

**Schedule 8**

(Performance regime)

**Explanatory Note:**

- (a) *Where there is a CVL TAC (Freight Services), the performance regime for the CVL Network will be administered by Network Rail through (and as part of) Schedule 8 of this contract.*
- (b) *The CVL Network will be considered to be part of the Network Rail network for the purposes of Schedule 8 of this contract and the performance regime of the CVL Network so that after the date that the CVL IM becomes the infrastructure manager of the CVL Network ("Transfer Date") the delay attribution on the CVL Network shall remain broadly consistent with the delay attribution prior to the Transfer Date.*
- (c) *On or around the date of this contract, the CVL IM and Network Rail will enter into a bilateral agreement which will attribute performance matters, as appropriate, between the CVL IM and Network Rail.*
- (d) *This explanatory note does not form part of this contract.*

**1. Definitions**

In this Schedule 8 unless the context otherwise requires:

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

**"30% Exposure"** has the meaning ascribed to it in paragraph 11.1.1;

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

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

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

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

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

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

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

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

**"Attributable to Network Rail"** means, in respect of any delay to or cancellation of a Combined Network Service or any other matter:

- (a) any delay or cancellation or other matter, occurring on or off the Combined Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Combined Network Restriction of Use, which is not Attributable to the Train Operator;

## Annex B

- (c) that portion of any such delay to or cancellation of a Combined Network Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail;
- (d) any delay or cancellation occurring on or off the Combined Network, caused by an Other Train Operator Train on the Combined Network; or
- (e) prior to the implementation of any ETCS Amendments in accordance with paragraph 12, any delay to or cancellation of a Combined Network Service occurring on the Combined Network or that prevents that Combined Network Service accessing the Combined Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication directly caused by the Deliberate Act of the Train Operator) that has been allocated as the responsibility of the Train Operator in the Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules,

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

**"Attributable to the Train Operator"** means:

- (a) in respect of any delay to or cancellation of a Combined Network Service, any such delay or cancellation arising as a result of:
  - (i) any acts or omissions of the Train Operator's staff or its agents, contractors or sub-contractors;
  - (ii) any Train Operator Omission;
  - (iii) any failure or defect in the Specified Equipment (with the exception of those failures, defects or miscommunications contemplated in sub-paragraph (e) of the definition of "Attributable to Network Rail") relating to a Combined Network Service (including where Network Rail or the CVL IM (as the case may be) shall have refused to permit the Combined Network Service to move over the Network or the CVL Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
  - (iv) any improperly loaded railway wagons which form the whole or part of any Combined Network Service;
  - (v) any Combined Network Service not being promptly accepted off the Combined Network at a Destination or Intermediate Point for reasons not caused by:
    - (A) Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
    - (B) the CVL IM (in its capacity as operator of the CVL Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for the CVL IM in its capacity as operator of the CVL Network) (other than the Train Operator);
  - (vi) any failures or delays arising off the Combined Network, other than those which are caused by:
    - (A) Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or

## Annex B

- (B) the CVL IM (in its capacity as operator of the CVL Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for the CVL IM in its capacity as operator of the CVL Network) (other than the Train Operator); or
  - (vii) that portion of any such delay to or cancellation of a Combined Network Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Combined Network Restriction of Use, any such delay or cancellation arising as a result of:
  - (i) any delay to or cancellation of a Combined Network Service Attributable to the Train Operator;
  - (ii) any Train Operator Omission; or
  - (iii) that portion of any such delay to, or cancellation of, a Combined Network Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

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

**"Baseline Annual Contract Mileage"** has the meaning ascribed to it in paragraph 10.2.2(b);

**"Benchmarks"** means the Train Operator Benchmark and the Network Rail Benchmark;

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

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

**"Combined Network"** means (together):

- (a) the Network; and
- (b) the CVL Network;

**"Combined Network Ancillary Movement"** means (as the case may be):

- (a) an Ancillary Movement (as such term is defined in clause 1 of this contract); or
- (b) a CVL Ancillary Movement;

**"Combined Network Cancellation"** means (as the case may be):

- (a) a Cancellation (as such term is defined in paragraph 8.1 of this Schedule 8); or
- (b) a CVL Cancellation;

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

**"Combined Network Diverted Service"** has the meaning ascribed to it in paragraph 1 of Schedule 4;

**"Combined Network Late Notice Cancellation"** means (as the case may be):

- (a) a Late Notice Cancellation; or
- (b) a CVL Late Notice Cancellation;

## Annex B

**“Combined Network Restriction of Use”** has the meaning ascribed to it in paragraph 1 of Schedule 4;

**“Combined Network Services”** means (together):

- (a) the Services; and
- (b) the CVL Services,

and reference in this Schedule 8 to a **“Combined Network Service”** shall mean, as the context requires, a Service or a CVL Service;

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

**“CVL Alternative Train Slot”** has the meaning ascribed to the term **“Alternative Train Slot”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Ancillary Movements”** has the meaning ascribed to the term **“Ancillary Movements”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Cancellation”** means any CVL Service:

