



## **2018 periodic review**

**Implementing PR18: conclusions  
to consultation on changes to  
access contracts**

February 2019

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# 1. Introduction

- 1.1 The purpose of this document is to set out our conclusions to our July 2018 consultation on how we proposed to implement our 2018 periodic review (PR18) decisions in track and station access contracts.

## Background

- 1.2 PR18 is the process through which we determine what Network Rail<sup>1</sup> should deliver in respect of its role in operating, maintaining and renewing its network in control period 6 (CP6)<sup>2</sup> and how the funding available should be best used to support this. This feeds through into:
- the service that passengers and freight customers receive and, together with taxpayers, ultimately pay for; and
  - the charges that Network Rail's passenger, freight and charter train operator customers will pay for access to its track and stations during CP6.
- 1.3 On 31 October 2018, we published our final determination on PR18 (available [here](#)), setting out our overall decisions. Many of these decisions affect provisions in access contracts (such as the access charges and compensation/incentive arrangements). As such, these contracts need to be amended to implement our decisions.
- 1.4 In July 2018, we consulted<sup>3</sup> on the changes that we considered were necessary or expedient to make to the standard provisions in track<sup>4</sup> and station access contracts to implement PR18 with effect from 1 April 2019. These changes were based on our proposed overall decisions as set out in our June 2018 [draft determination](#), which we were at that time consulting on. The July 2018 consultation also:
- reflected our conclusions to our January 2018 consultation on improvements to the drafting of certain track access contract provisions<sup>5</sup>; and
  - consulted on a contingency arrangement to manage the scenario where the statutory implementation process for PR18 (or a future periodic review) is

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<sup>1</sup> All references to Network Rail in this document are to Network Rail Infrastructure Limited.

<sup>2</sup> CP6 will run from 1 April 2019 to 31 March 2024.

<sup>3</sup> Implementing PR18: Consultation on changes to access contracts, ORR, July 2018, available [here](#).

<sup>4</sup> This includes changes to the Traction Electricity Rules that are incorporated into most track access contracts. The track access contracts within scope for PR18 implementation are those that contain an access charges review reopener in Schedule 7 (this is normally set out under the heading "Future access charges reviews" or, in freight contracts, "Freight Charging Review").

<sup>5</sup> Consultation on improvements to the drafting of Schedules 4, 7 and 8 of the passenger and freight model track access contracts, ORR, January 2018, available [here](#). The conclusions are available [here](#).

delayed (e.g. if Network Rail exercised its right to object to our overall PR18 decisions).

1.5 We received five responses to our July 2018 consultation, from: Network Rail, DB Cargo, First Greater Western, Freightliner Group and West Coast Trains. We are grateful to these parties for their responses.

1.6 This document:

- concludes on the July 2018 consultation, and discusses the main points raised by stakeholders in response;
- discusses any other material differences from our July 2018 consultation, in terms of the final changes that will be implemented in access contracts from 1 April 2019 onwards (discussed further below) and any other material matters arising.

1.7 It is structured as follows:

- Chapter 2 discusses contingency arrangements to manage a scenario where PR18 implementation is delayed;
- Chapter 3 discusses broadly common drafting changes relating to **franchised, freight and open access** track access contracts to implement PR18. Subsequent chapters then discuss the changes that are specific to:
  - **franchised and open access passenger operators** (Chapter 4); and
  - **freight train operators** (Chapter 5);
- Chapter 6 sets out the main changes relating to the drafting of **charter train operators'** track access contracts to implement PR18;
- Chapter 7 sets out the changes relating to **station access contracts** for which Network Rail is the facility owner or lessor (with the exception of those with full repairing and insuring leases, as Network Rail does not have responsibility for maintenance, repair or renewal for these); and
- Chapter 8 discusses how we implemented our decisions on variable usage charges for two track access contracts with bespoke arrangements (North Yorkshire Moors Railway Enterprises and West Coast Railway Company (Jacobite services). This has implications for any 'New Specified Equipment' operated in CP6.

## Next steps in the implementation process

1.8 The process for implementing the changes to access contracts to implement our PR18 final determination is via a series of notices issued under Schedule 4A of the Railways Act 1993. On 20 December 2018, we issued our ‘review notices’, which are the first set of notices. The review notices are available from the following links:

- [Review notice: Charter Operator Track Access Agreements](#);
- [Review notice: Franchised Passenger Track Access Agreements](#);
- [Review notice: Freight Customer Track Access Agreements](#);
- [Review notice: Freight Operator Track Access Agreements](#);
- [Review notice: Open Access Passenger Operator Track Access Agreements](#);
- [Review notice: Station Long Term Charges](#); and
- [Review notice: Traction Electricity Rules](#).

1.9 The review notices set out the detailed changes that would be applied to affected track and station access contracts from 1 April 2019, pending the completion of the implementation process. These changes reflect our conclusions to our July 2018 consultation. In particular, the notices:

- reflect the new CP6 model terms for track access contracts, along with – where appropriate to specific contracts – any relevant bespoke arrangements currently in place that should continue into CP6<sup>6</sup>;
- implement the outcome of the recalibration process followed for PR18, including changes to the Schedule 4 and 8 parameters specific to each train operator and changes to parameters for traction electricity charges<sup>7</sup>; and
- provide for Network Rail’s CP6 price lists to apply from 1 April 2019<sup>8</sup>.

1.10 The notices also gave Network Rail until 7 February 2019 to decide whether to object to any of the changes set out in the review notices. In January 2019, it advised us that it accepted the changes and would not be objecting. Accordingly, the next steps in the process are for us to:

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<sup>6</sup> We carried out a process to identify existing bespoke provisions and decide whether these should continue into CP6. This is described further in paragraphs 1.8 to 1.11 of our [July 2018 consultation](#).

<sup>7</sup> For more information, see our ‘2018 periodic review final determination: supplementary document – overview of charges and incentives decisions’, ORR, June 2018, available [here](#).

<sup>8</sup> Network Rail published these on 20 December 2018. The price lists are available [here](#).

- issue ‘notices of agreement’, confirming that Network Rail has accepted, and providing those that hold a track or station access contract with Network Rail with 28 days in which to decide whether to give notice that they wish to terminate their contract (i.e. if they are not content with the proposed changes to their contracts). We did this on 8 February 2019; and
- after the elapse of this 28 day period (in March 2019), to issue ‘review implementation notices’ confirming the proposed changes set out in our review notices and directing the parties to the relevant access contracts to enter into supplemental agreements to confirm that they have made the changes to their contracts.

1.11 Further detail on the statutory process for implementing PR18 is set out in Appendix A of our [July 2018 consultation](#).

## Further steps in the implementation process

1.12 As well as the notices that we issue to implement PR18, we will also be publishing:

- CP6 versions of our model track access contracts, reflecting the CP6 provisions inserted into existing track access contracts through the implementation process; and
- revised versions of our [track access guidance](#), to reflect the arrangements for CP6.

1.13 We will also be publishing our conclusions to our December 2018 consultation on implementing the infrastructure cost charge for open access operators<sup>9</sup>.

1.14 Remaining key milestones relating to PR18 implementation are set out in Table 1.1 below.

## Other matters relating to implementation of PR18

1.15 Alongside our July 2018 consultation document, we consulted also on changes to Network Rail’s network licence ([here](#)), to implement PR18 and also wider changes to reflect Network Rail’s devolved structure. We concluded on this consultation on 31 October 2018<sup>10</sup> and, after further development of the detailed licence drafting, on 20 December 2018, we issued a statutory consultation on proposed modifications to Network Rail’s network licence (available [here](#)). Subject to the outcome of that

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<sup>9</sup> ‘Open access infrastructure cost charge implementation’, ORR, December 2018, available [here](#).

<sup>10</sup> ‘2018 periodic review final determination – review of network licence: conclusions from consultation’, ORR, October 2018, available [here](#).

consultation, the modifications to the network licence will take effect from 1 April 2019.

**Table 1.1: Remaining milestones relating to the implementation of PR18**

Date	Milestone
<b>8 February 2019</b>	Publication of our 'notices of agreement', confirming that Network Rail has accepted the changes arising from our PR18 final determination. These notices give train operators 28 days in which to terminate their access contracts, as required by law.
<b>11 March 2019</b>	We issue our 'review implementation notices', confirming that the review will be implemented on 1 April 2019.
<b>28 February 2019</b>	Deadline for us to approve the grant mechanism in the track access contracts of franchised train operators in England & Wales, as set out in the 31 January 2019 letter of grant between the Secretary of State and Network Rail. If we decide not to approve the mechanism, we will determine the mechanism by 31 March 2019. (See paragraphs 4.54-4.66 for further details.)
<b>End of March 2019</b>	We determine the grant mechanism in the track access contracts of Scottish franchised train operators (and, if necessary, the mechanism for franchised train operators in England & Wales). See paragraphs 4.54-4.66 for further details on this.
<b>End of March 2019</b>	Holders of relevant access contracts enter into supplemental agreements to confirm that they have applied the changes set out in our review notices (as directed by the review implementation notice).
<b>End of March 2019</b>	We publish our conclusions to our consultation on implementing the infrastructure cost charge for open access operators.
<b>End of March 2019</b>	We publish an updated version of Network Rail's network licence, reflecting the modifications made following our statutory consultation of 20 December 2018.
<b>1 April 2019</b>	CP6 begins. Changes to train operators' access contracts, including new access charges take effect.
<b>By 31 October 2019</b>	ORR determines the Schedule of Baseline Timetabled Traffic (relating to franchised train operators), following Network Rail consulting train operators on the proposed baselines and submitting a schedule of these to ORR.



## 2. Contingency arrangements for a delay to the implementation of PR18

### Overview

This chapter sets out the outcome of our proposals regarding contingency arrangements for managing the consequences of a delay to PR18 implementation.

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### Introduction

- 2.1 Our July 2018 consultation set out contingency arrangements to cover the scenario where there is a delay to the statutory implementation of PR18. Such a delay might arise if, for example, Network Rail were to object to our PR18 review notices or if any party sought to challenge the notices through judicial review. This might lead to us referring our final determination to the Competition & Markets Authority (CMA) for it to decide the matter.
- 2.2 As most of the CP5 track access charges and the parameters in Schedules 4 and 8 will expire on 31 March 2019, a delay to implementation would mean that parts of the contracts would stop working effectively and Network Rail would not have the funding it needs to continue to operate its network.

### The contingency arrangements

- 2.3 As we said in July 2018, the contingency provision would (in the event of a delay) provide for:
- track access contracts to apply ORR's proposed changes (i.e. the ones that Network Rail had objected to) on an interim basis; and
  - once the periodic review process has been duly concluded and formally implemented (e.g. following a reference to the CMA), the final set of changes to track access contracts (including access charges) would take effect and either confirm or supersede the interim arrangements.
- 2.4 There would then be a retrospective adjustment, reflecting that the final set of changes to access contracts would be applied from the beginning of the new control period (including any access charges). Network Rail and train operators would therefore end up in the same financial position as they would have been in had the final settlement been applied in the first place.
- 2.5 As noted in July 2018, this approach is essentially the same as the one for PR08 and PR13.

