

# RAILWAYS ACT 1993

## 2013 PERIODIC REVIEW

### REVIEW NOTICE: FREIGHT OPERATOR TRACK ACCESS AGREEMENTS

TO:

- (1) the persons whose names are set out in Annex 1 to this Review Notice (the “**Train Operators**”);
- (2) Network Rail Infrastructure Limited (“**Network Rail**”); and
- (3) the Secretary of State for Transport, the Scottish Ministers and the Treasury,

together “the **Addressees**”.

#### 1 GENERAL

1.1 This review notice (the “**Review Notice**”) is given in accordance with paragraph 4 of Schedule 4A to the Railways Act 1993 (the “**Act**”).

1.2 The Office of Rail Regulation (“**ORR**”) has undertaken a review of:

(a) the amounts payable by Network Rail and each of the Train Operators to each other under each of the track access agreements listed in Annex 1 to this Review Notice (the “**Track Access Agreements**”); and

(b) the times at which, and the manner in which, those amounts are payable,

(the “**Review**”).

1.3 ORR's conclusions on the Review, and its reasons for those conclusions, are:

(a) set out in a document entitled "Periodic Review 2013: Final determination of Network Rail's outputs and funding for 2014-19" and published by ORR on 31 October 2013 (the "**Review Document**"); and

(b) hereby incorporated into this Review Notice.

1.4 By publishing this Review Notice and serving it on each of the Addressees, ORR is initiating the implementation of the Review.

## **2 Proposed Relevant Changes**

2.1 For or in connection with giving effect to ORR's conclusions on the Review, ORR proposes to direct the parties to each of the Track Access Agreements to amend their Track Access Agreement on the terms specified in Annexes 2 and 3 to this Review Notice (the "**proposed relevant changes**").

2.2 ORR proposes that, subject to paragraph 3, the proposed relevant changes will come into operation on and from 1 April 2014.

## **3 Regulated Amendments**

If, before the proposed relevant changes come into operation in relation to any Track Access Agreement, such Track Access Agreement is amended in a manner which is:

(a) approved by ORR under section 22 of the Act; or

(b) directed by ORR under section 22A or section 22C of the Act,

(each a "**regulated amendment**"), then:

- (i) the proposed relevant changes shall come into operation in relation to that Track Access Agreement subject to the regulated amendments; and
- (ii) if there is any conflict between the proposed relevant changes and the regulated amendments, the regulated amendments shall take precedence.

#### **4 Objections**

4.1 Subject to paragraph 4.2, any person specified in paragraph 4(4)(a) or (b) of Schedule 4A to the Act may make objections with respect to:

- (a) any of the proposed relevant changes; or
- (b) the date on which it is proposed that any such proposed relevant changes shall come into operation.

4.2 Any objection made under paragraph 4.1 must be:

- (a) made in writing;
- (b) received by ORR on or before 7 February 2014; and
- (c) addressed to ORR as follows:

John Larkinson  
Office of Rail Regulation  
One Kemble Street  
London WC2B 4AN

#### **5 Definitions and Interpretation**

5.1 In this Review Notice, unless the context otherwise requires:

- (a) references to “this Review Notice” include the Annexes to this Review Notice;
- (b) references to the singular include the plural and *vice versa*;

(c) words and phrases defined in:

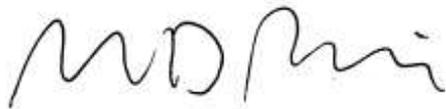
- (i) the Act;
- (ii) the Network Code (formerly known as the Railtrack Track Access Conditions 1995 (as amended)); or
- (iii) each Track Access Agreement,

shall have the same meanings in this Review Notice; and

(d) any general rules of interpretation contained in:

- (i) Condition A1 of the Network Code; or
- (ii) each Track Access Agreement,

shall also apply to this Review Notice.



**Richard Price**

**Chief Executive**

**FOR AND ON BEHALF OF  
THE OFFICE OF RAIL REGULATION**

Dated 20 December 2013



## ANNEX 1

### TRAIN OPERATORS AND TRACK ACCESS AGREEMENTS

<b>Train Operator Name</b>	<b>Train Operator Company Number</b>	<b>Original Date of Track Access Agreement</b>
Colas Rail Limited	02995525	21 December 2006
DB Schenker Rail (UK) Limited	02938988	9 February 2006
Devon & Cornwall Railways Limited	04973992	27 October 2011
Direct Rail Services Limited	03020822	8 January 2010
Europorte Channel SAS	518454-301	18 May 2011
Freightliner Limited	03118392	17 December 2007
Freightliner Heavy Haul Limited	03831229	26 September 2007
GB Railfreight Limited	03707899	29 January 2008
GB Railfreight Limited	03707899	16 April 2012
West Coast Railway Company Ltd	03066109	6 April 2011

## ANNEX 2

### STANDARD AMENDMENTS

***Explanatory Note:***

*In order to give effect to the ORR's conclusions on the Review, this Annex 2 sets out the standard form proposed relevant changes to be made to Schedules 4, 7, 8 and 10 and the Clauses of each Track Access Agreement (the "**standard amendments**").*

*In some Track Access Agreements, some of the provisions which are to be amended are not in standard form. Where this is the case, Part 1 of Annex 3 to this Review Notice sets out how the standard amendments will need to be modified, or certain other bespoke amendments will be required.*

*In certain instances, the publication of certain proposed relevant changes would or might, in the opinion of the ORR, seriously and prejudicially affect the interests of each Train Operator and/or Network Rail for the purpose of section 71(2) of the Act; they are therefore not being published. Where this is the case, such proposed relevant changes will be attached to Part 2 of Annex 3 to this Review Notice and will be sent only to the parties to the relevant Track Access Agreement, the Secretary of State for Transport, the Scottish Ministers and the Treasury.*

The following amendments shall be made to the Track Access Agreements, subject to any modifications set out in Annex 3:

## **1 Consequential and other amendments to the Clauses of each Track Access Agreement**

1.1 In Clause 1.1 (Definitions) of each Track Access Agreement:

- (a) delete the definition of "contract" and replace it with the following definition:

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

- (b) delete the definition of "Service Variation Sum" and replace it with the following:

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

- (c) delete the definition of "Track Charges" and replace it with the following definition:

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

- (d) insert the following new definition in alphabetical order:

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

1.2 In Clause 1.2 (Interpretation) of each Track Access Agreement:

- (a) at the end of paragraph (p), delete "and";

(b) at the end of paragraph (q), delete “.”, and replace it with “;”; and

(c) after paragraph (q) add the following paragraphs:

"(r) words and expressions defined in the Traction Electricity Rules shall have the same meanings in this contract; and

(s) if there is any conflict of interpretation between this contract (not including the Traction Electricity Rules) and the Traction Electricity Rules, the following order of precedence shall apply:

(1) the Traction Electricity Rules; and (2) this contract (not including the Traction Electricity Rules)."

1.3 In Clause 2 of each Track Access Agreement, delete the heading and Clauses 2.1 and 2.2 and replace them with:

**"2. NETWORK CODE AND TRACTION ELECTRICITY RULES**

**2.1 Incorporation**

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

**2.2 Modification to the Network Code or the Traction Electricity Rules**

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

1.4 At the end of the heading of Clause 7 of each Track Access Agreement, insert the words "**AND OTHER PAYMENTS**".

1.5 In each Track Access Agreement other than the Track Access Agreement between Network Rail and GB Railfreight Limited dated 16 April 2012 (the "**GBRf Customer TAA**"), delete Clause 11.5(a) and replace it with the following Clause:

"(a) does not limit any liability arising under Schedules 4, 7 or 8 or under the Traction Electricity Rules;"

- 1.6 In the **GBRf Customer TAA**, delete Clause 11.5.2(i), and replace it with the following Clause:

"(i) does not limit any liability arising under Schedules 4, 7 or 8 or under the Traction Electricity Rules;"

- 1.7 In each Track Access Agreement, other than:

- (i) the Track Access Agreement between Network Rail and Freightliner Limited (the "**Freightliner TAA**");
- (ii) the Track Access Agreement between Network Rail and Freightliner Heavy Haul Limited (the "**Freightliner HH TAA**"); and
- (iv) the **GBRf Customer TAA**,

delete Clause 13.1(a), and replace it with the following Clause:

"(a) any Part of the Network Code or the Traction Electricity Rules provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;"

- 1.8 In the **Freightliner TAA**, the **Freightliner HH TAA**, and the **GBRf Customer TAA**, delete Clause 13.1.1(a) and replace it with the following Clause:

"(a) any Part of the Network Code or the Traction Electricity Rules provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;"

- 1.9 Delete Clause 13.2 of each Track Access Agreement and replace it with the following Clause:

**"13.2 Unpaid sums**

If either party fails to pay:

(a) any invoice issued to it under this contract in respect of Track Charges; or

(b) any other sum which has fallen due in accordance with any provision of this contract,

then, subject to Clause 16.1.1:

(i) the amount invoiced or sum due, as referred to in Clause 13.2(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any invoice or other sum due);

(ii) such debt shall be recoverable by any means available under the laws of England and Wales; and

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

1.10 Delete Clause 14.6 of each Track Access Agreement and replace it with the following Clause:

**"Network Code and Traction Electricity Rules**

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

1.11 Delete Clause 17.2(b)(i) of each Track Access Agreement and replace it with the following Clause:

"(i) any obligation to pay money under Schedules 4, 7 and 8 or the Traction Electricity Rules; or".

1.12 Delete Clause 18.2.3(b) of each Track Access Agreement and replace it with the following Clause:

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

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

1.13 In each Track Access Agreement, other than the **GBRf Customer TAA**, immediately following Clause 18.7.3, insert the following new Clause 18.7.4:

*"18.7.4 Application of Traction Electricity Rules to other train operators*

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

1.14 In the **GBRf Customer TAA**, immediately following Clause 18.7.4, insert the following new Clause 18.7.5:

*"18.7.5 Application of Traction Electricity Rules to other train operators*

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

such rights as have been granted to it under the Traction Electricity Rules.".

## **2 Schedule 4 to each Track Access Agreement**

- 2.1 In each Track Access Agreement, other than the **GBRf Customer TAA**, delete Schedule 4 and replace it in its entirety with the Schedule 4 set out in Appendix 1 to this Annex 2.
- 2.2 In the **GBRf Customer TAA**, delete Schedule 4 and replace it in its entirety with the Schedule 4 set out in Appendix 2 to this Annex 2.

## **3 Schedule 7 to each Track Access Agreement**

- 3.1 In each Track Access Agreement, other than the **GBRf Customer TAA**, delete Schedule 7 and replace it in its entirety with the Schedule 7 set out in Appendix 3 to this Annex 2.
- 3.2 In the **GBRf Customer TAA**, delete Schedule 7 and replace it in its entirety with the Schedule 7 set out in Appendix 4 to this Annex 2.

## **4 Schedule 8 to each Track Access Agreement**

- 4.1 In each Track Access Agreement, other than the **GBRf Customer TAA** and the Track Access Agreement between Network Rail and Direct Rail Services Limited (the "**DRS TAA**"), delete Schedule 8 and replace it in its entirety with the Schedule 8 set out in Appendix 5 to this Annex 2. In Appendix 1 to Schedule 8 of each Track Access Agreement, other than the **GBRf Customer TAA** and the **DRS TAA**, insert the amounts opposite the references to "Train Operator Cap" and "Network Rail Cap" using the figures relating to Appendix 1 to Schedule 8 specific to that Track Access Agreement, which are attached separately in Part 2 of Annex 3 to this Review Notice.
- 4.2 In the **DRS TAA**, with the exception of Appendix 1 to Schedule 8, delete Schedule 8 and replace it with the Schedule 8 set out in Appendix 5 to this Annex 2.

4.3 In the **GBRf Customer TAA**, delete Schedule 8 and replace it in its entirety with the Schedule 8 set out in Appendix 6 to this Annex 2. In Appendix 1 to Schedule 8, insert the amounts opposite the references to “Train Operator Cap” and “Network Rail Cap” using the figures specific to the **GBRf Customer TAA**, which are attached separately in Part 2 of Annex 3 to this Review Notice.

## **5 Schedule 10 to each Track Access Agreement**

5.1 Schedule 10 to each Track Access Agreement shall be deleted and replaced in its entirety with the Schedule 10 set out in Appendix 7 to this Annex 2.



**Appendix 1 to Annex 2**

**Schedule 4**

## SCHEDULE 4: VARIATIONS TO SERVICES

### PART 1 - GENERAL PROVISIONS

#### 1. Definitions

##### 1.1 Definitions

In this Schedule 4 unless the context otherwise requires:

**“Actual Costs”** means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including those attributable to limb (f) of a Category 3 Disruption and any increase in Variable Costs but net of:

- (a) any benefit arising from a Category 3 Disruption including any decrease in Variable Costs as a consequence of a Category 3 Disruption; and
- (b) any Enhanced Planned Disruption Sum due to the Train Operator in connection with the relevant Service affected by a Category 3 Disruption;

**“Actual Costs Claim Notice”** has the meaning specified in paragraph 3.4.3;

**“Applicable Service”** means a Revised Base Service, a Diverted Service or any Service which suffers a Cancellation;

**“Base Service”** means:

- (a) a Planned Service which is not able to operate as Planned; or
- (b) a Train Slot in respect of a Level One Right or a Level Two Right which is not able to be entered in the New Working Timetable or the Working Timetable in accordance with those rights;

in either case because of the non-availability of any part of the Network as a result of a Network Rail Early Notice Possession;

**“Category 1 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (b) the Planned arrival time at Destination of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (c) the end to end journey of the Revised Base Service exceeds that of the Base Service by more than 10 miles; or
- (d) the imposition of more demanding length or weight restrictions for the Revised Base Service compared to the Base Service,

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 2 Disruption or a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

**“Category 2 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (e) there is no Revised Base Service;
- (f) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;

- (g) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service; or
- (h) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5;

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

**“Category 3 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service and the access from the Origin or to the Destination of the Base Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route);
- (b) (i) there is no Revised Base Service due to the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
- (ii) the Revised Base Service does not have an applicable gauge cleared route between the Origin and the Destination where:
  - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
  - (B) the Revised Base Service operates in whole, or in part, at the relevant location within this 60 hour period;

- (c) all or part of the goods planned to be carried by the Base Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination;
- (d) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;
- (e) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5; or
- (f) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Revised Base Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Base Service,

provided that the relevant variation arises as a direct result of a Network Rail Early Notice Possession;

**“Category 3 Disruption Trigger”** means where the Train Operator incurs Actual Costs as a consequence of any Category 3 Disruption arising from a single Network Rail Early Notice Possession;

**“Disruption Claim Notice”** has the meaning specified in paragraph 3.4.2;

**“Disruptive Event”** has the meaning ascribed to it in Part H of the Network Code;

**“Early Notice Possession”** means any Restriction of Use of all or part of the Network notified in all material respects to a Train Operator in accordance with sections 4, 5 or 7 of the Engineering Access Statement prior to the Possession Notice Date;

**“Electricity for Traction”** has the meaning ascribed to it in Schedule 5;

**“Enhanced Planned Disruption Sum”** means £800;

**“Freight Capacity Charge”** has the meaning ascribed to it in Schedule 7;

**“Late Notice Actual Costs”** means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

(a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and

(b) any Late Notice Cancellation Sum or Service Variation Sum (as the case may be) due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

**“Late Notice Actual Costs Claim Notice”** has the meaning specified in paragraph 9.3;

**“Late Notice Actual Costs Claim Trigger”** means:

(a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or

(b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

**“Late Notice Cancellation”** has the meaning ascribed to it in Schedule 8;

**“Late Notice Cancellation Sum”** has the meaning ascribed to it in Schedule 8;

**“Level One Right”** has the meaning ascribed to it in Schedule 5;

**“Level Two Right”** has the meaning ascribed to it in Schedule 5;

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

**“Normal Planned Disruption Sum”** means £300;

**“Operator Early Notice Possession”** means any Early Notice Possession to the extent:

- (a) required as a result of any damage to the Network or Environmental Damage which in each case:
  - (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and
  - (ii) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
- (c) required in connection with a Network Change proposed by the Train Operator under Condition G3 of the Network Code.

**“Original Service”** means a Planned Service which:

- (a) is affected by a Disruptive Event as described in paragraph 4.1; or
- (b) is not able to operate because of the non-availability of any part of the Network as described in paragraph 5.1;

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

**“Planned Disruption Sum”** means a Normal Planned Disruption Sum or an Enhanced Planned Disruption Sum;

**“Possession Notice Date”** means, in respect of each Service, the day which is 84 days before the day on which the Service is Planned to depart its Origin;

**“Relevant Cancellation”** has the meaning specified in paragraph 9.1;

**“Relevant Service Variation”** has the meaning specified in paragraph 9.2;

**“Revised Base Service”** means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D2 or D3 of the Network Code;

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

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

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

**“Variable Costs”** means the Train Operator’s costs which vary as a result of a Category 3 Disruption, a Relevant Cancellation or a Relevant Service Variation (as the case may be) arising directly from changes in train mileage including staff, maintenance, fuel or electricity costs, the Variable Charge and the Freight Capacity Charge.

## 1.2 *Interpretation*

References in this Schedule to a **“Service”**, except in the definition of “Round Trip”, shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

## 2. **Payment**

Subject to and in accordance with this Schedule 4 and paragraph 9 of Schedule 8, Network Rail shall, in respect of each Charging Period, pay or procure payment of:

- (a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (b) a Late Notice Cancellation Sum in respect of each Late Notice Cancellation and, where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (c) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (e) an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph 3.3.3 and in accordance with paragraph 3.3.3,

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum or one Cancellation Sum or one Late Notice Cancellation Sum in respect of an Applicable Service, whether under this Schedule 4 or under Schedule 8 or otherwise.

## **PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE**

### **3. Disruption compensation**

#### *3.1 Category 1 Disruption*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for a Normal Planned Disruption Sum in respect of each Category 1 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or

- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

### 3.2 *Category 2 Disruptions*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

### 3.3 *Category 3 Disruptions*

3.3.1 Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Base Service affected by a Category 3 Disruption which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.

3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of an Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Actual Costs Claim Notice; or
  
- (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
  - (ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
  
- (c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
  - (ii) pay to the Train Operator such Actual Costs within 28 days of those Actual Costs being agreed or

determined in accordance with Clause 13 (as the case may be).

