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14th September 2015

Dear Sir or Madam,

Error in CP5 Schedule 8 passenger train operator payment rates

1. I am writing to you to explain how we propose to address the error to the Schedule 8 passenger operator payment rates, which we have contacted you about over the last few months.
2. As you will recall, CH2M Hill recalibrated key Schedule 8 parameters as part of PR13, in a contract funded by ORR and Network Rail. Despite their quality assurance process, a formula error occurred in CH2M Hill's calculation of the TOC payment rates. We were notified of the error in February and have, since then, been working with CH2M Hill, franchise authorities and, where relevant, Network Rail, to find a way to address it.
3. I apologise for the time it has taken to get to this point. We needed to carry out further audits on the payment rates, discuss the financial impact with franchising authorities and assess the options. We wanted to get to a point where we could make a proposal to industry.
4. This letter sets out our proposal for addressing the error. We would like to hear your views on our proposal before we proceed with implementation, **by Monday, 12th October 2015.**
5. Whichever approach is implemented, we will seek to minimise the administrative burden on all parties, and we have been mindful of the need to limit that burden in our consideration of options.
6. This letter contains the following sections:
 - I. Summary of our proposal for addressing the error
 - II. What are the financial impacts of the error?
 - III. Why change the rates at all?
 - IV. When could a rate change be effective from?
 - V. How could the rates be changed?

- VI. What options (and implementation mechanisms) did we consider?
- VII. What factors did we take into account when making our decision?
- VIII. What is our proposal?
- IX. What were our reasons for proposing this course of action?
- X. What are the next steps?

Annex 1: Further information on the error and its correction

Annex 2: Contractual information on implementation mechanisms

7. Additionally, for each operator we include as attachments to this letter, the following confidential appendices:

- A document setting out your individual payment rates with and without the error and a broad estimate of how the error has affected your Schedule 8 payments in CP5. Information on the error is set out in Annex 1, but if you want to discuss this in more detail or understand how the calculation of impacts was arrived at you can discuss directly with CH2M Hill (Sch8TOCPR@ch2m.com).
- For franchised operators, a letter or guidance note (and any supporting materials) from your franchise authority setting out the impact of the error on your CP5 Franchise Payments and how our proposal for addressing the error would affect it. In considering the different options we have worked closely with franchise authorities to understand the full impacts on franchised operators and the process for implementing any change. Their letters are being sent alongside ours to present you with a fuller picture of the impacts of the error, and our proposal for addressing it, on your business; this is in order to allow you to arrive at an informed view on our proposal. During the consultation process you should refer to your franchising authority for further guidance on how the process for implementing our recommended option may be recognised in your franchise agreement.

I. **Summary of our proposal for addressing the error**

8. Our proposal for addressing the error is as follows:

- **We recommend that all operators change the payment rates prospectively** (i.e. effective from the prospective date that parties agree, for the remainder of the control period). Paragraph 17 of Schedule 8 of each operator's track access agreement enables either the operator or Network Rail to propose an

amendment to their payment rates; the parties then have the option either to agree the amendment (subject to our approval) or to dispute the proposal (as noted below).

- **In the event of a dispute under that Paragraph 17 mechanism, we would be minded to determine that the rates should be changed prospectively.** If the parties cannot agree on whether or not to change the contract rates and either party refers it to us for determination, we would be minded to determine that the rates should be changed prospectively. However, we would consider each case on the basis of arguments put to us.
- **Parties can agree not to change the payment rates.** If operators and Network Rail agree that the scale of the error, or its expected impact, is small relative to the administrative costs of changing the rates, they may agree not to change them.
- **Although we do not expect this to occur in many cases: if both parties (i.e. the TOC and Network Rail) agree to, and submit, a retrospective rate change request under section 22 of Railways Act 1993 (the Act), we would review such requests on a case by case basis.** We expect that operators who have paid more (or received less) than they would have done with the same level of performance and the corrected rates are most likely to prefer a retrospective amendment, since it would mean that Network Rail would pay the operator the difference. Network Rail would not receive additional funding to cover the costs of any such amendments, and it is for this reason that we do not expect retrospective amendments to occur in many cases (given that they need Network Rail's agreement).