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

in each case where at least 6 hours of the delay to the CVL Service is Attributable to Network Rail (by virtue of the application of this Schedule 8); or

- (d) in respect of which Network Rail:
  - (i) nominates a CVL Alternative Train Slot for a reason which is Attributable to Network Rail (by virtue of the application of this Schedule 8) as referred to in paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such CVL Train Slot and:
    - (A) does not propose a different CVL Alternative Train Slot; or
    - (B) proposes a different CVL Alternative Train Slot and this is not accommodated by Network Rail as a CVL Train Operator Variation;
  - (ii) is not able to nominate a CVL Alternative Train Slot as referred to in paragraphs 4 or 5 of Schedule 4;

**“CVL Diverted Service”** has the meaning ascribed to it in paragraph 1 of Schedule 4;

**“CVL Force Majeure Event”** has the meaning ascribed to the term **“Force Majeure Event”** in clause 17.1 of the CVL TAC (Freight Services);

**“CVL IM”** means Amey Keolis Infrastructure / Seilwaith Amey Keolis Limited, a company registered in England under number 11389544 having its registered office at The Sherard Building, Edmund Halley Road, Oxford, OX4 4DQ (including its successors and permitted assigns);

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

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

**“CVL Network Code”** means the document by that name published by the CVL IM;

## Annex B

**“CVL Railway Operational Code”** has the meaning ascribed to that term in Part H of the CVL Network Code;

**“CVL Rights Table”** has the meaning ascribed to it in Schedule 4;

**“CVL Services”** has the meaning ascribed to the term **“Services”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Short Notice Service”** has the meaning ascribed to the term **“Short Notice Service”** in clause 1 of the CVL TAC (Freight Services);

**“CVL TAC (Freight Services)”** means the track access contract (freight services) between the CVL IM and the Train Operator that grants the Train Operator permission to use the CVL Network;

**“CVL Timetable Planning Rules”** has the meaning ascribed to the term **“Timetable Planning Rules”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Train Operator Variation”** has the meaning ascribed to the term **“Train Operator Variation”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Train Operator Variation Request”** has the meaning ascribed to the term **“Train Operator Variation Request”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Train Slot”** has the meaning ascribed to the term **“Train Slot”** in clause 1 of the CVL TAC (Freight Services);

**“CVL Working Timetable”** has the meaning ascribed to the term **“Working Timetable”** in clause 1 of the CVL TAC (Freight Services);

**“Deliberate Act”** means any act or omission committed by the Train Operator which:

- (a) is a serious and substantial departure from good industry practice; and
- (b) shows a material disregard for any harmful, foreseeable and avoidable consequences that would be reasonably likely to result from such act or omission,

but shall not include an act or omission arising solely by way of an error of judgement or mistake unless such error of judgement or mistake is repeated on more than one occasion; and in the case of a Relevant Staff Member where such error of judgement or mistake occurs at least 6 months after the Relevant Staff Member has received training on the operational control of the relevant ETCS Equipment;

**“Disruption Sum”** means the Disruption Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

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

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

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

**“ETCS Amendments”** means any amendments made to this Schedule 8 and to any other provisions of this contract in accordance with paragraph 12 as a consequence of the introduction of ETCS NTC Mode on any part of the Network that is used by the Train Operator provided that the Train Operator’s Specified Equipment has triggered the ETCS NTC Mode Reliability Target;

**“ETCS Equipment”** means the line replaceable units or equipment specified and described in Appendix 4, including all parts of such ETCS Equipment;

**“ETCS Final Amendments”** means any amendments made to this Schedule 8 and to any other provisions of this contract, in accordance with paragraph 12 as a consequence of the introduction of ETCS Level 2 Mode on any part of the Network that is used by the Train Operator provided that the Train Operator’s Specified Equipment has triggered the ETCS Level 2 Mode Reliability Target;

## Annex B

**"ETCS Level 2 Mode"** means a level of ETCS application that allows movement authority to be passed to the train by GSM-R radio whilst track-based detection systems continue to be used to support safe train separation;

**"ETCS Level 2 Mode Reliability Target"** means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF;

**"ETCS NTC Mode"** means a level of ETCS application that allows the operation of the Specified Equipment with the National Train Control System;

**"ETCS NTC Mode Reliability Target"** means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF across all track access contracts that include this definition;

**"Exposure Level"** has the meaning ascribed to it in paragraph 11.1.1;

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

**"Financial Year t-1"** means the Financial Year preceding Financial Year t;

**"Financial Year t+1"** has the meaning ascribed to it in paragraph 10.2.2;

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

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

**"Incident Cap Notice"** has the meaning ascribed to it in paragraph 11.1.2;

**"Initial Incident Cap Notice"** has the meaning ascribed to it in paragraph 11.1.1;

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

**"Late Notice Cancellation Sum"** means the Late Notice Cancellation Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