### 3.4 *Notification, Disruption Claim Notices and Actual Costs Claim Notices*

3.4.1 The Train Operator shall notify Network Rail of any Network Rail Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Network Rail Early Notice Possession.

3.4.2 The Train Operator must notify Network Rail of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a **“Disruption Claim Notice”**).

3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail:

- (a) no later than the day falling 56 days after the end of the occurrence of the Network Rail Early Notice Possession giving rise to a Category 3 Disruption; or
- (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),

whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant

Network Rail Early Notice Possession (an “**Actual Costs Claim Notice**”).

3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Network Rail Early Notice Possession, provided that:

- (a) each such Actual Costs Claim Notice relates to a different period covered by the relevant Network Rail Early Notice Possession; and
- (b) no Actual Costs Claim Notice can be issued after the last day for serving notice specified under paragraph 3.4.3.

### 3.5 *Planned Disruption Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Planned Disruption Sum in respect of any Round Trip.

### 3.6 *Early notice of potential Actual Cost claims*

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Network Rail Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Network Rail Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Network Rail Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

## **PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE**

### **4. Services rescheduled following a Disruptive Event**

#### *4.1 Establishing an Alternative Train Slot*

Where there is a Disruptive Event:

- (a) to the extent that there is appropriate capacity available on the relevant part of the Network; and
- (b) subject to Part H of the Network Code and the Railway Operational Code,

Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally included in an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request (“**Originally Requested**”) in respect of any Service which is affected by the Disruptive Event and notify the Train Operator of it.

#### *4.2 Train Operator’s response*

On receiving Network Rail’s nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Train Operator Variation; or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

#### 4.3 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 4.2(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

#### 4.4 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Train Operator Variation under paragraph 4.3, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with that Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the original Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

#### 4.5 *Cancellation*

##### 4.5.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 4.1;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3; or

- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8 and paragraph 2 of Schedule 4 and paragraphs 8 and 9 of Schedule 8 shall apply.

4.5.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 4.2(a); or
- (b) accepted as a Train Operator Variation under paragraph 4.3,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

#### 4.6 *Part H of the Network Code*

This paragraph 4 is subject to the rights and obligations of the parties under Part H of the Network Code and the Railway Operational Code.

### **5. Other variations to Planned Services**

#### 5.1 *Non-availability of a Service*

This paragraph 5 applies if, for any reason other than:

- (a) a Restriction of Use to be taken pursuant to the Engineering Access Statement which has been notified in all material respects prior to the Possession Notice Date; and
- (b) the circumstances envisaged by paragraph 4,

Network Rail nominates that any part of the Network will not be available for a Planned Service to operate at the Planned time and such non-availability is:

- (i) Attributable to Network Rail (as defined in Schedule 8); and
- (ii) known about in sufficient time for an alternative Service to be the subject of a Train Operator Variation Request and entered into the Working Timetable as a new Planned Service.

## 5.2 *Establishing an Alternative Train Slot*

To the extent that there is appropriate capacity available on the relevant part of the Network, and subject to Parts D and H of the Network Code and the Decision Criteria, Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as Originally Requested and notify the Train Operator of it.

## 5.3 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 5.2, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Train Operator Variation); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

## 5.4 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 5.3(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

## 5.5 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Train Operator Variation under paragraph 5.4, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

## 5.6 *Cancellation*

### 5.6.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 5.2;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 5.3(b) and does not propose a different Alternative Train Slot under paragraph 5.4; or
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 5.4 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8, paragraph 2 of Schedule 4 shall apply and Network Rail shall be liable for the Late Notice Cancellation Sum in respect of that Cancellation in accordance with paragraphs 8.2.3 and 9 of Schedule 8.

### 5.6.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 5.3(a); or
- (b) accepted as a Train Operator Variation under paragraph 5.4,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

## **PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE**

### **6. Restrictions of Use before Possession Notice Date**

Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Network Rail nominates that any part of the Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Engineering Access Statement which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have no liability to the Train Operator under Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

## **PART 5 – SERVICE VARIATION**

### **7. Service Variation**

#### *7.1 Service Variation*

For the purposes of this Schedule 4, “**Service Variation**” means a variation to any Service which:

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Network Rail (as defined in Schedule 8); and
- (b) has one or more of the following effects:
  - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;
  - (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;

- (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
- (iv) the use of at least one additional locomotive for the Diverted Service over the number for the Original Service or use of a diesel locomotive for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for that Original Service as shown in Schedule 5;
- (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours;
- (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours; and
- (vii) while the Train Operator Originally Requested the Train Slot in accordance with Part D of the Network Code, the nomination and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Service because an act or omission of Network Rail resulted in the Originally Requested Train Slot not being Planned in accordance with Part D.

## *7.2 Network Rail liability*

Subject to paragraphs 7.3 and 7.4, Network Rail shall be liable in any Charging Period for a Service Variation Sum in respect of each Service Variation relating to a Service Planned to depart its Origin in that Charging Period.

## *7.3 Service Variation Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Service Variation Sum in respect of any Round Trip.

#### 7.4 *Service Variation / Cancellation*

Network Rail shall not be liable to the Train Operator for a Service Variation Sum if, following the Service Variation, the Train Operator is entitled to a Late Notice Cancellation Sum in respect of the Diverted Service.

### **PART 6 – NOT USED**

#### **8. Not Used**

### **PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS**

#### **9. Late Notice Actual Costs Claims**

##### *9.1 Late Notice Actual Costs Claim arising from Relevant Cancellation*

If, pursuant to paragraph 5.6.1, Network Rail is liable for a Late Notice Cancellation Sum in respect of a Cancellation (a “**Relevant Cancellation**”), and:

- (a) either:
  - (i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or
  - (ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
  - (iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and

- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Cancellation, then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

## 9.2 *Late Notice Actual Costs Claim arising from Relevant Service Variation*

If, pursuant to paragraph 7, Network Rail is liable for a Service Variation Sum in respect of a Service Variation (other than a Service Variation which arises from a variation to a Service which the Train Operator has accepted under paragraph 4) (a “**Relevant Service Variation**”), and:

- (a) either:
  - (i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:
    - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
    - (B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or
  - (ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or
  - (iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Original as shown in Schedule 5; or
  - (iv) the parties agree that there is a requirement for a specified number of the Train Operator’s train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and

- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

### 9.3 *Late Notice Actual Costs Claim Notice*

In respect of a claim for Late Notice Actual Costs arising under paragraphs 9.1 or 9.2 above, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail no later than the day falling 56 days after the occurrence of the Relevant Cancellation or Relevant Service Variation (as the case may be), and such claim must include details of the estimate of the Late Notice Actual Costs which are attributable to the Relevant Cancellation or Relevant Service Variation (as the case may be) (a “**Late Notice Actual Costs Claim Notice**”).

### 9.4 *Late Notice Actual Costs Claim Process*

Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of a Late Notice Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall also pay such Late Notice Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Late Notice Actual Costs Claim Notice; or
- (b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

- (ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
  
- (c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
  
  - (ii) pay to the Train Operator such Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).



**Appendix 2 to Annex 2**

**Schedule 4 to the GBRf Customer TAA**

## SCHEDULE 4: VARIATIONS TO SERVICES

### PART 1 - GENERAL PROVISIONS

#### 1. Definitions

##### 1.1 Definitions

In this Schedule 4 unless the context otherwise requires:

**“Actual Costs”** means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including those attributable to limb (f) of a Category 3 Disruption and any increase in Variable Costs but net of:

- (a) any benefit arising from a Category 3 Disruption including any decrease in Variable Costs as a consequence of a Category 3 Disruption; and
- (b) any Enhanced Planned Disruption Sum due to the Train Operator in connection with the relevant Service affected by a Category 3 Disruption;

**“Actual Costs Claim Notice”** has the meaning specified in paragraph 3.4.3;

**“Applicable Service”** means a Revised Base Service, a Diverted Service or any Service which suffers a Cancellation;

**“Base Service”** means:

- (a) a Planned Service which is not able to operate as Planned; or
- (b) a Train Slot in respect of a Level One Right or a Level Two Right which is not able to be entered in the New Working Timetable or the Working Timetable in accordance with those rights;

in either case because of the non-availability of any part of the Network as a result of a Network Rail Early Notice Possession;

**“Category 1 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (b) the Planned arrival time at Destination of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (c) the end to end journey of the Revised Base Service exceeds that of the Base Service by more than 10 miles; or
- (d) the imposition of more demanding length or weight restrictions for the Revised Base Service compared to the Base Service,

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 2 Disruption or a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

**“Category 2 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service;
- (b) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;
- (c) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service; or
- (d) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5;

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

**“Category 3 Disruption”** means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service and the access from the Origin or to the Destination of the Base Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route);
- (b) (i) there is no Revised Base Service due to the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
- (ii) the Revised Base Service does not have an applicable gauge cleared route between the Origin and the Destination where:
  - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and

- (B) the Revised Base Service operates in whole, or in part, at the relevant location within this 60 hour period;
- (c) all or part of the goods planned to be carried by the Base Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination;
- (d) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;
- (e) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5; or
- (f) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Revised Base Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Base Service,

provided that the relevant variation arises as a direct result of a Network Rail Early Notice Possession;

**“Category 3 Disruption Trigger”** means where the Train Operator incurs Actual Costs as a consequence of any Category 3 Disruption arising from a single Network Rail Early Notice Possession;

**“Disruption Claim Notice”** has the meaning specified in paragraph 3.4.2;

**“Disruptive Event”** has the meaning ascribed to it in Part H of the Network Code;

**“Early Notice Possession”** means any Restriction of Use of all or part of the Network notified in all material respects to a Train Operator in accordance with sections 4, 5 or 7 of the Engineering Access Statement prior to the Possession Notice Date;

**“Electricity for Traction”** has the meaning ascribed to it in Schedule 5;

**“Enhanced Planned Disruption Sum”** means £800;

**“Freight Capacity Charge”** has the meaning ascribed to it in Schedule 7;

**“Late Notice Actual Costs”** means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

- (a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and

(b) any Late Notice Cancellation Sum or Service Variation Sum (as the case may be) due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

**“Late Notice Actual Costs Claim Notice”** has the meaning specified in paragraph 9.3;

**“Late Notice Actual Costs Claim Trigger”** means:

(a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or

(b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

**“Late Notice Cancellation”** has the meaning ascribed to it in Schedule 8;

**“Late Notice Cancellation Sum”** has the meaning ascribed to it in Schedule 8;

**“Level One Right”** has the meaning ascribed to it in Schedule 5;

**“Level Two Right”** has the meaning ascribed to it in Schedule 5;

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

**“Normal Planned Disruption Sum”** means £300;

**“Operator Early Notice Possession”** means any Early Notice Possession to the extent:

(a) required as a result of any damage to the Network or Environmental Damage which in each case:

(i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and

(ii) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator; or

(b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or

(c) required in connection with a Network Change proposed by the Train Operator under Condition G3 of the Network Code.

**“Original Service”** means a Planned Service which:

(a) is affected by a Disruptive Event as described in paragraph 4.1; or

(b) is not able to operate because of the non-availability of any part of the Network as described in paragraph 5.1;

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

“**Planned Disruption Sum**” means a Normal Planned Disruption Sum or an Enhanced Planned Disruption Sum;

“**Possession Notice Date**” means, in respect of each Service, the day which is 84 days before the day on which the Service is Planned to depart its Origin;

“**Relevant Cancellation**” has the meaning specified in paragraph 9.1;

“**Relevant Service Variation**” has the meaning specified in paragraph 9.2;

“**Revised Base Service**” means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D2 or D3 of the Network Code;

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

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

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

“**Variable Costs**” means the Train Operator’s costs which vary as a result of a Category 3 Disruption, a Relevant Cancellation or a Relevant Service Variation (as the case may be) arising directly from changes in train mileage including staff, maintenance, fuel or electricity costs, the Variable Charge and the Freight Capacity Charge.

## 1.2 *Interpretation*

References in this Schedule to a “**Service**”, except in the definition of “Round Trip”, shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

## 2. **Payment**

Subject to and in accordance with this Schedule 4 and paragraph 9 of Schedule 8, Network Rail shall, in respect of each Charging Period, pay or procure payment of:

(a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;

- (b) a Late Notice Cancellation Sum in respect of each Late Notice Cancellation and, where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (c) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (e) an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph 3.3.3 and in accordance with paragraph 3.3.3,

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum or one Cancellation Sum or one Late Notice Cancellation Sum in respect of an Applicable Service, whether under this Schedule 4 or under Schedule 8 or otherwise.

## **PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE**

### **3. Disruption compensation**

#### *3.1 Category 1 Disruption*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for a Normal Planned Disruption Sum in respect of each Category 1 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

#### *3.2 Category 2 Disruptions*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

### 3.3 *Category 3 Disruptions*

3.3.1 Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Base Service affected by a Category 3 Disruption which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.

3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of an Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Actual Costs Claim Notice; or
- (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
  - (ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Network Rail shall:

- (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
- (ii) pay to the Train Operator such Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

### 3.4 *Notification, Disruption Claim Notices and Actual Costs Claim Notices*

3.4.1 The Train Operator shall notify Network Rail of any Network Rail Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Network Rail Early Notice Possession.

3.4.2 The Train Operator must notify Network Rail of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a “**Disruption Claim Notice**”).

3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail:

- (a) no later than the day falling 56 days after the end of the occurrence of the Network Rail Early Notice Possession giving rise to a Category 3 Disruption; or
- (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),

whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant Network Rail Early Notice Possession (an “**Actual Costs Claim Notice**”).

3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Network Rail Early Notice Possession, provided that:

- (a) each such Actual Costs Claim Notice relates to a different period covered by the relevant Network Rail Early Notice Possession; and

- (b) no Actual Costs Claim Notice can be issued after the last day for serving notice specified under paragraph 3.4.3.

### 3.5 *Planned Disruption Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Planned Disruption Sum in respect of any Round Trip.

### 3.6 *Early notice of potential Actual Cost claims*

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Network Rail Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Network Rail Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Network Rail Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

## **PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE**

### **4. Services rescheduled following a Disruptive Event**

#### 4.1 *Establishing an Alternative Train Slot*

Where there is a Disruptive Event:

- (a) to the extent that there is appropriate capacity available on the relevant part of the Network; and
- (b) subject to Part H of the Network Code and the Railway Operational Code,

Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally included in an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request (“**Originally Requested**”) in respect of any Service which is affected by the Disruptive Event and notify the Train Operator of it.

#### 4.2 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Train Operator Variation); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

#### 4.3 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 4.2(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

#### 4.4 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Train Operator Variation under paragraph 4.3, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with that Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the original Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

#### 4.5 *Cancellation*

##### 4.5.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 4.1;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3;
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Network Rail, or
- (d) Network Rail fails to comply with its obligations under Clause 5.10.6 to notify the Train Operator of any Train Slot for which there has been a successful Access Proposal, Rolled Over Access Proposal, Train Operator Variation Request by or on behalf of the Freight Customer and, as a result of such failure to notify, the Train Operator determines (acting

reasonably) that it has not received sufficient notice of such Train Slot to enable it to operate the relevant Freight Customer Service as planned,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8 and paragraph 2 of Schedule 4 and paragraphs 8 and 9 of Schedule 8 shall apply.

4.5.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 4.2(a); or
- (b) accepted as a Train Operator Variation under paragraph 4.3,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

#### 4.6 *Part H of the Network Code*

This paragraph 4 is subject to the rights and obligations of the parties under Part H of the Network Code and the Railway Operational Code.

### 5. **Other variations to Planned Services**

#### 5.1 *Non-availability of a Service*

This paragraph 5 applies if, for any reason other than:

- (a) a Restriction of Use to be taken pursuant to the Engineering Access Statement which has been notified in all material respects prior to the Possession Notice Date; and
- (b) the circumstances envisaged by paragraph 4,

Network Rail nominates that any part of the Network will not be available for a Planned Service to operate at the Planned time and such non-availability is:

- (i) Attributable to Network Rail (as defined in Schedule 8); and
- (ii) known about in sufficient time for an alternative Service to be the subject of a Train Operator Variation Request and entered into the Working Timetable as a new Planned Service.

#### 5.2 *Establishing an Alternative Train Slot*

To the extent that there is appropriate capacity available on the relevant part of the Network, and subject to Parts D and H of the Network Code and the Decision Criteria, Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as Originally Requested and notify the Train Operator of it.

### 5.3 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 5.2, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Train Operator Variation); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

### 5.4 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 5.3(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

### 5.5 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Train Operator Variation under paragraph 5.4, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

### 5.6 *Cancellation*

#### 5.6.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 5.2;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 5.3(b) and does not propose a different Alternative Train Slot under paragraph 5.4; or
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 5.4 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8, paragraph 2 of Schedule 4 shall apply and Network Rail shall be liable for the Late Notice Cancellation Sum in respect of that Cancellation in accordance with paragraphs 8.2.3 and 9 of Schedule 8.

5.6.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 5.3(a); or
- (b) accepted as a Train Operator Variation under paragraph 5.4,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

## **PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE**

### **6. Restrictions of Use before Possession Notice Date**

Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Network Rail nominates that any part of the Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Engineering Access Statement which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have no liability to the Train Operator under Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

## **PART 5 – SERVICE VARIATION**

### **7. Service Variation**

#### *7.1 Service Variation*

For the purposes of this Schedule 4, “**Service Variation**” means a variation to any Service which:

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Network Rail (as defined in Schedule 8); and
- (b) has one or more of the following effects:
  - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;
  - (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;
  - (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
  - (iv) the use of at least one additional locomotive for the Diverted Service over the number for the Original Service or use of a diesel locomotive for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for that Original Service as shown in Schedule 5;

- (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours;
- (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours; and
- (vii) while the Train Operator Originally Requested the Train Slot in accordance with Part D of the Network Code, the nomination and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Service because an act or omission of Network Rail resulted in the Originally Requested Train Slot not being Planned in accordance with Part D.

## 7.2 *Network Rail liability*

Subject to paragraphs 7.3 and 7.4, Network Rail shall be liable in any Charging Period for a Service Variation Sum in respect of each Service Variation relating to a Service Planned to depart its Origin in that Charging Period.

## 7.3 *Service Variation Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Service Variation Sum in respect of any Round Trip.

## 7.4 *Service Variation / Cancellation*

Network Rail shall not be liable to the Train Operator for a Service Variation Sum if, following the Service Variation, the Train Operator is entitled to a Late Notice Cancellation Sum in respect of the Diverted Service.