9. We are seeking your views by Monday, 12th October 2015. Please send them to rme.admin@orr.gsi.gov.uk.

II. What are the financial impacts of the error?

10. There are two money flows affected by the error:

- Schedule 8 payments between TOCs and Network Rail associated with deviations in an operator's performance from its benchmarks. The impact of the error on Schedule 8 payments is a function of (a) the scale of the error for each service group and (b) the performance against the benchmark for each service group.

- Franchise Payments between a franchised TOC and its franchise authority, after adjustment for the CP5 change. The adjustment is made in accordance with the principle that franchised TOCs should be compensated for changes to benchmarks and payment rates made at the time of a Periodic Review (subject to contractual change provisions). CP5 Franchise Payments¹ are affected by the error because the modelled Schedule 8 payments underpinning them are calculated using the CP5 payment rate. The impact of the error on Franchise Payments is influenced by (a) the size of the error for each service group and (b) the difference between the contractual performance forecast (or outturn performance where applicable) and the CP5 benchmark for each service group.

11. Because the size of the error to each payment rate is essentially random, and because its effect on an operator's Schedule 8 payments also depends on the operator's performance, the possible range of impacts on operators is diverse.
12. Moreover, as an incentive mechanism, we expect the level of the payment rates (and therefore the error) to have had an impact on operator performance. For this reason, the precise impact on Schedule 8 payments cannot be known, because we cannot know what level of performance operators would have delivered if the error had not occurred.
13. However, we can give an indication of the range of impacts of the error if we assume that the level of performance delivered by operators would have been the same if the rates had not included this error.
14. For illustrative purposes only: for the period between P01 2014/15 and P03 2015/16, the magnitude of the impact on Schedule 8 payments (not including the impact on Franchise Payments) for 15 of the 25 affected operators was less than £200,000, with the majority of those being considerably less than that. Of the remaining 10 operators, the largest positive impact is estimated to be around² £2.2m – that is, if the payment rates had been correct from the beginning of the control period and this operator had delivered the same level of performance, it would have been around £2.2m worse off. The largest negative impact is estimated to be around £600,000 – that is, if the rates

¹ By CP5 Franchise Payments we mean the franchise payments recalculated with CP5 rates/parameters

² These numbers are approximate; the final amount depends, in particular, on how disputed minutes are eventually allocated.

had been correct from the beginning of the control period and this operator had delivered the same level of performance, it would have been around £600,000 better off.

15. The impacts of the error on CP5 Franchise Payments are of a similar order of magnitude to the impacts on Schedule 8 payments to/from Network Rail, but typically have the opposite effect on the operator. This means that for many (but not all) franchised operators the Franchise Payments impact partially offsets the impact on the Schedule 8 impact.
16. For illustrative purposes only: the magnitude of the net impacts for 13 of the 25 operators affected by the error is estimated to be less than £200,000, with the majority of those being considerably less than that. Of the remaining 12 operators, the largest positive impact is estimated to be around £1.4m and the largest negative impact is estimated to be around £370,000.
17. For all TOCs, the specific detail of the impact of the error on the payment rates for each service group has been set out in the document attached to this letter.
18. As well as considering the impact on TOCs, we have also considered the financial impact on Network Rail and franchise authorities in arriving at our proposal.