## Summary of stakeholder views

2.6 There were no objections to our proposal, though two points were raised by respondents:

- (a) it was queried whether the protections in franchise agreements (e.g. under Clause 18.1/ Schedule 9) would apply if the contingency arrangement was triggered; and
- (b) it was suggested that we should include a dispute resolution provision to allow the train operator to contest the amount of any adjustment payment following the implementation of the final set of access charges.

## Outcome

2.7 On 27 November 2018, we wrote to Network Rail and train operators confirming that there had been no objections and asking that they amend their contracts to include the contingency arrangement<sup>11</sup>. In our letter we confirmed in respect of point (a) above that the Department for Transport and Transport Scotland had confirmed to us that they would apply the protections. We also said that we had included a dispute resolution provision in line with the proposal made by some consultees (based on existing provisions elsewhere in the model track access contracts).

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<sup>11</sup> 'Contingency arrangements for a delay to the statutory implementation of the 2018 periodic review (PR18), ORR', November 2018, available [here](#).

# 3. Changes affecting franchised, freight and open access track access contracts

## Overview

This chapter sets out the outcome of our July 2018 consultation in respect of the broadly common drafting changes that we proposed should be made to franchised, freight and open access track access contracts to implement PR18. The subsequent two chapters then discuss the changes that are specific to certain types of train operator.

Some of the points set out in this chapter also apply to charter train operators; we have indicated in Chapter 6 on charter contracts what these are.

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## Introduction

- 3.1 This chapter discusses the decisions that we made, following the July 2018 consultation and final determination, regarding broadly common changes to the track access contracts of franchised, freight and open access passenger operators. In particular, it covers, the following:
- A. contingency arrangements for the implementation of future periodic reviews;
  - B. indexation provisions;
  - C. removal of the capacity charge and route-level efficiency benefit sharing mechanism (REBS); and
  - D. changes relating to traction electricity, in particular the Traction Electricity Rules and related changes to Schedule 7.

## A. Contingency arrangements for subsequent periodic reviews

- 3.2 In Chapter 2, we set out the outcome of our consultation on the contingency arrangements for dealing with the scenario that PR18 cannot be implemented on 1 April 2019 as planned. In November 2018, we asked Network Rail and train operators to include the contingency arrangement in their track access contracts ahead of PR18 implementation.
- 3.3 In our July 2018 consultation, we noted that PR18 was the third periodic review in which we have asked Network Rail and train operators to amend their track access contracts to include such a contingency provision. Given the likely need for it in future, we proposed that the provision should be made a standard clause in the new CP6 model versions of Schedule 7.

## Summary of stakeholder views and outcome

- 3.4 There were no objections to the contingency provision being made a standard clause in track access contracts.
- 3.5 Accordingly, the contingency provision has been included in our review notices (albeit with some minor drafting improvements from the version we consulted on). As such, the provision will be in all existing track access contracts from 1 April 2019 and will be a model clause in CP6 for all relevant future track access contracts.
- 3.6 The provision is set out in paragraph 4 of Part 7 of Schedule 7 of franchised, open access and charter passenger track access contracts, and paragraph 3 of the Schedule 7 for freight track access contracts.

## B. Indexation

### The switch from RPI to CPI

- 3.7 In CP5, Network Rail's regulatory asset base (RAB), access charges, and payment rates in other mechanisms where we set the method of indexation, are indexed using the retail prices index (RPI) measure of inflation. Following earlier consultations, our draft determination set out our proposed decision to use the consumer price index (CPI) instead and we confirmed this in our final determination<sup>12</sup>.
- 3.8 The drafting that we published with our July 2018 consultation set out proposed changes to Schedules 4, 7, 8 and 9 that would give effect to this decision. However, as set out in our consultation, we said that we would not apply CPI indexation to:
- indexation provisions for pre-existing facility charges (see below); and
  - network grant amounts referred to in Schedule 7, as the governments specified these in cash prices meaning they should not be indexed in the contract.

### Stakeholder views

- 3.9 In its response, Network Rail said that it estimated that variable charges would be around £80m lower over CP6 because of the change to CPI. This is because CPI is around one percentage point lower than RPI.
- 3.10 First Greater Western noted that adopting CPI would create inconsistency with the indexation approach in franchise agreements.

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<sup>12</sup> See chapter 8 of our final determination overview document (available [here](#)) and chapter 2 of our supplementary document on the financial framework (available [here](#)).

## Our response

- 3.11 We note Network Rail's point about lower variable charges. We have made an adjustment to most track access charges for CP6 to reflect this point as we said there should not be a significant direct impact on Network Rail from this change. This is explained further below and in more detail in our final determination supplementary document '[Overview of charges and incentives decisions](#)'.
- 3.12 We note First Greater Western's point, but as this consultation is about implementing our policy decisions, we have not addressed issues relating to our policy here. Our rationale regarding the CPI change (and responses to consultation issues previously raised) is discussed more fully in our final determination and preceding consultations.
- 3.13 Our final determination confirmed the proposed approach we set out in our draft determination, and we have reflected this in our review notices, albeit that:
- in addition to applying this change to liability caps in Schedule 9, we have also updated the indexation provisions for the liability cap in clause 11.6.5 of freight track access contracts; and
  - in applying this change to liability caps in existing contracts, we have had to include a transitional provision.
- 3.14 The need for this transitional provision reflects that the original liability cap in each contract would have been agreed in the price base of the year that it was entered into. Since then, the level of the cap will have been uplifted annually using RPI. As such, if we had made a simple adjustment to the formula (from RPI to CPI), this would have affected the historical indexation from the start of the contracts to 2017-18 (the price base of our final determination). That is, CPI would be used to uplift from the original cap level to the value in 2017-18 (rather than from 2017-18 onwards). This would have had the effect of deflating the cap in real terms, which was not our policy intention.
- 3.15 Accordingly, the transitional provision provides for the indexation of the original cap using RPI until 2017-18, but provides that subsequent uplifts will use CPI. Note that this transitional provision is not required in new contracts or those agreed after 2017-18.

## Adjustments in respect of the switch to CPI indexation

- 3.16 In our consultations on the PR18 financial framework, we considered whether we should make an upward adjustment to opening levels of track access charges in CP6 in light of lower expected indexation increases under CPI compared to RPI during CP6.

- 3.17 We concluded as part of our final determination that for most charges, there should be an adjustment in order to make the change neutral in terms of the total charges paid/received over CP6<sup>13</sup>. However, we said that this RPI/CPI differential adjustment should not be applied to those charges that are being capped (e.g. for freight and charter operators<sup>14</sup>). Accordingly, this upward adjustment has only been applied to the rates of relevant train operators starting values on Network Rail's Track Usage Price List.
- 3.18 Indexation formulae in the contracts have been changed to use CPI in CP6 (other than for existing facility charges, as set out below). However, the formulae for those charges for which the rates have been capped and phased are slightly different to the indexation formulae of other charges. This is because the price lists set out different rates for each year of CP6, rather than having a single rate for the whole of CP6. A slightly different formula for capped and phased charges is required to cater for this<sup>15</sup>.

## Values used in indexation provisions

- 3.19 In our July 2018 consultation, we noted that while the indexation provisions in the current (CP5) track access contracts all refer to RPI values, the time periods referred to and the methods used to calculate the values, are not consistent across different types of track access contract. For example, some formulae compare the values of the RPI index for the month of November in different years (passenger contracts), whereas others refer to values in the first month in contract years (liability caps) or average values for calendar years (freight).
- 3.20 So, in our July 2018 consultation, we asked stakeholders whether we should implement a consistent approach for CPI indexation formulae in CP6 track access contracts and, if so, which of the existing variations we should use.

## Summary of stakeholder views and our response

- 3.21 DB Cargo supported the adoption of a consistent CPI formula across all track access contracts. It considered that the approach currently used in Schedule 7 of the freight track access contract should be applied to other contracts. It noted that this approach used yearly averages and as such reduced the possibility of significant volatility. Freightliner Group made a similar point.

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<sup>13</sup> Details on the indexation of charges in CP6 are outlined in our 'Charges and incentives decisions document' (available [here](#)).

<sup>14</sup> For the purposes of this issue, North Yorkshire Moors Railway Enterprises and West Coast Railway Company (Jacobite services) were treated as being charter operators for the purposes of this capping and phasing (as discussed in our draft and final determination documents).

<sup>15</sup> Our review notice for open access passenger operators contained an error regarding the application of the correct formulae for North Yorkshire Moors Railway Enterprises and West Coast Railway Company (Jacobite services). As such, the indexation formulae did not include the appropriate indexation for capped and phased charges. We have contacted the parties concerned to propose how to correct this.

- 3.22 Network Rail also supported the adoption of a consistent approach. However, it noted that some train operators were likely to prefer to retain their existing arrangements, as these may be linked to other commercial arrangements such as franchise agreements.
- 3.23 We note the points raised. We are mindful that we proposed some changes to the indexation formulae in PR13, which among other things would have provided greater consistency across all contracts. That proposal led to substantial concern from a number of train operators (both freight and passenger). Given this, and the fact we only received a few responses to our July 2018 consultation on this issue (and none from passenger operators), we concluded that it would be better not to introduce a consistent formulae approach for CP6.
- 3.24 However, this is something that could be further considered during CP6 (for application in the following control period). For example, if Network Rail seeks views on contractual reform and drafting improvements (as it did in November 2017), this issue could be reviewed as part of that.

## **Indexation of facility charges**

- 3.25 In our July 2018 consultation, we noted that several track access contracts contained facility charges. Given that these reflect commercial arrangements previously agreed between Network Rail and train operators (such as in respect of investments), we proposed not to change the method of indexation for these. Stakeholders did not object to this and our review notices provide for the existing indexation arrangements for these charges to remain in place.

## **Other comments raised by stakeholders and our response**

- 3.26 In the proposed CP6 provisions that we published with our July 2018 consultation, the initial indexation factor<sup>16</sup> used CPI. In its consultation response, Network Rail said that this was inconsistent with the approach taken for CP5. Its view was that to appropriately reflect the use of RPI to index charges in CP5, the initial indexation factor should use RPI, rather than CPI. It said that the use of CPI in the initial indexation factor would mean that variable charges would be around a further £70m lower over CP6, than they would otherwise be if RPI had been used for this. However, Network Rail recognised that that this was a policy decision that we had made.
- 3.27 We note Network Rail's point. But we think that once we have decided on the level of a charge at a point in time, it should be adjusted for inflation from that point in time, by the most appropriate inflation index, which for PR18 we think is CPI. The reduction

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<sup>16</sup> The initial indexation factor uplifts access charges on the price lists and financial parameters from 2017-18 prices (the price base of the final determination) to the price base of the first year of CP6.

in variable charges that Network Rail mentions is offset by higher fixed charges as explained in our PR18 final determination supplementary document on the financial framework.

## C. Removal of capacity charge and the route-level efficiency benefit sharing mechanism

3.28 In our July 2018 consultation, we said that the capacity charge and the route efficiency benefit sharing (REBS) mechanism provisions would be removed from Schedule 7. This reflected our previous policy decisions that these arrangements should not apply in CP6.

3.29 However, we said that transitional arrangements would need to be included. This is because the sums relating to these provisions for the year ending 31 March 2019 would remain to be calculated and paid following the start of CP6. Reflecting this, we set out transitional provisions referring to the terms of the access contracts in place up to the end of 31 March 2019.