## **PART 6 – NOT USED**

### **8. NOT USED**

## **PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS**

### **9. Late Notice Actual Costs Claims**

#### *9.1 Late Notice Actual Costs Claim arising from Relevant Cancellation*

If, pursuant to paragraph 5.6.1, Network Rail is liable for a Late Notice Cancellation Sum in respect of a Cancellation (a “**Relevant Cancellation**”), and:

- (a) either:

- (i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or
  - (ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
  - (iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Cancellation, then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

## 9.2 *Late Notice Actual Costs Claim arising from Relevant Service Variation*

If, pursuant to paragraph 7, Network Rail is liable for a Service Variation Sum in respect of a Service Variation (other than a Service Variation which arises from a variation to a Service which the Train Operator has accepted under paragraph 4) (a “**Relevant Service Variation**”), and:

- (a) either:
- (i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:
    - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
    - (B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or
  - (ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or
  - (iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Original as shown in Schedule 5; or
  - (iv) the parties agree that there is a requirement for a specified number of the Train Operator’s train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and

- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

### 9.3 *Late Notice Actual Costs Claim Notice*

In respect of a claim for Late Notice Actual Costs arising under paragraphs 9.1 or 9.2 above, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail no later than the day falling 56 days after the occurrence of the Relevant Cancellation or Relevant Service Variation (as the case may be), and such claim must include details of the estimate of the Late Notice Actual Costs which are attributable to the Relevant Cancellation or Relevant Service Variation (as the case may be) (a “**Late Notice Actual Costs Claim Notice**”).

### 9.4 *Late Notice Actual Costs Claim Process*

Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of a Late Notice Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall also pay such Late Notice Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Late Notice Actual Costs Claim Notice; or
- (b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall:
  - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
  - (ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Network Rail shall:

- (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
- (ii) pay to the Train Operator such Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

## **PART 8 – FREIGHT CUSTOMER SCHEDULE 4 RIGHTS**

### **10. Application of Schedule 4 to Freight Customer Services and Freight Customer Alternative Train Slots**

10.1 Where the Freight Customer notifies the Train Operator that, in respect of any Freight Customer Service:

- (a) the Freight Customer has, on or before the date of the Drawdown Notice relating to that Freight Customer Service, started to exercise its rights under paragraph 4 or 5 of schedule 4 to the Freight Customer Access Contract (the “**Freight Customer Schedule 4 Rights**”) in respect of that Freight Customer Service; but
- (b) as at such date, no Freight Customer Alternative Train Slot has been established in respect of such Freight Customer Service in accordance with those Freight Customer Schedule 4 Rights,

then the Train Operator shall only be entitled to exercise its rights under paragraph 4 or 5 (as the case may be) in respect of such Freight Customer Service to the extent that the Freight Customer has not already exercised its Freight Customer Schedule 4 Rights in respect of such Freight Customer Service, provided that:

- (i) if the Freight Customer has started to exercise its rights under paragraph 4 of schedule 4 to the Freight Customer Access Contract, the Train Operator shall not be entitled to exercise any of its rights under paragraph 5 in relation to such Freight Customer Service; and
- (ii) if the Freight Customer has started to exercise its rights under paragraph 5 of schedule 4 to the Freight Customer Access Contract, the Train Operator shall not be entitled to exercise any of its rights under paragraph 4 in relation to such Freight Customer Service.

10.2 Nothing in paragraph 10.1 shall, in respect of any Freight Customer Service or Freight Customer Alternative Train Slot incorporated into this contract in accordance with Clause 5.10.1:

- (a) prevent the Train Operator from operating a Service using any such Freight Customer Alternative Train Slot;

- (b) relieve Network Rail from any of its obligations and/or liabilities in respect of any such Freight Customer Alternative Train Slot; or
- (c) prevent the Train Operator from exercising any of its rights under this Schedule 4 in relation to any such Freight Customer Service in respect of which the Freight Customer has not exercised any of its Freight Customer Schedule 4 Rights.



**Appendix 3 to Annex 2**

**Schedule 7**

## SCHEDULE 7: TRACK CHARGES AND OTHER PAYMENTS

### 1. Definitions

In this Schedule 7 unless the context otherwise requires:

**“2008 Final Determinations”** means the document entitled “Periodic Review 2008: Determination of Network Rail’s outputs and funding for 2009-14” published by ORR on 30 October 2008;

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

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

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

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

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

**“Coaching Stock Miles”** means, in relation to coaching stock, the Contract Miles travelled by that coaching stock;

**“Coaching Stock Weight”** means, in relation to coaching stock, the gross weight of that coaching stock, measured in tonnes;

**“Coal Spillage Charge”** means the amount payable in respect of item 6 in the formula specified in paragraph 2.2.1;

**“Coal Spillage Charge Rate”** means, in respect of each Coal Vehicle used in a Service, the coal spillage charge rate per kgm for that Coal Vehicle, as set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

**“Coal Spillage Investment”** has the meaning attributed to it in paragraph 2.12.3(b);

**“Coal Spillage Reduction Investment Charge”** means the amount payable in respect of item 7 in the formula specified in paragraph 2.2.1;

**“Coal Spillage Reduction Investment Charge Rate”** means, in respect of each Coal Vehicle used in a Service, the coal spillage reduction investment charge rate per kgm set out in the Track Usage

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

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

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

“**Coal Vehicle**” means any vehicle in respect of which the applicable Commodity is coal;

“**Commodity**” means the commodity applying to each Service as shall be agreed between the Train Operator and Network Rail by reference to the classes of commodity in the Track Usage Price List;

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

“**Contributing Train Operator**” means, in relation to any Qualifying Modification, the train operator which:

- (a) has requested that Network Rail make the modification to the Operating Constraints; and
- (b) continues to utilise the modification;

“**CSR Rebate**” has the meaning attributed to it in paragraph 2.12.6;

“**CSR Variation Notice**” means a notice given by ORR to the parties which sets out whether the Total CSR Fund Balance (if any) shall be carried forward or whether a CSR Rebate shall be made;

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

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

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

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

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

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

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

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

**“Electrification Asset Usage Rate”** means, in respect of electrification asset usage, the rate per electrified kgtm on route type k as set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraph 2.7.1 and 2.7.2;

**“Empty Wagon Miles”** means, in relation to an empty wagon, the Contract Miles travelled by that empty wagon;

**“Empty Wagon Weight”** means, in relation to an empty wagon, the tare weight of that wagon, measured in tonnes;

**“ESI Vehicle”** means any vehicle in respect of which the applicable Commodity is electricity supply industry coal;

**“Freight Capacity Charge”** means the charge calculated in accordance with paragraph 2.3.1;

**“Freight Capacity Rate”** means, in respect of each Service, the freight capacity rate corresponding to the day (or days) of the week on which that Service is operated, as set out in the List of Capacity Charge Rates and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

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

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

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

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

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

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

**“FY CSR Fund”** has the meaning attributed to it in paragraph 2.12.3;

**“Geographic Area g”** means, for the purposes of performing the calculations set out in paragraph 2.4 and paragraph 18 of the Traction Electricity Rules, the relevant geographic section of the Network as set out in Appendix 5 of the Traction Electricity Rules;

**“Gross Tonne Miles”** or **“gtm”** means, in respect of each locomotive, loaded wagon, empty wagon or coaching stock, the Locomotive Miles, Loaded Wagon Miles, Empty Wagon Miles or Coaching Stock Miles

multiplied by the relevant Locomotive Weight, Loaded Wagon Weight, Empty Wagon Weight or Coaching Stock Weight respectively;

**“Incremental Costs”** means all reasonable additional costs properly and reasonably incurred by Network Rail in respect of any modification referred to in paragraph 2.8, being the additional reasonable costs (if any) to Network Rail in respect of its obligation to maintain and operate the Network, but excluding:

- (a) any loss of income on the part of Network Rail; and
- (b) freight-specific fixed and common costs for which Network Rail has already received funding from the Secretary of State, or any other body or person;

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

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

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

where:

IIF means the Initial Indexation Factor;

$\text{RPI}_{2012}$  means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2012; and

$\text{RPI}_{2013}$  means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013;

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

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

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

**“kgtm”** means 1000 Gross Tonne Miles;

**“kWh”** means kilowatt hours;

**“List of Capacity Charge Rates”** means the document entitled “List of Capacity Charge Rates” published by Network Rail on or about 20 December 2013 which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract;

**“Loaded Wagon Miles”** means, in relation to a loaded wagon, the Contract Miles travelled by that loaded wagon;

**“Loaded Wagon Weight”** means, in relation to a loaded wagon, the gross weight of that loaded wagon, measured in tonnes;

**“Locomotive Miles”** means, in relation to a locomotive, the Contract Miles travelled by that locomotive;

**“Locomotive Weight”** means, in relation to a locomotive, the gross weight of that locomotive, measured in tonnes;

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

(a) Network Rail and the Train Operator; or

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

(c) Network Rail and one or more other train operators,

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

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

(a) a train of a particular type; or

(b) a specific train having a train ID,

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

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

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

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

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

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

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

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

**“Outperformance Sum”** means the lower of:

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

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

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

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

**“QM Threshold”** means a level of costs in relation to a modification to the Operating Constraints determined in accordance with ORR’s Qualifying Modification Criteria;

**“Qualifying Modification”** means a modification to the Operating Constraints in excess of their level as at 1 April 2014, which:

- (a) exceeds the QM Threshold; and
- (b) in respect of which a Contributing Train Operator has paid Network Rail Incremental Costs under paragraph 2.8 or its equivalent in the relevant access agreement;

**“Qualifying Modification Benefit Charge”** means, in relation to any Qualifying Modification, a charge which shall:

- (a) take account of:
  - (i) the use made or to be made of the Qualifying Modification, where such modification increased the capacity of the Network; or
  - (ii) in any other case, the benefit which is likely to be derived from the Qualifying Modification by the Train Operator compared to the benefit derived from such modification by the Contributing Train Operator; and
- (b) reflect any relevant guidance in relation to the funding of modifications to the Operating Constraints published in ORR’s Qualifying Modification Criteria;

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

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

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

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

**“Relevant Year t”** means the Financial Year for the purposes of which any calculation falls to be made;

**“Relevant Year t-1”** means the Financial Year preceding Relevant Year t, and similar expressions shall be construed accordingly;

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

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

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

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

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

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

**“tariff band j”** means the tariff zone and time band in which the train in question is operated;

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

**“Total CSR Fund”** means, at any given time, the aggregate of all amounts received by Network Rail from all freight train operators in respect of the Coal Spillage Reduction Investment Charge;

**“Total CSR Fund Balance”** has the meaning attributed to it in paragraph 2.12.3(c);

**“Track Usage Price List”** means the document entitled “Track Usage Price List” published by Network Rail on or about 20 December 2013 which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract;

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

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

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

**“Train Mile”** means, in relation to a train, or a portion of a train, a mile travelled by that train, or that portion of a train, on the Network;

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

**“Underperformance Sum”** means the lower of:

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

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

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

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

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

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

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

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

## **2. Track Charges and Invoices**

### *2.1 Obligation on Train Operator to pay*

- 2.1.1 In respect of each Charging Period, the Train Operator shall pay or procure payment of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incremental Costs, the Incident Cap Access Charge Supplement and the Qualifying Modification Benefit Charge. In respect of each Relevant Year  $t$ , the Train Operator shall pay the amount of any sum  $S_t$  payable as provided in paragraph 2.4.2 and the amount of any sum  $S_{1tw}$  and/or  $S_{2tw}$  and/or any Charge Correction Amount payable, as provided in paragraph 18 of the Traction Electricity Rules. The charges will be rounded to the nearest penny. Where a calculation ends up exactly half way between whole numbers it will be adjusted upward.
- 2.1.2 No Track Charges shall be payable by the Train Operator in respect of a Train Slot when the train has not reached its Planned Destination for a reason which is Attributable to Network Rail.
- 2.1.3 Network Rail shall issue to the Train Operator an invoice as soon as practicable, or as otherwise agreed, following the expiry of each Charging Period in respect of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incident Cap Access Charge Supplement and any Incremental Costs or Qualifying Modification Benefit Charge which is or are payable in respect of that Charging Period.
- 2.1.4 If, at the time that Network Rail issues any invoice pursuant to paragraph 2.1.3, any Efficiency Benefit Share is payable by Network Rail to the Train Operator, or any Route-Level Efficiency Benefit Share or any amount of any sum  $S_t$  or any amount under the Traction Electricity Rules is payable by either party to the other, that invoice shall also reflect that Efficiency Benefit Share payable by Network Rail and the Route-Level Efficiency Benefit Share, the amount of  $S_t$  or any amount under the Traction Electricity Rules payable by either party to the other.

2.1.5 Where, in accordance with paragraph 2.3.2, Network Rail calculates that the Freight Capacity Charge Wash-up is a positive amount then, as soon as practicable, it shall issue to the Train Operator an invoice for that amount and the Train Operator shall pay or procure payment of it.

## 2.2 *Variable Charges*

2.2.1 The Variable Charge in respect of each Service in each Charging Period shall be calculated in accordance with the following formula:

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

where:

- 1 means, in respect of each locomotive, the VUC Rate for the relevant locomotive type multiplied by the kgtm for that locomotive type relating to the relevant Service;
- 2 means, in respect of each empty wagon, the VUC Rate for the relevant empty wagon type multiplied by the kgtm for that empty wagon type relating to the relevant Service;
- 3 means, in respect of each loaded wagon, the VUC Rate for the relevant loaded wagon type multiplied by the kgtm for that loaded wagon type relating to the relevant Service;
- 4 means, in respect of each unit of coaching stock, the VUC Rate for the relevant coaching stock type multiplied by the kgtm for that coaching stock type relating to the relevant Service;
- 5 means, in respect of each ESI Vehicle, IO Vehicle and each SNF Vehicle, the Freight Only Line Charge Rate for that ESI Vehicle, IO Vehicle or SNF Vehicle (as the case may be) multiplied by the kgtm for that ESI Vehicle, IO Vehicle or SNF Vehicle (as the case may be) relating to the relevant Service;
- 6 means, in respect of each Coal Vehicle, the Coal Spillage Charge Rate multiplied by the kgtm for that Coal Vehicle relating to the relevant Service;
- 7 means, in respect of each Coal Vehicle, the Coal Spillage Reduction Investment Charge Rate multiplied by the kgtm for that Coal Vehicle relating to the relevant Service;

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

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

- 2.2.2 Where the Train Operator intends to use New Registered Equipment on the Network, it shall where reasonably practicable inform Network Rail in writing of the date or likely date from which it intends to do so.
- 2.2.3 No supplement to the Traction Electricity Modelled Consumption Rates List or Track Usage Price List shall have effect unless it has been:
  - (a) agreed between the parties and ORR has consented to it; or
  - (b) determined by ORR.
- 2.2.4 Either the Train Operator or Network Rail shall be entitled to propose that:
  - (a) the Traction Electricity Modelled Consumption Rates List be supplemented as necessary to include a new train category and corresponding rate; or
  - (b) the Track Usage Price List be supplemented as necessary to include a new vehicle type and corresponding rate.
- 2.2.5 Any proposal of a kind referred to in paragraph 2.2.4 shall be made by notice to the other party and shall be accompanied by a specification of the proposal in reasonable detail and the reasons for it. The parties shall thereafter seek to agree in good faith the necessary supplement to the list in question.
- 2.2.6 Either party may request from the other such information that it reasonably requires in connection with the proposal and the party from whom the information was requested shall use reasonable endeavours to provide this information promptly.
- 2.2.7 Where the parties agree to a supplement following a proposal under paragraph 2.2.4, they shall request ORR's consent to it and provide

such information as ORR reasonably requires in order to decide whether to give its consent.

2.2.8 If the parties fail to reach agreement within 45 days of the date of the notice given under paragraph 2.2.5, at any point thereafter either party shall be entitled to refer the matter to ORR for determination.

2.2.9 Following a reference to ORR under paragraph 2.2.8, the parties shall, within such timescales as ORR may reasonably specify, furnish ORR with such information and evidence as ORR shall reasonably require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.

2.2.10 ORR may:

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

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

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

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

- (a) apply the supplement from the date in accordance with paragraph 2.2.11 or 2.2.12 above as applicable; and
- (b) within 28 days of the date of ORR's consent or determination:
  - (i) issue any adjusting invoice or credit note to the Train Operator. In the case of a supplement to the Track Usage Price List, this will reflect the difference between:
    - (1) the total amount paid by the Train Operator during the Default Period under item '9' of the formula in paragraph 2.2.1; and

- (2) the amount the Train Operator would have paid during this period under items '1' to '4' of the formula in paragraph 2.2.1 had the supplement been in place when the Train Operator first used the relevant railway vehicle on the Network; and
- (ii) publish on its website details of the supplement alongside the details of any other such supplements to which ORR has consented or determined pursuant to this or any other track access contract to which Network Rail is a party.

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

2.3.1 The Freight Capacity Charge shall be calculated in accordance with the following formula or such other method that the parties may agree with the object of calculating a Freight Capacity Charge that is not materially different from that calculated in accordance with the following formula:

$$\text{Freight Capacity Charge} = \sum (\text{FCR}_{\text{mf}} \times \text{CM}_{\text{mf}}) + (\text{FCR}_{\text{w}} \times \text{CM}_{\text{w}})$$

where:

$\text{FCR}_{\text{mf}}$  means the Freight Capacity Rate in respect of Services operated during the period from Monday to Friday (both inclusive) as set out in the List of Capacity Charge Rates;

$\text{CM}_{\text{mf}}$  means Contract Miles in respect of Services operated during the period from Monday to Friday (both inclusive);

$\text{FCR}_{\text{w}}$  means the Freight Capacity Rate in respect of Services operated on Saturday and/or Sunday, as set out in the List of Capacity Charge Rates;

$\text{CM}_{\text{w}}$  means Contract Miles in respect of Services operated on Saturday and/or Sunday; and

$\sum$  means the summation across all Services.