III. Why change the rates at all?

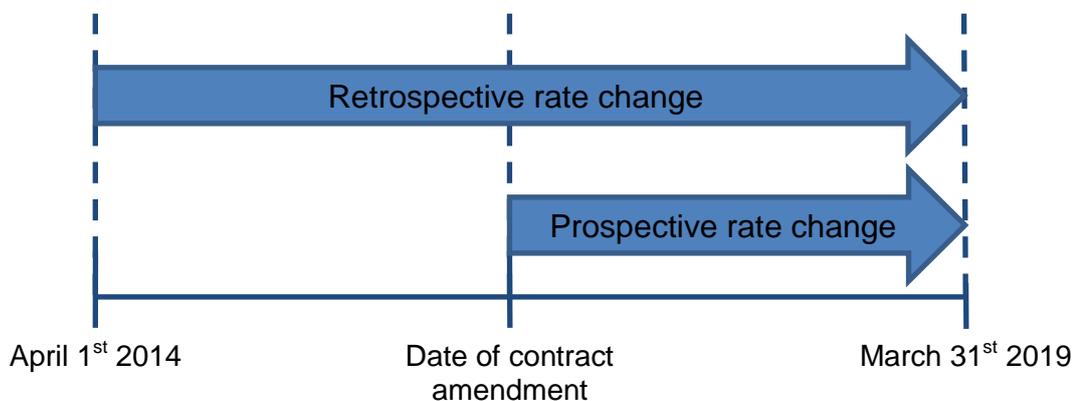
19. The calculations were part of the 2013 Periodic Review (PR13), which covered around £38bn of spend (2012/13 price base) over a five year period. Despite all the checks that are carried out, there is always a risk that there will be an error in the many hundreds of calculations.
20. In general, when an error is identified, regulators tend not to permit changes to a company's regulatory settlement during a control period; instead, the subsequent regulatory settlement may or may not be adjusted to correct for the impact of the error. Or, where the error is sufficiently material and meets any ex-ante specified criteria, the company may be subject to an interim review.
21. However, under Paragraph 17 of Schedule 8, parties to access contracts have the right themselves to request changes to the payment rates or benchmarks set out in Appendix 1 of Schedule 8. If both parties agree to the change then the application comes to us for approval; if the parties cannot agree then the proposed change can be referred to us for determination.

22. Since we could receive agreed or contested applications for changes to payment rates, we need to settle on the policy principles and legal position with respect to rate changes, with a view to presenting a clear view to the industry about how we would be minded to respond to proposals (without fettering our discretion).

IV. When could a rate change be effective from?

23. There are two possible dates from which any rate change would be effective:

- Retrospective rate changes, effective from 1st April 2014 (i.e. the start of CP5)
- Prospective rate changes (i.e. effective from the date of the contract amendment)



V. How could the rates be changed?

24. We have made every effort to consider the widest possible range of options for addressing the error. We identified three alternative approaches to how any amendment might be enabled:

- That we compel all parties to change their rates;
- That operators and Network Rail agree to correct the relevant rates; they would then submit the contract amendments to us for approval; or
- That one party to the access contract seeks to correct the rates, but the other does not agree to do so. In such an instance, either party could refer the dispute to us for determination.

VI. What options (and implementation mechanisms) did we consider?

Options on retrospective rate changes:

25. With respect to retrospective rate changes, there were three options we considered:

- A. **Should we compel all parties to change their rates retrospectively?**
- B. If not, if parties nonetheless agree to retrospective contract amendments, **should we approve retrospective amendments?**
- C. If so, **should Network Rail be provided with funding to cover additional payments it would incur to operators in making retrospective rate changes?**

Options on prospective rate changes:

26. With respect to prospective rate changes, there were also three options:

- D. **Should we compel all parties to change their rates prospectively?**
- E. If not, if parties nonetheless agree to prospective contract amendments, **should we be minded to approve prospective amendments?**
- F. If we left it to parties to agree, then, in the event of a dispute between parties about whether to amend the rates prospectively, if either party refers the matter to us for determination, **should we be minded to determine that rates should be changed prospectively?**

What are the legal mechanisms available for implementing changes?

27. We set out below the legal mechanisms we consider to be available for the implementation of any rate changes:

- **Compulsory retrospective or prospective amendments:** In relation to a compulsory amendment, where ORR compels parties to amend their payment rates, either retrospectively (per option A above), or prospectively (option D), we have identified that section 22C of the Act gives us this power. We have not used section 22C before. Given that it is probably unfamiliar to operators and Network Rail, and that understanding it is important to consideration of the option to compel parties to amend their rates, we set out an explanation of it in Annex 2 to this letter.

- **Agreed retrospective amendments:** In relation to retrospective amendments that the parties agree between themselves, section 22 of the Act allows parties to agree amendments (including those with retrospective effect), subject to our approval of the same.
- **Agreed prospective amendments:** Paragraph 17 of Schedule 8 of track access agreements provides a mechanism for prospective amendments to operator payment rates (for reference, the relevant parts of Paragraph 17 are set out in Annex 2 to this letter). In broad terms, Paragraph 17 enables either the operator or Network Rail to propose a prospective change to the payment rates set out in Appendix 1 of Schedule 8. Where both parties agree the change, Paragraph 17.2(h) provides for this agreed amendment to be submitted to ORR, and for us to approve it under the normal section 22 amendment procedure in the Act.
- **Disputed prospective amendments:** If the parties cannot agree to a change as proposed by either party, then under Paragraph 17.2(e) either party can refer the matter to us for determination.