3.30 We also said that we would remove the now redundant transitional provision for the 'efficiency benefit sharing' (EBS) mechanism that was in place during control period 4 (CP4, 2009-2014). This provision enabled payments to be made during CP5 for the year ending 31 March 2014, after we deleted the EBS mechanism as part of PR13.

### Summary of stakeholder views

3.31 Network Rail was generally supportive of our contractual drafting on the removal of both the capacity charge and REBS. However, it proposed some drafting changes. In particular:

- regarding the removal of the capacity charge, Network Rail suggested reintroducing in the contract for both freight and open access operators (OAOs) a provision stating that, if the capacity charge wash-up for the relevant year ending 31 March 2019 is a positive amount, then the train operator shall pay as soon as practicable;
- Network Rail asked us to amend the contract for franchised passenger operators, freight and OAOs to clarify that the provision of Schedule 7 relating to both the calculation and payment of any REBS will continue to apply in respect of the relevant year ending 31 March 2019;
- similarly, in relation to the retained REBS wording, Network Rail suggested that we add to Schedule 7 in franchised passenger operators' contracts a reference to Appendix 7A and 7B for consistency with our changes to the freight contract.



## Our response

3.32 In relation to all three points above, we accepted Network Rail's suggestions, and have included wording to be clearer on how the transition arrangements will work, and that the charges incurred prior to 1 April 2019 remain liable to be paid when invoiced during CP6.

## D. Changes to the Traction Electricity Rules and related changes to Schedule 7

3.33 The Traction Electricity Rules (TERs) set out the framework for charges relating to traction electricity, including on-train metering. The TERs also include the parameters for regenerative braking discounts and distribution system loss factors that apply to metered services.

3.34 At the start of CP5, the TERs were incorporated into franchised passenger and freight track access contracts. Since then, they have been incorporated into three open access passenger operators' contracts<sup>17</sup>.

3.35 This section discusses drafting changes to the TERs and related changes in Schedule 7 of the track access contract that are common to franchised, freight and open access operators.

### Deletion of defunct transitional risk sharing mechanism text

3.36 In our July 2018 consultation, we said we would delete defunct text in the TERs relating to the application of the transitional risk sharing mechanism for the year ending 31 March 2014 (paragraph 18A.1).

3.37 There were no objections from consultees to this change. Our review notice provides that this change will be applied to the TERs from 1 April 2019.

### Removal of power factor correction provisions

3.38 In its July 2017 consultation<sup>18</sup>, Network Rail sought views on (among other things) removing the power factor correction provisions from traction electricity charges for metered trains. This was on the grounds that the provisions were not currently used in practice (or used previously).

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<sup>17</sup> As set out in Chapter 4, we have taken a decision that the standard traction electricity provisions (including the TERs) should apply to open access passenger contracts that contain access rights to use electrified network, unless there are specific bespoke arrangements.

<sup>18</sup> Network Rail consultation on variable and station charges in CP6', Network Rail, July 2017, available [here](#).

3.39 Following consideration of stakeholder responses, Network Rail concluded on these issues in May 2018<sup>19</sup>, confirming its proposed approach.

3.40 The proposed contractual drafting that we consulted on in July 2018 reflected Network Rail's conclusions that these provisions be removed. However, we stated that we would make our final decision on whether to confirm this change once Network Rail had formally written to us on this in line with the agreed process relating to recalibration of variable charges.

3.41 Accordingly, in its [letter](#) to us of 9 November 2018, Network Rail asked that we approve (among other things) its decisions to remove the power factor correction provisions from the TERs.

## Our decision

3.42 In our 22 November 2018 [response](#) to Network Rail's letter, we confirmed that we would remove the power factor correction provisions from the TERs. This has been reflected in our Traction Electricity Rules review notice and we have also made consequential changes to Schedule 7.

## Meter tolerance factors

3.43 In our July 2018 consultation, we proposed that the provisions in the TERs relating to the accuracy tolerance of on-train meters be removed for CP6 (along with associated provisions in Schedule 7 of franchised passenger and freight contracts). This was on the basis that, like the power factor correction provisions, it was unlikely that these would be needed in future.

3.44 We therefore proposed to remove the tolerance factor provisions in the TERs (principally in paragraphs 11, 12 and 13 and in Appendix 4) and Schedule 7 of freight and franchised track access contracts.

## Summary of stakeholders' views

3.45 We received two responses on this, from Network Rail and First Great Western. They both supported the proposal to remove the meter tolerance factor provisions. Separately, Network Rail also formally requested in its letter of 9 November 2018 that we remove these provisions.

## Our decision

3.46 In our 22 November 2018 [letter](#) to Network Rail, we confirmed that we would remove the meter tolerance factor provisions from the Traction Electricity Rules. This change

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<sup>19</sup> Network Rail's conclusions on variable charges and station charges in Control Period 6 (CP6), May 2018. Accessible [here](#)

is reflected in the changes that will be applied to the TERs and model Schedule 7 provisions from the start of CP6.

## Recalibration of parameters in the TERs

3.47 In Network Rail's letter of 9 November 2018, it asked us to approve the outcome of the recalibration process that it carried out for:

- the distribution system loss factors (DSLFFs) used for calculating the charges that apply to metered services (the DSLFFs are set out in Appendix 3 of the TERs); and
- the regenerative braking discount rates for non-metered electrified services (set out in paragraph 15 of the TERs).

3.48 Our response to Network Rail of 22 November 2018 (see above) confirmed that we had approved these. Our Traction Electricity Rules review notice provides for these parameters to be updated in the TERs from 1 April 2019 onwards.

## Hybrid trains

3.49 In December 2016, Network Rail consulted the Traction Electricity Steering Group on proposed wording in Schedule 7 of passenger and freight track access contracts to cater for the use of hybrid (i.e. bimodal electric and diesel) rolling stock on the network. With the exception of some minor drafting changes, the group agreed the proposed wording. This has since been used for some train operators via a specific amendment to their track access contracts.

3.50 In July 2018, we proposed to incorporate the provisions for hybrid trains into the model franchised passenger and freight Schedule 7 so that these are available for any train operator to use them in CP6. The intention being to avoid train operators having to seek an amendment later, which would require our approval.

## Summary of stakeholder views

3.51 Network Rail welcomed our proposal to incorporate the provisions for hybrid trains into the model passenger and freight Schedule 7. It also made some minor drafting suggestions. No other stakeholder made a material comment on this proposal.

3.52 Network Rail also suggested that we include the same provisions in the model contract for charter and open access operators. However, Network Rail noted that it thought that it was unlikely that open access or charter operators would run bimodal units in CP6.

## Our decision

3.53 In light of the responses, we confirm our proposal. This applies to freight, franchised and open access passenger contracts containing the standard traction electricity provisions. We have also taken on board other minor drafting amendments that Network Rail suggested.

3.54 We note Network Rail's suggestion about including the provisions in the charter track access contracts. However, we decided that we should not include these provisions via PR18 implementation. As charter operators have their own arrangements relating to traction electricity, we were concerned that seeking to apply the hybrid provisions could be more complex than it first appeared. Given the limited time available for implementation, we did not explore this further. If Network Rail and charter operators consider that the hybrid provisions are needed, it would be open for them to propose an amendment.

## E.Rounding

3.55 In our [conclusions](#) to our January 2018 consultation on drafting improvements, we said we would apply a rounding rule (to three decimal places) in a few specific places to address suggestions previously made by Network Rail.

## Summary of stakeholder views

3.56 In response to the contractual drafting that we published with our July 2018 consultation, Network Rail suggested further rounding rules to apply to a number of other places in track access contracts. In particular, this included clarifying to how many decimal places access charge rates on each price list should be rounded to during annual uplifts. Its motivation for this was to address the ambiguity over whether annual uplifts for inflation should be applied to rounded or unrounded charging rates.

## Our response/decision

3.57 As well as confirming the rounding rule we proposed in July 2018, we have also reflected additional rounding rules as subsequently proposed by Network Rail in the CP6 provisions. We gave train operators the opportunity to comment on the list of these ahead of our issuing the review notices. We have taken account of the comments that we received (in particular, making a change from the list we circulated, with the agreement of Network Rail).

3.58 We also received additional suggestions for other rounding rules, from both Network Rail and DB Cargo. Given the limited time available to close down all of the CP6 drafting changes for the review notices, we could not consider these further.

However, during CP6, Network Rail may wish to discuss with train operators whether further rounding rules would be appropriate. These could then be introduced for CP7.

## F. Other changes

### Paperless billing

3.59 The drafting changes to the model contracts that we published in our July 2018 consultation included changes to the front end of the contracts to enable train operators to opt for paperless billing. This had been proposed by Network Rail in 2017<sup>20</sup>.

3.60 No consultee objected to this in response to our consultation. Our review notices provide for this change to apply to all existing contracts and put all operators onto the same terms in order to make the change to the email provision as simple as possible (some operators have previously deleted the fax provision, for example).

### References to default charges/rates

3.61 In CP5, we introduced a default charge for freight, franchised and open access operators for situations where there is no specific variable usage charge rate in place. This was referred to as the “Default Charge”.

3.62 In July 2018, we proposed renaming the “Default Charge” for the VUC to be “VUC Default Charge” with related terms (such as “Default Rate”) renamed accordingly. This was because Network Rail had proposed that, for CP6, a traction electricity default rate be introduced for passenger operators (which we proposed to call the “Traction Electricity Modelled Default Rate”, and which is discussed further in Chapter 4). As such, we wanted to ensure that both the VUC and traction electricity default provisions could not be confused with each other.

3.63 As well as applying this name change to passenger contracts, we also proposed applying it to freight contracts, even though the traction electricity default rate will not apply to freight operators. We proposed this because we think it is clearer and would support an easier read-across between provisions in the different types of contract. The change makes no material difference to how the provisions work in practice.

3.64 In its response, Network Rail suggested minor amendments to the proposed contractual wording for the VUC Default Charge and VUC Default Rate, for clarification, and we have accepted these. Network Rail also suggested amendments to the proposed wording for the Traction Electricity Modelled Default Rate (and

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<sup>20</sup> Network Rail’s consultation on proposed changes to the wording of track access contracts in Control Period 6 (CP6), Network Rail, November 2017, available [here](#).

suggested including a definition of a Traction Electricity Modelled Default Rate Period), which again we have accepted in the interests of clarity.

## 4. Changes to passenger operator access contracts

### Overview

This chapter sets out the outcome of our July 2018 consultation in respect of the other changes that we proposed be made to franchised and open access passenger contracts to implement PR18, in addition to those already covered under Chapter 3.

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### Introduction

- 4.1 This chapter discusses the main changes we have required to be made to franchised and open access passenger contracts (via our review notices) following our July 2018 consultation and our final determination, other than those already covered in Chapter 3.
- 4.2 It first discusses changes to Schedule 7, in particular the implementation of the infrastructure cost charge, respectively for franchised and open access operators (OAOs), changes to traction electricity provisions and (in relation to franchised operators only) provisions relating to network grant. It then briefly covers changes to Schedules 4 and 8.
- 4.3 Note that Chapter 8 sets out some additional information relating to the bespoke Schedule 7 variable usage charge arrangements in the track access contracts for North Yorkshire Moors Railway Enterprises PLC and West Coast Railway Company's 'Jacobite' services.