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

2.3.3  $KW_t$  is derived from the following formula:

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

where:

$KW_{tcoal}$  is calculated in accordance with paragraph 2.3.4 below;  
 $KW_{tinter}$  is calculated in accordance with 2.3.5 below; and

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

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

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

where:

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

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

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

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

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

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

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

where:

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

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

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

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

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

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

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

where:

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

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

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

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

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

## 2.4 Traction Electricity Charge

2.4.1 If the Train Operator procures the supply of electricity from or through Network Rail (whether as its agent or otherwise) for the purpose of running trains under this contract, the Traction Electricity Charge in Relevant Year  $t$  shall be calculated in accordance with the following formula:

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

where:

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

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

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

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

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

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

*Calculation of modelled consumption*

2.4.1.2  $E_{\text{tmo}}$  is derived from the following formula:

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

where:

$\Sigma$  means the summation across all Geographic Areas g, as appropriate;

$E_{tmog}$  is derived from the following formula:

$$E_{tmog} = \Sigma C_i \bullet EF_{gjt} \bullet UE_{igt}$$

where:

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

$C_i$  means the modelled consumption rate :

- (a) in kWh per electrified Train Mile in relation to passenger electric multiple units (using the rate for the relevant number of units); and
- (b) in kWh per electrified kgm in relation to locomotive-hauled units and all freight traffic,

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

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

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

#### *Calculation of consumption using metered consumption data*

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

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

where:

$\Sigma$  means the summation across all Geographic Areas g, as appropriate;

$E_{tmeg}$  is derived from the following formula:

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

where:

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

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

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

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

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

$\delta_m$  means the Tolerance Factor for the relevant train type for Metered Train m.

#### 2.4.1.4

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

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

where:

$\Sigma$  means the summation across all Geographic Areas g, as appropriate;

$E_{tmugAC}$  is derived from the following formula:

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

where:

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

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

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

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

$\delta_m$  means the Tolerance Factor for the relevant train type for Metered Train  $m$ ; and

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

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

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

where:

$\Sigma$  means the summation across all Geographic Areas  $g$ , as appropriate;

$E_{tmugDC}$  is derived from the following formula:

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

where:

- $\Sigma$  means the summation across all relevant Metered Trains  $m$  (determined in accordance with paragraph 2.4.1.1 above) and tariff bands  $j$ , as appropriate;
- $CME_{mjtDC}$  means the consumption of electricity (in kWh) from the DC System by Metered Trains  $m$  operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction Electricity Rules, in Geographic Area  $g$ , tariff band  $j$  and in Relevant Year  $t$ ;
- $EF_{gjt}$  means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area  $g$ , in tariff band  $j$  and in Relevant Year  $t$  as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;
- $\delta_m$  means the Tolerance Factor for the relevant train type for Metered Train  $m$ ; and
- $\lambda_{DCg}$  means the Network Rail Distribution System Loss Factor for the DC System in Geographic Area  $g$ .

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

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

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

2.4.3 Not used.

2.4.4 Not used.

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

2.4.5 If the Train Operator wishes to propose the introduction of On-Train Metering to measure traction electricity consumption for a vehicle or vehicles of a vehicle type that the Train Operator operates for the purposes of being invoiced by Network Rail for traction electricity, it

shall notify Network Rail of any required changes to the contract in connection with that proposal.

- 2.4.6 Any notice under paragraph 2.4.5 shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.
- 2.4.7 Promptly following any response served by Network Rail under paragraph 2.4.6, the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and, if so, the amendments.
- 2.4.8 If the parties agree an amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, that amendment shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed, the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.
- 2.4.9 Any agreed amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, which is approved by ORR under section 22 of the Act, shall apply with effect from the date agreed by the parties.
- 2.4.10 If the parties fail to reach agreement within 90 days after service of a notice under paragraph 2.4.5, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify ORR and request that ORR determines the matter. The parties shall, within such timescales as ORR may specify, furnish ORR with such information and evidence as ORR shall require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.
- 2.4.11 Where ORR determines the matter pursuant to paragraph 2.4.10, it may issue a notice to the parties setting out the amendments to be made to the contract and the date, which may be retrospective, from which they shall take effect.

#### 2.4.12 *Electrification Asset Usage Charge*

The Electrification Asset Usage Charge is an amount for electrification asset usage which is derived from the following formula:

$$\text{Electrification Asset Usage Charge} = \sum (EV_{tk} \cdot UV_{tk})$$

where:

$\sum$  means the summation across all Services using electric traction;

$EV_{tk}$  means an amount in respect of the Electrification Asset Usage Rate;

$UV_{tk}$  means the actual number of electrified kgtm on route type k in the relevant Charging Period in Relevant Year t operated by or on behalf of the Train Operator.

2.5 Not used.

2.6 *Incident Cap Access Charge Supplement*

The Incident Cap Access Charge Supplement shall be calculated in accordance with the following formula:

$$\text{Incident Cap Access Charge Supplement} = \text{CMCP} \times \text{ICACSR}$$

where:

CMCP means the sum of the Contract Miles operated in a Charging Period; and

ICACSR means the Incident Cap Access Charge Supplement Rate.

2.7 *Price Variation*

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

2.7.2 In respect of the Relevant Year commencing on 1 April 2015, and in respect of each subsequent Relevant Year, on 1 April of the Relevant Year the Indexed Figures from the Relevant Year t - 1 shall each be adjusted by multiplying them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula:

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

where:

$\text{RPI}_{t-1}$  means the average value of the monthly RPI figures for the 12 months up to and

including the month of December immediately preceding the relevant 1 April; and

$RPI_{t-2}$  means the average value of the monthly RPI figures for the 12 months up to and including the month of December which is 16 months before the relevant 1 April.

2.7.3 The Phased in Charges Indexation Adjustment shall be derived:

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

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

where:

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

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

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

where:

$PCIA_t$  means the Phased in Charges Indexation Adjustment in respect of the Relevant Year  $t$ ;

$RPI_{t-1}$  has the same meaning as set out in paragraph 2.7.2 above;

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

## 2.8 Incremental Costs

2.8.1 Where:

(a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request;

- (b) the operation of the Service requested would exceed the Operating Constraints applying as at 1 April 2014;
- (c) the Train Operator notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2014 in a manner so as to permit the operation of the Service requested under this contract;
- (d) Network Rail is reasonably able to effect such modifications in a timescale that meets the Train Operator's requirements; and
- (e) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed £300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

2.8.2 Network Rail shall, as soon as reasonably practicable following receipt of the Train Operator's notification under paragraph 2.8.1, notify the Train Operator that:

- (a) it shall effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c); or
- (b) it shall not effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c) for one of the following reasons:
  - (i) it is not reasonably able to effect such modification in a timescale that meets the Train Operator's requirements; or
  - (ii) the Incremental Costs of such modification are estimated by Network Rail to exceed £300,000 in any Financial Year.

2.8.3 If Network Rail fails to notify the Train Operator under paragraph 2.8.2, it shall be deemed to have accepted the Train Operator's request under paragraph 2.8.1(c).

2.8.4 Where Network Rail notifies the Train Operator under paragraph 2.8.2(a), paragraph 2.8.6 shall apply.

2.8.5 Where Network Rail notifies the Train Operator under paragraph 2.8.2(b), if the Train Operator disputes Network Rail's reasons under paragraphs 2.8.2(b)(i) or (ii), it shall be entitled to refer the matter for resolution in accordance with the ADRR.

2.8.6 Where Network Rail incurs Incremental Costs pursuant to paragraph 2.8.1, then such Incremental Costs shall be payable to Network Rail by the Train Operator in such amounts as are either:

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

2.8.7 Where:

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request; and
- (b) the operation of the Service requested:
  - (i) would exceed the Operating Constraints applying as at 1 April 2014; and
  - (ii) is permitted under the Operating Constraints applying as at the date of the request by reason of a Qualifying Modification,

then paragraph 2.8.8 shall apply.

2.8.8 The Train Operator shall, if it wishes to operate the Service requested under paragraph 2.8.7, pay to Network Rail a Qualifying Modification Benefit Charge of such amount as shall be determined to be reasonable by Network Rail using the criteria and guidance that are applicable to the Qualifying Modification Benefit Charge.

2.8.9 Where:

- (a) the Train Operator pays for Incremental Costs under paragraph 2.8.6 in respect of any modification (in its capacity as a Contributing Train Operator); and
- (b) another freight train operator pays a Qualifying Modification Benefit Charge to Network Rail in respect of such modification,

then Network Rail shall notify the Train Operator of the sum which it proposes to rebate to it and subject to paragraph 2.8.11, make a rebate to the Train Operator in respect of such Incremental Costs equal to the Qualifying Modification Benefit Charge so paid.

2.8.10 If the parties have failed to agree the Incremental Costs in accordance with paragraph 2.8.6 within 20 Working Days of the date of the relevant request under paragraph 2.8.1(a) either party shall be entitled to refer the determination of the Incremental Costs for resolution in accordance with the ADRR.

2.8.11 If the Train Operator disputes:

(a) the amount of any Qualifying Modification Benefit Charge payable by it under paragraph 2.8.8; or

(b) the amount of any rebate payable to it under paragraph 2.8.9,

within 20 Working Days of the date of its receipt from Network Rail of details of the amount of the charge or rebate respectively, it shall be entitled to refer the matter for resolution in accordance with the ADRR.

2.8.12 If a reference for resolution is made under paragraph 2.8.11, the parties shall serve a written notice on the freight train operator benefiting from the Qualifying Modification:

(a) notifying such freight train operator of the referral for resolution; and

(b) giving to such freight train operator the opportunity to become a party to the proceedings in respect of such resolution.

2.8.13 If a reference for resolution is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall:

(a) reach a decision which is fair and reasonable;

(b) have regard to:

(i) the matters in respect of which duties are imposed on ORR by virtue of section 4 of the Act; and

(ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;

(c) not make a determination which is inconsistent with any provisions of the Network Code; and

(d) give its reasons.

2.8.14 Network Rail undertakes to the Train Operator that, subject to the approval of ORR, in any regulated access agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with a freight train operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.

2.8.15 Where, in relation to any Qualifying Modification, the determination of any Qualifying Modification Benefit Charge, or corresponding rebate of Incremental Costs, is referred to expert determination by any person

under the provisions of any regulated access agreement (other than this contract):

- (a) such determination shall be binding on Network Rail and the Train Operator; and
- (b) Network Rail and the Train Operator shall make any necessary adjustments of payments between them under this contract to give effect to such determination.

2.8.16 Network Rail shall be the legal and beneficial owner of all modifications to Operating Constraints effected by or on behalf of Network Rail under this paragraph 2.8.

## 2.9 *Office of Rail Regulation's Qualifying Modification Criteria*

2.9.1 ORR may at any time issue criteria:

- (a) specifying how the QM Threshold for any Qualifying Modification shall be determined, which may vary for different types of Qualifying Modification; and
- (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.

2.9.2 ORR's criteria under paragraph 2.9.1(a) above shall not have effect unless ORR has:

- (a) consulted the parties in relation to the issues to be dealt with in such criteria;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 2.9.2(a); and
- (c) notified the parties as to its conclusions in relation to the issues to be dealt with in such criteria and the reasons for those conclusions.

## 2.10 *Efficiency Benefit Share*

2.10.1 The Efficiency Benefit Share:

- (a) is an amount (which shall not be a negative value) representing a return of Track Charges which shall be identified in the ORR's annual assessment of Network Rail as the "Efficiency Benefit Share", if any, to be rebated to the Train Operator, such amount to be determined in accordance with the methodology and principles set out in paragraphs 27.34 to 27.53 (inclusive) of the 2008 Final Determinations; and

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

2.10.2 If, pursuant to paragraph 2.10.1, the Train Operator is entitled to payment of an Efficiency Benefit Share in respect of Relevant Year t, then, subject to paragraph 2.10.3, such payment shall be made by Network Rail to the Train Operator as a lump sum payment within 28 days after the end of the Charging Period in which it is determined by the ORR that such payment should be made.

2.10.3 If, in respect of any Relevant Year t, an Efficiency Benefit Share is payable in accordance with paragraph 2.10.2 and this contract has either commenced or expired or otherwise been terminated during the course of that Relevant Year t, the Train Operator shall be entitled to a pro rata payment of the Efficiency Benefit Share payable in respect of that Relevant Year t. Such pro rata payment (which shall be payable in accordance with paragraph 2.10.2) shall be calculated as follows:

$$\text{ProrataEfficiencyBenefitShare} = \left( \frac{\text{EBS}}{13} \right) \times \text{CP}$$

where:

EBS means the total amount of the Efficiency Benefit Share that would have been payable to the Train Operator in respect of the whole of the Relevant Year t in question had this contract been in force for the entire Relevant Year t; and

CP means the number of Charging Periods during that Relevant Year t either:

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

(b) where this contract expires or is otherwise terminated during the course of that Relevant Year t, prior to the expiry or other termination of this contract,

provided that, in each case:

(i) if this contract expires or is otherwise terminated on or before the fourteenth day of a Charging Period, such Charging Period shall not be included in the calculation of 'CP';

(ii) if this contract expires or is otherwise terminated on or after the fifteenth day of a Charging Period,

such Charging Period shall be included in the calculation of 'CP';

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

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

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

2.11 Not used.

2.12 *Coal Spillage Reduction Investment Charge*

2.12.1 Not used.

2.12.2 The purpose of the Coal Spillage Reduction Investment Charge was to enable Network Rail to fund capital investments to reduce coal spillage on the Network, and Network Rail shall only be entitled to apply amounts received in respect of the Coal Spillage Reduction Investment Charge for such purpose.

2.12.3 Within 28 days of the end of each Financial Year, Network Rail shall provide the Train Operator and ORR with details of:

- (a) the total amount received by Network Rail from all freight train operators during that Financial Year in respect of the Coal Spillage Reduction Investment Charge (the "**FY CSR Fund**");

- (b) the aggregate amount of funding distributed by Network Rail during that Financial Year to reduce coal spillage on the Network (each a “**Coal Spillage Investment**”); and
- (c) the balance (if any) of the FY CSR Fund after:
  - (i) adding the Total CSR Fund Balance for the previous Financial Year if such Total CSR Fund Balance for the previous Financial Year has been carried forward; and
  - (ii) deducting the capital cost of any Coal Spillage Investments made during that Financial Year, (the “**Total CSR Fund Balance**”).

2.12.4 Within 56 days of the last day of each Financial Year, Network Rail shall, following consultation with the Train Operator and all other freight train operators whose access agreement in respect of track includes a provision similar to this paragraph 2.12, notify the Train Operator and ORR in writing whether it wishes to carry forward the Total CSR Fund Balance for application to Coal Spillage Investments in the then current Financial Year.

2.12.5 Network Rail’s notice pursuant to paragraph 2.12.4 shall be accompanied by such information and supporting evidence (including any freight train operators’ representations and details of any Coal Spillage Investments proposed for the then current Financial Year) as ORR may require to determine whether or not the Total CSR Fund Balance should be carried forward for application in the then current Financial Year.

2.12.6 If ORR determines that the Total CSR Fund Balance should not be carried forward and ORR issues a CSR Variation Notice to that effect, the Train Operator shall be entitled to a rebate of amounts paid by the Train Operator in respect of the Coal Spillage Reduction Investment Charge (a “**CSR Rebate**”). The amount of the CSR Rebate payable to the Train Operator shall be an amount which, when expressed as a percentage of the Total CSR Fund Balance, is equal to the proportion borne by the Train Operator’s total contribution to the Total CSR Fund.

2.12.7 If ORR determines that the Total CSR Fund Balance should be carried forward and ORR issues a CSR Variation Notice to that effect, Network Rail shall retain the Total CSR Fund Balance for application for Coal Spillage Investments in the then current Financial Year.

2.12.8 Promptly following service of a CSR Variation Notice under this paragraph 2.12, and in order to give effect to any CSR Rebate specified in that CSR Variation Notice, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
- (b) any payments already made,

in each case in respect of the Coal Spillage Reduction Investment Charge paid during the Financial Year ending immediately before 00:00 hours on 1 April 2014.

2.12.9 Any statement issued by Network Rail pursuant to paragraph 2.12.8 shall be accompanied by an adjusting invoice (which shall be payable by the Train Operator within 28 days) or credit note.

### 3. Freight Charging Review

3.1 ORR may carry out one or more access charges reviews of all or part of this contract such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation on and from 1 April 2019 or such later date as may be specified in that review.

3.2 In this paragraph 3, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

### 4. Route-Level Efficiency Benefit Share Mechanism

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

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

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

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

and

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

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

where:

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

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

- (a) for the Relevant Year in the course of which the notice referred to in paragraph 4.3 was served and all subsequent Relevant Years up to 31 March 2019; and
- (b) where Network Rail entered into a Material Alliance Agreement during the course of Relevant Year  $t$  and the Train Operator issued an Opt-out Notice pursuant to

paragraph 4.4(b) in Relevant Year t+1, in respect of any Charging Period in Relevant Year t commencing on or after the date of the Material Alliance Agreement.

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

4.3 The Train Operator may serve a notice, in the form set out in Appendix 2, on Network Rail (and shall provide a copy to ORR) informing Network Rail that the Route-Level Efficiency Benefit Share Mechanism shall not apply to the Train Operator in respect of one or more REBS Routes specified in the notice for the Relevant Year in the course of which the notice was served and all subsequent Relevant Years up to 31 March 2019 (an "**Opt-out Notice**"). Unless paragraph 4.4 applies, an Opt-out Notice may be served only before 1 July 2014.

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

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

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

- (i) the date on which the Train Operator commences operating the services described in paragraph 4.4(a); or

- (ii) the date of receipt of written confirmation from ORR under paragraph 4.4(b),

as the case may be.

- 4.5 Network Rail shall serve notice on ORR and the Train Operator that it has entered into an agreement which it considers to be a Material Alliance Agreement within 14 days after entering into it.
- 4.6 Network Rail shall provide such information, excluding information which is subject to a legally binding duty or obligation of confidentiality (whether arising under the terms of any contract or otherwise), to the Train Operator as the Train Operator may reasonably request in order to determine whether to serve an Opt-out Notice. Network Rail shall provide such information within 14 days of the request, unless not reasonably practicable to do so, in which case it shall provide the information as soon as reasonably practicable.