Options for no rate changes:

28. We also considered simply preserving the current (incorrect) rates for all operators, and not undertaking any corrective amendments. Maintaining the current rates for all operators would require that we reject all applications to amend contracts prospectively or retrospectively (whether agreed or disputed); this means answering “No” to all six of the options considered above.

VII. What factors did we take into account when making our decision?

29. As part of our consideration of which course of action to recommend to industry, we assessed the performance of the different options in light of all our section 4 duties, but in particular against the following criteria which we consider follow from our statutory duties and our broader role as an industry regulator with responsibility for conducting effective access charges reviews. In no particular order:

- Ensure that the Schedule 8 performance regime provides accurate incentives to operators;
- Maintain industry confidence in the Schedule 8 performance regime;
- Provide certainty to the industry on charges and rates;

- Have regard to the administrative cost to industry;
- Have regard to the financial impact on operators of (a) the error and (b) any action to correct it;
- Ensure that Network Rail remains able to finance its activities; and
- Have regard to funds of franchise authorities.

VIII. What is our proposal?

30. As stated above, our recommended proposal is as follows:

- We recommend that all operators change the payment rates prospectively;
- In the event of a dispute between Network Rail and an operator about whether or not to change rates prospectively, we would be minded to determine that the rates should be changed prospectively;
- Parties can agree not to change the payment rates; and
- We acknowledge that parties can agree to, and submit a retrospective rate change request under section 22 of the Act, and we would review these on a case by case basis.

31. In terms of the options A to F identified above, our proposal is as follows:

Option	Our Proposal
<i>Retrospective rate changes</i>	
A. Should we compel all parties to change their rates retrospectively?	No
B. Should we approve retrospective amendments?	On a case by case basis ³
C. Should Network Rail be funded to cover additional losses?	No
<i>Prospective rate changes</i>	
D. Should we compel all parties to change their rates prospectively?	No
E. Should we be minded to approve prospective amendments?	Yes
F. In the event of a dispute, should we be minded to determine that rates should be changed prospectively?	Yes

³ Under this proposal, requests for retrospective amendment will be reviewed on case by case basis. See paragraphs 35 and 36 for more information.

IX. What were our reasons for proposing this course of action?

On retrospective rate changes:

A. We would not compel TOCs to change their rates retrospectively

32. Compelling all TOCs to retrospectively change their rates would have the benefits that it would ensure that, amongst other things:

- It is our understanding that franchise authorities would be able to recalculate most (but not all) franchised operators' CP5 Franchise Payments to make them consistent with the corrected rates;
- Funds of most, but not all, franchise authorities, as they relate to CP5 Franchise Payments, would not be impacted by the error (the presently proposed CP5 Franchise Payments are such that franchise authorities are, in general, paying more, or receiving less, than they would have done if the error had not occurred);
- Network Rail recoups losses incurred as a result of the mismatch (resulting from the error) between payments made by TOCs under the TOC Schedule 8 regime and payments made by Network Rail under its regime⁴; and
- TOCs who would have received more or paid less in Schedule 8 payments if the rates had been correct, and their performance had been the same, receive the amounts they would have received for that level of performance.

33. However, it is important to note that were we to compel all operators to change the rates retrospectively, this would not return the industry to the position it would have been in if the rates had been right from the beginning of the control period. This is because amending payment rates retrospectively ignores the incentive properties of such rates. We can reasonably expect that operators may have based operational or investment decisions about the level of performance to deliver on the basis of the

⁴ Under the TOC Schedule 8 regime, Network Rail makes payments associated with TOC-caused delay on the basis of the Network Rail payment rate; the costs to Network Rail of those payments should then be covered by payments made by each TOC to Network Rail, associated with delay they cause and on the basis of their TOC payment rate. However, because of the error to TOC payment rates the sums paid out by Network Rail for TOC-caused delay exceed the sums paid to Network Rail by TOCs to cover those sums paid out, and Network Rail has incurred losses as a result.

published payment rates; however, correcting the rates retrospectively assumes that operators would have delivered the same level of performance if the rates had not included the error, rather than a level of performance appropriate to the correct rates. So, while we could correct the payment rates retrospectively, we cannot correct the impact they have had on operator behaviour.