**"MDNR"** has the meaning ascribed to it in paragraph 6.2.1(b);

**"MDTO"** has the meaning ascribed to it in paragraph 4.2.1(b);

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

**"Mission Failure"** means any irrecoverable incident that is deemed to have occurred as a result of ETCS functional failure where the Train Operator has taken all reasonable steps to correct such functional failure but has been unsuccessful, the occurrence of which during any operational day or before the start of the operational day, results in the Combined Network Cancellation of the Combined Network Service. Mission Failures are a sub-set of the Service Affecting Failures;

**"MTBMF"** or **"Mean Time Between Mission Failures"** means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Mission Failures;

**"MTBSAF"** or **"Mean Time Between Service Affecting Failures"** means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Service Affecting Failures;

**"National Train Control System"** means the traditional system used by Network Rail to control trains on its network using non-train based equipment which includes but is not limited to fixed signalling and track circuits;

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

**"Network Rail Cap"** means the Network Rail Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Network Rail Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and

## Annex B

paragraph 10.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

**"Network Rail Charging Period Limit"** means 1/13th of the Network Rail Cap;

**"Network Rail Payment Rate"** means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

**"Normal Planned Disruption Sum"** has the meaning ascribed to it in Schedule 4;

**"Other Train Operator Train"** means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract or the CVL TAC (Freight Services);

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

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

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

**"Planned Incident"** means an incident in connection with a Combined Network Restriction of Use to the extent that there is Recovery Time in respect of that Combined Network Restriction of Use incorporated in the Working Timetable and/or CVL Working Timetable (as the case may be);

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

**"Prolonged Disruption Amount"** means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

**"Prolonged Disruption Sum"** means the Prolonged Disruption Sum calculated in accordance with paragraph 7;

**"Railway Operational Code"** has the meaning ascribed to it in Part H of the Network Code;

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

**"Recovery Time"** means additional time incorporated in the Working Timetable and/or the CVL Working Timetable (as the case may be) to allow a train to regain time lost in delay during an earlier part of its journey;

**"Relevant Staff Member"** means the person(s) appointed from time to time by the Train Operator to be in operational control of the relevant Specified Equipment;

**"Service Affecting Failures"** means an independent failure(s) that disrupts or delays a Combined Network Service;

**"Service Operating Hours"** means the hours accumulated by Specified Equipment fitted with ETCS Equipment whilst operational. In the case of such Specified Equipment powered by diesel engines 'operational' means when the diesel engine is running and in the case of such Specified Equipment powered by electricity 'operational' means when the pantograph or collector shoe is connected to the overhead catenary or third rail as applicable;

**"Service Variation"** has the meaning ascribed to it in Schedule 4;

## Annex B

**"Third Party Train"** means a train other than a train operated by the Train Operator under this contract or the CVL TAC (Freight Services);

**"Train Operator Benchmark"** or **"TOB"** means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Charging Period, as specified in Appendix 1;

**"Train Operator Cap"** means the Train Operator Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Train Operator Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

**"Train Operator Charging Period Limit"** means 1/13th of the Train Operator Cap;

**"Train Operator Payment Rate"** means the Train Operator Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

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

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

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

**"Zero Exposure"** has the meaning ascribed to it in paragraph 11.1.1.

### 1A. Treatment of other defined terms used in this Schedule 8

1A.1 In this Schedule 8 only (except where expressly provided otherwise), the following capitalised terms shall have the following meanings (disregarding, for the avoidance of doubt, the definitions ascribed to these capitalised terms elsewhere in this contract):

- (a) **"Destination"** means:
  - (i) in relation to a Service:
    - (A) the location on the Network at which that Service is Planned to terminate; or
    - (B) if the location at which that Service is Planned to terminate is not on the Network, the location on the Network which:
      - (i) will enable the train operating that Service to leave the Network; and
      - (ii) is the most appropriate location for such train to use to terminate that Service on the Network;
  - (ii) in relation to a CVL Service:
    - (A) the location on the CVL Network at which that CVL Service is Planned to terminate; or
    - (B) if the location at which that CVL Service is Planned to terminate is not on the CVL Network, the location on the CVL Network which:
      - (i) will enable the train operating that CVL Service to leave the CVL Network; and
      - (ii) is the most appropriate location for such train to use to terminate that CVL Service on the CVL Network;
- (b) **"Empty Service"** means a Combined Network Service which does not convey:

## Annex B

- (i) loaded wagons; or
- (ii) empty passenger rolling stock;
- (c) **“Intermediate Point”** means:
  - (i) in relation to a Service:
    - (A) a location on the Network at which that Service is Planned to call; or
    - (B) if the location at which that Service is Planned to call is not on the Network, a location on the Network which:
      - (i) will enable the train operating that Service to be accepted off and presented onto the Network; and
      - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;
  - (ii) in relation to a CVL Service:
    - (A) a location on the CVL Network at which that CVL Service is Planned to call; or
    - (B) if the location at which that CVL Service is Planned to call is not on the CVL Network, a location on the CVL Network which:
      - (i) will enable the train operating that CVL Service to be accepted off and presented onto the CVL Network; and
      - (ii) is the most appropriate location for such train to use to move onto the CVL Network to reach the Destination of that CVL Service;
- (d) **“Origin”** means:
  - (i) in relation to a Service:
    - (A) the location on the Network at which that Service is Planned to commence; or
    - (B) if the location at which that Service is Planned to commence is not on the Network, the location on the Network which:
      - (i) will enable the train operating that Service to be presented onto the Network; and
      - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;
  - (ii) in relation to a CVL Service:
    - (A) the location on the CVL Network at which that CVL Service is Planned to commence; or
    - (B) if the location at which that CVL Service is Planned to commence is not on the CVL Network, the location on the CVL Network which:
      - (i) will enable the train operating that CVL Service to be presented onto the CVL Network; and
      - (ii) is the most appropriate location for such train to use to move onto the CVL Network to reach the Destination of that CVL Service; and
- (e) **“Performance Monitoring System”** has the meaning ascribed to it in Part B of the Network Code, it being acknowledged that Network Rail has agreed to additionally operate such Performance Monitoring System so as to accurately monitor train performance on the CVL Network and record:

## Annex B

- (i) the times at which trains arrive at, depart from and pass specified points on the CVL Network;
  - (ii) the difference between the time at which a train arrives at, departs from or passes a specified point on the CVL Network and the time published for such arrival, departure or passing in the CVL Working Timetable;
  - (iii) all cancelled trains and trains failing to pass any specified point on the CVL Network; and
  - (iii) the cause of train delays and cancellations on the CVL Network; and
- (f) **“Planned”** means entered in the Working Timetable or CVL Working Timetable (as the case may be).

### 2. General

#### 2.1 *Performance monitoring system recordings*

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

#### 2.2 *Liability for Short Notice Service*

Notwithstanding that (as the case may be):

- (a) Network Rail shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service; and/or
- (b) Network Rail shall have accepted a CVL Train Operator Variation Request for a CVL Train Slot which is a CVL Short Notice Service,

Network Rail shall have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service or CVL Short Notice Service (as the case may be) where such delay arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code or the CVL Railway Operational Code (as the case may be).

#### 2.3 *Mitigation of delays*

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

#### 2.4 *Calculation of Minutes Delay*

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

#### 2.5 *CVL Force Majeure Events*

The parties hereby acknowledge and agree that the occurrence of a CVL Force Majeure Event affecting the CVL IM shall be treated for the purposes of this Schedule 8 as the occurrence of a Force Majeure Event affecting Network Rail in respect of which the provisions of Clause 17 of this contract shall apply (save that Clause 17.9 shall not, in the circumstances of this paragraph 2.5, apply).

### 3. Diagnosis of delays

#### 3.1 *Attributing delays*

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

- (a) Attributable to the Train Operator;

## Annex B

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

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

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

### **3.3 Unexplained delays Attributable to Network Rail**

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

### **3.4 Unexplained delays Attributable to the Train Operator**

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

### **3.5 Identifying delaying incidents**

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

### **3.6 Performance statements**

Appendix 3 (Performance statements) shall have effect.

## **4. Minutes Delay in respect of Train Operator performance**

### **4.1 Prescribed delay period**

4.1.1 For the purposes of this paragraph 4, the aggregate Minutes Delay to Third Party Trains Attributable to the Train Operator arising as a result of any one incident or event shall be capped as follows:

- (a) where the Train Operator has elected to have no exposure above the Incident Cap in accordance with paragraph 11, any such minutes in excess of the Incident Cap shall be disregarded; or
- (b) where the Train Operator has elected to have 30% exposure above the Incident Cap in accordance with paragraph 11, 70% of such minutes in excess of the Incident Cap shall be disregarded.

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

### **4.2 Train Operator performance against TOB**

4.2.1 In respect of each Charging Period:

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

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

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

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

## Annex B

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

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

where:

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

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

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

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

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

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

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

- (a) in the case of a cancellation of a Combined Network Restriction of Use, the Disruption Sum; or
- (b) in the case of a delay to the commencement of a Combined Network Restriction of Use, one quarter of the Disruption Sum multiplied by the number of hours by which the commencement is delayed, up to a maximum of 4 hours. For the purposes of this paragraph 5(b) part of an hour shall be treated as an entire hour.

### 6. Minutes Delay in respect of Network Rail performance

#### 6.1 Combined Network Cancellations

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

- (a) if the Combined Network Service is a Combined Network Cancellation:
- (i) as defined in paragraph 8.1(a) of this Schedule 8; or
- (ii) falling within paragraph (a) of the definition of "CVL Cancellation",
- there shall not be any Minutes Delay in respect of the Combined Network Service Attributable to Network Rail;
- (b) if the Combined Network Service is a Combined Network Cancellation:
- (i) as defined in paragraph 8.1(b) of this Schedule 8; or
- (ii) falling within paragraph (b) of the definition of "CVL Cancellation",
- there shall be disregarded any Minutes Delay in respect of the Combined Network Service after the first 12 hours aggregate of Minutes Delay; and
- (c) if the Combined Network Service is a Combined Network Cancellation:
- (i) as defined in paragraph 8.1(c) of this Schedule 8; or
- (ii) falling within paragraph (c) of the definition of "CVL Cancellation",
- there shall be disregarded any Minutes Delay in respect of the Combined Network Service after the time at which the Combined Network Service arrives at the point on or off the Combined Network where it subsequently becomes a Combined Network Cancellation.

