice on Network Rail:

- (a) the service of the unilateral termination notice shall not affect the parties’ continuing obligations under this contract up to the date of termination specified in the unilateral termination notice; and
- (b) the contract shall terminate under Clause 3.5 on the later of:
 - (i) the date and time specified in the unilateral termination notice; and
 - (ii) the date upon which a copy of the unilateral termination notice is sent to ORR.

4. Consequence of termination

4.1 *Directions regarding location of Specified Equipment*

Immediately before, upon or following termination or expiry of this contract, the Train Operator shall comply or procure compliance with all reasonable directions given by Network Rail concerning the location of the Specified Equipment.

4.2 *Failure to comply with directions*

If the Train Operator fails to comply with any directions given under paragraph 4.1, Network Rail shall be entitled to remove from the Network or Stable any Specified Equipment left on the Network or to instruct a third party to do so and any reasonable costs incurred by Network Rail in taking such steps shall be paid promptly by the Train Operator.

4.3 *Evidence of costs*

Network Rail shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Train Operator shall reasonably request.

SCHEDULE 7: TRACK CHARGES AND OTHER PAYMENTS

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;

“2013 Final Determination” means the document entitled “Periodic Review 2013: Final determination of Network Rail’s outputs and funding for 2014-19” published by ORR on 31 October 2013;

“access charges review” has the meaning ascribed to it in Schedule 4A to the Act;

“AC System” means the alternating current system of electricity traction supply on the Network;

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

“Attributable to Network Rail” has the meaning attributed to it in Schedule 8 of this contract;

“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 used in a Service, the coal spillage charge rate per kg_{tm} for that Coal Vehicle, as set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“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 reduction investment charge rate per kg_{tm} set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“Coal Train” means any Service assigned, according to a methodology approved or determined by ORR on or before 10 February 2014, the Commodity of coal or biomass;

“Coal Trains Baseline” has the meaning attributed to it in paragraph 2.3.4;

“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 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 whether the Total CSR Fund Balance (if any) shall be carried forward or whether a CSR Rebate shall be made;

“DC System” means the direct current system of electricity traction supply on the Network;

“Default Period” means the period from the later of:

- (a) the date on which the New Registered Equipment is first used on the Network by the Train Operator; or
- (b) 1 April 2014,

until the date on which ORR consents to or determines a supplement to the Track Usage Price List under paragraph 2.2.10 in respect of that New Registered Equipment;

“Default Rate” means, in respect of any New Registered Equipment used on the Network by the Train Operator, the corresponding freight default rate for that type of vehicle (locomotive, empty wagon or loaded wagon) set out in the section of the Track Usage Price List entitled “Freight Variable Usage Charge default rates” and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“Delivery Plan” means the document, including its supporting documentation, published by Network Rail on or about 31 March 2014 setting out its delivery plan for the period 1 April 2014 – 31 March 2019;

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

“Electrification Asset Usage Charge” means the charge calculated in accordance with paragraph 2.4.12;

“Electrification Asset Usage Rate” means, in respect of electrification asset usage, the rate per electrified kgtm on route type k as set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraph 2.7.1 and 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 2.3.1;

“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, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“Freight Capacity Charge Wash-Up” means the charge calculated in accordance with paragraph 2.3.2;

“Freight Capacity Charge Wash-up Rate” means the rate for Services for the carriage of goods in the column headed “Wash-up rate” corresponding to the day of the week on which the Service is operated, as set out in the List of Capacity Charge Rates and being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“Freight Only Line Charge Rate” means, in respect of each ESI Vehicle, IO Vehicle and/or SNF Vehicle used in a Service, the rate per kgtm for that ESI Vehicle, IO Vehicle and/or SNF Vehicle (as applicable) which shall be:

- (a) in respect of the Relevant Year commencing on 1 April 2014 the total of the amount set out in the Track Usage Price List relating to the freight only line charge rate for an ESI Vehicle, IO Vehicle or SNF Vehicle for that year, multiplied by the Phased in Charges Indexation Adjustment calculated in accordance with paragraph 2.7.3(a); and
- (b) in respect of any other Relevant Year t, the total of the amount set out in the Track Usage Price List relating to the freight only line charge rate

for an ESI Vehicle, IO Vehicle or SNF Vehicle for that year multiplied by the Phased in Charges Indexation Adjustment for that year calculated in accordance with paragraph 2.7.3(b);

“Freight Specific Charge Rate” means, in respect of each ESI Vehicle, IO Vehicle and/or SNF Vehicle used in a Service the rate per kgm for that ESI Vehicle, IO Vehicle and/or SNF Vehicle (as applicable) which shall be:

- (a) in respect of the Relevant Year commencing on 1 April 2014 the total of the amount set out in the Track Usage Price List relating to the freight specific charge rate for an ESI Vehicle, IO Vehicle or SNF Vehicle for that year, multiplied by the Phased in Charges Indexation Adjustment calculated in accordance with paragraph 2.7.3(a); and
- (b) in respect of any other Relevant Year t, the total of the amount set out in the Track Usage Price List relating to the freight specific charge rate for an ESI Vehicle, IO Vehicle or SNF Vehicle for that year multiplied by the Phased in Charges Indexation Adjustment for that year calculated in accordance with paragraph 2.7.3(b);

“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 and paragraph 18 of the Traction Electricity Rules, the relevant geographic section of the Network as set out in Appendix 5 of the Traction Electricity Rules;

“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;

“Indexed Figures” means the Cancellation Sum, the Coal Spillage Charge Rate, Coal Spillage Reduction Investment Charge Rate, the Coal Trains Baseline, the Default Rate, the Disruption Sum, the Electrification Asset Usage Rate, the Enhanced Planned Disruption Sum, the Freight Capacity Rate, the Freight Capacity Charge Wash-Up Rate, the Incident Cap Access Charge Supplement Rate, the Intermodal Trains Baseline, the Late Notice Cancellation Sum, the Network Rail Cap, the Network Rail Payment Rate, the Normal Planned Disruption Sum, the Other Trains Baseline, the Prolonged

Disruption Amount, the Service Variation Sum, the Train Operator Cap and the Train Operator Payment Rate;

“Initial Indexation Factor” is derived from the following formula:

$$\text{IIF} = \left(1 + \frac{(\text{RPI}_{2013} - \text{RPI}_{2012})}{\text{RPI}_{2012}} \right)^2$$

where:

IIF means the Initial Indexation Factor;

RPI₂₀₁₂ means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2012; and

RPI₂₀₁₃ means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013;

“Intermodal Train” means any Service assigned, according to a methodology approved or determined by ORR on or before 10 February 2014, the Commodity of domestic or European intermodal;

“Intermodal Trains Baseline” has the meaning ascribed to it in paragraph 2.3.5;

“IO Vehicle” means any vehicle in respect of which the applicable Commodity is iron ore;

“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 20 December 2013 which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract;

“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;

“Material Alliance Agreement” means a legally binding agreement between:

- (a) Network Rail and the Train Operator; or
- (b) Network Rail, the Train Operator and one or more other train operators; or
- (c) Network Rail and one or more other train operators,

establishing an alliance under which the parties to such legally binding agreement agree to share risk or reward or both on a REBS Route or part thereof on which the Train Operator operates Services and which is likely to have a material direct financial impact on one or more elements of Network Rail’s costs or income included within the Route Baseline;

“Metered Train m” means, as the context requires, either:

- (a) a train of a particular type; or
- (b) a specific train having a train ID,

in either case as specified in Appendix 3 of this Schedule 7 or Appendix 2 or Appendix 4 of the Traction Electricity Rules;

“Network Rail Distribution System Loss Factor” means the relevant factor that represents the electrical losses between the On-Train Meter and Network Rail’s meter through which it purchases traction electricity for the AC System or the DC System in Geographic Area g, as set out in Appendix 3 of the Traction Electricity Rules;

