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**TRACK ACCESS CONTRACT (PASSENGER SERVICES)  
("THE JACOBITE")**

**Dated**

**11 May 2015**

**Between**

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**and**

**WEST COAST RAILWAY COMPANY LIMITED**

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THIS CONTRACT is made the 11 May 2015

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) West Coast Railway Limited, a company registered in England under number 03066109 having its registered office at Jesson Way, Crag Bank, Carnforth, Lancashire, LA5 9UR (the “Train Operator”).

WHEREAS:

- (A) Network Rail is the owner of the Network; and
- (B) Network Rail has been directed by ORR to grant to the Train Operator permission to use certain track comprised in 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 charges review**” has the meaning ascribed to it in paragraph 1(1) of Schedule 4A to the Act;

“**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 1159 of the Companies Act 2006;

“**Ancillary Movements**” has the meaning ascribed to it in Part D of the Network Code;

**“Applicable Engineering Access Statement”** means the Engineering Access Statement in force in respect of the Routes on 11 May 2015, as from time to time amended or replaced under Part D of the Network Code;

**“Applicable Timetable Planning Rules”** means the Timetable Planning Rules in force in respect of the Routes on 11 May 2015, as from time to time amended or replaced under Part D of the Network Code;

**“Applicable Timetable”** has the meaning ascribed to it in Schedule 8;

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

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

**“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 1 May 2015 and subsequently on each anniversary of such date;

**“D-X”** 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;

**“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;

**“Expiry Date”** means 31 October 2018;

**“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;

**“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;

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

**“Longstop Date”** means 31 October 2015;

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

**“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”** means, in respect of any day, the version of the Working Timetable for that day provided by Network Rail in accordance with Condition D2.7.1, as amended pursuant to Condition D2.7.4;

**“Office of Rail Regulation”** has the meaning ascribed to it under section 15 of the Railways and Transport Safety Act 2003, and references to "ORR" shall be construed as references to the Office of Rail Regulation;

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

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

**“railway facility”** has the meaning ascribed to it 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;

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

**“Routes”** means that part of the Network specified in Schedule 2;

**“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;

**“Services”** means the railway passenger services specified in Schedule 5;

**“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 as specified in paragraph 5.1 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 code systems as amended from time to time in accordance with its terms;

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

**“Timetable Participant”** shall have the meaning ascribed to it in 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 paragraph 1 of Part 2 of 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 Consist Data”** means information as to the number(s) and type(s) of railway vehicle comprised in a train movement;

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

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

**“TW-X”** 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;

**“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 as defined in Schedule 4;
- (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) words and expressions defined in the Traction Electricity Rules shall have the same meanings in this contract; and
- (q) 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 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 Modifications 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, other than Clause 5, take effect from the later of the signature of this contract and 11 May 2015.

### **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 that part of the Network comprising the Routes 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) 0159 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 Routes**

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

### **5.2 Meaning**

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

- (a) to use the track comprised in the Routes 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 that part of the Network comprising the Routes, with or without vehicles; and
- (f) for the Train Operator and its associates to bring things onto that part of the Network comprising the Routes and keep them there,

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

- (i) the Network Code;
- (ii) the Applicable Engineering Access Statement; and

(iii) the Applicable Timetable Planning Rules.

### **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 Applicable Engineering Access Statement and Applicable Timetable Planning Rules**

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

### **5.5 Engineering Access Statement, Timetable Planning Rules and Restrictions of Use**

Schedule 4 shall have effect.

### **5.6 The Services and the Specified Equipment**

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.

## **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 Routes in accordance

with the Working Timetable and the making of Ancillary Movements;  
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 Routes using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements.

## **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 the Routes.

## **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 Use of Railway Code Systems**

### *6.4.1 General*

The parties shall:

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

### *6.4.2 Provision of Train Consist Data*

Without prejudice to Clause 6.4.1, 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) procure that such data is true and accurate in all respects.

## **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 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 NOT USED**

## **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 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;
- (b) 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
- (c) 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 where the SPP Threshold has been exceeded as provided for in paragraph 18 of Schedule 8); 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, 5, 7 or 8 (other than under paragraph 18 of Schedule 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).

## **12 GOVERNING LAW**

This contract and any non-contractual obligations connected with it 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 4, 5, 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:
  - (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 Clause 8.1, 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, Schedule 7 and the 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, the Traction Electricity Rules or Schedule 7.

### **15 ASSIGNMENT AND NOVATION**

## **15.1 Assignment**

Neither party may assign, transfer, novate (including a novation under Clause 15.2) 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.

## **15.2 Novation**

Network Rail (and any assignee of all or part of Network Rail's rights under this contract) shall:

- (a) agree to the novation of the rights and obligations of the Train Operator under this contract in favour of another person (including the Secretary of State or a person nominated by him) in any circumstances where the Secretary of State requests Network Rail to participate in such a novation in the course of exercising its powers under section 30 of the Act; and
- (b) execute such contracts and do such things as the Secretary of State may reasonably request to give effect to the novation.

## **15.3 Novation terms**

Any novation under Clause 15.2 shall be on terms that:

- (a) the Train Operator shall not be released from:
  - (i) any accrued but unperformed obligation;
  - (ii) the consequences of any breach of this contract which is the subject of any proceedings (arbitral or otherwise) for the resolution of a dispute between the parties; or
  - (iii) any liability in respect of anything done under this contract before, or as at the date of, any such novation (except to the extent that such other person agrees to assume and be responsible for it); and
- (b) such other person shall not be required by Network Rail, as a term of or a condition to the novation, to agree to assume and be responsible for any unperformed obligation, liability or consequence of a breach of the kind referred to in Clause 15.3(a), but this shall not prevent any such agreement being a term or condition of the novation if required by the Secretary of State.

## **16 PAYMENTS, INTEREST AND VAT**

### **16.1 Payment**

#### *16.1.1 No deduction*

All sums due or payable by either party under this contract shall be paid free and clear of any deduction, withholding or set off except only as may be required by law or as expressly provided in any Schedule to this contract, in the Network Code, or under the Traction Electricity Rules.

### *16.1.2 Delivery of invoices*

All invoices issued under Schedule 7, or statements of amounts payable under Schedules 4, 5 or 8, under the Network Code, or under the Traction Electricity Rules, 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 Content of invoices and other statements of amounts payable*

Each invoice and statement of amounts payable shall 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.

## **16.2 Interest**

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.

## **16.3 VAT**

### *16.3.1 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.

### *16.3.2 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.

### 16.3.3 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 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, 5, 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 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 seven 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.

## **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 requires ORR's approval under section 22 of the Act, the amendment has been approved by ORR.

#### *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 registered company and communication details*

A party shall be entitled to modify in any respect:

- (a) the registered name and address details which relate to it and are set out on page one of this contract (provided that this modification shall not amount to or purport to be an assignment, transfer or novation of this contract); and
- (b) the communication particulars which relate to it and which are set out in Schedule 1,

by giving notice of such modification:

- (i) to the other party as soon as reasonably practicable; and
- (ii) 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), 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 Application to the Secretary of State*

The Secretary of State shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce Clauses 15.2 and 15.3.

#### *18.7.4 Application of the 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.

## **19 NOT USED**

## **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](mailto:notices@networkrail.co.uk)

All written notices to be marked:

“URGENT: ATTENTION THE COMPANY SECRETARY AND SOLICITOR”

and copied to:

Route Managing Director, LNW  
Network Rail Infrastructure Limited  
The Mailbox  
Birmingham  
B1 1RT

Tel: 0121 345 3000

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

West Coast Railway Company Limited  
Jesson Way  
Crag Bank  
Carnforth  
Lancashire  
LA5 9UR

Tel: 01524 732100

Fax: 01524 735518

All written notices to be marked:

“URGENT: ATTENTION THE COMPANY SECRETARY”

and copied to:

Managing Director  
West Coast Railway Company Limited  
Jesson Way  
Crag Bank

Carnforth  
Lancashire  
LA5 9UR

Tel: 01524 732100  
Fax: 01524 735518

3. The Train Operator's Address for service of invoices is:

West Coast Railway Company Limited  
Jesson Way  
Crag Bank  
Carnforth  
Lancashire  
LA5 9UR

Tel: 01524 732100  
Fax: 01524 735518

4. Network Rail's address for service of invoices is:

Network Rail Infrastructure Limited  
Shared Services Finance  
2nd Floor Square  
One Travis Street  
Manchester  
M1 2NY

## **SCHEDULE 2: THE ROUTES**

1. In order to provide the Services, the Train Operator has permission to use the routes specified in Column 1 of Table 2.1 of Schedule 5.
2. In order to provide Services when any part of the route is unavailable, the Train Operator has permission to use any reasonable route for diversionary purposes, subject to obtaining any necessary route clearance for the Specified Equipment over the route in question.
3. In order to make Ancillary Movements, the Train Operator has permission to use any reasonable route, subject to obtaining any necessary route clearance for the Specified Equipment over the route in question.
4. In order to Stable railway vehicles, the Train Operator has permission to use any reasonable location, subject to obtaining any necessary route clearance for the Specified Equipment for the location in question.
5. Use of all routes is subject to the Network Code.