### A. Infrastructure cost charges

- 4.4 Following earlier consultation, the June 2018 draft determination set out our proposed decisions on charges that recover fixed network costs. We called these 'infrastructure cost charges' (ICCs). For passenger operators, our key policy decisions for CP6 were that:
  - franchised operators would continue to contribute to fixed network costs (in CP5, they have paid an ICC known as the 'fixed track access charge' (FTAC)). We proposed some changes to how the FTAC would work; and
  - where appropriate, OAOs should begin to pay ICCs (a change from the current position, where OAOs do not contribute to fixed network costs).
- 4.5 Our July 2018 consultation set out how we proposed to contractualise our proposed decisions as set out in the draft determination. This is discussed below in turn for

franchised operators and OAOs, including our final decisions following the consultation and our final determination.

## Franchised operators

4.6 In our June 2018 ICC consultation<sup>21</sup>, we set out a proposal to annually adjust franchised passenger operators' ICCs (which would continue to be called FTACs for contractual purposes) in CP6 for changes in timetabled traffic.

4.7 Under this proposal the annual FTAC for each franchised passenger operator would be set at the start of CP6. However, at the end of each year, each operator's FTAC would be recalculated to reflect the difference between its baseline timetabled traffic and its actual timetabled traffic for that year.

4.8 In June 2018, we also set out our more detailed proposals for franchised passenger operators' FTAC that were intended to address the main concerns raised by stakeholders in response to our September 2017 ICC consultation<sup>22</sup>. These were to:

- annually adjust franchised passenger operators' FTACs based on variations in annual timetabled train miles (as opposed to another traffic metric, such as passenger kilometres or vehicle miles);
- apply the annual adjustment to franchised passenger operators' FTACs at the operator level (rather than at a lower level, e.g. the service group);
- annually adjust franchised passenger operators' FTACs by the percentage change in their annual timetabled traffic (as opposed to making the adjustment using a unit rate); and
- set a floor of 5% for the percentage decrease in a franchised passenger operator's timetabled traffic that is reflected in its ICC adjustment. This is to reduce Network Rail's exposure to income volatility. We also proposed a cumulative floor for the whole control period.

4.9 In our July 2018 consultation, we set out our proposed changes to the model franchised passenger Schedule 7 to implement these proposals. The main changes we proposed were to include:

- a definition for the annual FTAC wash-up,  $FW_t$ , in paragraph 1 of Part 1;
- the term ' $FW_t$ ' in the principal formula for track access charges;

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<sup>21</sup> 2018 periodic review draft determination: Supplementary document – Charges and incentives: Infrastructure cost charges consultation, Office of Rail and Road, June 2018. This may be accessed [here](#).

<sup>22</sup> PR18 consultation on charges recovering fixed network costs, Office of Rail and Road, September 2017. This may be accessed [here](#).



- the formula for calculating the annual ICC wash-up for franchised passenger operators in paragraph 2A of Part 2; and
- drafting that would, if necessary, apply the floor for the percentage decrease in a franchised passenger operator's timetabled traffic (that is reflected in its ICC adjustment in paragraph 2A of Part 2). We proposed to implement this as a floor of 1% per annum.

## Summary of stakeholder views

4.10 Network Rail advised us in its response that it was unlikely that it would be able to calculate and consult on the baseline timetabled train miles for each franchised passenger operator in time for them to be included in the Schedule of Fixed Charges that was due to be published on or around 20 December 2018<sup>23</sup>. Instead, it proposed publishing these baseline train mileages in a separate document by 31 March 2019.

4.11 Network Rail also proposed that we include a re-opener provision in relation to the baseline timetabled traffic figures for each franchised passenger train operator. This was on the basis that it considered the baseline timetabled traffic figures would need to be changed in CP6 to reflect any transfers of services between train operators as part of franchise remapping. In order to facilitate such a re-opener provision, Network Rail proposed defining the terms "Baseline timetabled traffic miles" and "Timetabled train miles".

4.12 In addition, Network Rail considered that there should be a mechanism to enable the parties to propose amendments to the baselines for any clear and obvious errors.

4.13 Network Rail also suggested using percentages rather than decimals in paragraph 2A of Part 2 of Schedule 7 for consistency with the text in that paragraph. In paragraph 2A of Part 2 of Schedule 7, Network Rail also asked that text be included to clarify what "less than -1%" means and suggested including text such as "a value such as -1.5 or -5% rather than -0.9%".

4.14 Finally, Network Rail asked us to include additional text to provide scope for greater flexibility in terms of the system that is used to report timetabled train miles during CP6. Our July 2018 drafting envisaged the system being agreed at 31 March 2019 and then being fixed for CP6. Network Rail considered that a more efficient system might emerge after this and as such it wanted some flexibility to switch to this.

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<sup>23</sup> *Schedule of Fixed Charges, Network Rail, December 2018*. This may be accessed [here](#).

## Our response

### Setting the timetabled traffic baselines for CP6

- 4.15 Since its response to our July 2018 consultation, we have had further discussions with Network Rail on the approach for setting the timetabled traffic baselines. Network Rail's preferred approach is to use timetabled train miles from its Schedule 4 Compensation System (S4CS) for a base year, 2019-20, and apply its traffic growth forecasts for each year of CP6. Implementing this approach requires train miles data from the May 2019 timetable. In our discussions with Network Rail ahead of our review notices, Network Rail advised us that the baselines would not be ready until around July 2019 (that is, later than the originally envisaged 31 March 2019 date). We therefore agreed to change the drafting in Schedule 7 to provide for this later date, though we also included provision for us to determine the baselines after July 2019, should this subsequently turn out to be necessary.
- 4.16 Indeed, following the issue of the review notices, Network Rail has informed us that October 2019 is a more realistic timescale to finalise the baselines. This reflects when the required timetabling information is likely to become available and the need to ensure sufficient time for consultation with franchised passenger operators before the timetabled traffic baselines are confirmed. We will continue to work with Network Rail on its approach to setting the timetabled traffic baselines in the run up to this date.

### The system for reporting timetabled train miles in each year of CP6

- 4.17 In terms of the system used to report timetabled train miles during each year of CP6, Network Rail considers its S4CS as being the most robust system to measure operators' annual timetabled train miles. However, as Network Rail has explained, more work is required to confirm if the S4CS data is appropriate to use for this purpose. Given this, as set out below, the final Schedule 7 wording provides for the system to be used for this purpose to be confirmed by 31 July 2019. This would mean, therefore, that Network Rail confirms the system used to report timetabled train miles in July 2019, prior to the baselines being finalised in October 2019.

### Re-opener and error provisions

- 4.18 As above, Network Rail proposed a re-opener provision in relation to the baseline timetabled traffic figures for each franchised passenger train operator (in response to our June 2018 ICC consultation). In our summary of responses to the draft determination<sup>24</sup> we explained that we considered that a re-opener provision should not be included in the franchised passenger operator model track access contract for timetabled traffic baselines. We recognised that the timetabled traffic baselines may

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<sup>24</sup> 2018 periodic review: Consultation on the draft determination – summary of comments and our responses, Office of Rail and Road, October 2018. This may be accessed [here](#).

need to be amended during CP6 to reflect franchise changes. However, any such amendment to relevant track access contracts can be addressed through an amendment to the contract approved under section 22 of the Railways Act 1993 (as has previously happened to reallocate the FTAC when franchises have been remapped during CP5 and earlier control periods).

4.19 Regarding Network Rail’s proposal for a re-opener provision to correct potential errors in the timetabled traffic baselines, we noted that there are no similar provisions to address errors in other charges or incentives. Indeed, while there was such a provision for addressing manifest errors in certain charge rates during CP4, the policy agreed by Network Rail and ORR during PR13 was that this should be removed for CP5. Given this, we did not consider it appropriate to include such a provision for timetabled traffic baseline errors. As with the process to finalise the price lists in each periodic review, it will be important that Network Rail has an effective quality assurance process, involving each relevant train operator, to ensure there are no errors.

## Final decisions

4.20 The responses to our June 2018 ICC consultation did not significantly affect the balance of arguments we put forward for our draft proposals for franchised passenger operators’ FTAC. As a result, in our October 2018 ICC conclusions document<sup>25</sup> we confirmed our decision to implement our proposals.

4.21 Consequently, we have made the majority of the changes we proposed to the model franchised passenger Schedule 7 that we proposed in our July 2018 consultation, including the main changes listed above. However, we have made some further changes, in particular the following:

- (a) in light of our discussions with Network Rail, we have updated the drafting to provide for the system to be used to report timetabled train miles to be agreed in writing by Network Rail and ORR by 31 July 2019 (rather than 31 March 2019);
- (b) the timetabled traffic baselines will be published in a stand-alone document (i.e. not included in the Schedule of Fixed Charges as originally planned). As set out above, we changed the provisions to provide for us to approve this document by the end of July 2019, or to determine them at a later date if necessary. As explained in paragraph 4.16, we now expect to approve/determine the baselines in October 2019, once Network Rail has submitted them to us; and

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<sup>25</sup> 2018 periodic review final determination: Supplementary document – Charges and incentives: Infrastructure cost charges conclusions, Office of Rail and Road, October 2018. This may be accessed [here](#).

- (c) we have adopted Network Rail’s suggestions that percentages be used rather than decimals in paragraph 2A of Part 2 of Schedule 7 and that we clarify what we mean by “less than -1%” (on this latter point, we included some explanatory wording in parenthesis in Schedule 7).

## Open access operators

4.22 In the June 2018 ICC consultation, published alongside the draft determination, we set out our final proposals for levying ICCs on OAOs. We confirmed these in our October 2018 final determination<sup>26</sup>:

- there will be two market segments for open access services in CP6: ‘interurban’ and ‘other’. ICCs will be levied on interurban services;
- existing OAOs that are operating in the interurban market segment will have relief from increases in charges due to the introduction of the ICCs for the whole of CP6 (unless they substantially modify their service);
- ICCs will be levied on OAOs as a rate per train mile<sup>27</sup>;
- an open access service can partly fall within the interurban market segment. The service would only be charged for the train miles within the interurban market segment; and
- ICCs for open access services (or parts of services) that fall within the interurban market segment will be set at £4 per train mile (2017- 18 prices) in CP6.

4.23 In Chapter 4 of our July 2018 consultation, we noted that an entirely new charge would need to be introduced into Schedule 7 of OAO contracts to implement the ICC. We summarised how we proposed to do this. Among other things, the drafting we published alongside the consultation included reference to an “Open Access ICC Rates List” that Network Rail would publish on or around 20 December 2018. The Schedule 7 drafting provided for this list to be supplemented during CP6 (using the process in paragraph 9 of Part 2) to include new rates as necessary.

4.24 Network Rail published a price list setting out which service coded groups will pay ICCs and the level of their ICCs for each year of the control period. Reflecting that new relevant service coded groups are likely to emerge over the course of the control

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<sup>26</sup> 2018 periodic review final determination: *Supplementary document – Charges and incentives: Infrastructure cost charges conclusions*, Office of Rail and Road, October 2018. This may be accessed [here](#).