“New Registered Equipment” means a type of railway vehicle or vehicle commodity combination not incorporated in the section of the Track Usage Price List entitled “Freight Variable Usage Charge rates”;

“On-Train Meter” and **“On-Train Metering”** have the meanings ascribed to them in paragraph 1.2 of the Traction Electricity Rules;

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

“Other Train” means any Service that is not a Coal Train or an Intermodal Train;

“Other Trains Baseline” has the meaning attributed to it in paragraph 2.3.6;

“Outperformance Cap” means the maximum possible amount in pounds sterling that can be attributed to a REBS Outperformance as published by Network Rail in its Delivery Plan;

“Outperformance Sum” means the lower of:

- (a) the Outperformance Cap as indexed in accordance with paragraph 4.11;
- and

(b) 25% of the amount in pounds sterling which ORR, in its annual efficiency and finance assessment of Network Rail, determines in respect of the REBS Outperformance;

“Phased in Charges Indexation Adjustment” has the meaning ascribed to it in paragraph 2.7.3;

“Power Factor Correction” means the relevant power factor correction as set out in Appendix 2 of the Traction Electricity Rules;

“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 2014, 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;

“REBS Outperformance” means the situation where ORR’s annual efficiency and finance assessment of Network Rail in respect of the REBS Route in Relevant Year t has identified, in accordance with the methodology and principles set out in Chapter 19 of the 2013 Final Determination, that Network Rail’s performance has exceeded the performance set in the Route Baseline as indexed in accordance with paragraph 4.10;

“REBS Route” means a route specified in the table in Appendix 1 for the purposes of the Route-Level Efficiency Benefit Share Mechanism;

“REBS Underperformance” means the situation where ORR’s annual efficiency and finance assessment of Network Rail in respect of the REBS

Route in Relevant Year t has identified, in accordance with the methodology and principles set out in Chapter 19 of the 2013 Final Determination, that Network Rail's performance has not achieved the performance set in the Route Baseline as indexed in accordance with paragraph 4.10;

"Relevant Year" means a year commencing at 0000 hours on 1 April and ending at 2359 hours on the following 31 March;

"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 Baseline" means the baseline value in respect of a REBS Route in Relevant Year t that is published by Network Rail in its Delivery Plan;

"Route-Level Efficiency Benefit Share" has the meaning ascribed to it in paragraph 4.1;

"Route-Level Efficiency Benefit Share Mechanism" means the provisions for the calculation and payment of the Route-Level Efficiency Benefit Share in respect of one or more REBS Routes as described in paragraph 4;

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

"RPI" means the General Index of Retail Prices All Items measured by CHAW and published each month but where RPI for any month is not published on or before the last day of the third month after such month or there is a material change in the base composition of RPI, then ORR may, after consultation with the parties and such other persons as it considers appropriate, determine the use of such other index as it deems appropriate in the circumstances;

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

"tariff band j" means the tariff zone and time band in which the train in question is operated;

"Tolerance Factor" means the relevant Tolerance Factor as set out in Appendix 4 of the Traction Electricity Rules;

"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 Reduction Investment Charge;

"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 20 December 2013 which, for the

purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract;

“Traction Electricity Charge” means the charge calculated in accordance with paragraph 2.4;

“Traction Electricity Modelled Consumption Rates List” means the document entitled “Traction Electricity Modelled Consumption Rates List” published by Network Rail on or about 20 December 2013 and specifying freight and passenger traction electricity modelled consumption rates which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 of this contract.

“train category” means train category i as identified in the table in the Traction Electricity Modelled Consumption Rates List entitled "Freight Traction Electricity Modelled Consumption Rates for CP5";

“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;

“Underperformance Cap” means the maximum possible amount in pounds sterling that can be attributed to a REBS Underperformance as published by Network Rail in its Delivery Plan;

“Underperformance Sum” means the lower of:

(a) the Underperformance Cap as indexed in accordance with paragraph 4.11; and

(b) 10% of the amount in pounds sterling which ORR, in its annual efficiency and finance assessment of Network Rail, determines in respect of the REBS Underperformance;

“Variable Charge” means the charge that varies according to kgm and is calculated in accordance with the formula set out in paragraph 2.2.1, summed across all Services;

“Vehicle Mile” in relation to a railway vehicle, means a mile travelled by that vehicle on the Network;

“VUC Rate” means, in respect of each locomotive type, empty wagon type, loaded wagon type and coaching stock type used in respect of each Service, the rate per kgm which shall be:

(a) in respect of the Relevant Year commencing on 1 April 2014 the total of the amount set out in the Track Usage Price List relating to the freight variable usage charge rate for the corresponding vehicle type and commodity for that year, multiplied by the Phased in Charges Indexation Adjustment calculated in accordance with paragraph 2.7.3(a); and

- (b) in respect of any other Relevant Year t , the total of the amount set out in the Track Usage Price List relating to the freight variable usage charge rate for the corresponding vehicle type and commodity for that year multiplied by the Phased in Charges Indexation Adjustment for that year calculated in accordance with paragraph 2.7.3(b); and

“**Volume Reconciliation**” has the meaning ascribed to it in the Traction Electricity Rules.

2. Track Charges and Invoices

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 and the Qualifying Modification Benefit Charge. In respect of each Relevant Year t , the Train Operator shall pay the amount of any sum S_t payable as provided in paragraph 2.4.2 and the amount of any sum S_{1tw} and/or S_{2tw} and/or any Charge Correction Amount payable, as provided in paragraph 18 of the Traction Electricity Rules. 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.
- 2.1.4 If, at the time that Network Rail issues any invoice pursuant to paragraph 2.1.3, any Efficiency Benefit Share is payable by Network Rail to the Train Operator, or any Route-Level Efficiency Benefit Share or any amount of any sum S_t or any amount under the Traction Electricity Rules is payable by either party to the other, that invoice shall also reflect that Efficiency Benefit Share payable by Network Rail and the Route-Level Efficiency Benefit Share, the amount of S_t or any amount under the Traction Electricity Rules payable by either party to the other.
- 2.1.5 Where, in accordance with paragraph 2.3.2, Network Rail calculates that the Freight Capacity Charge Wash-up is a positive amount then, as soon as practicable, it shall issue to the Train Operator an invoice for that amount and the Train Operator shall pay or procure payment of it.

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:

$$\text{Variable Charge} = 1 + 2 + 3 + 4 + 5 + 6 + 7 + 8 + 9$$

where:

- 1 means, in respect of each locomotive, the VUC 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 VUC 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 VUC 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 VUC 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, IO Vehicle and each SNF Vehicle, the Freight Only Line Charge Rate for that ESI Vehicle, IO Vehicle or SNF Vehicle (as the case may be) multiplied by the kgtm for that ESI Vehicle, IO 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;
- 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;
- 8 means, in respect of each ESI Vehicle, IO Vehicle and each SNF Vehicle, the Freight Specific Charge Rate for that ESI Vehicle, IO Vehicle or SNF Vehicle (as the case may be) multiplied by the kgtm for that ESI Vehicle, IO Vehicle or SNF Vehicle (as the case may be) relating to the relevant Service; and
- 9 means, in respect of New Registered Equipment during the Default Period, the Default Rate multiplied by the kgtm for that New Registered Equipment relating to the relevant Service.