Annex B

**6.2 Network Rail performance against NRB**

In respect of each Charging Period:

6.2.1

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

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

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

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

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

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

where:

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

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

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

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

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

**7. Prolonged Disruption**

**7.1 Prolonged Disruption Sum calculation**

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

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

where:

PDA is the Prolonged Disruption Amount;

S is one quarter of the number of Combined Network Services operated during the 4 Weeks immediately before the first Week of the Prolonged Disruption over that part of the Combined Network subject to the Prolonged Disruption; and

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

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2

## Annex B

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

### **7.2 Subsequent Prolonged Disruption**

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

### **7.3 Network Rail liability**

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

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Combined Network Service which is an:

- (a) Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party (other than, for the avoidance of doubt, the CVL TAC (Freight Services)), conveying empty wagons and/or coaching stock will not be an Empty Service);
- (b) a Short Notice Service or CVL Short Notice Service; or
- (c) an Ancillary Movement or CVL Ancillary Movement.

## **8. Combined Network Cancellation**

### **8.1 Definition of Cancellation**

"Cancellation" means any Service:

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

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

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

### **8.2 Network Rail liability**

8.2.1 Subject to:

- (a) paragraphs 8.2.2, 8.2.3 and 8.3 below; and

## Annex B

(b) paragraphs 4.5, 5.6 and 7.4 of Schedule 4,

Network Rail shall be liable in any Charging Period for the Cancellation Sum in respect of each Combined Network Cancellation of a Combined Network Service Planned to depart its Origin in that Charging Period.

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

(a)

- (i) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party (other than, for the avoidance of doubt, the CVL TAC (Freight Services)), conveying empty wagons and/or coaching stock will not be an Empty Service);
- (ii) a Short Notice Service or CVL Short Notice Service; or
- (iii) an Ancillary Movement or CVL Ancillary Movement; or

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

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

### **8.3 Late presentation of Combined Network Service**

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

(a) a Combined Network Cancellation as a result of:

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

(b) a conflict with any restrictions on the use of:

- (i) the Network contained in the Timetable Planning Rules; or
- (ii) the CVL Network contained in the CVL Timetable Planning Rules.

## **9. Payment**

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

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

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

9.1.3 In respect of any Financial Year, the Aggregate Net Liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.

9.1.4 The Aggregate Net Liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.

## Annex B

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

### **9.2 Issue of invoice or credit note**

- 9.2.1 In respect of each Charging Period, subject to paragraph 9.1, Network Rail shall:
- (a) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 11 of Appendix 3 within 28 days after the provision of such period final statement;
  - (a) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 12 of Appendix 3, within 28 days after the provision of such period final statement;
  - (b) issue a credit note in respect of the aggregate of all Normal Planned Disruption Sums and Enhanced Planned Disruption Sums for which Network Rail is liable in accordance with Schedule 4, if any, within 28 days after agreement of such liability.
- 9.2.2 In the event that (i) any of the period final statements referred to in sub-paragraphs 9.2.1(a) and 9.2.1(b) have not been provided within 28 days after the end of the Charging Period to which they relate or (ii) agreement referred to in sub-paragraph 9.2.1(c) has not been reached within those same 28 days, in both cases Network Rail may agree with the Train Operator that an interim payment be made. If such agreement is reached then the invoice or credit note (as appropriate) issued shall detail which of the relevant sums are thus settled and which remain outstanding; and any subsequent invoice or credit note (as appropriate) issued in respect of the same Charging Period under sub-paragraphs 9.2.1(a), 9.2.1(b) or 9.2.1(c) shall take account of the interim payments as well as remaining subject to paragraph 9.1.

### **9.3 Resolution of disputes**

- 9.3.1 Without prejudice to Clause 13, Part B of the Network Code and/or Part B of the CVL Network Code (as the case may be) shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.
- 9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

## **10. Reviews of Network Rail Cap and Train Operator Cap**

### **10.1 Not used**

### **10.2 Adjustments to the Network Rail Cap and Train Operator Cap**

- 10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraphs 2.7.1 and 2.7.2 of Schedule 7, provided that no adjustment shall be made to the Network Rail Cap or the Train Operator Cap pursuant to the following subparagraphs of this paragraph 10.2 prior to 1 April 2020.
- 10.2.2 Within 28 days after the last day of Financial Year t, Network Rail shall notify the Train Operator in writing of:
- (a) the total number of Combined Network Contract Miles operated by the Train Operator during Financial Year t (the "**Annual Contract Mileage**");