### **SCHEDULE 3: COLLATERAL AGREEMENTS**

1. Not used.
2. 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.
3. Not used.
4. 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: ENGINEERING ACCESS STATEMENT, TIMETABLE PLANNING  
RULES AND RESTRICTIONS OF USE**

**PART 1: NOT USED**

**PART 2: NOT USED**

**PART 3: TEMPORARILY NOT USED – TO BE REOPENED**

**PART 4: NOT USED**

**PART 5: NOT USED**



## SCHEDULE 5: THE SERVICES AND THE SPECIFIED EQUIPMENT

### 1 Definitions

1.1 In this Schedule unless the context otherwise requires:

|                                     |  |
|-------------------------------------|--|
| <b>“Calling Pattern”</b>            | means a list of stations related to one or more Passenger Train Slots, at which stops are to be Scheduled in the Working Timetable;  |
| <b>“Clockface Departures”</b>       | means, in respect of any Service, a pattern whereby departures from the point of origin of that Service, or any specified intermediate point, are fixed at the same number or numbers of minutes past each hour;                         |
| <b>“Contingent Right”</b>           | 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;                                 |
| <b>“Day”</b>                        | means any period of 24 hours beginning at 0200 hours and ending immediately before the next succeeding 0200 hours, and any reference in this Schedule to any named day of the week shall be to such period commencing on that named day; |
| <b>“Exercised”</b>                  | has the meaning ascribed to it in Part D of the Network Code;  |
| <b>“Firm Right”</b>                 | has the meaning ascribed to it in Part D of the Network Code;  |
| <b>“Journey Time”</b>               | means the time in the Working Timetable to be taken by a Service in travelling between the specified departure point and specified destination for that Service;   |
| <b>“Journey Time Review Notice”</b> | has the meaning ascribed to it in paragraph 7.5;   |
| <b>“Maximum Journey Time”</b>       | means, in respect of a Passenger Train Slot, the corresponding Maximum Journey Time, if any, set out in column 4 of Table 6.1;   |
| <b>“Maximum Key Journey Time”</b>   | means, in respect of a Passenger Train Slot, the corresponding Maximum Key Journey Time, if any, set out in column 4 of Table 6.1;   |
| <b>“Modification Notice”</b>        | has the meaning ascribed to it in paragraph 7.10;  |
| <b>“Network Change”</b>             | has the meaning ascribed to it in Part G of the Network Code;  |
| <b>“Passenger Train Slot”</b>       | means a Train Slot intended by the Train Operator to be used for the provision of a Service;   |

|  |  |
|--|--|
| <b>“Public Holiday”</b>                  | means any day other than Saturday or Sunday on which the banks in the City of London are not open for business;  |
| <b>“Reduced Regular Calling Pattern”</b> | has the meaning ascribed to it in paragraph 4.1;   |
| <b>“Regular Calling Pattern”</b>         | has the meaning ascribed to it in paragraph 4.1;   |
| <b>“Scheduled”</b>                       | means, in relation to the quantum, timing or any other characteristic of a train movement, that quantum, timing or other characteristic as included in the applicable Working Timetable; |
| <b>“Service Group”</b>                   | means any one or more (as the context may require) of the service groups described in this Schedule;   |
| <b>“Standard Specified Equipment”</b>    | means, in respect of any Service, the Specified Equipment listed opposite that Service in column 2 of Table 5.1;   |
| <b>“Steam Driven Equipment”</b>          | means Specified Equipment which is steam driven and listed opposite that Service in column 2 of Table 5.1;   |
| <b>“Timetable Period”</b>                | means the period of time between (and including) one Timetable Change Date and (but excluding) the immediately succeeding Timetable Change Date;   |
| <b>"Timing Load"</b>                     | means, in relation to a Service, the timing reference code as defined from time to time in the Working Timetable;  |
| <b>“Train Service Code” or “TSC”</b>     | means the eight character code applied in the Performance Monitoring System and used to identify Services;   |
| <b>“Weekday”</b>                         | means any day (including, except for the purposes of paragraphs 6 and 7, a Public Holiday) which is not a Saturday or Sunday; and  |

- 1.2 Unless otherwise stated, where in this Schedule a period is expressed to be between two specific times that period shall be inclusive of both such times.
- 1.3 The Train Operator's rights under this Schedule as to numbers of Passenger Train Slots per Day are calculated by reference to departures from the Scheduled start point on the Day in question, notwithstanding that a Passenger Train Slot may not be Scheduled to arrive at its end point until the immediately succeeding Day.

## 2 Passenger Train Slots

Table 2.1: Passenger Train Slots<sup>1</sup>

| 1                                |              |     |             |          | 2                     |          |        |
|----------------------------------|--------------|-----|-------------|----------|-----------------------|----------|--------|
|                                  |              |     |             |          |                       |          |        |
| Service description The Jacobite |              |     |             |          | Passenger Train Slots |          |        |
| From                             | To           | Via | Description | TSC      | Total Weekday         | Saturday | Sunday |
| Fort William                     | Mallaig      | N/A | N/A         | 22238108 | 1 <sup>2</sup>        | 1        | 1      |
| Mallaig                          | Fort William | N/A | N/A         | 22238108 | 1 <sup>2</sup>        | 1        | 1      |

Notes to Table:

<sup>1</sup> These Services may be scheduled to operate on any dates between 1 May and 31 October in any contract year, and the expected pattern of operation is as laid out in Appendix 1 to this Schedule 5.

<sup>2</sup> Between 1 June and 31 August the Train Operator has Firm Rights to two passenger train slots each weekday.

### *Passenger Train Slots*

- 2.1 The Train Operator has Firm Rights to the number of Passenger Train Slots in the Working Timetable in respect of a Service Group as listed against each Service specified in Table 2.1 on the Days so listed using any Specified Equipment included in Table 5.1.
- 2.2 Not used.
- 2.3 Not used.



*Table 2.2: Additional Passenger Train Slots – Not used*

- 2.4 Not used.
- 2.5 Not used.
- 2.6 Not used.
- 2.7 Not used.
- 2.8 Not used.
- 2.9 Not used.
- 2.10 In respect of any Public Holidays, the Train Operator has Firm Rights to operate a Weekday service of any of the Services listed in Table 2.1.
- 2.11 Not used.

**3 Not used**

#### 4 Calling Patterns

Table 4.1: Calling Patterns

| 1                   |              |     |             |          | 2                       | 3                   |
|---------------------|--------------|-----|-------------|----------|-------------------------|---------------------|
|                     |              |     |             |          |                         |                     |
| Service description |              |     |             |          |                         |                     |
| Between             | And          | Via | Description | TSC      | Regular Calling Pattern | Additional stations |
| Fort William        | Mallaig      | N/A | N/A         | 22238108 | Glenfinnan              |                     |
| Mallaig             | Fort William | N/A | N/A         | 22238108 | Glenfinnan              |                     |

### *Calling Patterns*

- 4.1 In respect of each Service specified in column 1 of Table 4.1, the Train Operator has Firm Rights to the corresponding Calling Pattern listed in column 2 of that Table (the “Regular Calling Pattern”) or any subset of the Calling Pattern (the “Reduced Regular Calling Pattern”).

### *Additional calls*

- 4.2 The Train Operator has Contingent Rights to have Scheduled, in respect of any Passenger Train Slot, calls at one or more of the stations set out opposite the Service in column 3 of Table 4.1 being stations which do not form part of the Regular Calling Pattern.

## 5 Specified Equipment

### *Specified Equipment*

5.1 In order to provide the Services specified in this Schedule 5, subject to obtaining any necessary route clearance for the route in question, the Train Operator has:

(a) Firm Rights to operate the following railway vehicles:

BR Std CI 4MT (4-6-0 and 2-6-0 variants)

BR Std CI 5MT

GWR CI 'Hall' (4-6-0)

LMS CI 5MT

LMS CI 8F

LNER CI B1

LNER CI K1

LNER CI K4

And up to 7 MK1 coaches<sup>1</sup>

<sup>1</sup> On dates when four passenger train slots operate, two of the passenger train slots shall be limited to 6 Mk1 coaches

and

(b) Contingent Rights to operate any railway vehicles registered with Network Rail's rolling stock library.

For the purposes of this contract the railway vehicles specified in paragraph 5.1(a) and 5.1(b) are known as the "Specified Equipment".

### *Train length*

- 5.2 The Train Operator has a Firm Right to the maximum train length in metres which the Network can from time to time accommodate, subject to a right of Network Rail to vary the train length in cases where the Network cannot accommodate all Access Proposals and Rolled Over Access Proposals to operate to the maximum length.
- 5.3 Nothing in paragraph 5.2 precludes the operation of trains in excess of platform lengths where appropriate measures have been taken to control, so far as is reasonably practicable, any risks introduced by the use of such longer trains.