Bilateral supplements to the Track Usage Price List and Traction Electricity Modelled Consumption Rates List

- 2.2.2 Where the Train Operator intends to use New Registered Equipment on the Network, it shall where reasonably practicable inform Network Rail in writing of the date or likely date from which it intends to do so.
- 2.2.3 No supplement to the Traction Electricity Modelled Consumption Rates List or Track Usage Price List shall have effect unless it has been:
- (a) agreed between the parties and ORR has consented to it; or
 - (b) determined by ORR.
- 2.2.4 Either the Train Operator or Network Rail shall be entitled to propose that:
- (a) the Traction Electricity Modelled Consumption Rates List be supplemented as necessary to include a new train category and corresponding rate; or
 - (b) the Track Usage Price List be supplemented as necessary to include a new vehicle type and corresponding rate.
- 2.2.5 Any proposal of a kind referred to in paragraph 2.2.4 shall be made by notice to the other party and shall be accompanied by a specification of the proposal in reasonable detail and the reasons for it. The parties shall thereafter seek to agree in good faith the necessary supplement to the list in question.
- 2.2.6 Either party may request from the other such information that it reasonably requires in connection with the proposal and the party from whom the information was requested shall use reasonable endeavours to provide this information promptly.
- 2.2.7 Where the parties agree to a supplement following a proposal under paragraph 2.2.4, they shall request ORR's consent to it and provide such information as ORR reasonably requires in order to decide whether to give its consent.
- 2.2.8 If the parties fail to reach agreement within 45 days of the date of the notice given under paragraph 2.2.5, at any point thereafter either party shall be entitled to refer the matter to ORR for determination.
- 2.2.9 Following a reference to ORR under paragraph 2.2.8, the parties shall, within such timescales as ORR may reasonably specify, furnish ORR with such information and evidence as ORR shall reasonably require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.
- 2.2.10 ORR may:

- (a) consent to any supplement that is agreed by the parties and submitted to it under paragraph 2.2.7, or following consultation with the parties, determine that a different supplement should apply; or
- (b) following a referral to ORR under paragraph 2.2.8, determine the supplement that should apply.

2.2.11 In the case of a supplement to the Traction Electricity Modelled Consumption Rates List, the supplement shall have effect from such date as ORR shall determine by notice to the parties, provided that such date shall not be a date falling prior to the start of the Relevant Year in which ORR consented to or determined the supplement.

2.2.12 In the case of a supplement to the Track Usage Price List, the supplement shall have retrospective effect from the first day of the Default Period.

2.2.13 Following ORR's consent or determination under paragraph 2.2.10 Network Rail shall:

- (a) apply the supplement from the date in accordance with paragraph 2.2.11 or 2.2.12 above as applicable; and
- (b) within 28 days of the date of ORR's consent or determination:
 - (i) issue any adjusting invoice or credit note to the Train Operator. In the case of a supplement to the Track Usage Price List, this will reflect the difference between:
 - (1) the total amount paid by the Train Operator during the Default Period under item '9' of the formula in paragraph 2.2.1; and
 - (2) the amount the Train Operator would have paid during this period under items '1' to '4' of the formula in paragraph 2.2.1 had the supplement been in place when the Train Operator first used the relevant railway vehicle on the Network; and
 - (ii) publish on its website details of the supplement alongside the details of any other such supplements to which ORR has consented or determined pursuant to this or any other track access contract to which Network Rail is a party.

2.3 *Freight Capacity Charge and Freight Capacity Charge Wash-Up*

2.3.1 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

Σ means the summation across all Services.

2.3.2 Within 90 days after the end of Relevant Year t, Network Rail shall calculate any Freight Capacity Charge Wash-up for the Train Operator (KW_t) in accordance with paragraph 2.3.3, and provide to the Train Operator such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations under this paragraph 2.3.2. If KW_t is a positive sum, such sum shall be payable by the Train Operator. If KW_t is a negative sum or equal to zero then no sum shall be payable by the Train Operator or by Network Rail.

2.3.3 KW_t is derived from the following formula:

$$KW_t = KW_{tcoal} + KW_{tinter} + KW_{tother}$$

where:

KW_{tcoal} is calculated in accordance with paragraph 2.3.4 below;

KW_{tinter} is calculated in accordance with 2.3.5 below; and

KW_{tother} is calculated in accordance with 2.3.6 below.

2.3.4 KW_{tcoal} is derived from the following formula:

$$KW_{tcoal} = (M_{tcoal} - B_{tcoal} - A_{tcoal}) \bullet (T_{tcoal}/A_{tcoal})$$

where:

M_{tcoal} means Network Rail's reasonable estimate of the aggregate revenue it would have been entitled to receive during Relevant Year t from the Freight Capacity Charge for Coal Trains under all track access agreements with Network Rail for the carriage of goods by railway if, in the calculation of the Freight Capacity Charge for Coal Trains under paragraph 2.3.1, the Freight Capacity Rate was interpreted to mean the Freight Capacity Charge Wash-up Rate and had been applied as such

for all Services relating to Coal Trains that had been operated by or on behalf of all freight operators on the Network during Relevant Year t;

B_{tcoal} means a baseline value in pounds for Coal Trains for Relevant Year t for all Train Operators with a track access agreement with Network Rail for the carriage of goods by railway, as set out in Network Rail's List of Capacity Charge Baselines for CP5, approved or determined by ORR and published on or before 10 February 2014 ("**Coal Trains Baseline**");

A_{tcoal} means the aggregate income which Network Rail, acting reasonably, estimates is owed to it under all track access agreements for the carriage of goods by railway in respect of the Freight Capacity Charge for all Services relating to Coal Trains that have been operated by or on behalf of all freight operators on the Network during Relevant Year t; and

T_{tcoal} means the total income which Network Rail, acting reasonably, estimates it is owed by the Train Operator who is party to this contract in respect of the Freight Capacity Charge for all Services relating to Coal Trains that it has operated on the Network during Relevant Year t.

If KW_{tcoal} is a negative sum, then for the purposes of paragraph 2.3.3 above, it shall be zero.

2.3.5 KW_{tinter} is derived from the following formula:

$$KW_{tinter} = (M_{tinter} - B_{tinter} - A_{tinter}) \bullet (T_{tinter}/A_{tinter})$$

where:

M_{tinter} has the same description as M_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Intermodal Trains';

B_{tinter} has the same description as B_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Intermodal Trains' ("**Intermodal Trains Baseline**");

A_{tinter} has the same description as A_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Intermodal Trains'; and

T_{tinter} has the same description as T_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Intermodal Trains'.

If KW_{tinter} is a negative sum, then for the purposes of paragraph 2.3.3 above, it shall be zero.

2.3.6 KW_{tother} is derived from the following formula:

$$KW_{tother} = (M_{tother} - B_{tother} - A_{tother}) \bullet (T_{tother}/A_{tother})$$

where:

M_{tother} has the same description as M_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Other Trains';

B_{tother} has the same description as B_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Other Trains' (**"Other Trains Baseline"**);

A_{tother} has the same description as A_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Other Trains'; and

T_{tother} has the same description as T_{tcoal} in paragraph 2.3.4 above, save that references to 'Coal Trains' shall be replaced by 'Other Trains'.

If KW_{tother} is a negative sum, then for the purposes of paragraph 2.3.3 above, it shall be zero.

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 in Relevant Year t shall be calculated in accordance with the following formula:

$$E_t = E_{\text{tmo}} + E_{\text{tme}} + E_{\text{tmuAC}} + E_{\text{tmuDC}}$$

where:

E_{tmo} means an amount calculated in accordance with paragraph 2.4.1.2 below;

E_{tme} means an amount calculated in accordance with paragraph 2.4.1.3 below;

E_{tmuAC} means an amount calculated in accordance with paragraph 2.4.1.4(a) below; and

E_{tmuDC} means an amount calculated in accordance with paragraph 2.4.1.4(b) below;

Circumstances in which calculation to be based on modelled data and circumstances in which calculation to be based on metered data

- 2.4.1.1 E_{tmo} shall be calculated in respect of all trains other than those identified in the table at Appendix 3, and E_{tme} , E_{tmuAC} and E_{tmuDC} shall be calculated in respect of the trains identified in the table at Appendix 3.