*Obligation to pay the Route-Level Efficiency Benefit Share*

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

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

where:

REBS means either  $O_t$  or  $U_t$  as the case may be; and

CP means the number of Charging Periods during that Relevant Year t either:

- (a) where this contract commences during the course of that Relevant Year t, following commencement of this contract; or
- (b) where this contract expires or is otherwise terminated during the course of that Relevant Year t, prior to the expiry or other termination of this contract,

provided that, in each case:

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

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

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

*Route Baseline Indexation*

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

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

where:

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

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

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

*Outperformance Cap and Underperformance Cap Indexation*

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

(a) in the case of the Outperformance Cap:

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

(b) in the case of the Underperformance Cap:

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

where:

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

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

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

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

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

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

## APPENDIX 1 – REBS ROUTES TABLE

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

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

**[Name of train operator representative]**

**[Position]**

Telephone: [xxx]

E-mail: [xxx]

[Date]

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

Network Rail

Kings Place

90 York Way

London

N1 9AG

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

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

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

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

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

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

Route	Route definition	Opt-out (please mark with an 'x')
Sussex		
Wales		
Wessex		
Western		

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

Yours faithfully

**[Name of train operator representative]**

**APPENDIX 3 - "METERED TRAINS M" FOR THE PURPOSES OF  
PARAGRAPH 2.4.1.1 OF PART 2**

<b>Train Type</b>	<b>Train ID</b>	<b>Traction Type</b>
	<i>[This column should include full train ID. If all trains of the relevant train type used by the Train Operator are metered, this column should say "All".]</i>	



**Appendix 4 to Annex 2**

**Schedule 7 to the GBRf Customer TAA**

## SCHEDULE 7: TRACK CHARGES AND OTHER PAYMENTS

### 1. Definitions

In this Schedule 7 unless the context otherwise requires:

“**2008 Final Determinations**” means the document entitled “Periodic Review 2008: Determination of Network Rail’s outputs and funding for 2009-14” published by ORR on 30 October 2008;

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

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

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

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

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

“**Coaching Stock Miles**” means, in relation to coaching stock, the Contract Miles travelled by that coaching stock;

“**Coaching Stock Weight**” means, in relation to coaching stock, the gross weight of that coaching stock, measured in tonnes;

“**Coal Spillage Charge**” means the amount payable in respect of item 6 in the formula specified in paragraph 2.2.1;

“**Coal Spillage Charge Rate**” means, in respect of each Coal Vehicle used in a Service, the coal spillage charge rate per kg<sup>2</sup>m for that Coal Vehicle, as set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

“**Coal Spillage Investment**” has the meaning attributed to it in paragraph 2.12.3(b);

“**Coal Spillage Reduction Investment Charge**” means the amount payable in respect of item 7 in the formula specified in paragraph 2.2.1;

“**Coal Spillage Reduction Investment Charge Rate**” means, in respect of each Coal Vehicle used in a Service, the coal spillage reduction investment

charge rate per kgkm set out in the Track Usage Price List and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

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

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

**“Coal Vehicle”** means any vehicle in respect of which the applicable Commodity is coal;

**“Commodity”** means the commodity applying to each Service as shall be agreed between the Train Operator and Network Rail by reference to the classes of commodity in the Track Usage Price List;

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

**“Contributing Train Operator”** means, in relation to any Qualifying Modification, the train operator which:

- (a) has requested that Network Rail make the modification to the Operating Constraints; and
- (b) continues to utilise the modification;

**“CSR Rebate”** has the meaning attributed to it in paragraph 2.12.6;

**“CSR Variation Notice”** means a notice given by ORR to the parties which sets out whether the Total CSR Fund Balance (if any) shall be carried forward or whether a CSR Rebate shall be made;

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

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

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

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

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

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

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

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

**“Electrification Asset Usage Rate”** means, in respect of electrification asset usage, the rate per electrified kgtm on route type k as set out in the Track Usage Price List and, being an Indexed Figure adjusted in accordance with paragraph 2.7.1 and 2.7.2;

**“Empty Wagon Miles”** means, in relation to an empty wagon, the Contract Miles travelled by that empty wagon;

**“Empty Wagon Weight”** means, in relation to an empty wagon, the tare weight of that wagon, measured in tonnes;

**“ESI Vehicle”** means any vehicle in respect of which the applicable Commodity is electricity supply industry coal;

**“Freight Capacity Charge”** means the charge calculated in accordance with paragraph 2.3.1;

**“Freight Capacity Rate”** means, in respect of each Service, the freight capacity rate corresponding to the day (or days) of the week on which that Service is operated, as set out in the List of Capacity Charge Rates and, being an Indexed Figure, adjusted in accordance with paragraphs 2.7.1 and 2.7.2;

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

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

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

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

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

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

**“FY CSR Fund”** has the meaning attributed to it in paragraph 2.12.3;

**“Geographic Area g”** means, for the purposes of performing the calculations set out in paragraph 2.4 and paragraph 18 of the Traction Electricity Rules, the relevant geographic section of the Network as set out in Appendix 5 of the Traction Electricity Rules;

**“Gross Tonne Miles”** or **“gtm”** means, in respect of each locomotive, loaded wagon, empty wagon or coaching stock, the Locomotive Miles, Loaded Wagon Miles, Empty Wagon Miles or Coaching Stock Miles multiplied by the relevant Locomotive Weight, Loaded Wagon Weight, Empty Wagon Weight or Coaching Stock Weight respectively;

**“Incremental Costs”** means all reasonable additional costs properly and reasonably incurred by Network Rail in respect of any modification referred to in paragraph 2.8, being the additional reasonable costs (if any) to Network Rail in respect of its obligation to maintain and operate the Network, but excluding:

- (a) any loss of income on the part of Network Rail; and
- (b) freight-specific fixed and common costs for which Network Rail has already received funding from the Secretary of State, or any other body or person;

**“Indexed Figures”** means the Cancellation Sum, the Coal Spillage Charge Rate, Coal Spillage Reduction Investment Charge Rate, the Coal Trains Baseline, the Default Rate, the Disruption Sum, the Electrification Asset Usage Rate, the Enhanced Planned Disruption Sum, the Freight Capacity Rate, the Freight Capacity Charge Wash-up Rate, the Incident Cap Access Charge Supplement Rate, the Intermodal Trains Baseline, the Late Cancellation Sum, the Network Rail Cap, the Network Rail Payment Rate, the Normal Planned Disruption Sum, the Other Trains Baseline, the Prolonged Disruption Amount, the Service Variation Sum, the Train Operator Cap and the Train Operator Payment Rate;

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

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

where:

IIF means the Initial Indexation Factor;

RPI<sub>2012</sub> means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2012; and

RPI<sub>2013</sub> means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013;

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

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

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

**“kgtm”** means 1000 Gross Tonne Miles;

**“kWh”** means kilowatt hours;

**“List of Capacity Charge Rates”** means the document entitled “List of Capacity Charge Rates” published by Network Rail on or about 20 December

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

**“Loaded Wagon Miles”** means, in relation to a loaded wagon, the Contract Miles travelled by that loaded wagon;

**“Loaded Wagon Weight”** means, in relation to a loaded wagon, the gross weight of that loaded wagon, measured in tonnes;

**“Locomotive Miles”** means, in relation to a locomotive, the Contract Miles travelled by that locomotive;

**“Locomotive Weight”** means, in relation to a locomotive, the gross weight of that locomotive, measured in tonnes;

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

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

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

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

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

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

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

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

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

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

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

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

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

**“Outperformance Sum”** means the lower of:

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

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

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

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

**“QM Threshold”** means a level of costs in relation to a modification to the Operating Constraints determined in accordance with ORR’s Qualifying Modification Criteria;

**“Qualifying Modification”** means a modification to the Operating Constraints in excess of their level as at 1 April 2014, which:

(a) exceeds the QM Threshold; and

(b) in respect of which a Contributing Train Operator has paid Network Rail Incremental Costs under paragraph 2.8 or its equivalent in the relevant access agreement;

**“Qualifying Modification Benefit Charge”** means, in relation to any Qualifying Modification, a charge which shall:

(a) take account of:

(i) the use made or to be made of the Qualifying Modification, where such modification increased the capacity of the Network; or

- (ii) in any other case, the benefit which is likely to be derived from the Qualifying Modification by the Train Operator compared to the benefit derived from such modification by the Contributing Train Operator; and
- (b) reflect any relevant guidance in relation to the funding of modifications to the Operating Constraints published in ORR's Qualifying Modification Criteria;

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

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

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

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

**“Relevant Year t”** means the Financial Year for the purposes of which any calculation falls to be made;

**“Relevant Year t-1”** means the Financial Year preceding Relevant Year t, and similar expressions shall be construed accordingly;

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

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

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

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

**“RPI”** means the General Index of Retail Prices All Items measured by CHAW and published each month but where RPI for any month is not published on or

before the last day of the third month after such month or there is a material change in the base composition of RPI, then ORR may, after consultation with the parties and such other persons as it considers appropriate, determine the use of such other index as it deems appropriate in the circumstances;

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

**“tariff band j”** means the tariff zone and time band in which the train in question is operated;

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

**“Total CSR Fund”** means, at any given time, the aggregate of all amounts received by Network Rail from all freight train operators in respect of the Coal Spillage Reduction Investment Charge;

**“Total CSR Fund Balance”** has the meaning attributed to it in paragraph 2.12.3(c);

**“Track Usage Price List”** means the document entitled “Track Usage Price List” published by Network Rail on or about 20 December 2013 which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract;

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

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

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

**“Train Mile”** means, in relation to a train, or a portion of a train, a mile travelled by that train, or that portion of a train, on the Network;

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

**“Underperformance Sum”** means the lower of:

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

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

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

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

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

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

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

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

## **2. Track Charges and Invoices**

### *2.1 Obligation on Train Operator to pay*

2.1.1 In respect of each Charging Period, the Train Operator shall pay or procure payment of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incremental Costs, the Incident Cap Access Charge Supplement and the Qualifying Modification Benefit Charge. In respect of each Relevant Year  $t$ , the Train Operator shall pay the amount of any sum  $S_t$  payable as provided in paragraph 2.4.2 and the amount of any sum  $S_{1_{tw}}$  and/or  $S_{2_{tw}}$  and/or any Charge Correction Amount payable as provided in paragraph 18 of the Traction Electricity Rules. The charges will be rounded to the nearest penny. Where a calculation ends up exactly half way between whole numbers it will be adjusted upward.

- 2.1.2 No Track Charges shall be payable by the Train Operator in respect of a Train Slot when the train has not reached its Planned Destination for a reason which is Attributable to Network Rail.
- 2.1.3 Network Rail shall issue to the Train Operator an invoice as soon as practicable, or as otherwise agreed, following the expiry of each Charging Period in respect of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incident Cap Access Charge Supplement and any Incremental Costs or Qualifying Modification Benefit Charge which is or are payable in respect of that Charging Period.
- 2.1.4 If, at the time that Network Rail issues any invoice pursuant to paragraph 2.1.3, any Efficiency Benefit Share is payable by Network Rail to the Train Operator, or any Route-Level Efficiency Benefit Share or any amount of any sum  $S_t$  or any amount under the Traction Electricity Rules is payable by either party to the other, that invoice shall also reflect that Efficiency Benefit Share payable by Network Rail and the Route-Level Efficiency Benefit Share, the amount of  $S_t$  or any amount under the Traction Electricity Rules payable by either party to the other.
- 2.1.5 Where, in accordance with paragraph 2.3.2, Network Rail calculates that the Freight Capacity Charge Wash-up is a positive amount then, as soon as practicable, it shall issue to the Train Operator an invoice for that amount and the Train Operator shall pay or procure payment of it.

## 2.2 *Variable Charges*

- 2.2.1 The Variable Charge in respect of each Service in each Charging Period shall be calculated in accordance with the following formula:

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

where:

- 1 means, in respect of each locomotive, the VUC Rate for the relevant locomotive type multiplied by the kgm for that locomotive type relating to the relevant Service;
- 2 means, in respect of each empty wagon, the VUC Rate for the relevant empty wagon type multiplied by the kgm for that empty wagon type relating to the relevant Service;
- 3 means, in respect of each loaded wagon, the VUC Rate for the relevant loaded wagon type multiplied by the kgm for that loaded wagon type relating to the relevant Service;
- 4 means, in respect of each unit of coaching stock, the VUC Rate for the relevant coaching stock type multiplied by the

kgtm for that coaching stock type relating to the relevant Service;

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

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

- 2.2.2 Where the Train Operator intends to use New Registered Equipment on the Network, it shall where reasonably practicable inform Network Rail in writing of the date or likely date from which it intends to do so.
- 2.2.3 No supplement to the Traction Electricity Modelled Consumption Rates List or Track Usage Price List shall have effect unless it has been:
- (a) agreed between the parties and ORR has consented to it; or
  - (b) determined by ORR.
- 2.2.4 Either the Train Operator or Network Rail shall be entitled to propose that:
- (a) the Traction Electricity Modelled Consumption Rates List be supplemented as necessary to include a new train category and corresponding rate; or
  - (b) the Track Usage Price List be supplemented as necessary to include a new vehicle type and corresponding rate.

- 2.2.5 Any proposal of a kind referred to in paragraph 2.2.4 shall be made by notice to the other party and shall be accompanied by a specification of the proposal in reasonable detail and the reasons for it. The parties shall thereafter seek to agree in good faith the necessary supplement to the list in question.
- 2.2.6 Either party may request from the other such information that it reasonably requires in connection with the proposal and the party from whom the information was requested shall use reasonable endeavours to provide this information promptly.
- 2.2.7 Where the parties agree to a supplement following a proposal under paragraph 2.2.4, they shall request ORR's consent to it and provide such information as ORR reasonably requires in order to decide whether to give its consent.
- 2.2.8 If the parties fail to reach agreement within 45 days of the date of the notice given under paragraph 2.2.5, at any point thereafter either party shall be entitled to refer the matter to ORR for determination.
- 2.2.9 Following a reference to ORR under paragraph 2.2.8, the parties shall, within such timescales as ORR may reasonably specify, furnish ORR with such information and evidence as ORR shall reasonably require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.
- 2.2.10 ORR may:
- (a) consent to any supplement that is agreed by the parties and submitted to it under paragraph 2.2.7, or following consultation with the parties, determine that a different supplement should apply; or
  - (b) following a referral to ORR under paragraph 2.2.8, determine the supplement that should apply.
- 2.2.11 In the case of a supplement to the Traction Electricity Modelled Consumption Rates List, the supplement shall have effect from such date as ORR shall determine by notice to the parties, provided that such date shall not be a date falling prior to the start of the Relevant Year in which ORR consented to or determined the supplement.
- 2.2.12 In the case of a supplement to the Track Usage Price List, the supplement shall have retrospective effect from the first day of the Default Period.
- 2.2.13 Following ORR's consent or determination under paragraph 2.2.10 Network Rail shall:
- (a) apply the supplement from the date in accordance with paragraph 2.2.11 or 2.2.12 above as applicable; and

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

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

2.3.1 The Freight Capacity Charge shall be calculated in accordance with the following formula or such other method that the parties may agree with the object of calculating a Freight Capacity Charge that is not materially different from that calculated in accordance with the following formula:

$$\text{Freight Capacity Charge} = \sum (\text{FCR}_{\text{mf}} \times \text{CM}_{\text{mf}}) + (\text{FCR}_{\text{w}} \times \text{CM}_{\text{w}})$$

where:

$\text{FCR}_{\text{mf}}$  means the Freight Capacity Rate in respect of Services operated during the period from Monday to Friday (both inclusive) as set out in the List of Capacity Charge Rates;

$\text{CM}_{\text{mf}}$  means Contract Miles in respect of Services operated during the period from Monday to Friday (both inclusive);

$\text{FCR}_{\text{w}}$  means the Freight Capacity Rate in respect of Services operated on Saturday and/or Sunday, as set out in the List of Capacity Charge Rates;

$\text{CM}_{\text{w}}$  means Contract Miles in respect of Services operated on Saturday and/or Sunday; and

$\sum$  means the summation across all Services.

2.3.2 Within 90 days after the end of Relevant Year  $t$ , Network Rail shall calculate any Freight Capacity Charge Wash-up for the Train Operator ( $\text{KW}_t$ ) in

accordance with paragraph 2.3.3, and provide to the Train Operator such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations under this paragraph 2.3.2. If  $KW_t$  is a positive sum, such sum shall be payable by the Train Operator. If  $KW_t$  is a negative sum or equal to zero then no sum shall be payable by the Train Operator or by Network Rail.

2.3.3  $KW_t$  is derived from the following formula:

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

where:

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

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

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

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

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

where:

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

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

$A_{tcoal}$  means the aggregate income which Network Rail, acting reasonably, estimates is owed to it under all track access agreements for the carriage of goods by railway in respect of the Freight Capacity Charge for all Services relating to Coal Trains that have been operated

by or on behalf of freight operators on the Network during Relevant Year t; and

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

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

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

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

where:

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

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

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

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

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

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

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

Where:

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

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

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

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

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

## 2.4 Traction Electricity Charge

2.4.1 If the Train Operator procures the supply of electricity from or through Network Rail (whether as its agent or otherwise) for the purpose of running trains under this contract, the Traction Electricity Charge in Relevant Year  $t$  shall be calculated in accordance with the following formula:

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

where:

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

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

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

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

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

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

*Calculation of modelled consumption*

2.4.1.2  $E_{\text{tmo}}$  is derived from the following formula:

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

where:

$\sum$  means the summation across all Geographic Areas  $g$ , as appropriate;

$E_{tmog}$  is derived from the following formula:

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

where:

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

$C_i$  means the modelled consumption rate :

- (a) in kWh per electrified Train Mile in relation to passenger electric multiple units (using the rate for the relevant number of units); and
- (b) in kWh per electrified kgm in relation to locomotive-hauled units and all freight traffic,

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

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

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

#### *Calculation of consumption using metered consumption data*

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

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

where:

$\Sigma$  means the summation across all Geographic Areas  $g$ , as appropriate;

$E_{tmeg}$  is derived from the following formula:

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

where:

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

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

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

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

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

$\delta_m$  means the Tolerance Factor for the relevant train type for Metered Train  $m$ .

#### 2.4.1.4

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

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

where:

$\Sigma$  means the summation across all Geographic Areas  $g$ , as appropriate;

$E_{tmugAC}$  is derived from the following formula:

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

where:

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

$CME_{mijtAC}$	means the consumption of electricity (in kWh) from the AC System by Metered Trains $m$ operated by or on behalf of the Train Operator, as measured by the On-Train Meters or as otherwise determined in accordance with the Traction Electricity Rules, in Geographic Area $g$ , tariff band $j$ and in Relevant Year $t$ ;
$PF_m$	means the Power Factor Correction for the relevant train type for Metered Train $m$ ;
$EF_{ijt}$	means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area $g$ , in tariff band $j$ and in Relevant Year $t$ as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;
$\delta_m$	means the Tolerance Factor for the relevant train type for Metered Train $m$ ; and
$\lambda_{ACg}$	means the Network Rail Distribution System Loss Factor for the AC System in Geographic Area $g$ .