34. Despite the benefits listed above, we are proposing not to compel operators to change their rates retrospectively. The main reason for this decision is the impact that a retrospective adjustment would have on operators' ability to plan their business and appropriately respond to the incentives created by the charging regimes. We are concerned that compelling operators to retrospectively amend their rates would create a precedent that would undermine industry confidence in the stability of rates and charges, which would impede the effectiveness of Schedule 8 and other charges as incentive mechanisms, as well as undermining the finality of the settlement arrived at in a Periodic Review. Other considerations, including, in particular, the impact on operators of having to pay back, in some cases, significant sums of money and the fact that CP5 Franchise Payments cannot be revised for some franchised operators⁵ also support this decision.

B. We would approve agreed retrospective adjustments on a case by case basis

35. Where operators and Network Rail agree to change rates retrospectively and, consequently, send a contract amendment (with retrospective effect) to us for approval, we would determine whether or not to approve the retrospective change on a case by case basis. In considering whether or not to approve retrospective amendments we would need to consider the net impact of the error (and the impact of any amendment) on the affected parties (including, in particular, the impact on Schedule 8 payments and, where applicable, on CP5 Franchise Payments).

36. We consider it appropriate to review these on a case by case basis because the effects of the error are such that the impacts on each operator are different. We would be minded to reject applications for retrospective amendment that result in net gains to an operator that has not incurred net losses as a result of the error; that is, if an operator is not, overall, demonstrably worse off as a result of the error and a retrospective

⁵ The error cannot be removed from Franchise Payments for some franchised operators (for contractual reasons) so a retrospective amendment would be one-sided for those operators.

amendment would lead to a gain for that operator, we would be minded to reject applications for retrospective amendment, despite their having been agreed by both parties.

C. We would not provide Network Rail with funding to cover losses incurred in making retrospective amendments

37. For those operators who have paid more, or received less, than they would have done if the rates had not included the error and their performance had been the same, adjusting the rates retrospectively would mean that Network Rail would have to pay money back to the operator.
38. In the event that making such retrospective amendments leads to a worsening of Network Rail's financial position, we propose that Network Rail would not receive additional funding to cover the losses so incurred.
39. This is because Network Rail would not be compelled to agree to the adjustment, and would enter into the contract freely. Adopting this approach reduces the scope for further losses to the tax payers (and net gains to operators overall) resulting from the error.

On prospective rate changes:

D. We would not compel TOCs to change their rates prospectively

40. Compelling all parties to change their rates prospectively would have the benefit that it would ensure that all operators are appropriately incentivised to limit the delay they cause to other operators, as per the methodology set out during PR13.
41. However, because the scale of the error for some TOCs' payment rates is small, and, being mindful of the administrative cost of changing the rates for TOCs and Network Rail, we are content that, where both parties to the access contract agree that a prospective rate change is not appropriate given the scale of the error and the cost of correcting it, the rates need not be changed.

E. We would be minded to approve prospective amendments to contract rates

42. Paragraph 17 of Schedule 8 of operators' track access agreements provides a mechanism by which either the operator or Network Rail may propose a change to the payment rates contained in appendix 1 to that schedule. Where both parties to the access contract agree to a prospective rate change, paragraph 17.2(h) provides for this

agreed amendment to be submitted to us, and for us to approve it under the normal section 22 amendment procedure in the Act.

43. It is important that the operator performance regime under Schedule 8 functions effectively, and to do so the payment rates should reflect the methodology set out in PR13. We would therefore prefer that all operators change their rates prospectively (though we are prepared to allow some operators not to change their rate, as per our proposal on option D). For this reason we would be minded to approve any agreed applications to change the rates prospectively.

F. We would be minded to determine a prospective change to payment rates, in the event of a dispute

44. If parties to an access contract cannot agree on whether or not to change the rates prospectively then under paragraph 17.2(e) either party can refer the matter to us for determination.