Calculation of modelled consumption

- 2.4.1.2 E_{tmo} is derived from the following formula:

$$E_{tmo} = \sum E_{tmog}$$

where:

Σ means the summation across all Geographic Areas g, as appropriate;

E_{tmog} is derived from the following formula:

$$E_{tmog} = \sum C_i \bullet EF_{gjt} \bullet UE_{igjt}$$

where:

Σ means the summation across all relevant train categories i (determined in accordance with paragraph 2.4.1.1 above) and tariff bands j, as appropriate;

C_i means the modelled consumption rate :

(a) in kWh per electrified Train Mile in relation to passenger electric multiple units (using the rate for the relevant number of units); and

(b) in kWh per electrified kgm in relation to locomotive-hauled units and all freight traffic,

for train category i shown in the Traction Electricity Modelled Consumption Rates List;

EF_{gjt} means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area g, in tariff band j and in Relevant Year t as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules; and

UE_{igjt} means the actual volume of usage (in electrified Vehicle Miles in relation to passenger electric multiple units or electrified kgm in relation to locomotive hauled units and all freight traffic), if any, of trains operated by or on behalf of the Train Operator in train category i, in Geographic Area g, in tariff band j and in Relevant Year t, pursuant to this contract.

Calculation of consumption using metered consumption data

2.4.1.3 E_{tme} is derived from the following formula:

$$E_{tme} = \sum E_{tmeg}$$

where:

Σ means the summation across all Geographic Areas g, as appropriate;

E_{tmeg} is derived from the following formula:

$$E_{tmeg} = \Sigma [((CME_{mgjt} \bullet PF_m \bullet EF_{gjt}) - (RGB_{mgjt} \bullet PF_m \bullet EF_{gjt})) \bullet (1 + \delta_m)]$$

where:

Σ means the summation across all relevant Metered Trains m (determined in accordance with paragraph 2.4.1.1 above) and tariff bands j, as appropriate;

CME_{mgjt} means the consumption of electricity (in kWh) by Metered Trains m operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction Electricity Rules, in Geographic Area g, tariff band j and in Relevant Year t;

PF_m means the Power Factor Correction for the relevant train type for Metered Train m;

EF_{gjt} means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area g, in tariff band j and in Relevant Year t as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;

RGB_{mgjt} means the electricity (in kWh) generated by braking by Metered Trains m operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction Electricity Rules, in Geographic Area g, tariff band j and in Relevant Year t; and

δ_m means the Tolerance Factor for the relevant train type for Metered Train m.

2.4.1.4

(a) E_{tmuAC} is derived from the following formula:

$$E_{tmuAC} = \Sigma E_{tmugAC}$$

where:

Σ means the summation across all Geographic Areas g, as appropriate;

E_{tmugAC} is derived from the following formula:

$$E_{tmugAC} = \Sigma [(CME_{mgjtAC} \bullet PF_m \bullet EF_{gjt}) \bullet (1 + \delta_m)] \bullet \lambda_{ACg}$$

where:

Σ means the summation across all Metered Trains m (determined in accordance with paragraph 2.4.1.1 above) and tariff bands j , as appropriate;

CME_{mijtAC} means the consumption of electricity (in kWh) from the AC System by Metered Trains m operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction Electricity Rules, in Geographic Area g , tariff band j and in Relevant Year t ;

PF_m means the Power Factor Correction for the relevant train type for Metered Train m ;

EF_{ijt} means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area g , in tariff band j and in Relevant Year t as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;

δ_m means the Tolerance Factor for the relevant train type for Metered Train m ; and

λ_{ACg} means the Network Rail Distribution System Loss Factor for the AC System in Geographic Area g .

(b) E_{tmuDC} is derived from the following formula:

$$E_{tmuDC} = \Sigma E_{tmugDC}$$

where:

Σ means the summation across all Geographic Areas g , as appropriate;

E_{tmugDC} is derived from the following formula:

$$E_{tmugDC} = \Sigma [(CME_{mijtDC} \bullet EF_{ijt}) \bullet (1 + \delta_m)] \bullet \lambda_{DCg}$$

where:

Σ means the summation across all relevant Metered Trains m (determined in accordance with paragraph 2.4.1.1 above) and tariff bands j , as appropriate;

CME_{mijtDC} means the consumption of electricity (in kWh) from the DC System by Metered Trains m operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction

Electricity Rules, in Geographic Area g, tariff band j and in Relevant Year t;

EF_{gjt} means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area g, in tariff band j and in Relevant Year t as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;

δ_m means the Tolerance Factor for the relevant train type for Metered Train m; and

λ_{DCg} means the Network Rail Distribution System Loss Factor for the DC System in Geographic Area g.

2.4.2 Traction Electricity Reconciliation for the Relevant Year ending on 31 March 2014

2.4.2.1 For the purposes of the traction electricity reconciliation to be carried out for the Relevant Year ending on 31 March 2014, the provisions in paragraphs 2.4.2 to 2.4.4 (Traction Electricity Reconciliation) of Schedule 7 to this contract (and such definitions and other provisions as are relevant to paragraphs 2.4.2 to 2.4.4) in force as at that date shall continue to apply to the extent (and only to the extent) necessary to enable the calculation and payment of the supplementary amount S_t .

2.4.2.2 For subsequent Relevant Years, paragraph 18 of the Traction Electricity Rules shall apply.

2.4.3 Not used.

2.4.4 Not used.

Election to introduce On-Train Metering for a vehicle or vehicle type

2.4.5 If the Train Operator wishes to propose the introduction of On-Train Metering to measure traction electricity consumption for 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 agree an amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, that amendment shall take effect only

when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed, 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.

- 2.4.9 Any agreed amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, which is approved by ORR under section 22 of the Act, shall apply with effect from the date agreed by the parties.
- 2.4.10 If the parties fail to reach agreement within 90 days after service of a notice under paragraph 2.4.5, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify ORR and request that ORR determines the matter. The parties shall, within such timescales as ORR may specify, furnish ORR with such information and evidence as ORR shall require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.
- 2.4.11 Where ORR determines the matter pursuant to paragraph 2.4.10, it may issue a notice to the parties setting out the amendments to be made to the contract and the date, which may be retrospective, from which they shall take effect.

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 Rate;

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 In respect of the Relevant Year commencing on 1 April 2014 the Indexed Figures shall each be adjusted by multiplying them by the Initial Indexation Factor.

2.7.2 In respect of the Relevant Year commencing on or after 1 April 2015 the Indexed Figures 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:

$$AF_t = \left(1 + \frac{RPI_{t-1} - RPI_{2013}}{RPI_{2013}} \right) \times \text{Initial Indexation Factor}$$

where:

AF_t means the Adjustment Factor in respect of the Relevant Year t ;

RPI_{t-1} means the average value of the monthly RPI figures for the 12 months up to and including the month of December immediately preceding the relevant 1 April; and

RPI_{2013} means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013.

2.7.3 The Phased in Charges Indexation Adjustment shall be derived:

(a) in respect of the Relevant Year commencing on 1 April 2014, from the following formula:

$$PCIA_{2014} = \text{Initial Indexation Factor}$$

where:

$PCIA_{2014}$ means the Phased in Charges Indexation Adjustment in respect of the Relevant Year commencing on 1 April 2014; and

- (b) in respect of any Relevant Year t commencing on or after 1 April 2015, from the following formula:

$$PCIA_t = \left(1 + \frac{(RPI_{t-1} - RPI_{2013})}{RPI_{2013}} \right) \bullet \text{Initial Indexation Factor}$$

where:

$PCIA_t$	means the Phased in Charges Indexation Adjustment in respect of the Relevant Year t;
RPI_{t-1}	has the same meaning as set out in paragraph 2.7.2 above;
RPI_{2013}	means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013.

2.8 Incremental Costs

2.8.1 Where:

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request;
- (b) the operation of the Service requested would exceed the Operating Constraints applying as at 1 April 2014;
- (c) the Train Operator notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2014 in a manner so as to permit the operation of the Service requested 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 notification 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 resolution in accordance with the ADRR.

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 relevant Service; or
- (b) if not so agreed between the parties, reasonable in the circumstances.