<sup>27</sup> *PR18: Infrastructure cost charges – final impact assessment of units of traffic for levying infrastructure cost charges on open access operators*, Office of Rail and Road, June 2018. This may be accessed [here](#).

period, we included provisions in paragraph 9 of Part 2 of the OAO Schedule 7 that provide for the price list to be supplemented with new groups during CP6.

## Summary of stakeholder views

4.25 Network Rail made the following points in response to our consultation:

- (a) it suggested that the ICC provisions be amended slightly so that the term ‘ $R_{ti}$ ’ (the rate of the ICC per Service Coded Group  $i$ ) is used throughout (it noted that the proposed drafting was inconsistent, as ‘ $R_t$ ’ and ‘ $R$ ’ were also used);
- (b) it suggested a change to paragraph (b) of Part 6 of Schedule 7 to say “the relevant number of Vehicle Miles or Train Miles applicable to each service so charged”, given that ICCs will be levied as a rate per train mile in CP6; and
- (c) Network Rail sought clarification in respect of ORR’s expectations for how the process for supplementing the Open Access ICC Rates List would work. In particular:
  - (i) would ORR envisage that Network Rail and the train operator should seek to agree whether a new (or modified) OAO service is interurban; and
  - (ii) if so, it said that ORR would need to provide further guidance on this (e.g. a definition of ‘interurban’ and some criteria to help decide whether services fall within this definition). Alternatively, it said that ORR could clarify that it is not necessary for Network Rail and train operators to agree on this prior to submitting a proposed supplement to the price list, and leave this to ORR to decide following receipt of the submission.

4.26 No other stakeholder commented on these provisions.

## Our response

4.27 We have incorporated Network Rail’s suggestions regarding Part 6 of Schedule 7 and  $R_{ti}$ .

## Supplements to the Open Access ICC Rates List and remaining implementation issues

4.28 On 20 December 2018, Network Rail published the Open Access ICC Rates List. This included the current services of existing OAOs<sup>28</sup>, with zero rates for the charge

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<sup>28</sup> ICC provisions were not included in the track access contracts of North Yorkshire Moors Railway Enterprises, West Coast Railway Company (Jacobite services) or South Yorkshire Supertram. Nor were they included on the Open Access ICC Rates List. Given the nature of their respective operations, we considered it very unlikely that their services would ever fall within the definition of ‘Interurban’. Of course, if this were to change, the relevant provisions would need to be added to their contracts through their application for our approval for access rights for these services.

(reflecting that these have relief from the ICC during CP6). Before new OAO services (or substantially modified services) begin operating, the list will need to be supplemented to include the appropriate ICC rate, using the provisions in paragraph 9 of Part 2 of Schedule 7.

- 4.29 As above, Network Rail has asked us to provide clarity on how we envisage this process working in practice. We agree this is important and will include this in our conclusions to our [December 2018 consultation](#) on implementing the ICC for OAOs.
- 4.30 In terms of the drafting of the price list supplement provision in paragraph 9, paragraph 9.4 sets the scope for how the Open Access ICC Rates List can be supplemented during CP6. The version of this paragraph included in our July 2018 consultation was based on the wording used in CP5 for supplements to the List of Capacity Charge Rates. This provided for supplements to be made to “take account of changes in the pattern and number of Services or to include rates in respect of new Services”.
- 4.31 However, subsequent to the consultation, we identified that the scope of this was too tight and did not align with our proposed policy. We have therefore broadened the scope of the finalised drafting so that it provides for either party to propose that:
- “the Open Access ICC Rates List be amended or supplemented as necessary to take account of any changes to the Services or to include rates in respect of new Services (and in this instance an amendment to the Open Access ICC Rates List shall be treated as a supplement for the purposes of this paragraph 9)”<sup>29</sup>
- 4.32 This provides, as necessary, for new rates to be added for new services and also for existing rates for specific services to be amended (for example, in the event of a substantial modification to a service). Our conclusions to our December 2018 consultation will set out our decisions on several remaining implementation issues relating to levying ICCs, including our policy on what services should pay an ICC. We will publish these conclusions by the end of March 2019.

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<sup>29</sup> As a ‘supplement’ implies an addition to the rates list, rather than the amendment of an existing entry, we have used both ‘amended’ and ‘supplemented’ in paragraph 9.4. However, provisions elsewhere in paragraph 9 (and in related definitions in Part 1 of Schedule 7) refer only to ‘supplements’ to price/rates lists or the price/rate lists being ‘supplemented’. For this reason, we included the parenthesis in paragraph 9.4 to clarify that an amendment shall be treated as if it was a supplement. This is to ensure that there is no doubt that it is our intention that the Open Access ICC Rates List shall be deemed to include any amendments (or supplements) made pursuant to paragraph 9 of Part 2 of Schedule 7.

## B. Traction electricity

### Partial fleet metering

4.33 In our July 2018 consultation, we proposed to include in Schedule 7 the drafting required to enable the billing of traction electricity using information from partially metered fleets (ready for use if that operator opts into ‘partial fleet metering’ under the TERs). This drafting had previously been developed and consulted on by Network Rail<sup>30</sup> in 2016, and has been available in CP5 for passenger operators to include via an amendment to their contracts.

### Summary of stakeholders’ views

4.34 Network Rail welcomed our proposal to include the partial fleet metering provisions in the model Schedule 7 traction electricity drafting. We did not receive any other material comment on this issue from other stakeholders.

### Our decision

4.35 We have included this drafting within the model Schedule 7 provisions. This will make it easier for operators to switch to billing using information from partially metered fleets.

### Application of default modelled consumption rate

4.36 Our July 2018 consultation noted that Network Rail had concluded, following consultation, that a default modelled consumption rate should be introduced. This would apply to passenger train operators running electric trains that are not billed on the basis of meters and which do not have a specific or generic modelled consumption rate applying to them. The purpose of this was to:

- provide Network Rail with a contractual basis for billing modelled services where a specific or generic modelled consumption rate does not yet exist; and
- provide an incentive for train operators to apply for a modelled consumption rate at the earliest available opportunity.

4.37 In July 2018, our formal decision on whether to confirm Network Rail’s conclusions remained pending (subject to Network Rail formally writing to us as part of the recalibration process). However, in our implementation consultation, we included provisions in Schedule 7 that would implement the default modelled consumption rate. This was to provide stakeholders with an opportunity to comment on the proposed contractual approach.

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<sup>30</sup> Network Rail’s consultation on this is accessible [here](#).

4.38 Paragraphs 4.22-4.25 of our July 2018 consultation summarised how the provision would work.

## Summary of stakeholder's views

4.39 We received one response, from Network Rail, which was supportive of the overall approach, subject to some comments:

- it suggested that we introduce the same provisions in the model track access contract for OAOs to ensure Network Rail is able to charge them for traction electricity, should they start running electrified trains.
- Network Rail said that services being charged a default modelled consumption rate should not be able to apply to receive a regenerative braking discount (if indeed their services are capable of regenerative braking). Network Rail argued that allowing a train operator to receive the discount in these circumstances would reduce the incentive for them to apply for a specific modelled consumption rate. In addition, Network Rail said that allowing them to receive the discount would introduce additional administrative work, which may not be warranted, as default consumption rates were intended as only a temporary measure.

## Our response

### Introduction of default modelled consumption rate

4.40 On 9 November 2018, Network Rail wrote to us requesting (among other things) that we approve its decision to introduce the default modelled consumption rate (Network Rail's letter may be accessed [here](#)). In our [response](#) to Network Rail of 22 November 2018, we confirmed that we would implement the default rate.

4.41 The final drafting that we have included in the CP6 Schedule 7 for this provision reflects what we consulted on in July 2018, albeit it with the minor changes to the formulae suggested by Network Rail in its response.

### Application to open access operators

4.42 We considered Network Rail's point that the default modelled consumption rate provisions should apply to all OAOs. As set out in Chapter 3, only some OAOs have traction electricity provisions in their contracts at present (Hull Trains, East Coast Trains and South Yorkshire Supertram).

4.43 Network Rail's concern stems from the fact that, in CP5, the current track access arrangements allow train operators to run electric trains for their services even if they do not have the appropriate billing provisions in place. That is, the relevant contractual provisions and an established modelled consumption rate for the train services (or, alternatively, meters on the trains). This means that currently, there



would be no contractual way for Network Rail to recover the costs of traction electricity from the train operator and no incentive to encourage the operator to obtain a specific modelled rate for its services.

4.44 We agree with Network Rail that this would be inconsistent with the intention to introduce the model default rate. However, we note that it would not be practical just to include the default modelled consumption rate provisions for OAOs, because other traction electricity (EC4T) provisions would be needed as well (e.g. the charge formulae, the volume and cost reconciliation processes set out in the Traction Electricity Rules, etc.). This means that to address Network Rail's concerns, in practice, all the standard traction electricity provisions would need to be added to OAOs' track access contracts.

4.45 Having reflected on this, we have decided to adopt a pragmatic approach to this issue. Where an open access operator holds access rights to use parts of the network that are electrified, and they could in practice run electric trains for these, the standard traction electricity provisions should be included in their contracts. The exception to this would be where there are bespoke arrangements for obtaining electricity already in place (e.g. in the case of Eurostar) or where these are required in future. We have implemented this decision in our review notices, with the effect that:

- Grand Central (which currently has no traction electricity provisions, but runs diesel services over part of the network that is electrified) will have the standard CP6 traction electricity provisions in its contract from 1 April 2019, along with East Coast Trains, Hull Trains and South Yorkshire Supertram<sup>31</sup>;
- North Yorkshire Moors and West Coast Railway Company (for its Jacobite services) do not currently have any EC4T provisions and only have rights to operate over non-electrified network. We have not required the insertion of the standard EC4T provisions in these contracts. This is because they could not operate electric trains without first obtaining additional access rights from Network Rail. If either of these train operators were to agree rights with Network Rail to run on an electrified part of the network, it would be for Network Rail to ensure that the necessary provisions were included in the track access contract at the time that those rights were agreed; and
- Eurostar retains its existing bespoke arrangements.

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<sup>31</sup> Albeit that South Yorkshire Supertram also retains some bespoke arrangements for traction electricity.

## Application of regenerative braking discount

- 4.46 We have carefully considered the proposal by Network Rail that services being charged a default modelled consumption rate should not be able to apply to receive the regenerative discount rate even if they are capable of regenerative braking.
- 4.47 The use of a regenerative braking system (where a train is equipped with one) reduces the net energy consumed by the train.
- 4.48 When we introduced the regenerative braking discounts in CP2, our objective was, among others, to incentivise operators to install regenerative braking systems on their trains. This was on the basis that this would save energy, which would both reduce costs and improve environmental performance. For non-metered operators, this cost saving is currently recognised through a regenerative braking discount (the operator has to apply to Network Rail for this under the TERs). The discount is applied as a reduction in the modelled traction electricity consumption. For metered services, train operators pay for the net consumption after taking into account the regenerated energy. This means that to calculate the traction electricity charge, all regenerative energy is subtracted from the gross energy consumption and then the losses mark-up is applied to this net energy consumption.
- 4.49 As described above, the policy on regenerative braking discounts has its own specific incentive objectives, notably supporting better energy efficiency and environmental performance. This remains important, given the price of energy and environmental concerns.
- 4.50 Therefore, we consider that denying regenerative braking discounts to services capable of regenerative braking would be inconsistent with these policy objectives and would also be unfair to operators who invest in the system. Moreover, it would also affect the cost reflectivity of the end-of-year volume reconciliation.
- 4.51 In conclusion, while we agree with Network Rail that the application of default modelled consumption rates might be temporary (given that train operators would be incentivised to obtain a modelled rate), we have decided that train operators whose services are charged the default modelled consumption rates should be able to receive the regenerative discounts in CP6 (subject to the provisions of the TERs) for the reasons set out above.