## **6 Journey Time Protection – Not used**

**7 Provisions applicable to Journey Time protection – Not used**

**8 Other rights**

*Table 8.1: Platform Rights – Not used*

8.1 Not used.

8.2 Not used

*Table 8.2: Connections – Not used*

8.3 Not used.

8.4 Not used.

Table 8.3: Departure time ranges

| 1  |              |            |                    |            | 2             | 3              | 4                            |
|--|--------------|------------|--------------------|------------|---------------|----------------|------------------------------|
| <b>Service Group</b>                     |              |            |                    |            |               |                |                              |
| <b>Service description: The Jacobite</b> |              |            |                    |            |               |                |                              |
| <b>From</b>                              | <b>To</b>    | <b>Via</b> | <b>Description</b> | <b>TSC</b> | <b>Days</b>   | <b>Station</b> | <b>Departure time ranges</b> |
| Fort William                             | Mallaig      | -          | -                  | 22238108   | SX SO and SUN | Fort William   | 09:45 to 10:45               |
| Mallaig                                  | Fort William | -          | -                  | 22238108   | SX SO and SUN | Mallaig        | 13:40 to 14:40               |
| Fort William                             | Mallaig      | -          | -                  | 22238108   | SX            | Fort William   | 14:10 to 15:10               |
| Mallaig                                  | Fort William | -          | -                  | 22238108   | SX            | Mallaig        | 18:10 to 19:10               |

*Departure time ranges*

8.5 For each Service specified in column 1 of Table 8.3, the Train Operator has Firm Rights, on the Days specified in column 2, to departure times from the station specified in column 3 within the range specified in column 4.

*Table 8.4: Stabling facilities – Not used*

8.6 Not used.

*Table 8.5: Turnaround times – Not used*

8.7 Not used.

*Table 8.6: Quantum of Additional Calls – Not used*

8.8 Not used

## 9 Steam Driven Equipment

Without prejudice to the other provisions of this contract, the provisions below shall apply when the Specified Equipment contained in the Train Operator Variation Request includes Steam Driven Equipment:

- 9.1 Network Rail shall take all precautions as are reasonably practicable in assessing the weather forecasts received from the Meteorological Office or other like body and other reports referred to in paragraph 9.3 below and notifying the Train Operator in accordance with paragraph 9.2 where it appears there may be a serious risk of fire if a Train Service is operated by Steam Driven Equipment.
- 9.2 If it appears to Network Rail that there may be a serious risk of fire if a Train Slot is operated by Steam Driven Equipment, it shall use its reasonable endeavours to give the Train Operator not less than seven days' notice to that effect, provided that Network Rail shall have no liability to the Train Operator as a result of its failure to do so.
- 9.3 Subject to paragraph 9.1 above and notwithstanding paragraph 9.2, on or at any time before 12 noon on the third Working Day prior to the day on which a Train Service or the first of a series of Train Services is planned to be operated by Steam Driven Equipment (each an "Affected Train Service"), Network Rail may give notice ("Withdrawal Notice") to the Train Operator that, in view of one or more weather forecasts received by Network Rail from the Meteorological Office or other like body or one or more reports concerning fire risks received by Network Rail from any occupier of land adjacent to the routes over which the Affected Train Service is Planned to operate:
  - (a) Network Rail reasonably considers that there is a significant risk of fire if the Affected Train Slot is operated by Steam Driven Equipment; and
  - (b) accordingly, the permission granted to the Train Operator pursuant to this contract to operate the Affected Train Service by Steam Driven Equipment is withdrawn; and
  - (c) requesting the Train Operator to notify Network Rail on or before 1500 hours on the second Working Day prior to the day on which the Affected Train Service is planned to operate whether it wishes to operate the Affected Train Service by Diesel or Electric Equipment, failing which each Affected Train Service shall be deemed to be cancelled but without either party having any liability to the other under this contract or otherwise in respect of such cancellation and the Working Timetable shall, where necessary, be amended accordingly.
- 9.4 If the Train Operator notifies Network Rail, in accordance with paragraph 9.3 (c) that it wishes to operate the Affected Train Service using Diesel or Electric Equipment, then, provided such Diesel or Electric Equipment is permitted to operate over the relevant Routes in accordance with the Applicable Timetable Planning Rules, such notification shall be treated as a Train Operator Variation Request accepted by Network Rail, and the Working Timetable shall, where necessary, be amended accordingly.

9.5 A Withdrawal Notice, which may be given either by telephone or electronic mail or facsimile (and if given by telephone, a facsimile shall be sent subsequently for confirmatory purposes only), shall be given by Network Rail to such representative of the Train Operator as the Train Operator may notify in writing to Network Rail from time to time for the purposes of this paragraph 9.

## **10 Management and Replacement of Toilets**

10.1 Up to 31 October 2018, the Train Operator shall control the use of toilets aboard the Services such that effluent will not be discharged by the Standard Specified Equipment (or any replacement Specified Equipment) onto Network Rail infrastructure at terminal stations. Failure to control the use of toilets to this extent will constitute an Event of Default, in accordance with paragraph 1.1 of Schedule 6.

10.2 From 1 November 2018, the Train Operator shall have installed, and shall be operating exclusively, Controlled Emission Toilets (CETs) on the Standard Specified Equipment, or shall be operating with replacement Specified Equipment that features CETs exclusively.

**Appendix 1 – Intended dates of operation**

| <b>2015 TT</b> | Sunday                | Monday                     | Tuesday                    | Wednesday                  | Thursday                   | Friday                     | Saturday              |
|----------------|-----------------------|----------------------------|----------------------------|----------------------------|----------------------------|----------------------------|-----------------------|
| May            |                       | 11, 18*, 25*               | 12, 19*, 26*               | 13, 20*, 27*               | 14, 21*, 28*               | 15, 22*, 29*               |                       |
| June           | 21, 28                | 01*, 08*, 15*,<br>22*, 29* | 02*, 09*, 16*,<br>23*, 30* | 03*, 10*, 17*,<br>24*      | 04*, 11*, 18*, 25*         | 05*, 12*, 19*, 26*         | 20, 27                |
| July           | 05, 12, 19, 26        | 06*, 13*, 20*,<br>27*      | 07*, 14*, 21*,<br>28*      | 01*, 08*, 15*,<br>22*, 29* | 02*, 09*, 16*,<br>23*, 30* | 03*, 10*, 17*,<br>24*, 31* | 04, 11, 18, 25        |
| August         | 02, 09, 16, 23,<br>30 | 03*, 10*, 17*,<br>24*, 31  | 04*, 11*, 18*,<br>25*      | 05*, 12*, 19*,<br>26*      | 06*, 13*, 20*, 27*         | 07*, 14*, 21*, 28*         | 01, 08, 15, 22,<br>29 |
| September      | 06, 13, 20            | 07, 14, 21, 28             | 01, 08, 15, 22,<br>29      | 02, 09, 16, 23,<br>30      | 03, 10, 17, 24             | 04, 11, 18, 25             | 05, 12, 19            |
| October        |                       | 05, 12, 19                 | 06, 13, 20                 | 07, 14, 21                 | 01, 08, 15, 22             | 02, 09, 16, 23             |                       |

*\* Afternoon Service operates in addition to Morning Service*

**2016 TT**

**Morning Service**

EWD between Monday 9 May and Friday 21 October, inclusive

SO between Saturday 18 June and Saturday 17 September, inclusive

SUN between Sunday 19 June and Sunday 18 September, inclusive

**Afternoon Service**

EWD between Monday 16 May and Friday 26 August, inclusive

## **2017 TT**

### **Morning Service**

EWD between Monday 8 May and Friday 20 October, inclusive

SO between Saturday 17 June and Saturday 16 September, inclusive

SUN between Sunday 18 June and Sunday 17 September, inclusive

### **Afternoon Service**

EWD between Monday 15 May and Friday 25 August, inclusive

## **2018 TT**

### **Morning Service**

EWD between Monday 7 May and Friday 19 October, inclusive

SO between Saturday 16 June and Saturday 15 September, inclusive

SUN between Sunday 17 June and Sunday 16 September, inclusive

### **Afternoon Service**

EWD between Monday 14 May and Friday 24 August, inclusive



## **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 or the
- (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;
- (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; and
- (g) any discharge of effluent from the Standard Specified Equipment (or any replacement Specified Equipment) onto Network Rail infrastructure which breaches paragraphs 10.1 and 10.2 of Schedule 5 of this Track Access Contract.

#### *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 that part of the Network comprising the Routes 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 Routes or any parts of them or any other part of the Network;
- (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 amount due, seven days shall be a reasonable grace period).

### *2.3 Effect of 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 purposes 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 Routes to provide the Services to the extent specified in the Suspension Notice;
- (b) in relation to Services suspended by the Suspension Notice, the amount of the Fixed Track Charge (as that term is defined in Schedule 7) shall be abated on a daily basis by an amount equal to the proportion of passenger vehicle miles not run on any day due to the suspension divided by the passenger vehicle miles timetabled for the Corresponding Day to that day (as that term is defined and determined under Part 3 of Schedule 4), as multiplied by the daily amount of the Fixed Track Charge (as so defined);
- (c) 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

- (d) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purposes 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;
- (c) Routes; and
- (d) categories of train movements or railway vehicles, (or (as the case may be) 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;
- (c) Routes; and
- (d) categories of train movements or railway vehicles, (or (as the case may be) 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.