2.8.7 Where:

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request; and
- (b) the operation of the Service requested:
 - (i) would exceed the Operating Constraints applying as at 1 April 2014; and
 - (ii) is permitted under the Operating Constraints applying as at the date of the request 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 requested 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 request under paragraph 2.8.1(a) either party shall be entitled to refer the determination of the Incremental Costs for resolution in accordance with the ADRR.

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 resolution in accordance with the ADRR.

2.8.12 If a reference for resolution 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 resolution; and
- (b) giving to such freight train operator the opportunity to become a party to the proceedings in respect of such resolution.

2.8.13 If a reference for resolution is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum 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 a determination which is inconsistent with any provisions of the Network Code; and

(d) give its 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:

- (a) 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; and
- (b) shall only be payable in respect of any Relevant Year t ending on or before 31 March 2014.

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 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';

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

2.10.4 Without prejudice to the generality of Clause 16.4.1, any payment of an Efficiency Benefit Share (an "**EBS payment**") shall be made on the basis that it is to be treated as exclusive of VAT, so that where and to the extent that the EBS payment is consideration for a supply for VAT purposes Network Rail shall in addition pay to the Train Operator an amount equal to the amount of VAT due in respect of that EBS payment and either:

- (a) the Train Operator shall issue a VAT invoice to Network Rail in respect of the relevant amount; or
- (b) if the parties so agree and have entered into an applicable self-billing agreement (within the meaning of regulation 13(3A) of the Value Added Tax Regulations 1995 (the "**VAT Regulations**")) that continues in force then Network Rail shall produce for itself a self-billed invoice (within the meaning of regulation 13(3) of the VAT Regulations) in respect of the relevant amount.

2.11 *Not used.*

2.12 *Coal Spillage Reduction Investment Charge*

2.12.1 Not used.

2.12.2 The purpose of the Coal Spillage Reduction Investment Charge was 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; 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 whether it wishes to carry forward the Total CSR Fund Balance for application to Coal Spillage Investments in the then current Financial Year.

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 the Total CSR Fund Balance should be carried forward for application in the then current Financial Year.

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 any 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 paid during the Financial Year ending immediately before 00:00 hours on 1 April 2014.

- 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 2019 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.

4. Route-Level Efficiency Benefit Share Mechanism

Calculation of the Route-Level Efficiency Benefit Share

- 4.1 The Route-Level Efficiency Benefit Share for Relevant Year t (" O_t " or " U_t " as the case may be) is the amount (if any) that is payable by Network Rail to the Train Operator or by the Train Operator to Network Rail, as the case may be, in respect of a REBS Route, derived from the following formula:

- (a) in the case of a REBS Outperformance:

$$O_t = \left[\frac{V_t + D_t}{AV_t} \right] \cdot \text{Outperformance Sum}$$

and

- (b) in the case of a REBS Underperformance:

$$U_t = \left[\frac{V_t + D_t}{AV_t} \right] \cdot \text{Underperformance Sum}$$

where:

- O_t means the amount that is payable by Network Rail to the Train Operator in respect of REBS Outperformance on the REBS Route in Relevant Year t ;
- V_{ct} means the amounts payable under items 1 to 4 of the Variable Charge paid by the Train Operator in respect of the REBS Route for Relevant Year t ;
- D_t means the amount payable under item 9 of the Variable Charge paid by the Train Operator in respect of the REBS Route in Relevant Year t ;
- AV_{ct} means the aggregate amounts payable under items 1 to 4 and 9 of the Variable Charge paid by all train operators providing services for the carriage of freight in respect of the REBS Route in Relevant Year t (and calculated by summing the amounts payable under items 1 to 4 and 9 of the Variable Charge under paragraph 2.2.1 and the corresponding provisions of each relevant train operator's access agreement) and the aggregate variable usage charge and default charge payable by all train operators providing services for the carriage of passengers in respect of the REBS Route in Relevant Year t (and calculated by summing the amount V_t and D_t under paragraph 3 of Part 2 of Schedule 7 of each relevant train operator's access agreement); and
- U_t means the amount that is payable by the Train Operator to Network Rail in respect of REBS Underperformance on the REBS Route in Relevant Year t .

4.2 The Route-Level Efficiency Benefit Share (if any) calculated under paragraph 4.1 shall be payable for each REBS Route for Relevant Year t , unless the Train Operator has exercised a right to opt out in respect of a particular REBS Route in accordance with paragraph 4.3 or 4.4. Where the Train Operator has exercised such a right, no Route-Level Efficiency Benefit Share shall be payable by or to the Train Operator, in respect of that REBS Route:

- (a) for the Relevant Year in the course of which the notice referred to in paragraph 4.3 was served and all subsequent Relevant Years up to 31 March 2019; and
- (b) where Network Rail entered into a Material Alliance Agreement during the course of Relevant Year t and the Train Operator issued an Opt-out Notice pursuant to paragraph 4.4(b) in Relevant Year $t+1$, in respect of any Charging Period in Relevant Year t commencing on or after the date of the Material Alliance Agreement.

Train Operator right to opt out of the Route-Level Efficiency Benefit Share Mechanism

4.3 The Train Operator may serve a notice, in the form set out in Appendix 2, on Network Rail (and shall provide a copy to ORR) informing Network

Rail that the Route-Level Efficiency Benefit Share Mechanism shall not apply to the Train Operator in respect of one or more REBS Routes specified in the notice for the Relevant Year in the course of which the notice was served and all subsequent Relevant Years up to 31 March 2019 (an "**Opt-out Notice**"). Unless paragraph 4.4 applies, an Opt-out Notice may be served only before 1 July 2014.

4.4 If any of the following circumstances apply, the Train Operator may serve an Opt-out Notice at any time until 31 March 2019:

- (a) the Train Operator commences operating on one or more REBS Routes on which it did not previously operate services, services for the carriage of passengers or freight by railway as a result of entering into a new access agreement or otherwise. In these circumstances such Opt-out Notice may be served only in respect of the REBS Routes on which the Train Operator commences operating those services; or
- (b) Network Rail notifies ORR and the Train Operator that it has entered into an agreement which is, in its opinion, a Material Alliance Agreement and ORR confirms in writing that it agrees. In these circumstances the Opt-out Notice may only be served in respect of the REBS Route to which the Material Alliance Agreement applies.

In the circumstances described in paragraphs 4.4(a) and (b), the Opt-out Notice must be served within two months after:

- (i) the date on which the Train Operator commences operating the services described in paragraph 4.4(a); or
- (ii) the date of receipt of written confirmation from ORR under paragraph 4.4(b),

as the case may be.

4.5 Network Rail shall serve notice on ORR and the Train Operator that it has entered into an agreement which it considers to be a Material Alliance Agreement within 14 days after entering into it.

4.6 Network Rail shall provide such information, excluding information which is subject to a legally binding duty or obligation of confidentiality (whether arising under the terms of any contract or otherwise), to the Train Operator as the Train Operator may reasonably request in order to determine whether to serve an Opt-out Notice. Network Rail shall provide such information within 14 days of the request, unless not reasonably practicable to do so, in which case it shall provide the information as soon as reasonably practicable.