## Deletion of transitional arrangements for the volume and cost reconciliation

- 4.52 In our July 2018 consultation, we noted that paragraph 4A of Part 2 of Schedule 7 in franchised operators contracts (relating to the volume and cost reconciliation in respect of the year ending 31 March 2014) was now redundant and that we would delete it for CP6.

4.53 No one objected to this deletion and, accordingly, our review notice for franchised passenger contracts provides that this text will be deleted from 1 April 2019.

## **C. Network grant and related provisions**

4.54 Schedule 7 of franchised passenger track access contracts contain provisions relating to the payment of network grants by the Secretary of State or (for Scottish franchises) by the Scottish Ministers. These include provisions relating to grant dilution and rebates of access charges by Network Rail.

4.55 In our July 2018 consultation, we noted that discussions were ongoing with both the Department for Transport (DfT) and Transport Scotland regarding the changes that may be needed to these provisions, as part of continuing discussions on the detailed application of the financial arrangements for CP6.

4.56 Reflecting this, our consultation could only set out some of the changes that we thought were likely to be needed to the network grant provisions. These were described in paragraphs 4.30 to 4.40 of that document.

4.57 Our policy on grant dilution and rebates was set out in our final determination.

### **Summary of stakeholder views**

4.58 In response to the consultation, Network Rail noted that the discussions with DfT and Transport Scotland remained ongoing. As such, it said it was not commenting on the drafting at that stage. We received no other comments, other than those made on this topic in response to our draft determination (which we addressed in our final determination).

### **Grant dilution provisions**

#### **Developments since our consultation and our final determination**

4.59 For CP5, there has been a deed of grant between DfT and Network Rail, and a grant agreement between Transport Scotland and Network Rail, in respect of network grant payments.

4.60 In light of Network Rail's reclassification as a public sector arm's length body, in July 2018, we noted that the network grant deeds/agreements might be replaced by more straightforward grant award letters. This would reflect the 'grant in aid'<sup>32</sup> nature of network grants for CP6.

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<sup>32</sup> Grant in aid refers to funding provided to government bodies to finance their operations within parameters set by governments.

- 4.61 The letter of grant between Network Rail and the Secretary of State was agreed on 31 January 2019. The final terms of the letter of grant between Network Rail and the Scottish Ministers are still being discussed.
- 4.62 Part 3A of Schedule 7 to the track access contracts for franchised passenger operators in CP5 contain network grant dilution provisions. These provide that, in the unlikely event that a network grant payment was not made, the franchised train operators would each be obliged to pay a share of the shortfall amount to Network Rail, three months after the 'dilution date'. This reflects that network grant is used to offset an amount of the fixed track access charge. Thus, if network grant is not paid, the fixed track access charges effectively adjust as a result.
- 4.63 In our final determination for PR18<sup>33</sup>, we decided to retain the network grant dilution provisions currently included in track access contracts, as it is important that Network Rail has certainty over its network grant income.
- 4.64 Accordingly, in the CP6 versions of the track access contracts, we retained the grant dilution provisions. However, we included provision to allow Network Rail and each of the Scottish Ministers and the Secretary of State until 31 January 2019 to agree the mechanism to, in certain circumstances, vary the annual amounts of network grant set out in our final determination. These agreements are subject to our approval. We also included provisions for us to determine these mechanisms if the parties were unable to agree them by 31 January 2019.
- 4.65 Network Rail and the Secretary of State agreed the grant mechanism for their letter of grant on 31 January 2019. We are now reviewing it and will decide whether to approve it for franchised passenger track access contracts (in England & Wales) by 28 February 2019. If we do not approve it, by 31 March 2019, we will determine the provisions to be used after consulting Network Rail and the Secretary of State.
- 4.66 Network Rail and the Scottish Ministers did not agree the grant mechanism for their letter of grant by 31 January 2019. Accordingly, by 31 March 2019, we will determine the provisions to be included in the track access contracts of Scottish franchised train operators, and will consult with Network Rail and the Scottish Ministers as part of this.

## Rebates

- 4.67 The CP5 track access contracts for franchised passenger operators currently contain a provision under which Network Rail can rebate income that *'it does not require in order to discharge its obligations under its network licence and any contracts to which it is a party to train operators'*. ORR's approval is required before a rebate is paid.

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<sup>33</sup> See chapter 7 of our supplementary document on the financial framework (available [here](#)).

- 4.68 At the time of our draft determination<sup>34</sup>, we thought that the public sector spending rules that will apply to Network Rail in CP6 would mean that provisions in Schedule 7 relating to rebate payments might no longer be necessary. This was because, subject to the budgetary flexibility that the UK Government has allowed Network Rail in CP6, funding that Network Rail does not spend in a particular year in CP6 is liable to be reclaimed by DfT/Transport Scotland.
- 4.69 Given this, we noted in July 2018 that it was conceivable that the rebate arrangements could be removed from Schedule 7. However, we retained the provisions in our consultation draft of Schedule 7, albeit with the inclusion of a VAT provision (which would be needed in CP6 because of a consequential change elsewhere in the contract). Following the consultation, we can confirm that the rebate provision has been retained for CP6. This is because it may be useful for Network Rail to make rebate payments using the current rebate mechanism. As in CP5, payments should only be made in exceptional circumstances and should not create risks to the financial sustainability of Network Rail's business.

## Scotland-specific changes

- 4.70 In July 2018, we noted that the version of Schedule 7 applied to Scottish franchised operators would need to be different (as now) from the version of Schedule 7 applied to franchised operators in England & Wales (this latter version was in the draft model franchised passenger contract that we published in July 2018). These changes were to reflect the devolved arrangements in Scotland (e.g. references to the Scottish Ministers instead of to the Secretary of State).
- 4.71 There were no specific stakeholder responses to this point.

## Schedules 4 and 8

- 4.72 In our July 2018 consultation document, we did not include any policy driven changes to the drafting of Schedule 4 or Schedule 8. However, in the draft contractual provisions that we published with the consultation, we included some non-policy changes (i.e. those that would improve the drafting but would not alter the underlying purpose of the drafting). These reflected the conclusions to our January 2018 consultation on improving contractual drafting. Our July 2018 [conclusions document](#) set out further detail on this.

## Summary of stakeholder views

- 4.73 In response to the drafting we published in July 2018, Network Rail noted that the definition of "Public Holiday" had been included in Schedules 4 and 5, but not in Schedule 8. Given this, Network Rail suggested that this defined term either be

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<sup>34</sup> In our supplementary document on the financial framework, available [here](#).

included in Schedule 8, or removed from all schedules and included in the definitions section in the front end of the contract instead. We received no other comments on this.

## **Our response**

4.74 While we did not apply the amendment to insert “Public Holiday” at the front of existing track access contracts as part of PR18 implementation, we will reflect it in the revisions to the new model versions of the contracts.

## 5. Changes to freight track access contracts

### Overview

This chapter sets out the outcome of our July 2018 consultation in respect of the other changes that we proposed be made to freight track access contracts to implement PR18, in addition to those set out in Chapter 3.

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### Introduction

5.1 This chapter discusses our decisions on implementing PR18 specifically relating to freight track access contracts, following our consideration of responses to our July 2018 consultation. Other changes affecting freight contracts (which also relate to passenger contracts) are set out in Chapter 3.

### A. Schedule 7

#### Baseline date for Operating Constraints and other provisions

5.2 In our July 2018 consultation, we noted that paragraph 2.8 of Schedule 7 in freight track access contracts (Incremental costs) refers to the 'Operating Constraints' of the network applying at 1 April 2014 (the start of CP5). We said that we would update this date (and similar provisions elsewhere) to refer to 1 April 2019, reflecting the start of CP6.

#### Stakeholder comments

5.3 While it did not object to this proposed change, Freightliner Group suggested adding some further text to the Operating Constraints provision. It proposed a clarification so that only changes that have been formalised and published through the network change process can be included in the new baseline. Otherwise, it said there would be the possibility that a change to Operating Constraints could be published without the correct change processes having been first undertaken.

#### Our response

5.4 We note this proposal, but considered that it was a potentially contentious drafting change that was not necessary to implement PR18 and had not been discussed previously as part of the process. We also considered that adopting it would require further discussion and consultation with Network Rail and other parties in order to fully understand its effects. This was not possible in the time available. However, it could be considered as part of any industry review of the contractual provisions during CP6.

5.5 As per our proposal, we have updated the baseline date in the final CP6 model provisions.

## Infrastructure cost charge and removal of coal spillage provisions

### Infrastructure cost charge

5.6 Our draft determination set out our proposed decisions regarding ICCs for freight operators. We subsequently confirmed these proposed decisions in our final determination in October 2018. In short, this was that in CP6:

- freight services carrying ESI<sup>35</sup> coal, iron ore or spent nuclear fuel would continue to be subject to mark-up charges (as they have been in CP5)<sup>36</sup>. In addition, services carrying ESI biomass would also pay the mark-up charges; and
- the two existing mark-up charges (freight specific charge (FSC) and the freight only line (FOL) charge) would be merged into a single charge. This would retain the name 'freight specific charge' for contractual and billing purposes<sup>37</sup>.

5.7 Our July 2018 consultation set out how we intended to implement these decisions. Our proposed approach was to:

- remove the definition and the references to the FOL charge in Schedule 7 (save in relation to a transitional provision to reflect that the FOL charge would remain payable up to the end of 31 March 2019, which Network Rail would be billing for in early CP6); and
- insert references to 'ESI Biomass Vehicle' into Schedule 7, to enable the application of the FSC.

### Removal of coal spillage charge and related provisions

5.8 In addition to the removal of the capacity charge and REBS (discussed in Chapter 3), we concluded (in June 2017) that the coal spillage charge should be removed for CP6. Reflecting this, in July 2018, we deleted the definition and references to this charge and included a transitional provision, similar to that for the FOL charge as referred to above.

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<sup>35</sup> Electricity supply industry.

<sup>36</sup> In CP5, we referred to charges recovering fixed network costs from freight operators as mark-ups, reflecting the language of the European directives and domestic legislation. For CP6 these charges are referred to as ICCs. The name change has no effect on the legal status of the charges.

<sup>37</sup> While it retains the name for simplicity, it is an ICC that reflects what the market can bear.



5.9 We also proposed to delete the references to Coal Spillage Investment and the Coal Spillage Reduction Investment Charge. These charges ceased at the end of CP4 and the transition arrangement that was included for CP5 is now redundant.

## Summary of stakeholder views

5.10 In connection with the proposed transitional provisions, Network Rail suggested that we reinstate the definitions of the FOL Charge Rate and Coal Spillage Charge, but amend their definitions to refer to the 2018-19 financial year, the CP5 Track Usage Price List, and CP5 indexation provisions.