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

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

where:

$\Sigma$  means the summation across all Geographic Areas  $g$ , as appropriate;

$E_{tmugDC}$  is derived from the following formula:

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

where:

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

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

$EF_{ijt}$  means the charge for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area  $g$ , in tariff band  $j$  and in

Relevant Year  $t$  as agreed or determined pursuant to paragraph 19 of the Traction Electricity Rules;

$\delta_m$  means the Tolerance Factor for the relevant train type for Metered Train  $m$ ; and

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

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

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

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

2.4.3 Not used.

2.4.4 Not used.

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

2.4.5 If the Train Operator wishes to propose the introduction of On-Train Metering to measure traction electricity consumption for a vehicle or vehicles of a vehicle type that the Train Operator operates for the purposes of being invoiced by Network Rail for traction electricity, it shall notify Network Rail of any required changes to the contract in connection with that proposal.

2.4.6 Any notice under paragraph 2.4.5 shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.

2.4.7 Promptly following any response served by Network Rail under paragraph 2.4.6, the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and, if so, the amendments.

2.4.8 If the parties agree an amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, that amendment shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed, the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.

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

2.4.12 *Electrification Asset Usage Charge*

The Electrification Asset Usage Charge is an amount for electrification asset usage which is derived from the following formula:

$$\text{Electrification Asset Usage Charge} = \sum (EV_{tk} \cdot UV_{tk})$$

where:

- $\sum$  means the summation across all Services using electric traction;
- $EV_{tk}$  means an amount in respect of the Electrification Asset Usage Rate;
- $UV_{tk}$  means the actual number of electrified kgtm on route type k in the relevant Charging Period in Relevant Year t operated by or on behalf of the Train Operator.

2.5 Not used.

2.6 *Incident Cap Access Charge Supplement*

The Incident Cap Access Charge Supplement shall be calculated in accordance with the following formula:

$$\text{Incident Cap Access Charge Supplement} = \text{CMCP} \times \text{ICACSR}$$

where:

CMCP means the sum of the Contract Miles operated in a Charging Period; and

ICACSR means the Incident Cap Access Charge Supplement Rate.

## 2.7 Price Variation

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

2.7.2 In respect of the Relevant Year commencing on 1 April 2015, and in respect of each subsequent Relevant Year, on 1 April of the Relevant Year the Indexed Figures from the Relevant Year  $t - 1$  shall each be adjusted by multiplying them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula:

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

where:

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

$\text{RPI}_{t-2}$  means the average value of the monthly RPI figures for the 12 months up to and including the month of December which is 16 months before the relevant 1 April.

2.7.3 The Phased in Charges Indexation Adjustment shall be derived:

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

$$\text{PCIA}_{2014} = \text{Initial Indexation Factor}$$

where:

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

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

$$\text{PCIA}_t = \left( 1 + \frac{(\text{RPI}_{t-1} - \text{RPI}_{2013})}{\text{RPI}_{2013}} \right) \bullet \text{Initial Indexation Factor}$$

where:

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

## 2.8 *Incremental Costs*

### 2.8.1 *Where:*

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request;
- (b) the operation of the Service requested would exceed the Operating Constraints applying as at 1 April 2014;
- (c) the Train Operator notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2014 in a manner so as to permit the operation of the Service requested under this contract;
- (c) Network Rail is reasonably able to effect such modifications in a timescale that meets the Train Operator's requirements; and
- (d) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed £300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

2.8.2 Network Rail shall, as soon as reasonably practicable following receipt of the Train Operator's notification under paragraph 2.8.1, notify the Train Operator that:

- (a) it shall effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c); or

(b) it shall not effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c) for one of the following reasons:

- (i) it is not reasonably able to effect such modification in a timescale that meets the Train Operator's requirements; or
- (ii) the Incremental Costs of such modification are estimated by Network Rail to exceed £300,000 in any Financial Year.

2.8.3 If Network Rail fails to notify the Train Operator under paragraph 2.8.2, it shall be deemed to have accepted the Train Operator's request under paragraph 2.8.1(c).

2.8.4 Where Network Rail notifies the Train Operator under paragraph 2.8.2(a), paragraph 2.8.6 shall apply.

2.8.5 Where Network Rail notifies the Train Operator under paragraph 2.8.2(b), if the Train Operator disputes Network Rail's reasons under paragraphs 2.8.2(b)(i) or (ii), it shall be entitled to refer the matter for resolution in accordance with the ADRR.

2.8.6 Where Network Rail incurs Incremental Costs pursuant to paragraph 2.8.1 or, pursuant to paragraph 2.8.17(A), any Freight Customer Incremental Costs are deemed to be Incremental Costs determined in accordance with this paragraph 2.8.6, then such Incremental Costs shall be payable to Network Rail by the Train Operator in such amounts as are either:

(a) in the case of any Incremental Costs other than any Freight Customer Incremental Costs that are deemed to be Incremental Costs in accordance with paragraph 2.8.17(A):

- (i) agreed between the parties prior to operation of the relevant Service; or
- (ii) if not so agreed between the parties, reasonable in the circumstances; or

(b) in the case of any Freight Customer Incremental Costs that are deemed to be Incremental Costs in accordance with paragraph 2.8.17(A), determined in accordance with paragraph 2.8.6 of schedule 7 to the Freight Customer Access Contract.

2.8.7 Where:

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request; and
- (b) the operation of the Service requested:
  - (i) would exceed the Operating Constraints applying as at 1 April 2014; and
  - (ii) is permitted under the Operating Constraints applying as at the date of the request by reason of a Qualifying Modification,

then paragraph 2.8.8 shall apply.

2.8.8 The Train Operator shall, if it wishes to operate the Service requested under paragraph 2.8.7, pay to Network Rail a Qualifying Modification Benefit Charge of such amount as shall be determined to be reasonable by Network Rail using the criteria and guidance that are applicable to the Qualifying Modification Benefit Charge.

2.8.9 Where:

- (a) the Train Operator pays for Incremental Costs under paragraph 2.8.6 in respect of any modification (in its capacity as a Contributing Train Operator); and
- (b) another freight train operator pays a Qualifying Modification Benefit Charge to Network Rail in respect of such modification,

then Network Rail shall notify the Train Operator of the sum which it proposes to rebate to it and subject to paragraph 2.8.11, make a rebate to the Train Operator in respect of such Incremental Costs equal to the Qualifying Modification Benefit Charge so paid.

2.8.10 If the parties have failed to agree the Incremental Costs in accordance with paragraph 2.8.6 within 20 Working Days of the date of the relevant request under paragraph 2.8.1(a) either party shall be entitled to refer the determination of the Incremental Costs for resolution in accordance with the ADRR.

2.8.11 If the Train Operator disputes:

- (a) the amount of any Qualifying Modification Benefit Charge payable by it under paragraph 2.8.8; or

(b) the amount of any rebate payable to it under paragraph 2.8.9,

within 20 Working Days of the date of its receipt from Network Rail of details of the amount of the charge or rebate respectively, it shall be entitled to refer the matter for resolution in accordance with the ADRR.

2.8.12 If a reference for resolution is made under paragraph 2.8.11, the parties shall serve a written notice on the freight train operator benefiting from the Qualifying Modification:

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

2.8.13 If a reference for resolution is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
  - (i) the matters in respect of which duties are imposed on ORR by virtue of section 4 of the Act; and
  - (ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;
- (c) not make a determination which is inconsistent with any provisions of the Network Code; and
- (d) give its reasons.

2.8.14 Network Rail undertakes to the Train Operator that, subject to the approval of ORR, in any regulated access agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with a freight train operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.

2.8.15 Where, in relation to any Qualifying Modification, the determination of any Qualifying Modification Benefit Charge, or corresponding rebate of Incremental

Costs, is referred to expert determination by any person under the provisions of any regulated access agreement (other than this contract):

- (a) such determination shall be binding on Network Rail and the Train Operator; and
- (b) Network Rail and the Train Operator shall make any necessary adjustments of payments between them under this contract to give effect to such determination.

2.8.16 Network Rail shall be the legal and beneficial owner of all modifications to Operating Constraints effected by or on behalf of Network Rail under this paragraph 2.8.

*2.8.17 Liability to Pay Freight Customer Incremental Costs*

If:

- (a) Network Rail incurs Freight Customer Incremental Costs under the Freight Customer Access Contract; and
- (b) the Freight Customer serves a written notice on both the Train Operator and Network Rail (a "**Freight Customer Incremental Costs Notice**") specifying that either:
  - (i) the Train Operator is the beneficiary of the modification to the Operating Constraints which gave rise to such Freight Customer Incremental Costs so as to enable the Train Operator to operate one or more of the Freight Customer Services subsequently incorporated into this contract in accordance with Clause 5.10.1; or
  - (ii) the Train Operator should pay those Freight Customer Incremental Costs (regardless of whether or not the Train Operator is the beneficiary of the modification to the Operating Constraints which gave rise to such Freight Customer Incremental Costs); and
- (c) at the time when the Freight Customer serves the Freight Customer Incremental Costs Notice on Network Rail and the Train Operator under paragraph 2.8.17(b), one or more Freight Customer Services have

been incorporated into this contract in accordance with Clause 5.10.1 and there has been no revocation of all (but not some only) of the Train Operator's rights in respect of such Freight Customer Services in accordance with Clause 5.10.8 or Clause 5.10.9; and

(d) Network Rail:

- (i) has not previously recovered any of those Freight Customer Incremental Costs from any other person; and
- (ii) is not entitled to recover any of those Freight Customer Incremental Costs from any other person,

then:

- (A) those Freight Customer Incremental Costs shall be deemed to be "Incremental Costs" determined in accordance with paragraph 2.8.6;
- (B) Network Rail shall be entitled to issue an invoice to the Train Operator in respect of those Freight Customer Incremental Costs in accordance with this Schedule 7; and
- (C) those Freight Customer Incremental Costs shall be payable to Network Rail by the Train Operator under paragraph 2.1 as if each reference to "Incremental Costs" in paragraph 2.1 were a reference to those Freight Customer Incremental Costs (and each reference to "Track Charges" in this contract shall be construed accordingly).

#### *2.8.18 Recovery of Freight Customer Incremental Costs*

If, after payment by the Train Operator of any Freight Customer Incremental Costs in accordance with paragraph 2.8.17, it is established that either:

- (a) Network Rail has already recovered those Freight Customer Incremental Costs from any other person; or
- (b) at the time at which the Train Operator paid such Freight Customer Incremental Costs, Network Rail was entitled to recover those Freight

Customer Incremental Costs from any other person (whether or not Network Rail actually made such recovery); or

- (c) at the time at which the Freight Customer issued the relevant Freight Customer Incremental Costs Notice, either no Freight Customer Services had been incorporated into this contract in accordance with Clause 5.10.1, or the Train Operator's rights in respect of all (but not some only) Freight Customer Services so incorporated into this contract had been revoked in accordance with Clause 5.10.8 or Clause 5.10.9,

then Network Rail shall promptly repay to the Train Operator an amount equal to the Freight Customer Incremental Costs paid by the Train Operator in accordance with Clause 16.3.2.

## 2.9 *Office of Rail Regulation's Qualifying Modification Criteria*

2.9.1 ORR may at any time issue criteria:

- (a) specifying how the QM Threshold for any Qualifying Modification shall be determined, which may vary for different types of Qualifying Modification; and
- (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.

2.9.2 ORR's criteria under paragraph 2.9.1(a) above shall not have effect unless ORR has:

- (a) consulted the parties in relation to the issues to be dealt with in such criteria;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 2.9.2(a); and
- (c) notified the parties as to its conclusions in relation to the issues to be dealt with in such criteria and the reasons for those conclusions.

## 2.10 *Efficiency Benefit Share*

2.10.1 The Efficiency Benefit Share:

- (a) is an amount (which shall not be a negative value) representing a return of Track Charges which shall be identified in the ORR's

annual assessment of Network Rail as the “Efficiency Benefit Share”, if any, to be rebated to the Train Operator, such amount to be determined in accordance with the methodology and principles set out in paragraphs 27.34 to 27.53 (inclusive) of the 2008 Final Determinations; and

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

2.10.2 If, pursuant to paragraph 2.10.1, the Train Operator is entitled to payment of an Efficiency Benefit Share in respect of Relevant Year t, then, subject to paragraph 2.10.3, such payment shall be made by Network Rail to the Train Operator as a lump sum payment within 28 days after the end of the Charging Period in which it is determined by the ORR that such payment should be made.

2.10.3 If, in respect of any Relevant Year t, an Efficiency Benefit Share is payable in accordance with paragraph 2.10.2 and this contract has either commenced or expired or otherwise been terminated during the course of that Relevant Year t, the Train Operator shall be entitled to a pro rata payment of the Efficiency Benefit Share payable in respect of that Relevant Year t. Such pro rata payment (which shall be payable in accordance with paragraph 2.10.2) shall be calculated as follows:

$$\text{ProrataEfficiencyBenefitShare} = \left( \frac{\text{EBS}}{13} \right) \times \text{CP}$$

where:

EBS means the total amount of the Efficiency Benefit Share that would have been payable to the Train Operator in respect of the whole of the Relevant Year t in question had this contract been in force for the entire Relevant Year t; and

CP means the number of Charging Periods during that Relevant Year t either:

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

(b) where this contract expires or is otherwise terminated during the course of that Relevant Year t, prior to the expiry or other termination of this contract,

provided that, in each case:

(i) if this contract expires or is otherwise terminated on or before the fourteenth day of a Charging Period, such

Charging Period shall not be included in the calculation of 'CP';

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

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

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

2.11 Not used.

## 2.12 *Coal Spillage Reduction Investment Charge*

2.12.1 Not used.

2.12.2 The purpose of the Coal Spillage Reduction Investment Charge was to enable Network Rail to fund capital investments to reduce coal spillage on the Network, and Network Rail shall only be entitled to apply amounts received in respect of the Coal Spillage Reduction Investment Charge for such purpose.

2.12.3 Within 28 days of the end of each Financial Year, Network Rail shall provide the Train Operator and ORR with details of:

- (a) the total amount received by Network Rail from all freight train operators during that Financial Year in respect of the Coal Spillage Reduction Investment Charge (the “**FY CSR Fund**”);
- (b) the aggregate amount of funding distributed by Network Rail during that Financial Year to reduce coal spillage on the Network (each a “**Coal Spillage Investment**”); and
- (c) the balance (if any) of the FY CSR Fund after:
  - (i) adding the Total CSR Fund Balance for the previous Financial Year if such Total CSR Fund Balance for the previous Financial Year has been carried forward; and
  - (ii) deducting the capital cost of any Coal Spillage Investments made during that Financial Year, (the “**Total CSR Fund Balance**”).

2.12.4 Within 56 days of the last day of each Financial Year, Network Rail shall, following consultation with the Train Operator and all other freight train operators whose access agreement in respect of track includes a provision similar to this paragraph 2.12, notify the Train Operator and ORR in writing whether it wishes to carry forward the Total CSR Fund Balance for application to Coal Spillage Investments in the then current Financial Year.

2.12.5 Network Rail’s notice pursuant to paragraph 2.12.4 shall be accompanied by such information and supporting evidence (including any freight train operators’ representations and details of any Coal Spillage Investments proposed for the then current Financial Year) as ORR may require to determine whether or not the Total CSR Fund Balance should be carried forward for application in the then current Financial Year.

2.12.6 If ORR determines that the Total CSR Fund Balance should not be carried forward and ORR issues a CSR Variation Notice to that effect, the Train Operator shall be entitled to a rebate of amounts paid by the Train Operator in respect of the Coal Spillage Reduction Investment Charge (a “**CSR Rebate**”). The amount of the CSR Rebate payable to the Train Operator shall be an amount which, when expressed as a percentage of the Total CSR Fund Balance, is equal to the proportion borne by the Train Operator’s total contribution to the Total CSR Fund.

2.12.7 If ORR determines that the Total CSR Fund Balance should be carried forward and ORR issues a CSR Variation Notice to that effect, Network Rail shall retain the Total CSR Fund Balance for application for Coal Spillage Investments in the then current Financial Year.

2.12.8 Promptly following service of a CSR Variation Notice under this paragraph 2.12, and in order to give effect to any CSR Rebate specified in that CSR Variation Notice, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
- (b) any payments already made,

in each case in respect of the Coal Spillage Reduction Investment Charge paid during the Financial Year ending immediately before 00:00 hours on 1 April 2014.

2.12.9 Any statement issued by Network Rail pursuant to paragraph 2.12.8 shall be accompanied by an adjusting invoice (which shall be payable by the Train Operator within 28 days) or credit note.

### **3. Freight Charging Review**

3.1 ORR may carry out one or more access charges reviews of all or part of this contract such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation on and from 1 April 2019 or such later date as may be specified in that review.

3.2 In this paragraph 3, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

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

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

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

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

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

and

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

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

where:

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

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

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

Year t commencing on or after the date of the Material Alliance Agreement.

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

4.3 The Train Operator may serve a notice, in the form set out in Appendix 2, on Network Rail (and shall provide a copy to ORR) informing Network Rail that the Route-Level Efficiency Benefit Share Mechanism shall not apply to the Train Operator in respect of one or more REBS Routes specified in the notice for the Relevant Year in the course of which the notice was served and all subsequent Relevant Years up to 31 March 2019 (an "**Opt-out Notice**"). Unless paragraph 4.4 applies, an Opt-out Notice may be served only before 1 July 2014.

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

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

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

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

as the case may be.

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

4.6 Network Rail shall provide such information, excluding information which is subject to a legally binding duty or obligation of confidentiality (whether

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

*Obligation to pay the Route-Level Efficiency Benefit Share*

4.7 If, pursuant to paragraph 4.1, a party is entitled to payment from the other of a Route-Level Efficiency Benefit Share in Relevant Year t, then, subject to paragraphs 4.2 and 4.8, such payment shall be made to the party entitled to the payment by the other party as a lump sum payment within 56 days after the date of publication of ORR's annual efficiency and finance assessment of Network Rail for Relevant Year t.