Obligation to pay the Route-Level Efficiency Benefit Share

- 4.7 If, pursuant to paragraph 4.1, a party is entitled to payment from the other of a Route-Level Efficiency Benefit Share in Relevant Year t, then, subject to paragraphs 4.2 and 4.8, such payment shall be made to the party entitled to the payment by the other party as a lump sum payment within 56 days after the date of publication of ORR's annual efficiency and finance assessment of Network Rail for Relevant Year t.
- 4.8 If, in respect of any Relevant Year t, a Route-Level Efficiency Benefit Share is payable in accordance with paragraph 4.7 and this contract has either commenced or expired or otherwise been terminated during the course of that Relevant Year t, the party entitled to payment shall be entitled to a pro rata payment of the Route-Level Efficiency Benefit Share payable in respect of that REBS Route for Relevant Year t. Such pro rata payment (which shall be payable in accordance with paragraph 4.9) shall be calculated as follows:

$$\text{Pro rata REBS}_t = \left(\frac{\text{REBS}}{13} \right) \times \text{CP}$$

where:

REBS means either O_t or U_t as the case may be; 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 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';
- (ii) if this contract 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';

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

4.9 Without prejudice to the generality of Clause 16.4.1, any payment of a Route-Level Efficiency Benefit Share (a “**REBS payment**”) shall be made on the basis that it is to be treated as exclusive of VAT, so that where and to the extent that the REBS payment is consideration for a supply for VAT purposes the party making that REBS payment shall in addition pay to the party receiving the REBS payment an amount equal to the amount of VAT due in respect of that REBS payment and either:

- (a) the party receiving the REBS Payment shall issue a VAT invoice to the party making such REBS payment in respect of the relevant amount; or
- (b) if the parties so agree and have entered into an applicable self-billing agreement (within the meaning of regulation 13(3A) of the VAT Regulations) that continues in force then the party making the REBS payment shall produce for itself a self-billed invoice (within the meaning of regulation 13(3) of the VAT Regulations) in respect of the relevant amount.

Route Baseline Indexation

4.10 The indexed Route Baseline in respect of Relevant Year t shall be derived from the following formula:

$$RBI_t = \text{Route Baseline} \cdot \left(1 + \frac{(RPI_t - RPI_{2012})}{RPI_{2012}} \right)$$

where:

- RBI_t means the indexed Route Baseline in respect of Relevant Year t;
- RPI_t means the RPI published or determined with respect to the month of November in Relevant Year t; and
- RPI_{2012} means the RPI published or determined with respect to the month of November 2012.

Outperformance Cap and Underperformance Cap Indexation

4.11 The indexed Outperformance Cap and Underperformance Cap in respect of Relevant Year t shall be derived from the following formula:

(a) in the case of the Outperformance Cap:

$$OCI_t = OC_t \cdot \left(1 + \frac{(RPI_t - RPI_{2012})}{RPI_{2012}} \right)$$

(b) in the case of the Underperformance Cap:

$$UCI_t = UC_t \cdot \left(1 + \frac{(RPI_t - RPI_{2012})}{RPI_{2012}} \right)$$

where:

OCI_t means the indexed Outperformance Cap in respect of Relevant Year t;

OC_t means the Outperformance cap in respect of Relevant Year t;

UCI_t means the indexed Underperformance Cap in respect of Relevant Year t;

UC_t means the Underperformance cap in respect of Relevant Year t;

RPI_t has the meaning set out in paragraph 4.10 above; and

RPI_{2012} has the meaning set out in paragraph 4.10 above.

APPENDIX 1 – REBS ROUTES TABLE

Route	Route definition
Anglia	As defined in Network Rail's Delivery Plan supporting information
East Midlands	
Kent	
London North East	
London North West	
Scotland	
Sussex	
Wales	
Wessex	
Western	

APPENDIX 2 – ROUTE-LEVEL EFFICIENCY BENEFIT SHARE MECHANISM OPT-OUT NOTICE

[Name of train operator representative]

[Position]

Telephone: [xxx]

E-mail: [xxx]

[Date]

[Enter name of person specified in paragraph 1 of Schedule 1 to the contract]

Network Rail 1 Eversholt Street, London, NW1 2DN

Dear *[Enter name of person specified in paragraph 1 of Schedule 1 to the contract]*,

Opt-out from the Route-Level Efficiency Benefit Share (REBS) Mechanism

This is an Opt-out Notice in respect of the REBS Mechanism in Schedule 7 of the track access contract between Network Rail Infrastructure Limited and *[Enter train operator name here]*, dated *[insert date of track access contract]* (“the contract”).

[Enter train operator name here] hereby exercises its right to opt-out of the REBS Mechanism in respect of the REBS Routes identified in Table 1 below, pursuant to *{delete as appropriate [paragraph 4.3 of Schedule 7] or [paragraph 4.4 of Schedule 7]}* to the contract.

Table 1: REBS opt-out matrix

Route	Route definition	Opt-out (please mark with an ‘x’)
Anglia	As defined in Network Rail’s Delivery Plan supporting information	
East Midlands		
Kent		
London North East		
London North West		
Scotland		
Sussex		
Wales		
Wessex		
Western		

I have sent a copy of this notice to the Director of Railway Markets and Economics at the Office of Rail Regulation and to the Head of Regulatory Policy at Network Rail *[and any other person at Network Rail entitled to a copy as set out in paragraph 1 of Schedule 1 to the contract]*.

Yours faithfully

[Name of train operator representative]

APPENDIX 3 – “METERED TRAINS M” FOR THE PURPOSES OF PARAGRAPH 2.4.1.1 OF PART 2

Train Type	Train ID	Traction Type
Class 86/5	All	AC
Class 86/6	All	AC
Class 90	All	AC

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;

“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 paragraphs 2.7.1 and 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;

“ETCS” means the European Train Control System;

“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;

“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 paragraphs 2.7.1 and 2.7.2 of Schedule 7;

“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 Cap” means the Network Rail Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Network Rail Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8;

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

“Network Rail Payment Rate” means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 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 paragraphs and 2.7.1 and 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 Cap” means the Train Operator Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Train Operator Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8;

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

“Train Operator Payment Rate” means the Train Operator Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 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 Train Operator Variation Request 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:

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

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:

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

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:

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

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:

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

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:

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

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 Train Operator Variation; 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 Timetable Planning Rules.

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 Baseline Network Mileage, 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** ”); and
 - (b) the difference (whether positive or negative) between the Actual Mileage t and the Baseline Network Mileage, in each case expressed as a percentage of the Baseline Network Mileage.
- 10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of the Traffic Growth or Traffic Reduction (as the case may be), Network Rail shall:
 - (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 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); and
 - (iv) Network Rail’s determination of the Adjusted Train Operator Benchmark;
 - (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 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 determination under paragraph 10.1.5(a)(iv).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 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 determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 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 determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for resolution in accordance with the ADRR save that the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall (i) have regard to any relevant criteria and/or policy statement most recently issued by ORR and/or any guidance issued by ORR in relation to the matter referred for resolution and (ii) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 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 for resolution under paragraph 10.1.6(c), and to be bound by the determination, 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 determination notified pursuant to paragraph 10.1.5(a)(iv); and/or

- (B) the determination of the relevant ADRR Forum differs from Network Rail's determination pursuant to paragraph 10.1.5(a)(iv) with which the Train Operator agreed.

10.1.7 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; and
- (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;

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

10.1.8 When the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7 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.

10.1.9 If a reference is made to a relevant ADRR Forum 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 relevant ADRR Forum makes its determination pursuant to paragraph 10.1.6(c). Following the relevant ADRR Forum'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 relevant ADRR Forum or (ii) following the relevant ADRR Forum'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 paragraphs 2.7.1 and 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 the following subparagraphs of this paragraph 10.2 prior to 1 April 2015.

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 respect of Financial Year $t+1$, 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 Baseline Annual Contract Mileage specified in Appendix 1, 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 specified 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)
1, 000 minutes	0.1041
2, 000 minutes	0.0473
3, 000 minutes	0.0292
4, 000 minutes	0.0215

5, 000 minutes	0.0152
6, 000 minutes	0.0104
7, 000 minutes	0.0066
8, 000 minutes	0.0037
9, 000 minutes	0.0008
10, 000 minutes	0.0007
No Incident Cap	None

12. ETCS Amendments

12.1 *Circumstances in which ETCS Amendments can be made*

- (a) Either party may by notice to the other propose that amendments are made to this Schedule 8 (and to any other provisions of this contract as a result of those amendments) as a consequence of the introduction of ETCS on any part of the Network that is used by the Train Operator ("**ETCS Amendments**").
- (b) ORR may make ETCS Amendments, subject to complying with paragraph 12.3.