5.11 In their responses, DB Cargo and Freightliner Group said that the definitions of “ESI Coal Vehicle”, “ESI Biomass Vehicle”, “SNF Vehicle” and “IO Vehicle” needed further clarification with regard to whether it is the intention in CP6 to levy the Freight Specific Charge on vehicles either for the loaded and empty movements or just for the loaded movement.

## Our response

5.12 As with the transitional arrangements for charges in the passenger contracts, we have accepted Network Rail’s suggestions for greater clarification as to how the transitional arrangements for charges incurred in 2018-19 should be calculated and paid.

5.13 We note DB Cargo and Freightliner’s view that further clarification is needed about how the movements are charged the FSC. However, we do not think this is required. Currently, for freight trains carrying the relevant commodities, both loaded and empty movements are charged the FSC and FOL charge. This reflects that all movements (of commodities that can bear charges) should be charged for the long-term costs of using the railway. As the charge (per thousand gross tonne miles) for each commodity is the same for both loaded and empty movements, we do not consider that further clarification is necessary.

5.14 On 20 December 2018, Network Rail published the CP6 version of the Track Usage Price List<sup>38</sup>. This sets out the new FSC rates for all freight services identified as being able to bear the FSC charges, including rates for vehicles carrying ESI biomass.

## Traction electricity charges

5.15 As proposed in our July 2018 consultation, we have deleted paragraph 2.4.2 of Schedule 7 relating to the ‘Traction Electricity Reconciliation’ from the CP6 model

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<sup>38</sup> CP6 price lists consistent with ORR’s Final Determination, Network Rail, December 2018. This may be accessed [here](#).

Schedule 7. This was a transitional provision for the year ending 31 March 2014 and is no longer required.

## B. Schedules 4 and 8

5.16 Our July 2018 consultation noted that we planned to make some non-policy changes to Schedules 4 and 8, based on the responses to our January 2018 consultation on improving contractual drafting. Our July 2018 [conclusions document](#) provides further detail on this.

5.17 Our July 2018 consultation said that we would not be making any policy driven changes to the drafting of Schedule 4.

5.18 For Schedule 8, however, our consultation noted our policy decision to remove the annual adjustment to freight operator benchmarks for CP6<sup>39</sup>. Reflecting this, we proposed to delete the contractual provisions referring to this adjustment from Schedule 8.

## Summary of stakeholder views

5.19 As regards Schedule 4, DB Cargo and Freightliner Group suggested that the reference to ‘Round Trip’ in paragraphs 3.5 and 3.7 of Schedule 4 should be extended to include “unless the train is loaded in both directions” to reflect common practice, because where a train is loaded in both directions it forms a separate train or “Service”. They also suggested amending the definition of Round Trip by substituting the word “Train” with “Service”.

5.20 Network Rail suggested we introduce a provision in Schedule 8 to allow freight operators to choose between the current incident cap regime and an alternative one that offers some more exposure in exchange for a lower incident cap access charge supplement (ICACS). This was in response to a decision we had made previously regarding freight operator exposure above the incident caps. This decision was that Network Rail could give freight operators the option to switch from the existing incident cap regime to one that offers some exposure in exchange for a lower ACS<sup>40</sup>.

5.21 Accordingly, Network Rail suggested including an additional column in the table set out under paragraph 11.2 within Schedule 8 of the freight track access contract. The purpose of this column would be to include the ICACS for the incident caps that expose freight operators to a proportion of delay minutes above the incident caps (alternative incident cap regime). There would therefore be two levels of exposure:

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<sup>39</sup> *Final Decision: Proposal to remove the annual adjustment to the freight and charter operator Schedule 8 benchmarks*, ORR, March 2018. This may be accessed [here](#).

<sup>40</sup> *Final Decision: The level of freight operator exposure above the incident caps*, Office of Rail and Road, October 2018. This may be accessed [here](#).

one would be “Zero Exposure” above the incident cap, and the other option would be “30% Exposure” above the incident cap. Network Rail provided proposed drafting for this.

## Our response

5.22 In relation to the clarification of the “Round Trip”, we have amended the definition itself, to address the point raised by DB Cargo and Freightliner Group.

5.23 We were content with Network Rail’s proposal to provide freight operators with the option of an alternative exposure level to incidents. We therefore incorporated its suggested drafting into paragraphs 11.1 and 11.2 of Schedule 8. This is consistent with the decision we made previously (see paragraph 5.20 above).

## Other implementation issues relating to Schedule 8

5.24 During the process to close down the drafting ahead of the publication of review notices, some uncertainty arose regarding what unit the Baseline Annual Contract Mileage (set out in Appendix 1 of Schedule 8) should be expressed as. Given this, in the version of Appendix 1 included in the review notice, we inserted a provision providing for us to determine this number once Network Rail has confirmed the unit/number. We anticipate that it will request us to determine the number shortly after the start of CP6.

## C.Changes to the freight customer operator track access contracts and freight customer track access contracts

5.25 In our July 2018 consultation, we set out how we proposed to implement our PR18 decisions for freight customer operator track access contracts and freight customer track access contracts. In summary, we said that:

- (a) the **freight customer operator track access contract** (FCOTAC) would adopt the same amendments required to the freight track access contract. The one exception to this was that the FCOTAC would require an additional amendment, to paragraph 10.2.3(a) of Schedule 8 (to change references to 2013 and 2014 to be 2018 and 2019 respectively); and
- (b) the **freight customer track access contract** (FCTAC) would require some minor amendments to reflect the amendments made to the FCOTAC, and these were set out in paragraph 5.19 of our consultation document.

## Summary of stakeholder views and our decision

5.26 Network Rail was supportive of our proposals regarding the FCTAC and FCOTAC. We received no other responses on this topic.

5.27 We have implemented our proposed approach in our review notices, albeit that there were no active FCOTACs in place that required amending. However, the changes will be reflected in the CP6 model FCOTAC which we will publish in due course.

# 6. Changes to charter track access contracts

## Overview

This chapter discusses the outcome of our July 2018 consultation and the subsequent decisions that we have taken in respect of implementing PR18 in charter track access contracts.

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## Introduction

6.1 Our July 2018 consultation set out how we proposed to implement PR18 in charter track access contracts (CTACs). This chapter sets out our final decisions on this following responses to the consultation and our final determination.

## Changes to CTACs

6.2 Our July 2018 consultation summarised the main changes that we proposed to make to CTACs. These were:

- in the front end, some minor drafting improvements (in particular, to include the option to switch to paperless billing, as previously proposed by Network Rail);
- in Schedule 7, to:
  - remove the capacity charge (as discussed in Chapter 3);
  - reflect the switch from RPI to CPI (discussed in Chapter 3); and
  - include the contingency provision for a delay to the implementation of future periodic reviews (discussed in Chapter 3).
- in Schedule 8, to:
  - reflect the change from RPI to CPI (discussed in Chapter 3);
  - reflect our decision to remove the annual adjustment to charter operator benchmarks for CP6<sup>41</sup>; and
  - as with other types of contract, to update the financial parameters to reflect the outcome of the PR18 recalibration process; and

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<sup>41</sup> *Final Decision: Proposal to remove the annual adjustment to the freight and charter operator Schedule 8 benchmarks*, Office of Rail and Road, March 2018. This may be accessed [here](#).

- in Schedule 9 (limitation of liability), to amend paragraph 1 to reflect the switch from RPI to CPI (discussed in Chapter 3).

## Summary of stakeholder views

6.3 Network Rail suggested we introduce a provision in Schedule 8 to allow charter operators to choose between the current incident cap regime and an alternative one that offers higher risk exposure in exchange for a lower ICACS. This would be consistent with the approach taken for freight track access contracts (see Chapter 5).

## Our response

6.4 We agreed with Network Rail's suggestion that charter operators should be given the option to choose a higher level of risk exposure in return for a lower ICACS (consistent with freight operators). This provides consistency with the options that freight operators will have in CP6. We have reflected this in the new CP6 model Schedule 8 for charter operators, which we included in the charter review notice.

# 7. Changes to station access contracts

## Overview

This chapter discusses the outcome of our July 2018 consultation in respect of the changes needed to station access contracts to implement our decision to index station long term charges using CPI rather than RPI from CP6 onwards.

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## Introduction

7.1 This chapter discusses the outcome of our July 2018 consultation in respect of the changes needed to station access contracts to implement our PR18 decisions.

## Station long term charge

### Recalibration and changes to indexation provisions

7.2 In our July 2018 consultation, we said that – as part of PR18 implementation – we would need to revise the station long term charges (SLTCs) set out in station access contracts. We noted that this would involve a relatively straightforward change to the National Station Access Conditions (NSACs) and Independent Station Access Conditions (ISACs)<sup>42</sup> (both of which have Scottish and English & Welsh versions).

7.3 We also said that, consistent with our approach to track access charges, we would need to revise the indexation provisions for the SLTC so that it uses CPI rather than RPI.

7.4 We noted that this would affect condition F11 of the National Station Access Conditions (NSACs) and condition 42 of the Independent Station Access Conditions (ISACs), and the definition of RPI (in paragraph 1.2 of Part A of the NSACs and in paragraph 1.2 of Part 1 of the ISACs). Among other changes, we proposed to delete the definition of RPI and replace it with a new CPI definition.

7.5 We said that we would use the “Review of Long term charge” provision<sup>43</sup> in the NSACs/ISACs to make these changes.

### Other references to RPI elsewhere in the NSACs and ISACs

7.6 Our consultation also noted two definitions in the front end of the NSACs and ISACs that contain references to RPI (“Financial Impact Test” (FIT) and “Station Investor’s

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<sup>42</sup> The National Station Access Conditions (England & Wales), the National Station Access Conditions (Scotland) and Independent Station Access Conditions are available on our website [here](#).

<sup>43</sup> This is the access charges reopener that is included within the NSACs/ISACs for reviewing the SLTC.

Qualification” (SIQ)). These are set out in paragraph 1.2 of Part A of the NSACs and paragraph 1.2 of Part 1 of the ISACs.

- 7.7 We said that we did not think it would be appropriate for there to be an inconsistent approach to indexation within the ISACs and NSACs (i.e. where some provisions use RPI and some use CPI). However, we noted that we would not be able to amend the FIT and SIQ definitions to change RPI to CPI using our powers under the access charges review reopener, because the definitions do not relate to the SLTC.
- 7.8 We noted that while we had separate powers that would enable us to amend the ISACs and NSACs unilaterally, the provisions for this would require at least a six month delay before the changes could take effect. The timing of the periodic review process would mean that any changes made using these separate powers could only take effect after the start of CP6 on 1 April 2019 (which would not be ideal).
- 7.9 Given this, we said that it would be open for another party to propose that this change be made through the industry change process (which requires industry support but does not require a six month delay to implementation). We mentioned that we had begun discussing with Network Rail whether it would be willing to propose this change.
- 7.10 Notwithstanding this, in the consultation we specifically sought views on:
- (a) whether there might be good reasons for not changing the method of indexation for the “Financial Impact Test” and “Station Investor’s Qualification” to CPI, even though this would mean inconsistency with the rest of the NSACs/ISACs; and
  - (b) whether the definition of RPI should be retained (albeit not used) in the NSACs and ISACs (for example, do contracts/annexes that incorporate these documents rely on the definition of RPI contained within them)?