## **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

### PART 1: INTERPRETATION

#### 1 Definitions

In Parts 1-7 inclusive, 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 by Schedule 4A to the Act;
- “Actual Train Movements”** means:
- (a) the dates on which trains ran;
  - (b) the times at which trains ran; and
  - (c) the stations between which trains ran;
- “Capacity Charge”** means a variable charge, calculated in accordance with paragraph 6 of Part 2;
- “Default Charge”** means a variable charge calculated in accordance with paragraph 3.3 of Part 2;
- “Default Period”** means the period from the later of:
- (a) the date on which the New Specified Equipment is first used on the Network by the Train Operator; or
  - (b) 11 May 2015,
- until the date on which ORR consents to or determines a supplement to the Track Usage Price List under paragraph 9.10 of Part 2 in respect of that New Specified Equipment;

**“Default Rate”** means, in respect of any New Specified Equipment used on the Network by the Train Operator, the corresponding passenger default rate for that type of vehicle set out in the section of the Track Usage Price List entitled “Passenger Variable Usage Charge default rates”;

**“Default Train Consist Data”** means the data listed in Appendix 7C as amended from time to time in accordance with paragraph 10.4 of Part 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 5.1 of Part 2;

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

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

where:

IIF means Initial Indexation Factor;

$RPI_{2012}$  means the RPI published or determined with respect to the month of November 2012; and

$RPI_{2013}$  means the RPI published or determined with respect to the month of November 2013;

**“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 9.10 of Part 2 of Schedule 7 to this contract;

**“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;

**“New Specified Equipment”**

means a type of railway vehicle that is not:

- (a) a steam locomotive, with or without a tender; or
- (b) a diesel locomotive,

and is not included in the section of the Track Usage Price List entitled “Passenger Variable Usage Charge rates”;

**“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 1.11 of Part 3; 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;

|                                 |  |
|---------------------------------|--|
| <b>“Period”</b>                 | means each consecutive period for 28 days during the term of this contract commencing at 0000 hours on 1 April in each year, provided that the length of the first and last such period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;  |
| <b>“Planned Train Movements</b> | means: <ul style="list-style-type: none"> <li>(a) the dates on which trains are planned to run;</li> <li>(b) the times at which trains are planned to run; and</li> <li>(c) the stations between which trains are planned to run;</li> </ul>   |
| <b>“REBS Outperformance”</b>    | 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 1.10 of Part 3;     |
| <b>“REBS Route”</b>             | means a route specified in the table in Appendix 7A for the purposes of the Route-Level Efficiency Benefit Share Mechanism;  |
| <b>“REBS Underperformance”</b>  | 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 1.10 of Part 3; |
| <b>“Relevant Year”</b>          | 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 Relevant Year for the purposes of which any calculation falls to be made; “Relevant Year t-1” means the Relevant Year preceding Relevant Year t; and similar expressions shall be construed accordingly;  |

|  |                   |   |
|--|-------------------|---|
| <b>"Route Baseline"</b>                      |                   | means the baseline value in respect of a REBS Route in Relevant Year t that is published by Network Rail in its Delivery Plan;  |
| <b>"Route-Level Benefit Share"</b>           | <b>Efficiency</b> | has the meaning ascribed to it in paragraph 1.1 of Part 3;  |
| <b>"Route-Level Benefit Share Mechanism"</b> | <b>Efficiency</b> | 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 1 of Part 3;   |
| <b>"RPI"</b>                                 |                   | means the General Index of Retail Prices All Items measured by CHAW and published each month, or: <ul style="list-style-type: none"> <li>(a) if the index for any month in any year shall not have been published on or before the last day of the third month after such month, such index for such month or months as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances; or</li> <li>(b) if there is a material change in the basis of the index, such other index as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances;</li> </ul> |
| <b>"Service Coded Group"</b>                 |                   | means any Service or collection of Services or Ancillary Movements operating under a service code specified in the List of Capacity Charge Rates, and any Ancillary Movements relating to such Services;  |
| <b>"Track Usage Price List"</b>              |                   | 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 9.10 of Part 2 of Schedule 7 to this contract;   |
| <b>"Train Consist Data"</b>                  |                   | means the information relating to the number(s) and type(s) of railway vehicle comprised in a train movement;   |

|                                |   |
|--------------------------------|---|
| <b>“Train Mile”</b>            | in relation to a train, means a mile travelled by that train on the Network;  |
| <b>“Underperformance Cap”</b>  | 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;   |
| <b>“Underperformance Sum”</b>  | means the lower of:<br>(a) the Underperformance Cap as indexed in accordance with paragraph 1.11 of Part 3; and<br>(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; |
| <b>“Variable Charges”</b>      | means the Capacity Charge, the Default Charge and the Variable Usage Charge;  |
| <b>“Variable Usage Charge”</b> | means a variable charge, calculated in accordance with paragraph 3.1 of Part 2;   |
| <b>“Vehicle Mile”</b>          | in relation to a railway vehicle, means a mile travelled by that vehicle on the Network; and  |
| <b>“Weekday”</b>               | has the meaning ascribed to it in paragraph 1.1 of Schedule 5.  |

## PART 2: TRACK CHARGES

### 1 Principal formula

During each Relevant Year, Network Rail shall levy and the Train Operator shall pay Track Charges in accordance with the following formula:

$$T_t = V_t + K_t + D_t - BS_t$$

where:

$T_t$  means Track Charges in Relevant Year t;

$V_t$  means an amount in respect of the Variable Usage Charge in Relevant Year t which is derived from the formula in paragraph 3.1;

$K_t$  means an amount in respect of the Capacity Charge in Relevant Year t which is derived from the formula in paragraph 6;

$D_t$  means an amount (if any) in respect of the Default Charge in Relevant Year t which is calculated in accordance with paragraph 3.3; and

$BS_t$  means an amount (which shall not be a negative value) in respect of the Efficiency Benefit Share in Relevant Year t which is determined in accordance with paragraph 5.1.

### 2 Not used.

### 3 Variable Usage Charge

#### 3.1 Variable Usage Charge

For the purposes of paragraph 1, the term  $V_t$  means an amount in respect of the Variable Usage Charge in Relevant Year t which is derived from the following formula:

$$V_t = \sum V_{it} \cdot UV_{it}$$

where:

$\underline{V}_{it}$  means an amount for a type of vehicle i for Relevant Year t which is derived from the following formula:

$$V_{it} = V_{it-1} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

$RPI_{t-1}$  means the RPI published or determined with respect to the month of November in Relevant Year t-1;

$RPI_{t-2}$  means the RPI published or determined with respect to the month of November in Relevant Year t-2,

but so that in relation to the Relevant Year commencing on 1 April 2014,  $V_{it}$  shall be:

- (a) for any steam locomotive and any tender, the corresponding variable usage charge rate per Vehicle Mile as set out in the section of the Track Usage Price List entitled “West Coast Railway Company Limited Variable Usage Charge rates (Jacobite)”;
- (b) for any diesel locomotive, the corresponding variable usage charge rate per Vehicle Mile as set out in the section of the Track Usage Price List entitled “Passenger Variable Usage Charge rates”; and
- (c) for any other vehicle type i, the corresponding variable usage charge rate per Vehicle Mile as set out in the section of the Track Usage Price List entitled “Passenger Variable Usage Charge rates”,

in each case multiplied by the Initial Indexation Factor; and in relation to the next following Relevant Year  $V_{it-1}$  shall have the same value;

$UV_{it}$  means the actual volume of usage (in Vehicle Miles) in Relevant Year t of vehicle type i (referred to in the Track Usage Price List) operated by or on behalf of the Train Operator; and

$\Sigma$  means the summation across all relevant categories of vehicle types i.

3.2 Not used

3.3 *Default Charge*

For the purposes of paragraph 1, the term  $D_t$  means the amount of Default Charge payable in respect of New Specified Equipment in Relevant Year t which is derived from the following formula:

$$D_t = \sum D_{nt} \bullet UD_{nt}$$

where:

$D_{nt}$  means the Default Rate for that New Specified Equipment for Relevant Year t which is derived from the following formula:

$$D_{nt} = D_{nt-1} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

$RPI_{t-1}$  has the meaning set out in paragraph 3.1 above;

$RPI_{t-2}$  has the meaning set out in paragraph 3.1 above,

but so that in relation to the Relevant Year commencing on 1 April 2014,  $D_{nt}$  shall have, in respect of New Specified Equipment, the corresponding Default Rate for that New Specified Equipment, multiplied by the Initial Indexation Factor; and in relation to the next following Relevant Year  $D_{nt-1}$  shall have the same value;

$UD_{nt}$  means the actual volume of usage of New Specified Equipment in Vehicle Miles during the Default Period in Relevant Year t operated by or on behalf of the Train Operator; and

$\Sigma$  means the summation across all relevant New Specified Equipment.

#### **4 Not used.**

### **5. Efficiency benefit share**

#### **5.1 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 Relevant Years ending on or before 31 March 2014.

5.2 If, pursuant to paragraph 5.1, the Train Operator is entitled to payment of an Efficiency Benefit Share in respect of Relevant Year t, then, subject to paragraph 5.3, 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 Period in which it is determined by the ORR that such payment should be made.