12.2 *ETCS Amendments agreed by the parties*

- (a) A party that wishes to make ETCS Amendments shall serve a notice on the other party that:
 - (i) specifies as far as possible the proposed ETCS Amendments and the date from which they are to have effect; and
 - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments and setting out the reasons for making them.
- (b) The party receiving a notice under paragraph 12.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, and in any event within 20 Working Days following service of a response pursuant to paragraph 12.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments and the date on which they are to have effect.
- (d) If:
 - (i) the parties agree to make ETCS Amendments pursuant to paragraph 12.2(c); or

- (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 12.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,

they shall notify ORR.

12.3 *ORR right to approve, determine or make ETCS Amendments*

(a) If ORR:

- (i) receives a notification under paragraph 12.2(d); or
- (ii) proposes to make ETCS Amendments itself,
then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments it shall:
 - (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments; and
 - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments shall have effect.

- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 12.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

APPENDIX 1: PERFORMANCE

Train Operator Performance

Train Operator Payment Rate £43.44 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator

Train Operator Cap [REDACTED]

Disruption Sum £2,126

Network Rail Performance

Network Rail Payment Rate £19.13 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 2.37 Minutes Delay per 100 Train Operator Miles.

Network Rail Benchmark

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be 7.20 Minutes Delay per 100 Train Operator Miles;

Cancellation Sum

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,813 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,835 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 £1,566.

Baseline Network Mileage

The Baseline Network Mileage shall be 351,602,955.

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.

SCHEDULE 9: LIMITATION ON LIABILITY

1. Definitions

In this Schedule 9:

“Liability Cap” means:

- (a) in relation to the first Contract Year, the sum of £5,447,732 and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{RPI_n}{RPI_1} \right]$$

where:

- (i) C_1 is the sum of £5,447,732;
- (ii) C_n is the Liability Cap in the nth subsequent Contract Year;
- (iii) RPI_n is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n; and
- (iv) RPI_1 is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the month in which this contract became effective under Clause 3.1.

2. Application

The limitations on liability contained in this Schedule apply in the circumstances set out in Clause 11.5.

3. Limitation on Network Rail's liability

In relation to any claim for indemnity made by the Train Operator to which this Schedule 9 applies:

- (a) Network Rail shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and Network Rail shall have no further liability for it.

4. Limitation on Train Operator's liability

In relation to any claims for indemnity made by Network Rail to which this Schedule 9 applies:

- (a) the Train Operator shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and the Train Operator shall have no further liability for it.

5. Disapplication of limitation

To the extent that any Relevant Losses:

- (a) result from a conscious and intentional breach by a party; or
- (b) are in respect of obligations to compensate any person for liability for death or personal injury, whether resulting from the negligence of a party or the negligence of any of its officers, employees or agents or from a failure by a party to comply with its Safety Obligations,

such Relevant Losses:

- (i) shall not be subject to the limitation of liability in Schedule 9; and
- (ii) shall not be taken into account when calculating the amount of Relevant Losses in respect of claims admitted or finally determined in a Contract Year for the purposes of the limitations of liability in this Schedule 9.

6. Exclusion of legal and other costs

The limits on the parties' liabilities provided for in paragraphs 3 and 4 shall not apply to costs incurred in recovering any amount under a relevant claim, including legal, arbitral and other professional fees and expenses.

7. Exclusion of certain Relevant Losses

A party shall have no claim for Relevant Losses to the extent that such Relevant Losses result from its own negligence or breach of this contract.

8. Continuing breaches

Nothing in this Schedule 9 shall prevent a party making a new claim for indemnity in respect of a continuing breach of contract which:

- (a) is a continuing breach of contract which continues for more than 12 months;
- (b) is a continuing breach of contract which continues beyond a period within which it might reasonably be expected to have been remedied; or
- (c) is a breach of a Performance Order in relation to a breach of contract,

but any such new claim shall not include any sum which was the subject matter of a previous claim and was extinguished by virtue of paragraph 3(b) or 4(b).

9. Final determination of claims

For the purpose of this Schedule 9, a determination of a claim for Relevant Losses by a Court or other tribunal shall be treated as final when there is no further right of appeal or review from such determination or in respect of which any right of appeal or review has been lost, whether by expiry of time or otherwise.

SCHEDULE 10: NETWORK CODE AND TRACTION ELECTRICITY RULES MODIFICATIONS

1. Automatic effect

1.1 General

This contract shall have effect:

- (a) with the modifications; and
- (b) from the date,

specified by ORR in a modification notice as supplemented (where appropriate) by a notice of consent to requisite adaptations or a notice of determined requisite adaptations.

1.2 Retrospective effect

No relevant notice may have retrospective effect.

2. Modification notice

2.1 Meaning

A modification notice is a notice given by ORR to the parties for the purposes of this contract, which modifies specified provisions of this contract (other than this Schedule 10) by making such modifications as are consequential upon, or necessary to give full effect to, any change to the Network Code or the Traction Electricity Rules.

2.2 Contents of modification notice

A modification notice shall state:

- (a) the modifications which are to be made to this contract;
- (b) the date from which specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification; and
- (c) which of the specified modifications are to be subject to adaptation and the backstop date for the requisite adaptations in question.

3. Adaptation procedure

3.1 Application

This paragraph 3 applies in the case of specified modifications which are specified as being subject to adaptation.

3.2 *Negotiation of Adaptations*

In respect of the modifications in each modification notice:

- (a) within 14 days of the date of service of the relevant modification notice, the parties shall meet and in good faith negotiate and attempt to agree the requisite adaptations;
- (b) each party shall ensure that:
 - (i) such negotiations are conducted in good faith in a timely, efficient and economical manner, with appropriate recourse to professional advice; and
 - (ii) ORR's criteria are applied in the negotiations; and
- (c) the negotiations shall not continue after the backstop date.

3.3 *Agreed adaptations - notice to the Office of Rail Regulation*

If the parties have agreed the requisite adaptations on or before the backstop date, not later than seven days after the backstop date the agreed requisite adaptations shall be sent by the parties to ORR for its consent, together with a statement, signed by or on behalf of both parties:

- (a) stating the reasons for the agreed requisite adaptations;
- (b) stating the extent to which and ways in which ORR's criteria have been applied in arriving at the agreed requisite adaptations and, in any case where they have not been applied, the reasons; and
- (c) giving such other information as ORR may have requested.

3.4 *Agreed adaptations - Office of Rail Regulation's consent*

If ORR is satisfied with the agreed requisite adaptations, and it gives a notice of consent to requisite adaptations, they shall have effect as provided for in paragraph 3.8.

3.5 *Agreed requisite adaptations - Office of Rail Regulation's refusal of consent*

If ORR gives notice to the parties that it is not satisfied with any or all of the agreed requisite adaptations, it may:

- (a) require the parties again to follow the procedure for negotiating requisite adaptations (with such modifications as to time limits as it specifies), in which case they shall do so; or
- (b) determine the requisite adaptations itself.

3.6 *Requisite adaptations - failure to agree or submit*

If the parties have failed to submit agreed requisite adaptations to ORR for its consent within 7 days after the backstop date, it may determine the requisite adaptations itself.

3.7 *Notice of determined requisite adaptations*

A notice of determined requisite adaptations is a notice:

- (a) given by ORR to the parties for the purposes of this paragraph 3 following the failure of the parties to send to ORR within 7 days of the backstop date requisite adaptations to which it gives its consent; and
- (b) which states the requisite adaptations which ORR has determined should be made using its powers to do so under paragraph 3.5 or 3.6.

3.8 *Effect of requisite adaptations*

Requisite adaptations established either:

- (a) by agreement of the parties and in respect of which ORR has given a notice of consent to requisite adaptations under paragraph 3.4; or
- (b) by the determination of ORR under paragraph 3.5 or 3.6 and stated in a notice of determined requisite adaptations,

shall have effect from such date as ORR states in the relevant notice of consent to requisite adaptations or (as the case may be) the relevant notice of determined requisite adaptations.