4.8 If, in respect of any Relevant Year t, a Route-Level Efficiency Benefit Share is payable in accordance with paragraph 4.7 and this contract has either commenced or expired or otherwise been terminated during the course of that Relevant Year t, the party entitled to payment shall be entitled to a pro rata payment of the Route-Level Efficiency Benefit Share payable in respect of that REBS Route for Relevant Year t. Such pro rata payment (which shall be payable in accordance with paragraph 4.9) shall be calculated as follows:

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

where:

REBS means either  $O_t$  or  $U_t$  as the case may be; and

CP means the number of Charging Periods during that Relevant Year t either:

- (a) where this contract commences during the course of that Relevant Year t, following commencement of this contract; or
- (b) where this contract expires or is otherwise terminated during the course of that Relevant Year t, prior to the expiry or other termination of this contract,

provided that, in each case:

- (i) if this contract expires or is otherwise terminated on or before the fourteenth day of a Charging Period, such Charging Period

shall not be included in the calculation of 'CP';

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

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

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

#### *Route Baseline Indexation*

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

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

where:

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

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

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

*Outperformance Cap and Underperformance Cap Indexation*

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

(a) in the case of the Outperformance Cap:

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

(b) in the case of the Underperformance Cap:

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

where:

OCI<sub>t</sub> means the indexed Outperformance Cap in respect of Relevant Year t;

OC<sub>t</sub> means the Outperformance Cap in respect of Relevant Year t;

UCI<sub>t</sub> means the indexed Underperformance Cap in respect of Relevant Year t;

UC<sub>t</sub> means the Underperformance Cap in respect of Relevant Year t;

RPI<sub>t</sub> has the meaning set out in paragraph 4.10 above; and

RPI<sub>2012</sub> has the meaning set out in paragraph 4.10 above.

## APPENDIX 1 – REBS ROUTES TABLE

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

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

**[Name of train operator representative]**

**[Position]**

Telephone: [xxx]

E-mail: [xxx]

[Date]

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

Network Rail  
 Kings Place  
 90 York Way  
 London  
 N1 9AG

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

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

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

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

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

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

Route	Route definition	Opt-out (please mark with an 'x')
Wessex		
Western		

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

Yours faithfully

**[Name of train operator representative]**

**APPENDIX 3**

**METERED TRAINS M" FOR THE PURPOSES OF PARAGRAPH 2.4.1.1 OF PART 2**

<b>Train Type</b>	<b>Train ID</b>	<b>Traction Type</b>
	<i>[This column should include full train ID. If all trains of the relevant train type used by the Train Operator are metered, this column should say "All".]</i>	



**Appendix 5 to Annex 2**

**Schedule 8**

## SCHEDULE 8: PERFORMANCE REGIME

### 1. Definitions

In this Schedule 8 unless the context otherwise requires:

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

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

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

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

**“Adjusted Train Operator Benchmark”** means the Train Operator Benchmark as adjusted in accordance with paragraph 10.1.7;

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

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

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

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

**“Attributable to both the Train Operator and Network Rail”** means, in respect of any delay to or cancellation of a Service or a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the guidance on

allocation of responsibility for incidents set out in the Delay Attribution Guide, that both the Train Operator and Network Rail are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of “Attributable to the Train Operator” or “Attributable to Network Rail”);

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

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail; or
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

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

**“Attributable to the Train Operator”** means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
  - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;

- (ii) any Train Operator Omission;
  - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
  - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
  - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
  - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
  - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
- (i) any delay to or cancellation of a Service Attributable to the Train Operator;
  - (ii) any Train Operator Omission; or
  - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train

Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

(aa) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide; and

(bb) ignoring any delay or cancellation under paragraph (d) of the definition of “Attributable to Network Rail”;

“**Baseline Annual Contract Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Baseline Network Mileage**” has the meaning ascribed to it in paragraph 10.1.1;

“**Benchmarks**” means the Train Operator Benchmark and the Network Rail Benchmark;

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

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

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

“**Disruption Sum**” means the Disruption Sum specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

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

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

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

**“Financial Year t-1”** means the Financial Year preceding Financial Year t;

**“Financial Year t+1”** has the meaning ascribed to it in paragraph 10.1.7;

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

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

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

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

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

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

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

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

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

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

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

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

**“Network Rail Payment Rate”** means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

**“Other Train Operator Train”** means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract;

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

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

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

**“Planned Incident”** means an incident in connection with a Restriction of Use to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Working Timetable;

**“Prolonged Disruption”** means the operation of Services in accordance with the Working Timetable on any part of the Network (for which there is no reasonably practicable diversionary route) being prevented for more than one Week as a result of any event or circumstance Attributable to Network Rail, but excluding from such

events and circumstances Restrictions of Use, strikes, any kind of industrial action (on the part of any person) and the direct effects of the weather;

**“Prolonged Disruption Amount”** means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

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

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

**“Recovery Time”** means additional time incorporated in the Working Timetable to allow a train to regain time lost in delay during an earlier part of its journey;

**“Relevant Train Operator Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

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

**“Third Party Train”** means a train other than a train operated by the Train Operator under this contract;

**“Third Party Train Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Total Actual Operated Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Traffic Growth”** has the meaning ascribed to it in paragraph 10.1.1;

**“Traffic Reduction”** has the meaning ascribed to it in paragraph 10.1.1;

**“Train Operator Benchmark”** or **“TOB”** means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Charging Period, as specified in Appendix 1 and adjusted in accordance with paragraph 10.1;

**“Train Operator Cap”** means the Train Operator Cap specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8, save that, in respect of the first and last Financial Year, the Train Operator Cap shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;

**“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 paragraph 2.7.2 of Schedule 7; and

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

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

**“Trigger”** means the act of a train arriving at, passing or departing from a Recording Point.

## **2. General**

### **2.1 *Performance monitoring system recordings***

For the purposes of this Schedule 8, Network Rail shall use recordings made using the Performance Monitoring System, including the times at

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

## *2.2 Liability for Short Notice Service*

Network Rail shall, notwithstanding that it shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code.

## *2.3 Mitigation of delays*

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

## *2.4 Calculation of Minutes Delay*

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

# **3. Diagnosis of delays**

## *3.1 Attributing delays*

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

- (a) Attributable to the Train Operator;
- (b) Attributable to Network Rail; or

(c) Attributable to both the Train Operator and Network Rail.

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

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

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

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

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

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

### 3.5 *Identifying delaying incidents*

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

### 3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

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

### 4.1 *Prescribed delay period*

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

that any such minutes in excess of the Incident Cap shall be disregarded.

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

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

4.2.1 In respect of each Charging Period:

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

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

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

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

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

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

where:

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

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

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

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

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

**5. Cancellations of or delays to Restrictions of Use Attributable to the Train Operator**

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

- (a) in the case of a cancellation of a Restriction of Use, the Disruption Sum; or
- (b) in the case of a delay to the commencement of a Restriction of Use, one quarter of the Disruption Sum multiplied by the number of hours by which the commencement is delayed, up to a

maximum of four hours. For the purposes of this paragraph 5(b) part of an hour shall be treated as an entire hour.

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

### *6.1 Cancellations*

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

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

### *6.2 Network Rail performance against NRB*

In respect of each Charging Period:

#### **6.2.1**

- (a) the Minutes Delay to Services which are Attributable to Network Rail; and

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

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

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

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

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

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

where:

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

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

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

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

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

## 7. Prolonged Disruption

### 7.1 Prolonged Disruption Sum calculation

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

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

where:

PDA is the Prolonged Disruption Amount;

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

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

<b>Week</b>	<b>Multiplier</b>
Week 1	1
Week 2	1
Week 3	2

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

## 7.2 *Subsequent Prolonged Disruption*

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

## 7.3 *Network Rail liability*

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

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement.

## 8. **Cancellation**

### 8.1 *Cancellation*

**“Cancellation”** means any Service:

- (a) which does not depart from its Origin within 12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within 12 hours after the time at which it is Planned to depart and arrives at its Destination more

than 12 hours after the time at which it is Planned to arrive, and in respect of which no Diverted Service has been agreed; or

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

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

- (d) in respect of which Network Rail:

- (1) nominates an Alternative Train Slot for a reason which is Attributable to Network Rail under paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such Train Slot and:

- (i) does not propose a different Alternative Train Slot; or

- (ii) proposes a different Alternative Train Slot and this is not accommodated by Network Rail as a Train Operator Variation; or

- (2) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

## 8.2 *Network Rail liability*

8.2.1 Subject to paragraphs 8.2.2, 8.2.3 and 8.3 below, and paragraphs 4.5, 5.6 and 7.4 of Schedule 4, Network Rail shall be liable in any Charging Period for the Cancellation Sum in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

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

- (a) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement; or
- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

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

### 8.3 *Late presentation of Service*

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

- (a) a Cancellation as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code; or
- (b) a conflict with any restrictions on the use of the Network contained in the Timetable Planning Rules.

## 9. Payment

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

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

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

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

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

9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit shall be taken into account when calculating the Train Operator's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.6 In respect of any Financial Year, the Aggregate Net Liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.

9.1.7 In this paragraph 9.1, the "**Aggregate Net Liability**" of a party means, in respect of a Charging Period or Financial Year, its liability after setting off the liability of the other party to it under the same provisions in respect of the same period.

## 9.2 *Issue of invoice or credit note*

9.2.1 In respect of each Charging Period, subject to paragraph 9.1, the liabilities of the Train Operator and of Network Rail for any Performance Sums (as such Performance Sums may be adjusted under paragraph 10), Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums shall be set off against each other, and Network Rail shall issue an invoice or credit note as appropriate in respect of the balance, if any, within 28 days after the end of such Charging Period.

9.2.2 The invoice or credit note issued under paragraph 9.2.1 shall show:

- (a) any Performance Sums, Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums for which Network Rail or the Train Operator is liable; and
- (b) any matter referred to in Appendix 3 which the Train Operator or Network Rail has disputed under paragraph 3 of Appendix 3 and which is still in dispute.

## 9.3 *Resolution of disputes*

9.3.1 Without prejudice to Clause 13, Part B of the Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.

9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

## 10. Reviews of Benchmarks, Network Rail Cap and Train Operator Cap

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

#### 10.1.1 In this paragraph 10:

**“Baseline Annual Contract Mileage”** means the amount determined in accordance with paragraph 10.2.3;

**“Baseline Network Mileage”** means the amount determined in accordance with paragraph 10.1.3;

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

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

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

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

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

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

#### 10.1.2 The Train Operator Benchmark that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial

Year shall be the Train Operator Benchmark specified in Appendix 1 as adjusted in accordance with this paragraph 10.1.

#### 10.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2012/2013, as specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.1.3(b).
- (b) If, in accordance with paragraph 10.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year t+1 and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 10.1, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

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

#### 10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of the Traffic Growth or Traffic Reduction (as the case may be), Network Rail shall:

- (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing of:
  - (i) the Actual Mileage t;

- (ii) the Baseline Network Mileage;
  - (iii) Network Rail's calculation of the Traffic Growth or Traffic Reduction (as the case may be) in accordance with paragraph 10.1.4(b); and
  - (iv) Network Rail's determination of the Adjusted Train Operator Benchmark;
- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) such background data and workings as may reasonably be required for a proper understanding of Network Rail's calculations and determinations under this paragraph 10.1; and
- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing that the same Adjusted Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1.

#### 10.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determination under paragraph 10.1.5(a)(iv).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall

notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 10.1.7.

- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for resolution in accordance with the ADRR save that the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall (i) have regard to any relevant criteria and/or policy statement most recently issued by ORR and/or any guidance issued by ORR in relation to the matter referred for resolution and (ii) set out in its determination the reasons for that determination.
  
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 10.1 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 10.1 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 10.1.6(c), and to be bound by the determination, even if, either:
  - (A) pursuant to paragraph 10.1.6(a), the Train Operator has notified Network Rail that it agrees with Network Rail's determination notified pursuant to paragraph 10.1.5(a)(iv); and/or
  - (B) the determination of the relevant ADRR Forum differs from Network Rail's determination pursuant to paragraph 10.1.5(a)(iv) with which the Train Operator agreed.

10.1.7 The Train Operator Benchmark in respect of each Charging Period within the Financial Year immediately following Financial Year t ("**Financial Year t+1**") and, subject to paragraph 10.1.8, each

subsequent Financial Year, shall be adjusted in accordance with the following formula:

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

where:

ATO B means the Adjusted Train Operator Benchmark;

TO B means the current Train Operator Benchmark;

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

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

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

10.1.8 When the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7 then, subject to paragraph 10.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 10.1.7.

10.1.9 If a reference is made to a relevant ADRR Forum in accordance with paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the relevant ADRR Forum makes its determination pursuant to paragraph 10.1.6(c). Following the relevant ADRR Forum’s determination pursuant to paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the Adjusted Train Operator Benchmark as determined, as

the case may be, by (i) the relevant ADRR Forum or (ii) following the relevant ADRR Forum's determination pursuant to paragraph 10.1.6(c), the parties in accordance with this paragraph 10.1.

10.1.10 Promptly following any adjustment to the Train Operator Benchmark under this paragraph 10.1, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

(a) any invoices and credit notes already issued; and

(b) any payments already made in respect of Performance Sums,

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

10.1.11 Any statement issued by Network Rail pursuant to paragraph 10.1.10 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 9.2.

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

10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraph 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 this paragraph 10.2 prior to 1 April 2015.

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

(a) the total number of Contract Miles operated by the Train Operator during Financial Year t (the “**Annual Contract Mileage**”);

(b) Network Rail's determination as to whether or not the Annual Contract Mileage for Financial Year t exceeds or is less than the Baseline Annual Contract Mileage by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual

Contract Mileage (the “**Annual Contract Mileage Variation**”);  
and

- (c) if Network Rail determines that there has been an Annual Contract Mileage Variation, Network Rail’s proposal for an adjusted Network Rail Cap and/or Train Operator Cap in respect of Financial Year t+1, in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

### 10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the total number of Contract Miles operated by the Train Operator during the Financial Year commencing on 1 April 2013 and ending on 31 March 2014, unless it is adjusted in accordance with paragraph 10.2.3(b).
- (b) If, in accordance with paragraph 10.2.2(b), Network Rail determines that there has been an Annual Contract Mileage Variation, then the Baseline Annual Contract Mileage for Financial Year t+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Contract Mileage pursuant to this paragraph 10.2.3(b) shall be the Annual Contract Mileage for the Financial Year t in which the Annual Contract Mileage Variation has occurred.

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

10.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Cap and/or the Train Operator Cap, the parties shall notify ORR and shall provide

ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.

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

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

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

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

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

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

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

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

## 11. Selection by the Train Operator of the Incident Cap

### 11.1 Selection by the Train Operator of the Incident Cap

11.1.1 On or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap it wishes to apply (the “**Initial Incident Cap Notice**”), and the Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in the column adjacent to the Incident Cap selected by the Train Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

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

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

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps:

<b>Incident Cap</b>	<b>Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period)</b>
1, 000 minutes	0.1041
2, 000 minutes	0.0473

3, 000 minutes	0.0292
4, 000 minutes	0.0215
5, 000 minutes	0.0152
6, 000 minutes	0.0104
7, 000 minutes	0.0066
8, 000 minutes	0.0037
9, 000 minutes	0.0008
10, 000 minutes	0.0007
No Incident Cap	None

## 12 ETCS Amendments

### 12.1 *Circumstances in which ETCS Amendments can be made*

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

### 12.2 *ETCS Amendments agreed by the parties*

- (a) A party that wishes to make ETCS Amendments shall serve a notice on the other party that:
  - (i) specifies as far as possible the proposed ETCS Amendments and the date from which they are to have effect; and
  - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments and setting out the reasons for making them.
- (b) The party receiving a notice under paragraph 12.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, and in any event within 20 Working Days following service of a response pursuant to paragraph 12.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments and the date on which they are to have effect.
- (d) If:
  - (i) the parties agree to make ETCS Amendments pursuant to paragraph 12.2(c); or
  - (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 12.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,

they shall notify ORR.

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

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

## APPENDIX 1: PERFORMANCE

### Train Operator Performance

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

**Train Operator Cap** £

**Disruption Sum** £2,126

### Network Rail Performance

**Network Rail Payment Rate** £19.13 per Minutes Delay to Services which are Attributable to Network Rail

**Network Rail Cap** £

**Prolonged Disruption Amount** means an amount equal to the Late Notice Cancellation Sum

## **Benchmarks**

### **Train Operator Benchmark**

Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to each Charging Period shall be 2.37 Minutes Delay per 100 Train Operator Miles.

### **Network Rail Benchmark**

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

### **Cancellation Sum**

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,813 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,835 for each Cancellation equal to or above the Cancellation Threshold; and
- (c) the “**Cancellation Threshold**” in any Charging Period shall be 0.41 per cent of the total number of Services operated by the Train Operator in that Charging Period.

### **Late Notice Cancellation Sum**

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,566.

### **Baseline Network Mileage**

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

## APPENDIX 2: CALCULATION OF MINUTES DELAY

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

where:

- A1 is the number of minutes between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);
- A2 is the Planned time between the Triggers mentioned in (A) above; and
- B is any Recovery Time between such Triggers.

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

## **APPENDIX 3: PERFORMANCE STATEMENTS**

### **Interim statements provided by Network Rail**

1. As soon as reasonably practicable after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), Network Rail shall provide to the Train Operator the following interim statements:
  - (a) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to the Train Operator;
    - (iii) are wholly or partly MDTO (as calculated in accordance with paragraph 4.2.1 of this Schedule 8); and
    - (iv) wholly or partly caused Minutes Delay for any Third Party Train, including the aggregate number of Minutes Delay in respect of Third Party Trains for each such incident;
  - (b) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to Network Rail; and
    - (iii) are wholly or partly MDNR (as calculated in accordance with paragraph 6.2.1 of this Schedule 8);
  - (c) an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable;

- (d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and
- (e) an interim statement listing:
  - (i) the total Contract Miles; and
  - (ii) the total number of Services,

in each case operated by the Train Operator during that Charging Period.

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

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

### **Dispute of interim statement**

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

### **Deemed agreement**

6. Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph 3 that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

### **Further interim statement**

7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:
  - (a) Attributable to the Train Operator;
  - (b) Attributable to Network Rail; or
  - (c) Attributable to both the Train Operator and Network Rail,

but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.

8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

### **Statement of adjustment**

9. If Condition B3.3 of the Network Code (Adjustment to prior results) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.
10. Any statement issued by Network Rail under paragraph 9 shall be accompanied by an adjusting invoice or credit note.