5.3 If, in respect of any Relevant Year t, an Efficiency Benefit Share is payable in accordance with paragraph 5.2 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 5.2) shall be calculated as follows:

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

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 Periods during that Relevant Year t either:

where this contract commences during the course of that Relevant Year t, following commencement of this contract; or

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

5.4 Without prejudice to the generality of Clause 16.3.1, 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.

## 6 Capacity Charge

For the purposes of paragraph 1, the term  $K_t$  means an amount in respect of the Capacity Charge in Relevant Year  $t$  which shall be derived from the following formula:

$$K_t = \left[ \sum (P_{g_{twdi}} \cdot T_{g_{twdi}}) + (P_{g_{twei}} \cdot T_{g_{twei}}) \right]$$

where:

$\sum$  means the sum across all Service Coded Groups  $i$ ;

$P_{g_{twdi}}$  means the Weekday rate per Service Coded Group  $i$  in respect of Relevant Year  $t$  shown in the List of Capacity Charge Rates and indexed in accordance with the following formula:

$$P_{g_{twdi}} = P_{g_{t-1wdi}} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

$RPI_{t-1}$  has the meaning set out in paragraph 3.1 above; and

$RPI_{t-2}$  has the meaning set out in paragraph 3.1 above.

but so that in relation to the Relevant Year  $t$  commencing on 1 April 2014,  $P_{g_{twdi}}$  shall have the value for the Weekday rate per Service Coded Group  $i$  shown for the Train Operator in the List of Capacity Charge Rates, multiplied by the Initial Indexation Factor; and in relation to the next following Relevant Year,  $P_{g_{t-1wdi}}$  shall have the same value;

$P_{g_{twei}}$  means the weekend rate per Service Coded Group  $i$  in respect of Relevant Year  $t$  shown in the List of Capacity Charge Rates and indexed in accordance with the following formula:

$$P_{g_{twei}} = P_{g_{t-1wei}} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

$RPI_{t-1}$  has the meaning set out in paragraph 3.1 above; and  
 $RPI_{t-2}$  has the meaning set out in paragraph 3.1 above,

but so that in relation to the Relevant Year  $t$  commencing on 1 April 2014,  $Pg_{twei}$  shall have the value for the weekend rate per Service Coded Group  $i$  shown for the Train Operator in the List of Capacity Charge Rates, multiplied by the Initial Indexation Factor; and in relation to the next following Relevant Year,  $Pg_{t-1wei}$  shall have the same value;

$Tg_{twdi}$  means the actual Train Miles run on Weekdays by Services or Ancillary Movements in Service Coded Group  $i$  in the Relevant Year  $t$ ; and

$Tg_{twei}$  means the actual Train Miles run on weekends by Services or Ancillary Movements in Service Coded Group  $i$  in the Relevant Year  $t$ .

**7 Not used.**

**8 Not used.**

**9 Bilateral supplements to the List of Capacity Charge Rates and Track Usage Price List**

9.1 Where the Train Operator intends to use New Specified 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.

9.2 Where the Train Operator uses New Specified Equipment on the Network, the Train Operator shall pay Network Rail the relevant Default Charge during the Default Period.

9.3 No supplement to the Track Usage Price List or List of Capacity Charge Rates shall have effect unless it has been:

- (a) agreed between the parties and ORR has consented to it; or
- (b) determined by ORR.

9.4 Either the Train Operator or Network Rail shall be entitled to propose that:

- (a) the Track Usage Price List be supplemented as necessary to include a new vehicle type and corresponding rate; or
- (b) the List of Capacity Charge Rates be supplemented as necessary to take account of changes in the pattern and number of Services or to include rates in respect of new Services.

9.5 Any proposal of a kind referred to in paragraph 9.4 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.

- 9.6 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.
- 9.7 Where the parties agree to a supplement following a proposal under paragraph 9.4, 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.
- 9.8 If the parties fail to reach agreement within 45 days of the date of the notice given under paragraph 9.5, at any point thereafter either party shall be entitled to refer the matter to ORR for determination.
- 9.9 Following a reference to ORR under paragraph 9.8, 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.
- 9.10 ORR may:
  - (a) consent to any supplement that is agreed by the parties and submitted to it under paragraph 9.7, or following consultation with the parties, determine that a different supplement should apply; or
  - (b) following a referral to ORR under paragraph 9.8, determine the supplement that should apply.
- 9.11 In the case of a supplement to the List of Capacity Charge Rates, 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 11 May 2015.
- 9.12 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.
- 9.13 Following ORR's consent or determination under paragraph 9.10 Network Rail shall:
  - (a) apply the supplement from the date in accordance with paragraph 9.11 or 9.12 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 the amount paid by the Train Operator for the Default Charge during the Default Period and the amount that it would have paid during the Default Period in

respect of the Variable Usage Charge had the supplement been in place at the time 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.

## **10 Payment of Track Charges and Other Sums Due under the Contract**

### *10.1 Payment of Track Charges and Other Sums Due under the Contract*

- (a) Save where the contract provides otherwise, the Train Operator shall pay or procure the payment to Network Rail of:
  - (i) the Variable Usage Charge;
  - (ii) not used;
  - (iii) the Capacity Charge;
  - (iv) the Default Charge; and
  - (v) any other sums which have fallen due in accordance with any provision of this contract,

attributable to any Period as invoiced by Network Rail on or after expiry of each such Period within 21 days of the invoice date or 28 days after the end of the Period, whichever is later.

- (b) Not used.
- (c) Not used.

### *10.2 Train Consist Data*

- (a) The Train Operator shall, 28 days before the start of each Period, provide to Network Rail details of its Planned Train Movements for that period, including the Planned Train Consist Data for each train movement (the "Period Plan");
- (b) Network Rail shall, within 14 days of receiving the Period Plan, calculate the Variable Usage Charge payable by the Train Operator in respect of the Period Plan (the "VTUCP") using the Train Consist Data supplied by the Train Operator and, to the extent such Train Consist Data is not available to Network Rail, the Default Train Consist Data;
- (c) The Train Operator shall pay the Variable Usage Charge in accordance with the provisions of paragraph 10.1 of this Schedule 7;
- (d) The Train Operator shall, within 7 days of the end of each Period, provide to Network Rail details of its Actual Train Movements for that Period, including the Train Consist Data for each train movement (the "Period Actual");

- (e) Network Rail shall, within 14 days of receiving the Period Actual, calculate the Variable Usage Charge payable by the Train Operator in respect of the Period Actual (the "VTUCA") using the Train Consist Data supplied by the Train Operator and, to the extent such Train Consist Data is not available to Network Rail, the Default Train Consist Data; and
- (f) Network Rail shall, each period, compare the VTUCP with the VTUCA for the same period and:
  - (i) if the VTUCP exceeds the VTUCA, shall credit the Train Operator with the difference between the VTUCP and the VTUCA on the next following invoice issued in accordance with paragraph 10.1 of this Schedule 7; or
  - (ii) if the VTUCA exceeds the VTUCP, shall debit the Train Operator with the difference between the VTUCA and the VTUCP on the next following invoice issued in accordance with paragraph 10.1 of this Schedule 7.

### 10.3 *Invoices and right to object to invoices*

- (a) For each period, Network Rail shall be entitled to invoice the Train Operator for Variable Charges in respect of any and all train movements to be operated by the Train Operator during the following Period based on either:
  - (i) Planned Train Movements provided by the Train Operator in respect of any train movement prior to the time that such train movement is completed; or
  - (ii) (to the extent that (i) above does not apply) Default Train Consist Data. Each such invoice will be payable in accordance with the provisions of paragraph 10.1.
- (b) Either party shall be entitled, at any time prior to the later of 2359 hours on the seventh day following receipt by the Train Operator of the relevant invoice, to notify the other that it objects to any Train Consist Data (including, where applicable, the use of Default Train Consist Data) on which the whole or any part of the Variable Charges included in the relevant invoice are based and any such notice shall specify in reasonable detail what that party believes to be the Train Consist Data for the relevant train movement(s) ("**notice of objection**"). In the absence of any notice of objection being served within such time the Train Consist Data used in the relevant invoice shall be final and binding on the parties.
- (c) The parties shall seek to agree the Train Consist Data specified in any notice of objection and any consequential financial adjustment required to the relevant invoice. If the parties are unable to agree such Train Consist Data within 14 days following receipt of a notice of objection,

either party may refer the matter for resolution in accordance with the ADRR.

- (d) Within seven days of any Train Consist Data being agreed or determined in accordance with paragraph 10.3(c), Network Rail shall, if any consequential or financial adjustment of the relevant invoice is required, issue a further invoice to, or (as the case may be) a credit note in favour of, the Train Operator in the amount of the relevant adjustment. The invoice or credit note shall be payable at the same time as the invoice for Variable Charges for the relevant Period or, if issued later than 21 days after the end of the relevant Period, within seven days after the date of its issue.
- (e) Where, as a result of any invoice or credit note issued pursuant to paragraph 10.3, any sum of money which has been paid shall become repayable or any sum of money which has been unpaid shall become payable the party to whom such sum shall be paid shall be paid or allowed interest at the Default Interest Rate on such sum from the date when it (if repayable) was paid or the date when such sum (if payable) ought to have been paid until the date of payment or repayment.

#### *10.4 Unrepresentative Train Consist Data*

- (a) If at any time during this contract either party considers the Default Train Consist Data specified in Appendix 7C is not representative of the Train Operator's Services and in particular, but without limitation, the type(s) of railway vehicles then in use and the regular number of carriages forming part of those railway vehicles in the operation of its Services, either party shall be entitled on written notice to the other to request that the Default Train Consist Data be amended. Any such request shall specify in reasonable detail the grounds for the request and the proposed amendments to the Default Train Consist Data.
- (b) The parties shall endeavour to reach agreement on any amendments to the Default Train Consist Data within 21 days of the date of the request referred to in paragraph 10.4(a) and if the parties are unable to agree such amendments within such time period, either party may refer the matter for resolution in accordance with the ADRR.
- (c) Upon the earlier of agreement between the parties or determination by a relevant ADRR Forum, the parties shall notify ORR of the proposed amendments to the Default Train Consist Data and, subject to ORR not objecting to the proposed amendments within 14 days (the "**14 day period**") of receipt of the notification by ORR, such amendments shall take effect from the first day of the next Period following the earlier of ORR confirming its consent to the proposed amendments and the expiry of the 14 day period. If ORR objects to the proposed amendments within the 14 day period, the parties shall endeavour to reach agreement with ORR on the appropriate amendments, if any, to the Default Train

Consist Data which shall then take effect on the first day of the Period next following that in which agreement is reached.