4. Procedural matters

4.1 *More than one notice*

More than one modification notice may be given.

4.2 *Differences etc as to requisite adaptations*

Any difference or question as to whether any thing is a requisite adaptation shall be determined by ORR:

- (a) on the application of either party; and
- (b) in accordance with such procedure (including as to consultation) as ORR may by notice to the parties determine.

4.3 *Co-operation and information*

If ORR gives notice to either or both of the parties that it requires from either or both of them information in relation to any requisite adaptation or proposed requisite adaptation:

- (a) the party of whom the request is made shall provide the requested information promptly and to the standard required by ORR; and
- (b) if that party fails timeously to do so, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

4.4 Office of Rail Regulation's criteria

In relation to the negotiation of any requisite adaptation, ORR shall be entitled to:

- (a) give to the parties any criteria which it requires to be applied in the negotiations; and
- (b) modify the criteria after consultation.

4.5 Procedural modifications

In relation to the procedure in paragraph 3 for the agreement or establishment of requisite adaptations (including the times within which any step or thing requires to be done or achieved):

- (a) such procedure may be modified by ORR by a notice of procedural modification given by it to the parties; but
- (b) ORR may give a notice of procedural modification only if it is satisfied that it is necessary or expedient to do so in order to promote or achieve the objectives specified in section 4 of the Act or if such a notice is requested by both parties.

4.6 Dates

In this Schedule 10:

- (a) where provision is made for a date to be specified or stated by ORR it may, instead of specifying or stating a date, specify or state a method by which a date is to be determined, and references to dates shall be construed accordingly; and
- (b) any notice given by ORR which states a date may state different dates for different purposes.

4.7 Requirement for prior consultation

No relevant notice shall have effect unless:

- (a) ORR has first consulted the parties and the Secretary of State in relation to the proposed relevant notice in question;

- (b) in the consultations referred to in paragraph 4.7(a), ORR has made available to the parties and the Secretary of State such drafts of the proposed relevant notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each party and the Secretary of State the opportunity to make representations in relation to the proposed relevant notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the relevant notice to be given;
- (d) ORR has notified the parties and the Secretary of State as to its conclusions in relation to the relevant notice in question (including by providing to each such person a copy of the text of the proposed relevant notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.7(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

4.8 *Consolidated contract*

Not later than 28 days after the giving of the last of:

- (a) a modification notice; and
- (b) a notice of determined requisite adaptations or a notice of consent to requisite adaptations (as the case may be),

Network Rail shall prepare and send to the Train Operator, ORR and the Secretary of State a copy of this contract as so modified.

4.9 *Saving*

Nothing in this Schedule 10 affects:

- (a) the right of either party to approach and obtain from ORR guidance in relation to the requisite adaptations; or
- (b) the right of ORR at any time to effect modifications to the Network Code under Condition C8 of that code, or the Traction Electricity Rules pursuant to the provisions contained therein.

5. **Definitions**

In this Schedule 10 unless the context otherwise requires:

“backstop date” means the date (being not earlier than 28 days from the date of the modification notice) specified as such

	in a modification notice (or such later date as may be established under paragraph 3.5(a), 4.5 or 4.6);
“modification notice”	has the meaning ascribed to it in paragraph 2.1;
“notice of consent to requisite adaptations”	means a notice given by ORR under paragraph 3.4;
“notice of determined requisite adaptations”	has the meaning ascribed to it in paragraph 3.7;
“notice of procedural modification”	means a notice given by ORR to the parties under paragraph 4.5 modifying any aspect of the procedure in this Schedule 10 for the agreement or establishment of requisite adaptations;
“ORR’s criteria”	means the criteria established by ORR for the purposes of the negotiation of requisite adaptations and given to the parties, or modified, under paragraph 4.4;
“relevant notice”	means a modification notice, notice of consent to requisite adaptations, notice of determined requisite adaptations, notice of procedural modification or notice of modification of ORR’s criteria;
“requisite adaptations”	in relation to specified modifications, means the amendments (including the addition of information) to the provisions in question which are necessary or expedient so as to give full effect to them in the particular circumstances of the case, and “adaptation” shall be construed accordingly; and
“specified”	means specified in a modification notice, and “specify” and “specifying” shall be construed accordingly.

SCHEDULE 11: CTRL

1. Definitions

1.1 Definitions

In this Schedule 11:

“CTRL” means

- (a) the proposed rail link between St Pancras in the London Borough of Camden and the Channel Tunnel Portal at Castle Hill, Folkestone in Kent known as the new Channel Tunnel Rail Link authorised to be constructed by the Channel Tunnel Rail Link Act 1996 and its associated and enabling works, facilities and installations;
- (b) the proposed railway which will connect the proposed railway mentioned in paragraph (a) above to Network Rail's Chatham to Victoria railway, together with its associated and enabling works, facilities and installations; and
- (c) the works authorised by the Order,

but excluding the Thameslink Works and the Thameslink Enabling Works;

“CTRL Project” means CTRL together with the Thameslink Works (excluding the Thameslink Completion Works), the Thameslink Enabling Works and all other works authorised by Schedule 1 and 2 of, or pursuant to paragraph 1 of Schedule 8 of, the CTRL Act 1996 in relation thereto;

“Order” means the Channel Tunnel Rail Link (Stratford Station and Subsidiary Works) Order 2001;

“Thameslink Advance Works” means those works, including those relating to:

- (a) the installation of a crossover facility at the Clerkenwell Tunnel with associated signalling, electrification and control equipment; and
- (b) track remodelling including crossovers, signalling, electrification and control equipment in the Kentish Town area,

identified as Thameslink Advance Works by an agreement dated 3 April 1996 between the Secretary of State and Railtrack PLC (now Network Rail);

“Thameslink Box” means the structure to be constructed beneath London St Pancras station as part of the Thameslink Enabling Works to accommodate the platforms forming part of a new railway station to be known as “Midland Road”;

“Thameslink Completion Works” means those works, including:

- (a) the fitting out of the Thameslink Box, station stairwell, underpass and concourse;
- (b) the installation of new signalling and electrification for the Midland Road station; and
- (c) railway works associated with the cross-site links to the Great Northern Line,

identified as Thameslink Completion Works by an agreement dated 3 April 1996 between the Secretary of State and Railtrack PLC (now Network Rail);

“Thameslink Enabling Works” means those works, other than Thameslink Works, identified as Thameslink Enabling Works by an agreement dated 3 April 1996 between the Secretary of State and Railtrack PLC (now Network Rail); and

“Thameslink Works” means the Thameslink Advance Works and the Thameslink Completion Works.

1.2 *Interpretation*

For the purposes of this Schedule 11, references to the “construction” of the CTRL Project shall be deemed to include the design, construction and/or testing and commissioning of the CTRL Project.

2. CTRL

2.1 *CTRL Compensation*

Except in relation to death or personal injury as a result of the construction of the CTRL Project, no compensation or reimbursement of costs shall be payable by Network Rail to the Train Operator under this contract, including Part G of the Network Code, or otherwise in relation to or in respect of matters arising in connection with the construction of the CTRL Project.

2.2 *Network Change*

The conditions in Condition G2.1(a) of the Network Code will not be satisfied in relation to the CTRL Project and the Train Operator may not serve a notice under Condition G2.1 in relation to a Network Change (as defined in Part G of the Network Code) relating to the construction of the CTRL Project.

IN WITNESS whereof the duly authorised representatives of Network Rail and the Train Operator have executed this contract on the day first above written.

Signed by

Print name.....

Duly authorised for and on behalf of

NETWORK RAIL INFRASTRUCTURE LIMITED

Signed by

Print name.....

Duly authorised for and on behalf of

FREIGHTLINER LIMITED