## Annex B

- (b) Network Rail's determination as to whether or not the Annual Contract Mileage for Financial Year  $t$  exceeds or is less than the Baseline Annual Contract Mileage (as determined in accordance with paragraph 10.2.3 below ("**Baseline Annual Contract Mileage**") by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual Contract Mileage (the "**Annual Contract Mileage Variation**"); and
- (c) if Network Rail determines that there has been an Annual Contract Mileage Variation, Network Rail's proposal for an adjusted Network Rail Cap and/or Train Operator Cap in respect of the Financial Year immediately following Financial Year  $t$  ("**Financial Year  $t+1$** "), in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

### 10.2.3

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

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

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

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

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

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

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

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

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

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

## Annex B

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

### 11. Selection by the Train Operator of the Incident Cap and Exposure Level

#### 11.1 Selection by the Train Operator of the Incident Cap and Exposure Level

11.1.1 Subject to paragraph 11.1.3, on or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap and the level of exposure above the Incident Cap ("**Exposure Level**") it wishes to apply, being either no exposure above the Incident Cap, as described in paragraph 4.1.1(a) ("**Zero Exposure**"), or 30% exposure above the Incident Cap, as described in paragraph 4.1.1(b) ("**30% Exposure**") (such notification being the "**Initial Incident Cap Notice**"). The Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the level of Incident Cap selected by the Train Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap and Exposure Level selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

11.1.2 Subject to paragraph 11.1.3, the Train Operator may change the level of Incident Cap and Exposure Level previously selected by it (either in the Initial Incident Cap Notice or any subsequent Incident Cap Notice issued pursuant to this paragraph 11.1.2) with effect from 1 April in any Financial Year by notifying Network Rail in writing of the level of Incident Cap and Exposure Level it wishes to apply for that Financial Year (the "**Incident Cap Notice**"). Any such Incident Cap Notice must be served by the Train Operator on Network Rail by no later than 6 weeks prior to 1 April in the Financial Year from which the Train Operator wishes the new level of Incident Cap and Exposure Level to apply, and the Incident Cap Access Charge Supplement Rate applicable for that and each subsequent Financial Year shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the level of Incident Cap selected by the Train Operator in the Incident Cap Notice until it is replaced by a different level of Incident Cap and Exposure Level selected by the Train Operator in an Incident Cap Notice issued pursuant to this paragraph 11.1.2.

11.1.3 For the avoidance of doubt, if the Train Operator selected an Incident Cap prior to Financial Year 2019/20, and did not issue a subsequent Incident Cap Notice in respect of Financial Year 2019/20 selecting 30% Exposure, the Train Operator shall be deemed, for the purposes of paragraphs 11.1.1 and 11.1.2, to have selected Zero Exposure for Financial Year 2019/20.

#### 11.2 Level of Incident Cap, Exposure Level and Incident Cap Access Charge Supplement Rate

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps and, in respect of the relevant Incident Cap, the Exposure Level as set out in either Column B or C:

A	B	C
<b>Incident Cap</b>	<b>Incident Cap Access Charge Supplement Rate (£ per Combined Network Contract Mile operated in a Charging Period)</b> expressed in pounds sterling and rounded to four decimal places – Zero Exposure above the Incident Cap	<b>Incident Cap Access Charge Supplement Rate (£ per Combined Network Contract Mile operated in a Charging Period)</b> expressed in pounds sterling and rounded to four decimal places – 30% Exposure above the Incident Cap
1,000 minutes	0.2045	0.1432
2,000 minutes	0.1057	0.0740
3,000 minutes	0.0623	0.0436
4,000 minutes	0.0403	0.0282

Annex B

A	B	C
<b>Incident Cap</b>	<b>Incident Cap Access Charge Supplement Rate (£ per Combined Network Contract Mile operated in a Charging Period)</b> expressed in pounds sterling and rounded to four decimal places – Zero Exposure above the Incident Cap	<b>Incident Cap Access Charge Supplement Rate (£ per Combined Network Contract Mile operated in a Charging Period)</b> expressed in pounds sterling and rounded to four decimal places – 30% Exposure above the Incident Cap
5,000 minutes	0.0280	0.0196
6,000 minutes	0.0217	0.0152
7,000 minutes	0.0172	0.0121
8,000 minutes	0.0135	0.0095
9,000 minutes	0.0101	0.0071
10,000 minutes	0.0067	0.0047
No Incident Cap	None	None

**12. ETCS Amendments and ETCS Final Amendments**

**12.1 Circumstances in which ETCS Amendments and ETCS Final Amendments can be made**

- (a) Either party may by notice to the other propose ETCS Amendments or ETCS Final Amendments.
- (b) ORR may make ETCS Amendments, subject to complying with paragraph 12.3.