#### 10.5 *Disputed amounts repayment and interest rate*

- (a) Where a party wishes to contest any invoice issued to it under this Schedule 7 (including any invoice in respect of Track Charges) it shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute but shall pay the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice.
- (b) Where a party has given notice under paragraph 10.5(a) that it disputes part of any invoiced amount:
  - (i) payment of such sum shall be without prejudice to the determination of whether such sum is properly due or not; and
  - (ii) if it is subsequently determined that the disputed sum, or part of it, was not properly due the payee shall repay the disputed sum, or relevant part, to the payer together with interest (to accrue daily and be compounded monthly) at the Default Interest Rate from the date of payment until the actual date of repayment.

### **PART 3: ROUTE-LEVEL EFFICIENCY BENEFIT SHARE MECHANISM**

#### **1. Route-Level Efficiency Benefit Share Mechanism**

##### *Calculation of the Route-Level Efficiency Benefit Share*

1.1 The Route-Level Efficiency Benefit Share for Relevant Year t (“**O<sub>t</sub>**” or “**U<sub>t</sub>**” 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;
- $D_t$  means the Default Charge payable by the Train Operator in respect of the REBS Route for Relevant Year t;
- $V_t$  means the Variable Usage Charge payable by the Train Operator in respect of the REBS Route for Relevant Year t;
- $AV_t$  means 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 values of  $V_t$  and  $D_t$  under paragraph 1 of Part 2 and the corresponding provisions of each relevant train operator's access agreement) and the aggregate amounts payable under items 1 to 4 and 9 of the variable charge payable 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 items 1 to 4 and 9 of the variable charge under paragraph 2.2.1 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.

- 1.2 The Route-Level Efficiency Benefit Share (if any) calculated under paragraph 1.1 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 1.3 or 1.4. 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 1.3 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 1.4(b) in Relevant Year t+1, in respect of any 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*

- 1.3 The Train Operator may serve a notice, in the form set out in Appendix 7B, 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 1.4 applies, an Opt-out Notice may be served only before 1 July 2015.
- 1.4 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 1.4(a) and (b), the Opt-out Notice must be served within two months after:
- the date on which the Train Operator commences operating the services described in paragraph 1.4(a); or
  - the date of receipt of written confirmation from ORR under paragraph 1.4(b),
- as the case may be.
- 1.5 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.
- 1.6 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 Route-Level Efficiency Benefit Share*

- 1.7 If, pursuant to paragraph 1.1, a party is entitled to payment from the other of a Route-Level Efficiency Benefit Share in Relevant Year t, then, subject to paragraphs 1.2 and 1.8, 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.
- 1.8 If, in respect of any Relevant Year t, a Route-Level Efficiency Benefit Share is payable in accordance with paragraph 1.7 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 1.9) 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 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 Period, such 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 Period, such Period shall be included in the calculation of 'CP';
- (iii) if this contract commences on or before the fourteenth day of a Period, such Period shall be included in the calculation of 'CP'; and

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

1.9 Without prejudice to the generality of Clause 16.3.1, 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*

1.10 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<sub>t</sub> means the indexed Route Baseline in respect of Relevant Year t;

RPI<sub>t</sub> means the RPI published or determined with respect to the month of November in Relevant Year t; and

RPI<sub>2012</sub> means the RPI published or determined with respect to November 2012.

*Outperformance Cap and Underperformance Cap Indexation*

1.11 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 1.10 above; and

$RPI_{2012}$  has the meaning set out in paragraph 1.10 above.

### **PART 3A: NOT USED**

### **PART 4: NOT USED**

### **PART 5: NOT USED**

### **PART 6: SUPPLEMENTAL PROVISIONS**

Each invoice or credit note issued by Network Rail to the Train Operator shall contain or be accompanied by separate itemisation of the following charges and other information (as relevant) in respect of the period covered by the invoice or credit note:

(a) not used;

- (b) the rate of Variable Usage Charge and any Default Charge and the relevant number of Vehicle Miles applicable to vehicles for each service so charged;
- (c) not used;
- (d) not used;
- (e) not used;
- (f) not used;
- (g) the amount of any Efficiency Benefit Share in respect of Relevant Years ending on or before 31 March 2014;
- (h) not used;
- (i) not used;
- (j) the amount of any sum  $K_t$  payable as provided in paragraph 6 of Part 2; and
- (k) in respect of any other sums which have fallen due in accordance with any provisions of this contract, separately the amount payable in respect of each head of charge.

## **PART 7: FUTURE ACCESS CHARGES REVIEWS**

### **1 General**

ORR may carry out one or more access charges reviews of all or part of this contract as follows:

- (a) an access charges review 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; and
- (b) not used.

### **2 Not used.**

### **3 Interpretation**

In this Part 7, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

## APPENDIX 7A – REBS ROUTES TABLE

| <b>Route</b>      | <b>Route definition</b>   |
|-------------------|---|
| 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 7B – 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 1.3 of Part 3 to Schedule 7] or [paragraph 1.4 of Part 3 to Schedule 7]} to the contract.

**Table 1: REBS opt-out matrix**

| <b>Route</b>      | <b>Route definition</b>   | <b>Opt-out<br/>(please mark with an<br/>'x')</b> |
|-------------------|---|--|
| 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 7C – DEFAULT TRAIN CONSIST DATA

| <b>TRAIN SERVICE CODE</b> | <b>TYPE OF TRAIN MOVEMENT</b>                      | <b>DEFAULT TRAIN CONSIST DATA</b>   |
|---------------------------|--|-------------------------------------|
| 22238108                  | Train movement(s) between Fort William and Mallaig | Steam locomotive and 7 Mk 1 coaches |

## SCHEDULE 8: PERFORMANCE REGIME

### 1 Interpretation

#### 1.1 Definitions

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

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

**“Adjusted Train Operator Benchmark”** means the Train Operator Benchmark as adjusted in accordance with paragraph 8.1.7;

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

**“Applicable Timetable”** means, in respect of a day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D2.1.1 of the Network Code as at 22.00 hours on the day prior to that day, and which is applicable to the Service or other trains;

**“Cancellation”** means, in respect of any Service, the failure to operate at all and “Cancelled” shall be construed accordingly;

**“Charter Service Variation Sum”** means, in respect of paragraphs 3.4 and 4.4, the amount specified in Appendix 8A as the Charter Service Variation Sum;

**“Diversion”** means a Service which operates but which is diverted off its Planned route and for these purposes, running on different lines on the same route shall not constitute such a Diversion;

**“ETCS”** means the European Train Control System;

**“Failure to Stop”** means a Service which, whether or not it is the subject of a Diversion, fails to call at one or more of the intermediate stations at which it is Planned to call;

**“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

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|  | (b) the last such period shall end on the Expiry Date;   |
| <b>“Initial Indexation Factor”</b>                   | has the meaning ascribed to it in Schedule 7;  |
| <b>“Initial Planned Service Incident Cap Notice”</b> | has the meaning ascribed to it in paragraph 9.1.1;   |
| <b>“Interim Statement”</b>                           | means a written summary showing, in respect of Network Rail performance, the information required under paragraph 3.5 and, in respect of Train Operator performance, the information required under paragraph 4.5;   |
| <b>“Joint Cancellation Sum”</b>                      | means, in the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, the amount specified in Appendix 8A as the Joint Cancellation Sum for that Planned Service Cancellation;   |
| <b>“Minutes Delay”</b>                               | means the number of minutes of delay in respect of a Trigger of a Recording Point calculated in accordance with paragraph 5;   |
| <b>“Network Rail Annual Cap”</b>                     | means the Network Rail Annual Cap specified in Appendix 8A, as adjusted in accordance with paragraph 7 and paragraph 8.2 of this Schedule 8, save that in respect of the first and last Financial Year, the Network Rail Annual Cap shall be that specified in Appendix 8A, multiplied by the Adjustment Fraction; |
| <b>“Network Rail Benchmark” or “NRB”</b>             | means the Network Rail Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period, as specified in Appendix 8A;  |
| <b>“Network Rail Cancellation Sum”</b>               | means, in the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, the amount specified in Appendix 8A as the Network Rail Cancellation Sum for that Planned Service Cancellation;   |
| <b>“Network Rail Payment Rate”</b>                   | means, in respect of a Planned Service, the rate, expressed as pounds per NR Performance Minute, specified in Appendix 8A as the Network Rail Payment Rate for that Planned Service (as adjusted in accordance with paragraph 7);  |
| <b>“NR Performance Minute”</b>                       | has the meaning set out in paragraph 3.1;  |