## Summary of stakeholder views

- 7.11 Other than Network Rail, no stakeholder commented on our proposed approach to implementing PR18 for station access contracts. Network Rail responded that it was content with the changes that we had proposed.
- 7.12 However, regarding the issue of whether to change RPI to CPI in the FIT and SIQ definitions, Network Rail subsequently suggested that making this change might not be desirable. It noted that these definitions were in the station access conditions of stations leased on a long-term basis to other parties (such as those stations in Greater Anglia and the Essex Thameside and East Coast Main Line franchises. The station access agreements relating to such stations are out of scope of PR18).
- 7.13 It suggested that if these different sets of station access conditions were indexed using different inflation measures, then – over time – the financial values for these



two definitions would become inconsistent (currently, the values are the same for all stations). For example, the SIQ would be different depending on whether the station was on a long lease or not. Network Rail said that this could potentially cause some confusion or create a perverse incentive regarding investment decisions. It noted that a potential solution to this would be to amend the station access conditions for stations on long leases to use CPI for the FIT and SIQ definitions, so that these are consistent.

## Our response

### Indexation of FIT and SIQ definitions

7.14 We have discussed with Network Rail the issue it raised regarding the FIT and SIQ definitions. As part of this, we noted that:

- it was recognised some years ago that stations moving to full repairing and insuring leases would in time lead to inconsistencies between the different access conditions. At the time, those involved in the decision making were content with this;
- as a result of PR18, the indexation for the SLTC would be changing. This would mean it would be inevitable that there would be some form of inconsistency. That is, either:
  - inconsistency **within the NSACs/ISACs** (between the SLTC and the two definitions mentioned above); or
  - if all RPI provisions in the NSACs/ISACs are changed to CPI, inconsistency **between the station access conditions** for stations on a long-term lease and the remaining stations owned by Network Rail; and
- as the regulator (rather than a contractual party), we are not in a good position to judge which of these two types of inconsistency would be preferable.

7.15 Hence, we suggested that this was an area where industry parties, rather than ORR, would be better placed to consider and decide what approach to take and to implement this. Network Rail agreed. It advised us that it would set out this issue and consult on Conditions Change Proposals for the station access conditions for all affected stations (with a proposal that the FIT and SIQ definitions use CPI instead of RPI). Its intention was that any change (if supported by consultees) would take effect in time for the start of CP6.

7.16 Also, instead of us deleting and replacing the definition of RPI with the one for CPI, Network Rail asked us to insert the new CPI definition but to retain the definition of RPI. This was because, depending on the outcome of Network Rail's Conditions

Change Proposal, the definition of RPI might still be needed for use in the FIT and SIQ definitions.

## Our decision

7.17 Overall, to implement our PR18 decisions for stations, we have applied the changes that we set out in our July 2018 consultation, with two exceptions – as follows.

- As per Network Rail's request, while we have inserted a new definition of CPI, we have left in the pre-existing definition of RPI in the NSACs and ISACs (although it is no longer used to index the SLTC). If the outcome of the Conditions Change Proposal is that the RPI definition is no longer needed, the definition can be removed in the future – e.g. during the next periodic review or as part of a future Conditions Change Proposal.
- The pre-existing definition of RPI contains provision for ORR to determine the value of the RPI index, in the unlikely situation that the Office for National Statistics has not published a value. In such circumstances, the definition requires ORR to consult with Network Rail, the 'Relevant Operator' and the Secretary of State. In the process to finalise the drafting, we noted that this provision dates from the 1990s, prior to devolution to the Scottish Government and Welsh Government (or to English regions). We therefore concluded that it would be inappropriate for us to perpetuate (in the new CPI definition) the requirement for us to consult the Secretary of State, but not other relevant government bodies whose franchise agreements would be affected by our determination.

We have therefore changed the drafting of the definition of CPI that will be applied to the ISACs and NSACs from 1 April 2019 to say the following:

“...ORR may, after consultation with Network Rail and each Relevant Operator, **and such other persons as ORR considers appropriate**, determine to be appropriate in the circumstances;”

This avoids the oddity of us being required to consult the Secretary of State for stations in, say, Scotland, but not being required to consult the Scottish Ministers. Instead, it will be for us to consult those parties that we consider appropriate, which we would expect to include any affected franchise authorities.

## 8. Issues relating to bespoke provisions in track access contracts

### Overview

This chapter sets out some issues relating to how we implemented our decisions regarding the capping and phasing of variable usage charges for North Yorkshire Moors Railway and West Coast Railway Company's Jacobite services. These were not known about at the time of the July 2018 consultation.

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- 8.1 In addition to developing the final model provisions to implement PR18 in track access contracts from the start of CP6, we also had to take account of any bespoke arrangements in existing contracts. There was a process, begun in March 2018, to identify and agree the appropriate approach for these.
- 8.2 This chapter sets out an issue that arose at a late stage in respect of how we implemented our decision to cap and phase the variable usage charge for North Yorkshire Moors Railway (NYMR) and West Coats Railway Company's (WCRC's) Jacobite services in the relevant track access contracts.

### North Yorkshire Moors Railway and WCRC Jacobite – application of phasing/capping decisions

#### Background

- 8.3 In CP5, the track access contracts for both NYMR and WCRC (Jacobite services) have had bespoke provisions relating to their variable usage charges (VUC). They also have had their own specific sections on the Track Usage Price List<sup>44</sup>, as well as being able to use the main section of the price list where appropriate.
- 8.4 These provisions reflect, in part, that in CP5 both train operators have had a generic steam locomotive rate that is unique to them and which is intended to apply to all types of steam locomotive that they operate. The drafting ensures that no other steam VUC rates set out on the main passenger section of the price list are used to calculate their VUC.
- 8.5 In CP5, NYMR has also had what is in effect a 'generic' rate for diesel locomotives. This is used where NYMR operates a diesel locomotive for which there is no existing specific rate in the main section of the Track Usage Price List.

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<sup>44</sup> Albeit that for the Jacobite, the VUC rates were applied during CP5 as a supplement to the Track Usage Price List.

## PR18 implementation issues

8.6 Two issues have required us to change how the drafting is expressed in the contracts:

- (a) in CP6, Jacobite services will no longer have a generic steam rate (although NYMR will retain its generic steam and diesel rates). This change was made as part of Network Rail's process to recalibrate the VUC for CP6 and produce a new price list; the generic rate is no longer needed as a result of this;
- (b) our final determination concluded that the VUC rates applying to both NYMR and Jacobite services should be capped/phased-in. Reflecting this, the specific sections of the CP6 Track Usage Price List<sup>45</sup> relating to both operators are expressed on a yearly basis (rather than there being a specific rate for the whole of CP6, as per the main passenger section of the price list).

This means that the rates set out in the main passenger section of the Track Usage Price List would not be appropriate for either operator to use (if these rates needed to be used), as these rates are not capped or phased-in. As such, the rates would be too high.

8.7 The CP6 drafting we developed to address these issues is set out in the Schedule 7 for NYMR and WCRC (Jacobite services) (see Appendix 3 to Annex 2 of the relevant [review notice](#) (see page 77), as further amended for Jacobite services by paragraph 3.4 of Annex 2 of the notice (see pages 22-24)).

8.8 This drafting has some implications for both operators in terms of what they would need to do if they begin operating vehicles for which there is not already an appropriate rate set out in their section of the Track Usage Price List. This is discussed below.

### The CP6 provisions

8.9 For Jacobite services, the CP6 provisions provide that the VUC will be calculated using only the VUC rates set out in the section of the Track Usage Price List entitled "West Coast Railway Company Limited Variable Usage Charge rates (Jacobite)". This section of the price list includes rates for the following vehicle types: 1, 2, 98/5 and 98/8.

8.10 For NYMR services, the CP6 provisions provide that the VUC will be calculated using only the VUC rates set out in the section of the Track Usage Price List entitled "North Yorkshire Moors Railway Enterprises sPLC Variable Usage Charge rates". This

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<sup>45</sup> The CP6 Track Usage Price List, as published by Network Rail on 20 December 2018, is available [here](#).

section of the price list includes rates for the following vehicle types: 1, 25/3, and any steam locomotive and any tender.

8.11 If any service is operated using a vehicle that is not in this section of the price list (and, in the case of NYMR, is not a diesel locomotive<sup>46</sup>), the contract will treat this as “New Specified Equipment”. This means that the contract will apply the relevant default rate, as set out in the “Passenger Variable Usage Charge default rates” section. In line with Network Rail’s established policy, the default rate is set at a high level to incentivise operators to obtain a specific rate for their vehicle.

8.12 However, the contract already sets out a process for obtaining a more appropriate rate for any vehicle that is New Specified Equipment, and for this to be applied retrospectively to the date when it began to be used on the network. This is set out in paragraph 9 of Part 2 of Schedule 7 (the process for agreeing a supplement to the Track Usage Price List). Accordingly, if the train operator begins to use a vehicle that is:

- not in the train operator’s own section of the price list; but
- is on the main passenger section of the price list (but which is not capped or phased-in),

either the train operator or Network Rail can propose that a new rate be supplemented to the train operator’s own section of the price list using the paragraph 9 provisions, and applying appropriate capping/phasing-in. This will then provide for that new rate to be applied for the purposes of calculating the VUC.

## **NYMR’s use of diesel locomotives**

8.13 As mentioned above, in CP5, NYMR has had a ‘generic’ rate that could be used if it operated a diesel locomotive for which there was not already a specific VUC rate in the main passenger section of the Track Usage Price List.

8.14 This arrangement was intended to be continued for CP6. However, in light of the issues mentioned above, we have had to change how this works. Otherwise, we would have had to include convoluted and complex drafting in the contract. As part of this, we also asked Network Rail to change how this generic rate appears on the Track Usage Price List.

8.15 The CP6 provisions work as follows:

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<sup>46</sup> See paragraph 8.13 for further details.

- (a) on the Track Usage Price List, the diesel rate is set out in its own section entitled “North Yorkshire Moors Railway Enterprises PLC Variable Usage Charge **diesel default rate**” [text emphasised here for clarity];
- (b) if NYMR operates any diesel locomotive for which there is not already a specific rate in the section of the Track Usage Price List entitled “North Yorkshire Moors Railway Enterprises PLC Variable Usage Charge rates”, it will be treated as “New Specified Equipment”. The default charge will then be applied; and
- (c) the default charge that will apply to it will be the rate set out in NYMR’s ‘diesel default list’ (i.e. the generic rate will be applied).

8.16 If in CP6 NYMR operates a diesel locomotive for which there is a specific rate on the main passenger section of the Track Usage Price List, then either or both parties should then follow the process under paragraph 9 to propose a specific rate be calculated for this (reflecting the appropriate capping and phasing) and then seek our consent to supplement this to the main NYMR section of the price list<sup>47</sup>. This applies whether the new rate would be higher or lower than the generic / default diesel rate.

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<sup>47</sup> That is, the section entitled “North Yorkshire Moors Railway Enterprises PLC Variable Usage Charge rates”. We would not expect any supplements to be made to the default diesel rate section of the price list.



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