45. We envisage that if there is a dispute about whether or not to change the payment rates, it may be because either Network Rail or (more likely) the operator considers that the prospective impact of the error is immaterial compared to the administrative costs of changing it. Given our preference for ensuring the accuracy of the incentives provided by the regime, in the event that the dispute is referred to us, we are likely to be minded to determine that the rates should change prospectively. However, we would review each case along with the arguments of the parties as they are presented to us, and make a decision in each case on its merits.

X. What are the next steps?

46. We would like the views of industry participants on the proposal set out in the letter and our reasoning. We are seeking these views by Monday, 12th October 2015.

47. Please send your responses to rme.admin@orr.gsi.gov.uk.

48. If you want to understand more about the error, or how the estimates of the impact on your Schedule 8 payments were arrived at, please contact CH2M Hill directly (Sch8TOCPR@ch2m.com).

49. If you have questions about the impact to your CP5 Franchise Payments please contact your franchise authority.

50. If you have any other queries about this letter please contact ORR (rme.admin@orr.gsi.gov.uk).

51. When we have collated the views of industry, if the consultation process yields no new evidence or compelling grounds for reviewing the proposal, we will write to you again to confirm that we will be pursuing this option and will attach proforma wording and applications as necessary to help facilitate any rate amendments.
52. If the consultation process produces new evidence or arguments we have not yet considered that have a material bearing on our decision we will seek to review our proposal in light of them. If this proves necessary we will inform industry at the end of the consultation period.

Yours sincerely

A handwritten signature in black ink, appearing to be 'John Larkinson', written in a cursive style.

John Larkinson

Annex 1: Further information on the error and its correction

What was the error?

1. The principal error to the operator payment rates related to the calculation of the actual lateness of trains of a delayed service group due to causing service groups. This should be calculated by taking the proportion of the delayed service group's Network Rail benchmark AML which was the responsibility of each causing service group. The proportion is calculated based on TOC-on-TOC delays. However, the error meant that instead of using the delayed service group's Network Rail benchmark, the causing service group's benchmark was used. The nature of the error meant that it was hard to identify by conventional audit methods⁶.
2. The impact of this error on each payment rate is essentially random.
3. The error was identified by CH2M Hill in the context of re-calibrating rates for the Caledonian Sleeper franchise. The error in the model produced results for that franchise that were counter-intuitive. It was in the process of trying to understand those counter-intuitive results that CH2M Hill identified the error in the model. At that stage it informed us of the error in the model, as well as beginning its own internal review of the spreadsheet models used.
4. CH2M Hill apologises to us and the industry for the error. We are grateful to it for the transparent and proactive approach it has taken in mitigating the impacts of the error, including organising independent audits of its recalibration work.
5. In reviewing the spreadsheet models that calculated the operator payment rates, CH2M Hill identified two further issues. These were both very small in their impact on the payment rates, but, since the calculations were already being revised, and with a view to being consistent with the specification and precedent for these rates, it was decided that they should be addressed at the same time. The additional issues were:
 - A problem with the point at which the division by number of days occurred in the model. The weekday, Saturday and Sunday delays were each divided by the number of days before they were summed rather than after. This was

⁶ Full detail on the quality assurance followed by CH2M Hill in the original Schedule 8 re-calibration project can be found in section 4.6 of the following document:
http://orr.gov.uk/data/assets/pdf_file/0014/482/halcrow-sch8-recalibration-2013-10-07.pdf

inconsistent with the original specification, so we decided that the calculation should be revised.

- An adjustment to non-template operator payment rates for the number of days operated that was inconsistent with the approach used in the CP3 model (though not inconsistent with the specification). CH2M Hill identified that the number of days was calculated based on the number of days the service group that caused the delay operates. As the peak services occur during the week this means that “peak” service groups would generally have zero Saturdays and Sundays, recovering the total liability over a smaller number of days than other TOCs. The alternative approach would be to use the full number of days in the reference period in all cases. Both approaches are consistent with the specification. However, because the approach using the full number of days is consistent with that used in the CP3 model, we decided that the calculation should be revised.

6. If you wish to understand more about any of the issues identified you can contact CH2M Hill (Sch8TOCPR@ch2m.com) directly.

How can we be confident that the re-calculated rates are right?