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| <b>“Performance Sum”</b>                     | means an amount for which Network Rail or the Train Operator is liable under paragraphs 3 or 4 following a Period in relation to Minutes Delay in that Period and the preceding Periods, as adjusted in accordance with paragraph 8;   |
| <b>“Period”</b>                              | means each consecutive period of 28 days during the term of this contract commencing at 0000 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to seven days on reasonable prior notice from Network Rail to the Train Operator; |
| <b>“Planned”</b>                             | means entered into the Applicable Timetable;   |
| <b>“Planned Incident”</b>                    | means an incident described as such in paragraph 6.6;  |
| <b>“Planned Service”</b>                     | means a passenger carrying Service (excluding any Ancillary Movement) of the Train Operator under this contract which is entered in the Applicable Timetable;  |
| <b>“Planned Service Cancellation”</b>        | means the Cancellation or Termination of a Planned Service;  |
| <b>“Planned Service Incident Cap”</b>        | means, in respect of a Planned Service (and its associated Ancillary Movements) operated by or on behalf of the Train Operator, the Planned Service Incident Cap selected by the Train Operator in accordance with paragraph 9.1;  |
| <b>“Planned Service Incident Cap Notice”</b> | has the meaning ascribed to it in paragraph 9.1.2;   |
| <b>“Recording Point”</b>                     | means a location at which Network Rail records the times at which trains arrive, pass or depart that location;   |
| <b>“Recovery Time”</b>                       | means additional time incorporated into the Applicable Timetable to allow a train to regain time lost earlier in its journey as a result of a Restriction of Use;  |
| <b>“Relevant Year”</b>                       | has the meaning ascribed to it in Schedule 7;  |
| <b>“Restriction of Use”</b>                  | means any restriction of use of all or any part of the Network for the purposes of, or in connection with, inspection, maintenance, renewal or repair of the Network or any other works carried out in relation to the Network or any other railway asset or any other works in relation to it;          |
| <b>“RPI”</b>                                 | has the meaning ascribed to it in Schedule 7;  |

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| <b>“Service Characteristics”</b>               | means, in relation to any Service, the characteristics of that Service specified in any Train Operator Variation Request;   |
| <b>“Service Incident”</b>                      | means an incident which arises from, is caused by or results from a Planned Service or any of its associated Ancillary Movements;   |
| <b>“Termination”</b>                           | means, in respect of any Service, the operation of such train in such a way that it – <ul style="list-style-type: none"> <li>(a) fails to reach its Planned final destination station; or</li> <li>(b) commences at a point other than its Planned station start point and does not call at its Planned station start point</li> </ul> and which is not a Cancellation; |
| <b>“Third Party Train Cancellation”</b>        | means the Cancellation or Termination of any train excluding any Ancillary Movements and excluding any Planned Service;   |
| <b>“Third Party User”</b>                      | means the operator (including the Train Operator) of any train excluding any Ancillary Movements and excluding any Planned Service;   |
| <b>“Third Party User Cancellation Minutes”</b> | means, in respect of a Third Party Train Cancellation, the number of minutes specified in Appendix 8A as the Third Party User Cancellation Minutes;   |
| <b>“TO Performance Minute”</b>                 | has the meaning set out in paragraph 4.1;   |
| <b>“Train Mile”</b>                            | has the meaning ascribed to it in Schedule 7;   |
| <b>“Train Operator Annual Cap”</b>             | means the Train Operator Annual Cap specified in Appendix 8A, as adjusted in accordance with paragraph 7 and paragraph 8.2 of this Schedule 8, save that in respect of the first and last Financial Year, the Train Operator Annual Cap shall be that specified in Appendix 8A, multiplied by the Adjustment Fraction;  |
| <b>“Train Operator Benchmark” or “TOB”</b>     | means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period, as specified in Appendix 8A and adjusted in accordance with paragraph 8;   |
| <b>“Train Operator Payment Rate”</b>           | means, in relation to delay caused to a Third Party User, the rate, expressed as pounds per TO Performance Minute, specified in Appendix 8A (as adjusted in   |

accordance with paragraph 7);

**“Trigger”**

means the act of a train arriving at, passing or departing from a Recording Point;

**“Week”**

means a period of seven days beginning on Sunday and ending on the immediately following Saturday (both days inclusive), save that where that period of seven days would otherwise fall within two Periods (“Period A” and “Period B”) for the purposes of this Schedule each of the following shall constitute a Week –

- (a) Sunday to the last day of Period A (both days inclusive); and
- (b) the first day of Period B to the immediately following Saturday (both days inclusive).

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

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

- 2.1 In respect of Cancellation, this Schedule 8 shall only apply to any Planned Service Cancellation for which Network Rail is responsible or jointly responsible with the Train Operator and which occurs after 22:00 on the day before such Planned Service is due to run.
- 2.2 Each of the Train Operator and Network Rail shall use all reasonable endeavours to keep the other of them informed of any known or anticipated delay to, or Cancellation, Termination or Diversion of, Planned Services or any Ancillary Movements associated therewith.
- 2.3 Each of Network Rail and the Train Operator shall take reasonable steps to avoid and mitigate the effects of:
  - (a) any incidents upon the Planned Services; and
  - (b) any Service Incident affecting other trains.
- 2.4 Network Rail shall use recordings made using the Performance Monitoring System for the purposes of this Schedule 8 including the times at which the Services and other trains Trigger Recording Points. Where appropriate Network Rail may require the Train Operator, in respect of Services only, to make the relevant entry, to record such times on the Performance Monitoring System. Network Rail and the Train Operator shall each comply with and be bound by the provisions of the Performance Data Accuracy Code referred to in Part B of the Network Code and the provisions of that Code shall apply to this contract. Accordingly, the provisions of this Schedule 8 concerning the recording of train performance information or which refer to information regarding train performance (including references to the time at which a train Triggers a Recording Point), and the rights and remedies of the Train Operator in respect of the same, shall be subject to and interpreted in accordance with the provisions of that Code.
- 2.5 In respect of each Trigger of a Recording Point Network Rail shall use its reasonable endeavours to record separately, as unexplained delay, those minutes of delay of three minutes or more included in Minutes Delay for which it is unable to identify the incident(s) which caused that delay. The Train Operator shall co-operate with Network Rail on request by providing all such information as it has in its possession regarding the identification of the incident(s) which caused that delay.
- 2.6 All unexplained delay recorded in accordance with paragraph 2.5 shall, notwithstanding the provisions of paragraph 6.3(b) be allocated between the parties as follows –
  - (a) any Minutes Delay or Cancellation Minutes in respect of Service Incidents arising either off the Network or at stations at which the Train Operator's Services are Planned to call shall be included in the TO Performance Minutes; and
  - (b) any Minutes Delay to a Service or Planned Service Cancellation arising on the Network and which are not allocated to the Train Operator under this Schedule (including paragraph 2.6(a)) shall be included in the NR Performance Minutes.
- 2.7

- (a) Network Rail shall provide to the Train Operator through the Performance Monitoring System as soon as reasonably practicable, and in any event no later than the following Working Day, the information recorded or provided to it under paragraphs 2.4 or 2.5.
  - (b) the Train Operator shall be deemed to have agreed the information recorded by Network Rail and Network Rail shall be deemed to have agreed the information recorded by the Train Operator except, in either case, to the extent that it has, within two clear Working Days of the information being provided, notified the other that it disputes the information. Any such notification shall specify the reasons for the dispute, so as to assist resolution of the dispute. The parties shall endeavour to resolve each such dispute within two Working Days of its notification.
- 2.8 Within 5 Working Days of a Trigger occurring, Network Rail shall be entitled to re-allocate responsibility to the Train Operator for each minute of delay included in Minutes Delay where further information becomes available to Network Rail which would otherwise result in responsibility for the relevant incident being allocated to the Train Operator in accordance with paragraph 6.4. Paragraph 2.7(b) shall apply to the allocation of responsibility under this paragraph 2.8.
- 2.9 Network Rail shall have no liability to the Train Operator under the terms of this Schedule in respect of Minutes Delay to a Planned Service or a Planned Service Cancellation to the extent that it is caused, in either case, by that Planned Service being presented to Network Rail on the Network after the time Planned for such presentation. In such circumstances, Network Rail shall use its reasonable endeavours to facilitate the movement of the Planned Service as expeditiously as possible subject to
  - (a) any access rights which it may have granted to third parties; and
  - (b) any Restrictions of Use of the Network in the Applicable Engineering Access Statement or the Applicable Timetable Planning Rules.

### 3 Network Rail performance

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

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

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

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

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

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

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

where:

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

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

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

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

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

3.3 In the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, Network Rail shall, in respect of that Planned Service be liable to pay to the Train Operator

(in substitution for and to the exclusion of any liability under paragraph 3.4) the Network Rail Cancellation Sum. In the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, then in respect of that Planned Service Network Rail shall be liable to pay to the Train Operator (in substitution for and to the exclusion of any liability under paragraph 3.4) the Joint Cancellation Sum.