**12.2 ETCS Amendments and ETCS Final Amendments agreed by the parties**

- (a) A party that wishes to make ETCS Amendments or ETCS Final Amendments shall serve a notice on the other party that:
  - (i) specifies as far as possible the proposed ETCS Amendments or proposed ETCS Final Amendments and the date from which they are to have effect;
  - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments or proposed ETCS Final Amendments and setting out the reasons for making them; and
  - (iii) gives broad effect to the principle that the liability of the parties under this Schedule 8 (all other things being equal) is no greater after the implementation of any ETCS Amendments or ETCS Final Amendments than it was prior to the implementation of those ETCS Amendments or ETCS Final Amendments.
- (b) The party receiving a notice under paragraph 12.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, and in any event within 20 Working Days following service of a response pursuant to paragraph 12.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments or proposed ETCS Final Amendments and the date on which they are to have effect.
- (d) If:
  - (i) the parties agree to make ETCS Amendments or ETCS Final Amendments pursuant to paragraph 12.2(c); or

## Annex B

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

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

- (a) If ORR:
  - (i) receives a notification under paragraph 12.2(d); or
  - (ii) proposes to make ETCS Amendments or ETCS Final Amendments itself,  
then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments or ETCS Final Amendments it shall:
    - (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments or the proposed ETCS Final Amendments; and
    - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments or ETCS Final Amendments shall have effect.
- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 12.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

### **12.4 Amendments to sub-paragraph (e) of the definition of "Attributable to Network Rail" as a consequence of ETCS Amendments**

With effect from the implementation of any ETCS Amendments in accordance with paragraphs 12.2 and/or 12.3, sub-paragraph (e) of the definition of "Attributable to Network Rail" in paragraph 1 shall be replaced with the following wording:

"any delay or cancellation occurring on or off the Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication of such ETCS Equipment when operating in NTC Mode or directly caused by the Deliberate Act of the Train Operator) that has been allocated as the responsibility of the Train operator in the Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules"

### **12.5 Amendments to Schedule 8 as a consequence of ETCS Final Amendments**

With effect from the implementation of any ETCS Final Amendments in accordance with paragraphs 12.2 and/or 12.3, the amendments to Schedule 8 listed in Appendix 5 shall have effect.

### **12.6 Amendments to Schedule 8 as a consequence of ETCS Amendments or ETCS Final Amendments**

The parties acknowledge and agree that any amendments made to Schedule 8 pursuant to this paragraph 12 must also apply to any other operator whose Access Agreement in relation to track includes a provision similar to this paragraph 12 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 12.2(d)(ii) even if, either:

- (a) pursuant to paragraph 12.2, the Train Operator has notified Network Rail that it agrees with Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments; and/or
- (b) the determination of any ETCS Amendments or ETCS Final Amendments by ORR differs from Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments with which the Train Operator agreed.

## Annex B

**Appendix 1**  
Performance

**Train Operator Performance**

<b>Train Operator Payment Rate</b>	£54.04 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.
<b>Train Operator Cap</b>	£[●]
<b>Disruption Sum</b>	£2,375

**Network Rail Performance**

<b>Network Rail Payment Rate</b>	£21.38 per Minutes Delay to Services which are Attributable to Network Rail.
<b>Network Rail Cap</b>	£[●]
<b>Prolonged Disruption Amount</b>	means an amount equal to the Late Notice Cancellation Sum.

## Annex B

### **Benchmarks**

#### **Train Operator Benchmark**

The Train Operator Benchmark (TOB) in relation to each Charging Period shall be 3.10 Minutes Delay per 100 Train Operator Miles.

#### **Network Rail Benchmark**

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be 7.82 Minutes Delay per 100 Train Operator Miles;

#### **Cancellation Sum**

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £2,025 for each Combined Network Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £5,401 for each Combined Network Cancellation equal to or above the Cancellation Threshold; and
- (c) the "**Cancellation Threshold**" in any Charging Period shall be 0.40 per cent of the total number of Combined Network Services operated by the Train Operator in that Charging Period.

#### **Late Notice Cancellation Sum**

The Late Notice Cancellation Sum in respect of each Combined Network Late Notice Cancellation shall be £1,749.

#### **Baseline Annual Contract Mileage**

The Baseline Annual Contract Mileage shall be the number approved or determined by ORR in due course.

**Appendix 2**

Calculation of Minutes Delay

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

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

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

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

### Appendix 3

#### Performance Statements

##### Interim statements provided by Network Rail

1. Using all reasonable endeavours, Network Rail shall provide to the Train Operator an interim statement listing all incidents which are in connection with Combined Network Services which were Planned to depart from their Origin during each day. Such interim statements shall be issued on the eighth day after the end of each particular day (or, if the eighth day is not a Working Day, on the next Working Day thereafter) indicating:
  - (a) which incidents are Attributable to the Train Operator and, in respect of such incidents, the Minutes Delay to Third Party Trains;
  - (b) which incidents are Attributable to Network Rail and, in respect of such incidents, the Minutes Delay to Combined Network Services;
  - (c) which incidents are Attributable to both the Train Operator and Network Rail, and in respect of such incidents (i) that portion of Minutes Delay to Third Party Trains which is allocated to the Train Operator and (ii) that portion of Minutes Delay to Combined Network Services which is allocated to Network Rail; and
  - (d) which incidents in categories (a) to (c) above remain, at the time of production of the interim statement, under further investigation following a referral by the Train Operator under Condition B2.3.2 of the Network Code or condition B2.3.2 of the CVL Network Code (as the case may be).
2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, Network Rail shall provide to the Train Operator an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable under paragraph 5 of Schedule 8.
3. As soon as reasonably practicable after the end of each Charging Period, and using all reasonable endeavours to provide such interim statement within six Working Days after the end of each Charging Period, Network Rail shall provide to the Train Operator an interim statement listing:
  - (a) the total Combined Network Contract Miles; and
  - (b) the total number of Combined Network Services,in each case operated by the Train Operator during that Charging Period.