7. CH2M Hill conducted a thorough internal audit of the revised operator payment rate model in light of the errors it identified. It developed a set of “test cases” as a partial parallel build of the model. These test cases were specifically designed to identify any counter-intuitive results. The results of the test cases do not indicate any further issues with the revised model.
8. CH2M Hill then commissioned an independent review of the revised train operator payment rate model. The focus of this review, undertaken by CEPA, was on the consistency of the model with its specification, but it also considered:
 - correction of known issues;
 - internal consistency checks;
 - implementation of recommendations; and
 - modelling best practice.
9. CEPA’s review identified no issues in the revised model that would have affected the calculation of the payment rates.

10. In addition, Network Rail undertook supplementary checks, including sense-checking the numbers.
11. In light of the error to the operator payment rates, and as set out in our email of 24th April 2015, we decided it would be prudent to have the calculation of the Network Rail payment rates reviewed as well, in view of the fact that they are an input into the operator rates. CH2M Hill again commissioned CEPA to do a forensic review of the Network Rail payment rates on the same basis as the review of the operator rates. As a result of its review, CEPA confirmed that it found no material issues that would change the calculation of the Network Rail payment rates in the model it reviewed. The Network Rail payment rates are also considerably simpler to calculate. We are therefore as confident as we can be that there are no errors to the Network Rail payment rates.
12. In light of the work done by CEPA, CH2M Hill and Network Rail to review the operator payment rate model (and the Network Rail payment rate model, as an input to the former), we are as confident as we reasonably can be that the operator payment rates are now calculated according to the methodology established in PR13.

Annex 2: Contractual information on implementation mechanisms

Section 22C, of the Act, allowing ORR to give directions compelling amendments to an access agreement:-

1. Section 22C(1) states: “ORR may give directions requiring the parties to an access agreement to make to the access agreement amendments which are, in its opinion, necessary to give effect to the conditions of a licence or otherwise required in consequence of the conditions of a licence.”
2. We consider that the relevant licence conditions for this purpose are conditions 1.1 and 1.2 of Network Rail’s network licence. The relevant parts state:
 - “1.1 The purpose is to secure:
 - (a) the operation and maintenance of the network;
 - [...]in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:
 - (i) the quality and capability of the network; and
 - (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.”
 - “1.2 The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.”
3. We consider that using Network Rail’s licence as the basis for exercising section 22C to amend operators’ access agreements is valid, given the operators’ rates are set out in a contract to which Network Rail is a party, and that a performance regime is a legal requirement on Network Rail, and is integral to Network Rail’s role and purpose as the network operator under its licence. We are also satisfied that section 22C can be used to compel an amendment with retrospective effect.

Paragraph 17, Schedule 8 provisions, allowing prospective amendments to payment rates to be proposed by the parties:-

“17.1 Either party may by notice to the other propose that Appendix 1 be amended in accordance with this paragraph 17.

“17.2 (a) The party who wishes to amend Appendix 1 shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:

- (i) where such change relates to a forthcoming timetable change, on or before the first day of the month six months before the relevant Principal Change Date or Subsidiary Change Date on which that timetable change is due to occur; and
- (ii) in any other case, prior to the date from which it proposes such change shall have effect.

[...]

(e) If the parties fail to reach agreement [...]:

- (i) either party may notify ORR; and
- (ii) if ORR elects to determine the matter, the parties shall furnish ORR with such information and evidence as ORR shall require in order to determine the matter, such determination to be binding on the parties.

[...]

(h) Any agreed amendment to Appendix 1 in connection with the proposal referred to in paragraph 17.1 which is agreed by the parties or determined by the relevant ADRR Forum, and which is approved by ORR under section 22 of the Act shall apply with effect from either:

- (i) the relevant Principal Change Date or Subsidiary Change Date (where paragraph 17.2(a)(i) applies); or
- (ii) the date proposed by the party requesting the change (where paragraph 17.2(a)(ii) applies), unless otherwise agreed by the parties or determined by the relevant ADRR Forum in accordance with paragraph 17.2(f).



- (i) Where ORR determines the matter subject to paragraph 17.2(e)(ii), it may issue a notice to the parties setting out the amendments to be made to Appendix 1 and the date, which may be retrospective, from which they shall take effect.”