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

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

## 4 Train operator performance

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

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

where –

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

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

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

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

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

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

where:

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

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

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

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

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

4.4 If –

- (a) any service operated by a Third Party User is the subject of a Diversion or Failure to Stop but does not become a Third Party Train Cancellation for which Third Party User Cancellation Minutes are allocated to the Train Operator under paragraph 4.1; or
- (b) Network Rail has to postpone a Restriction of Use or has to keep open any part of the Network beyond the time at which such part of the Network is generally open to passenger carrying movements

due to a Service Incident for which the Train Operator is allocated responsibility under paragraph 6.4 and, as a result, Network Rail incurs additional costs which, but for the Service Incident it would not have incurred,

the Train Operator shall, in addition to any liability under paragraph 4.2, pay Network Rail the Charter Service Variation Sum in respect of the Planned Service provided that Network Rail shall have notified to and supplied the Train Operator with evidence (to its reasonable satisfaction) of such costs on or before the end of the Period following the Period in which such Service Incident occurred.

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

## **5 Calculation of minutes delay**

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

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

where –

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

A2 is the Planned time between such Triggers; and

B is any Recovery Time between such Triggers.

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

## **6 Allocation of responsibility**

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

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

- 6.5 Network Rail and the Train Operator shall be allocated joint responsibility for –
- (a) any incident caused by or in connection with any incident arising at or in a station which is not within the reasonable control of either party; or
  - (b) any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 6.3 or 6.4.
- 6.6 An incident in connection with a Restriction of Use shall be treated as a Planned Incident to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Applicable Timetable.

## 7 Payment terms and supplementary provisions

- 7.1.1 The aggregate of any and all sums for which each party is liable under this Schedule in relation to Planned Services which were Planned to depart from their point of origin during a Period shall be set off against each other and the balance, if any, shall be invoiced by Network Rail to the Train Operator or, as the case may be, shall be the subject of a credit note issued by Network Rail to the Train Operator within 14 days after the end of the Period and shall be payable within 28 days after the end of the Period.
- 7.1.2 In respect of any Financial Year, the aggregate liability of Network Rail to make balance payments to the Train Operator under paragraph 7.1.1 shall not exceed the Network Rail Annual Cap.
- 7.1.3 In respect of any Financial Year, the aggregate liability of the Train Operator to make balance payments to Network Rail under paragraph 7.1.1 shall not exceed the Train Operator Annual Cap.
- 7.1.4 Where any amount which is the subject of this Schedule is in dispute –
- (a) the undisputed amount shall be accounted for in accordance with paragraph 7.1.1 (and shall be subject to set off accordingly);
  - (b) the disputed balance (“disputed balance”) shall be accounted for in the calculations made under paragraph 7.1.1 for the Period in which the dispute is resolved or otherwise determined (and shall be subject to set off accordingly); and
  - (c) the disputed balance shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the date on which the disputed balance would but for such dispute have been due to be so accounted for until the date of such account.
- 7.2 In respect of the Financial Year commencing on 1 April 2014, on 1 April 2014 each of the Network Rail Payment Rate, Train Operator Payment Rate, Network Rail Annual Cap and Train Operator Annual Cap, Network Rail Cancellation Sum, Joint Cancellation Sum and the Charter Service Variation Sum shall be adjusted by multiplying them by the Initial Indexation Factor. In respect of the Financial Year commencing on 1 April 2015, and in respect of each subsequent Financial Year, on 1 April in each Financial Year, each of the Network Rail Payment Rate, Train Operator Payment Rate, Network Rail Annual Cap and Train Operator Annual Cap, Network Rail Cancellation Sum, Joint Cancellation Sum and the Charter Service Variation Sum respectively which in each case applied in the immediately preceding Financial Year shall be further adjusted by multiplying them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula:

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

where –

- (a)  $\text{RPI}_{t-1}$  means the RPI published or determined with respect to the month of November in relevant Year t-1; and; and

(b)  $RPI_{t-2}$  means the RPI published or determined with respect to the month of November in Relevant Year t-2..

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

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

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

#### 8.1.1 In this paragraph 8:

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

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

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

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

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

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

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

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

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

#### 8.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2012/2013, as specified in Appendix 8A, unless it is adjusted in accordance with paragraph 8.1.3(b).
- (b) If, in accordance with paragraph 8.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year t+1 and (ii) each subsequent Financial Year until any further adjustment is made to the Train

Operator Benchmark in accordance with paragraph 8, shall be the Actual Mileage  $t$  for the Financial Year  $t$  in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

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

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

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

8.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from

Network Rail required to be provided pursuant to paragraph 8.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determination under paragraph 8.1.5(a)(iv).

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

8.1.7 The Train Operator Benchmark in respect of each Period within the Financial Year immediately following Financial Year t ("**Financial Year t+1**") and,

subject to paragraph 8.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

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

where:

ATO B means the Adjusted Train Operator Benchmark;

TO B means the current Train Operator Benchmark;

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

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

C F is 1.044 (being the “congestion factor”).

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

8.1.9 If a reference is made to a relevant ADRR Forum in accordance with paragraph 8.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the relevant ADRR Forum makes its determination pursuant to paragraph 8.1.6(c). Following the relevant ADRR Forum’s determination pursuant to paragraph 8.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the Adjusted Train Operator Benchmark as determined, as the case may be, by (i) the relevant ADRR Forum or (ii) following the relevant ADRR Forum’s determination pursuant to paragraph 8.1.6(c), the parties in accordance with this paragraph 8.

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

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

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

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

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

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

- (a) prior to 1 April 2015; and
- (b) thereafter only if the total number of Train Miles operated by the Train Operator during Financial Year t or the Baseline Annual Train Mileage is 1,000,000 or greater.

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

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

## 8.2.3

- (a) The Baseline Annual Train Mileage that shall apply from 1 April in each Financial Year shall be the total number of Train Miles operated by the Train Operator during the Financial Year commencing on 1 April 2013 and ending on 31 March 2014, unless it is adjusted in accordance with paragraph 8.2.3(b).
- (b) If, in accordance with paragraph 8.2.2(b), Network Rail determines that there has been an Annual Train Mileage Variation, then the Baseline Annual Train Mileage for Financial Year t+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Train Mileage pursuant to this paragraph 8.2.3(b) shall be the Annual Train Mileage for the Financial Year t in which the Annual Train Mileage Variation has occurred.

8.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be

provided pursuant to paragraph 8.2.2, the parties shall endeavour to agree whether the Network Rail Annual Cap and/or the Train Operator Annual Cap should be adjusted in accordance with this paragraph 8.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2 shall be subject to the prior approval of ORR.

- 8.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap, the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.
- 8.2.6 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, either:
- (i) the parties fail to reach agreement; or
  - (ii) prior to the expiry of that 56 day period both parties agree that agreement is unlikely to be reached prior to the expiry of that period,
- the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine the matter. The parties agree to abide by any determination issued by ORR.
- 8.2.7 Any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap shall take effect only when it has been approved by ORR and, unless otherwise specified by ORR, any such adjustment shall take effect from 1 April in Financial Year t.
- 8.2.8 Promptly following any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:
- (a) any invoices and credit notes already issued; and
  - (b) any payments already made in respect of Performance Sums,
- in each case relating to the Periods in Financial Year t+1.
- 8.2.9 Any statement issued by Network Rail pursuant to paragraph 8.2.8 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 7.1.

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

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

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

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

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

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

| Planned Service Incident Cap    | Planned Service Incident Cap Access Charge Supplement Rate (£ per Train Mile operated in a Period, 2012/13 prices) |
|---------------------------------|--|
| 93 minutes                      | 0.28   |
| 147 minutes                     | 0.22   |
| 500 minutes                     | 0.12   |
| 1,000 minutes                   | 0.09   |
| 5,000 minutes                   | 0.03   |
| No Planned Service Incident Cap | None   |



## 10 ETCS Amendments

### 10.1

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

### 10.2

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

### 10.3

- (a) If ORR:
  - (i) receives a notification under paragraph 10.2(d); or
  - (ii) proposes to make ETCS Amendments itself,then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments it shall:
  - (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments; and

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

## APPENDIX 8A

Service Variation Sum: £600.99

Joint Cancellation Sum: £914.73

Network Rail Cancellation Sum: £1,829.47

Network Rail Payment Rate: £19.29 per NR Performance Minute

Network Rail Annual Cap: £547,000

Network Rail Benchmark (NRB): the NRB in relation to a Period shall be 2.45 Minutes Delay per 100 Train Operator Miles

Train Operator Payment Rate: £12.59 per TO Performance Minute

Train Operator Annual Cap: £547,000

Train Operator Benchmark (TOB): subject to adjustment in accordance with paragraph 8, the TOB in relation to each Period shall be 0.40 Minutes Delay per 100 Train Operator Miles

Third Party User Cancellation Minutes: 35 minutes

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

## **SCHEDULE 9: LIMITATION ON LIABILITY**

### **1 Definitions**

In this Schedule

“Liability Cap” means:

- (a) the sum of £3M; and
- (b) not used.

### **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 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 seven 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 seven 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 either 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:

- “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) 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;

|  |   |
|--|---|
| <b>“notice of procedural modification”</b> | 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;   |
| <b>“ORR’s criteria”</b>                    | 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;  |
| <b>“relevant notice”</b>                   | means a modification notice, notice of determined requisite adaptations, notice of procedural modification or notice of modification of ORR’s criteria;   |
| <b>“requisite adaptations”</b>             | 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 |
| <b>“specified”</b>                         | means specified in a modification notice.   |

**IN WITNESS** whereof the duly authorised representatives of Network Rail and the Train Operator have executed this contract on the date 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  
**WEST COAST RAILWAY COMPANY LIMITED**