##### Interim statements provided by the Train Operator

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

##### Dispute of interim statement

## Annex B

5. Within two Working Days of receipt of any interim statement under paragraph 1, 2, 3 or 4 of this Appendix the recipient shall notify the provider of the interim statement of any reason why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.
6. Within the next five Working Days after notification of any dispute under paragraph 5 above, nominated representatives of the parties shall meet and attempt to resolve that dispute.
7. If any matter is still in dispute ten Working Days after the meeting held under paragraph 6 above, either party may refer such matter for resolution under paragraph 9.3.1 of Schedule 8.

### **Deemed agreement**

8. Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph 5 above that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

### **Period final statements**

9. After the resolution of any investigations listed in an interim statement in accordance with paragraph 1(d) above, and of any disputes notified under paragraph 5 above, Network Rail shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
  - (a) the total Combined Network Cancellations and the aggregate of the Cancellation Sums payable under Schedule 8;
  - (b) the total Combined Network Late Notice Cancellations and the aggregate of the Late Notice Cancellation Sums payable under Schedule 8;
  - (c) the total Service Variations and the aggregate of the Service Variation Sums payable under Schedule 4;
  - (d) the aggregate of the Disruption Sums payable under Schedule 8; and
  - (e) the aggregate of the Prolonged Disruption Sums payable under Schedule 8,in each case applicable to Combined Network Services Planned to depart from their Origin during that Charging Period.
10. After the resolution of any incidents referred for further investigation under Condition B2.3.2 of the Network Code or condition B2.3.2 of the CVL Network Code (as the case may be), Network Rail shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
  - (a) the total Performance Sum for which Network Rail is liable under Schedule 8; and
  - (b) the total Performance Sum for which the Train Operator is liable under Schedule 8in each case including such relevant calculations as the parties shall agree from time to time.

### **Statement of adjustment**

11. If Condition B3.3 of the Network Code (Adjustment to prior results) or condition B3.3 of the CVL Network Code (as the case may be) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.
12. Any statement issued by Network Rail under paragraph 11 above shall be accompanied by an adjusting invoice or credit note.

## Appendix 4

## ETCS Equipment

<b>European Vital Computer (EVC)</b>
[detail to be completed]
<b>Driver Machine Interface (DMI)</b>
[detail to be completed]
<b>Train Interface Unit (TIU)</b>
[detail to be completed]
<b>Balise Antenna</b>
[detail to be completed]
<b>Juridical Recorder Unit (JRU)</b>
[detail to be completed]
<b>Non-Vital Computer (NVC)</b>
[detail to be completed]
<b>Odometry System</b>
[detail to be completed]
<b>Control and Maintenance Workstations</b>
[detail to be completed]
<b>Power Supply Units (PSU)</b>
[detail to be completed]
<b>Interface Equipment</b>
[detail to be completed]
<b>AWS/TPWS Equipment</b>
[detail to be completed]
<b>Cables, connections, labelling and other miscellaneous items</b>
[detail to be completed]

**Appendix 5**

Amendments to Schedule 8 as a Consequence of ETCS Final Amendments

From the effective date of any ETCS Final Amendments agreed in accordance with paragraph 12, the following amendments to Schedule 8 shall also take effect:

- 1 Paragraph 1: definition of “Attributable to Network Rail”:
  - (a) delete “;or” from the end of sub-paragraph (d) and replace with a full stop; and
  - (b) delete sub-paragraph (e) in its entirety.
- 2 Paragraph 1: definition of “Attributable to the Train Operator”, delete the following wording from sub-paragraph (iii):

“(with the exception of those failures, defects or miscommunications contemplated in sub-paragraph (e) of the definition of “Attributable to Network Rail”)”
- 3 Paragraph 1: delete the following definitions:

“Deliberate Act”

“ETCS”

“ETCS Amendments”

“ETCS Final Amendments”

“ETCS Level 2 Mode”

“ETCS Level 2 Mode Reliability Target”

“ETCS NTC Mode”

“ETCS NTC Mode Reliability Target”

“Mission Failure”

“MTBMF”

“MTBSAF”

“National Train Control System”

“Relevant Staff Member”

“Service Affecting Failures”

“Service Operating Hours”
- 4 Delete paragraph 12 in its entirety

## Annex B