**Appendix 6 to Annex 2**

**Schedule 8 to the GBRf Customer TAA**

## SCHEDULE 8: PERFORMANCE REGIME

### 1. Definitions

In this Schedule 8 unless the context otherwise requires:

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

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

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

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

**“Adjusted Train Operator Benchmark”** means the Train Operator Benchmark as adjusted in accordance with paragraph 10.1.7

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

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

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

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

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

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

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail,

but which the parties agree, or it is otherwise determined, is Attributable to Network Rail; or

- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

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

**“Attributable to the Train Operator”** means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
  - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;
  - (ii) any Train Operator Omission;
  - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
  - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
  - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
  - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
  - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:

- (i) any delay to or cancellation of a Service Attributable to the Train Operator;
- (ii) any Train Operator Omission; or
- (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

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

**“Baseline Annual Contract Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Baseline Network Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Benchmarks”** means the Train Operator Benchmark and the Network Rail Benchmark;

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

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

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

**“Disruption Sum”** means the Disruption Sum specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

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

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

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

**“Financial Year t-1”** means the Financial Year preceding Financial Year t;

**“Financial Year t+1”** has the meaning ascribed to it in paragraph 10.1.7;

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

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

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

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

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

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

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

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

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

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

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

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

**“Network Rail Payment Rate”** means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

**“Other Train Operator Train”** means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract;

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

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

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

**“Planned Incident”** means an incident in connection with a Restriction of Use to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Working Timetable;

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

**“Prolonged Disruption Amount”** means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

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

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

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

**“Recovery Time”** means additional time incorporated in the Working Timetable to allow a train to regain time lost in delay during an earlier part of its journey;

**“Relevant Train Operator Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

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

**“Third Party Train”** means a train other than a train operated by the Train Operator under this contract;

**“Third Party Train Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Total Actual Operated Mileage”** has the meaning ascribed to it in paragraph 10.1.1;

**“Traffic Growth”** has the meaning ascribed to it in paragraph 10.1.1;

**“Traffic Reduction”** has the meaning ascribed to it in paragraph 10.1.1;

**“Train Operator Benchmark”** or **“TOB”** means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Charging Period, as specified in Appendix 1 and adjusted in accordance with paragraph 10.1;

**“Train Operator Cap”** means the Train Operator Cap specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8, save that, in respect of the first and last Financial Year, the Train Operator Cap shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;

**“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 paragraph 2.7.2 of Schedule 7; and

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

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

**“Trigger”** means the act of a train arriving at, passing or departing from a Recording Point.

## **2. General**

### **2.1 *Performance monitoring system recordings***

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

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

Network Rail shall, notwithstanding that it shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a

result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code.

### 2.3 *Mitigation of delays*

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

### 2.4 *Calculation of Minutes Delay*

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

## 3. **Diagnosis of delays**

### 3.1 *Attributing delays*

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

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

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

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

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

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

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

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

### 3.5 *Identifying delaying incidents*

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

3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

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

4.1 *Prescribed delay period*

4.1.1 For the purposes of this paragraph 4, the aggregate Minutes Delay to Third Party Trains Attributable to the Train Operator arising as a result of any one incident or event shall be capped at the Incident Cap, so that any such minutes in excess of the Incident Cap shall be disregarded.

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

4.2 *Train Operator performance against TOB*

4.2.1 In respect of each Charging Period:

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

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

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

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

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

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

where:

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

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

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

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

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

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

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

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

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

### 6.1 Cancellations

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

- (a) if the Service is a Cancellation as defined in paragraph 8.1(a), there shall not be any Minutes Delay in respect of the Service Attributable to Network Rail;
- (b) if the Service is a Cancellation as defined in paragraph 8.1(b), there shall be disregarded any Minutes Delay in respect of the Service after the first 12 hours aggregate of Minutes Delay; and
- (c) if the Service is a Cancellation as defined in paragraph 8.1(c), there shall be disregarded any Minutes Delay in respect of the Service after the time

at which the Service arrives at the point on or off the Network where it subsequently becomes a Cancellation.

## 6.2 Network Rail performance against NRB

In respect of each Charging Period:

### 6.2.1

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

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

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

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

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

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

where:

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

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

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

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

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

## 7. Prolonged Disruption

### 7.1 Prolonged Disruption Sum calculation

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

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

where:

PDA is the Prolonged Disruption Amount;

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

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

<b>Week</b>	<b>Multiplier</b>
Week 1	1
Week 2	1
Week 3	2
Week 4	3
Week 5 to 13	2
Week 14 to 26	1.5

### 7.2 Subsequent Prolonged Disruption

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

### 7.3 *Network Rail liability*

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

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement.

## 8. **Cancellation**

### 8.1 *Cancellation*

“**Cancellation**” means any Service:

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

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

(d) in respect of which Network Rail:

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

### 8.2 *Network Rail liability*

8.2.1 Subject to paragraphs 8.2.2, 8.2.3 and 8.3 below, and paragraphs 4.5, 5.6 and 7.4 of Schedule 4, Network Rail shall be liable in any Charging Period for the

Cancellation Sum in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

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

- (a) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement; or
- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

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

### 8.3 *Late presentation of Service*

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

- (a) a Cancellation as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code; or
- (b) a conflict with any restrictions on the use of the Network contained in the Timetable Planning Rules.

## 9. **Payment**

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

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

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

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

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

## 9.2 *Issue of invoice or credit note*

9.2.1 In respect of each Charging Period, subject to paragraph 9.1, the liabilities of the Train Operator and of Network Rail for any Performance Sums (as such Performance Sums may be adjusted under paragraph 10), Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums shall be set off against each other, and Network Rail shall issue an invoice or credit note as appropriate in respect of the balance, if any, within 28 days after the end of such Charging Period.

9.2.2 The invoice or credit note issued under paragraph 9.2.1 shall show:

- (a) any Performance Sums, Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums for which Network Rail or the Train Operator is liable; and
- (b) any matter referred to in Appendix 3 which the Train Operator or Network Rail has disputed under paragraph 3 of Appendix 3 and which is still in dispute.

## 9.3 *Resolution of disputes*

9.3.1 Without prejudice to Clause 13, Part B of the Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.

9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

## 10. Reviews of Benchmarks, Network Rail Cap and Train Operator Cap

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

#### 10.1.1 In this paragraph 10:

**“Baseline Annual Contract Mileage”** means the amount determined in accordance with paragraph 10.2.3;

**“Baseline Network Mileage”** means the amount determined in accordance with paragraph 10.1.3;

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

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

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

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

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

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

10.1.2 The Train Operator Benchmark that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Train Operator Benchmark specified in Appendix 1 as adjusted in accordance with this paragraph 10.1.

#### 10.1.3

- (a) The Baseline Network Mileage that shall apply from 1 April in each Financial Year shall be the Total Actual Operated Mileage for Financial Year 2012/2013, as specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.1.3(b).

- (b) If, in accordance with paragraph 10.1.6, it is determined or agreed that an Adjusted Train Operator Benchmark is required, then the Baseline Network Mileage for (i) Financial Year t+1 and (ii) each subsequent Financial Year until any further adjustment is made to the Train Operator Benchmark in accordance with paragraph 10.1, shall be the Actual Mileage t for the Financial Year t in which the Traffic Growth or Traffic Reduction (as the case may be) which gave rise to the requirement for an Adjusted Train Operator Benchmark occurred.

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

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

10.1.5 Promptly (and in any event, within 7 days) following determination, in accordance with paragraph 10.1.4, of the Traffic Growth or Traffic Reduction (as the case may be) Network Rail shall:

- (a) notify the Train Operator (at the same time as notifying any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing of:
  - (i) the Actual Mileage t;
  - (ii) the Baseline Network Mileage;
  - (iii) Network Rail’s calculation of the Traffic Growth or Traffic Reduction (as the case may be) in accordance with paragraph 10.1.4(b); and
  - (iv) Network Rail’s determination of the Adjusted Train Operator Benchmark;
- (b) provide to the Train Operator (at the same time as providing to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) such background data and workings as may reasonably be required for a proper understanding of Network Rail’s calculations and determinations under this paragraph 10.1; and
- (c) confirm to the Train Operator (at the same time as confirming to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1) in writing that the same Adjusted Train Operator Benchmark shall apply to any other operators whose access agreement in relation to track includes a similar provision to this paragraph 10.1.

## 10.1.6

- (a) Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, the Train Operator shall notify Network Rail in writing whether it agrees or disagrees with Network Rail's determination under paragraph 10.1.5(a)(iv).
- (b) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has not received written notification from either (i) the Train Operator and/or (ii) any other train operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the Train Operator Benchmark shall be adjusted in accordance with paragraph 10.1.7.
- (c) If, within 28 days of despatch by Network Rail of the information, notification and confirmation from Network Rail required to be provided pursuant to paragraph 10.1.5, Network Rail has received written notification from either (i) the Train Operator and/or (ii) any other operator whose access agreement in relation to track includes a similar provision to this paragraph 10.1, informing Network Rail that the Train Operator and/or such other train operator (as the case may be) disagrees with Network Rail's determination pursuant to paragraph 10.1.5(a)(iv), then Network Rail shall notify ORR and the Train Operator, and the matter shall be referred for resolution in accordance with the ADRR save that the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall (i) have regard to any relevant criteria and/or policy statement most recently issued by ORR and/or any guidance issued by ORR in relation to the matter referred for resolution and (ii) set out in its determination the reasons for that determination.
- (d) The parties acknowledge and agree that any adjustment to the Train Operator Benchmark under this paragraph 10.1 must also apply to all other operators whose access agreement in relation to track includes a provision similar to this paragraph 10.1 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 10.1.6(c), and to be bound by the determination, even if, either:
  - (A) pursuant to paragraph 10.1.6(a), the Train Operator has notified Network Rail that it agrees with Network Rail's determination notified pursuant to paragraph 10.1.5(a)(iv); and/or

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

10.1.7 The Train Operator Benchmark in respect of each Charging Period within the Financial Year immediately following Financial Year t (“**Financial Year t+1**”) and, subject to paragraph 10.1.8, each subsequent Financial Year, shall be adjusted in accordance with the following formula:

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

where:

ATO B means the Adjusted Train Operator Benchmark;

TO B means the current Train Operator Benchmark;

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

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

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

10.1.8 When the Train Operator Benchmark in relation to any Financial Year is adjusted pursuant to paragraph 10.1.7 then, subject to paragraph 10.1.9, the Train Operator Benchmark for Financial Year t+1 shall be the Adjusted Train Operator Benchmark determined in accordance with paragraph 10.1.7.

10.1.9 If a reference is made to a relevant ADRR Forum in accordance with paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be the same Train Operator Benchmark as applied for Financial Year t until such time as the relevant ADRR Forum makes its determination pursuant to paragraph 10.1.6(c). Following the relevant ADRR Forum’s determination pursuant to paragraph 10.1.6(c), the Train Operator Benchmark for Financial Year t+1 shall be replaced with effect from 1 April in Financial Year t+1 by the Adjusted Train Operator Benchmark as determined, as the case may be, by (i) the relevant ADRR Forum or (ii) following the relevant ADRR Forum’s determination pursuant to paragraph 10.1.6(c), the parties in accordance with this paragraph 10.1.

10.1.10 Promptly following any adjustment to the Train Operator Benchmark under this paragraph 10.1, and in order to give effect to that adjustment, Network

Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
  - (b) any payments already made in respect of Performance Sums,
- in each case relating to the Charging Periods in Financial Year t+1.

10.1.11 Any statement issued by Network Rail pursuant to paragraph 10.1.10 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 9.2.

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

10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraph 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 this paragraph 10.2 prior to 1 April 2015.

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

- (a) the total number of Contract Miles operated by the Train Operator during Financial Year t (the “**Annual Contract Mileage**”);
- (b) Network Rail’s determination as to whether or not the Annual Contract Mileage for Financial Year t exceeds or is less than the Baseline Annual Contract Mileage by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual Contract Mileage (the “**Annual Contract Mileage Variation**”); and
- (c) if Network Rail determines that there has been an Annual Contract Mileage Variation, Network Rail’s proposal for an adjusted Network Rail Cap and/or Train Operator Cap in respect of Financial Year t+1, in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

### 10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the total number of Contract Miles operated by the Train Operator during the Financial Year commencing on 1 April 2013 and ending on 31 March 2014, unless it is adjusted in accordance with paragraph 10.2.3(b).
- (b) If, in accordance with paragraph 10.2.2(b), Network Rail determines that there has been an Annual Contract Mileage Variation, then the Baseline Annual Contract Mileage for Financial Year t+1 and each

subsequent Financial Year until any further adjustment is made to the Baseline Annual Contract Mileage pursuant to this paragraph 10.2.3(b) shall be the Annual Contract Mileage for the Financial Year t in which the Annual Contract Mileage Variation has occurred.

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

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

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

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

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

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

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

- (a) any invoices and credit notes already issued; and

(b) any payments already made in respect of Performance Sums,  
in each case relating to the Charging Periods in Financial Year t+1.

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

## 11. Selection by the Train Operator of the Incident Cap

### 11.1 Selection by the Train Operator of the Incident Cap

11.1.1 On or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap it wishes to apply (the “**Initial Incident Cap Notice**”), and the Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in the column adjacent to the Incident Cap selected by the Train Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

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

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

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps:

<b>Incident Cap</b>	<b>Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period)</b>
1, 000 minutes	0.1041
2, 000 minutes	0.0473
3, 000 minutes	0.0292

4, 000 minutes	0.0215
5, 000 minutes	0.0152
6, 000 minutes	0.0104
7, 000 minutes	0.0066
8, 000 minutes	0.0037
9, 000 minutes	0.0008
10, 000 minutes	0.0007
No Incident Cap	None

## 12 ETCS Amendments

### 12.1 *Circumstances in which ETCS Amendments can be made*

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

### 12.2 *ETCS Amendments agreed by the parties*

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

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

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

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

## **APPENDIX 1: PERFORMANCE**

### **Train Operator Performance**

<b>Train Operator Payment Rate</b>	£43.44 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.
<b>Train Operator Cap</b>	£
<b>Disruption Sum</b>	£2,126

### **Network Rail Performance**

<b>Network Rail Payment Rate</b>	£19.13 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

## **Benchmarks**

### **Train Operator Benchmark**

Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to each Charging Period shall be 2.37 Minutes Delay per 100 Train Operator Miles.

### **Network Rail Benchmark**

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

## **Cancellation Sum**

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £1,813 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £4,835 for each Cancellation equal to or above the Cancellation Threshold; and
- (c) the “**Cancellation Threshold**” in any Charging Period shall be 0.41 per cent of the total number of Services operated by the Train Operator in that Charging Period.

## **Late Notice Cancellation Sum**

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,566.

## **Baseline Network Mileage**

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

## APPENDIX 2: CALCULATION OF MINUTES DELAY

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
  - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
  - (b) in respect of each other recorded Trigger, the lesser of:
    - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
    - (ii) the greater of  $((A1-A2) + B)$  and zero,where:
  - A1 is the number of minutes between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);
  - A2 is the Planned time between the Triggers mentioned in (A) above; and
  - B is any Recovery Time between such Triggers.
2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

## **APPENDIX 3: PERFORMANCE STATEMENTS**

### **Interim statements provided by Network Rail**

1. As soon as reasonably practicable after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), Network Rail shall provide to the Train Operator the following interim statements:
  - (a) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to the Train Operator;
    - (iii) are wholly or partly MDTO (as calculated in accordance with paragraph 4.2.1 of this Schedule 8); and
    - (iv) wholly or partly caused Minutes Delay for any Third Party Train, including the aggregate number of Minutes Delay in respect of Third Party Trains for each such incident;
  - (b) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to Network Rail; and
    - (iii) are wholly or partly MDNR (as calculated in accordance with paragraph 6.2.1 of this Schedule 8);
  - (c) an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable;
  - (d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and
  - (e) an interim statement listing:
    - (i) the total Contract Miles; and
    - (ii) the total number of Services,in each case operated by the Train Operator during that Charging Period.

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

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

## **Dispute of interim statement**

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

## **Deemed agreement**

6. Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph 3 that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

## **Further interim statement**

7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:
  - (a) Attributable to the Train Operator;
  - (b) Attributable to Network Rail; or

(c) Attributable to both the Train Operator and Network Rail,

but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.

8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

### **Statement of adjustment**

9. If Condition B3.3 of the Network Code (Adjustment to prior results) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.
10. Any statement issued by Network Rail under paragraph 9 shall be accompanied by an adjusting invoice or credit note.



**Appendix 7 to Annex 2**

**Schedule 10**

## **SCHEDULE 10: NETWORK CODE AND TRACTION ELECTRICITY RULES MODIFICATIONS**

### **1. Automatic effect**

#### *1.1 General*

This contract shall have effect:

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

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

#### *1.2 Retrospective effect*

No relevant notice may have retrospective effect.

### **2. Modification notice**

#### *2.1 Meaning*

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

#### *2.2 Contents of modification notice*

A modification notice shall state:

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

### **3. Adaptation procedure**

#### *3.1 Application*

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

### 3.2 *Negotiation of Adaptations*

In respect of the modifications in each modification notice:

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

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

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

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

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

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

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

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

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

### 3.6 *Requisite adaptations - failure to agree or submit*

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

### 3.7 *Notice of determined requisite adaptations*

A notice of determined requisite adaptations is a notice:

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

### 3.8 *Effect of requisite adaptations*

Requisite adaptations established either:

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

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

## **4. Procedural matters**

### 4.1 *More than one notice*

More than one modification notice may be given.

### 4.2 *Differences etc as to requisite adaptations*

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

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

### 4.3 *Co-operation and information*

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

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

#### 4.4 *Office of Rail Regulation's criteria*

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

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

#### 4.5 *Procedural modifications*

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

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

#### 4.6 *Dates*

In this Schedule 10:

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

#### 4.7 *Requirement for prior consultation*

No relevant notice shall have effect unless:

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

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

#### 4.8 *Consolidated contract*

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

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

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

#### 4.9 *Saving*

Nothing in this Schedule 10 affects:

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

### 5. **Definitions**

In this Schedule 10 unless the context otherwise requires:

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

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



## ANNEX 3

### BESPOKE AMENDMENTS

#### **PART 1 (MODIFICATIONS TO STANDARD AMENDMENTS AND OTHER BESPOKE AMENDMENTS)**

***Explanatory Note:***

*This Annex 3 sets out (i) the modifications which need to be made to the standard amendments and (ii) certain other bespoke amendments, in each case required in order to give effect to ORR's conclusions on the Review in the Track Access Agreements listed below.*

*If a particular Track Access Agreement does not appear in Part 1 of this Annex 3, ORR proposes that the standard amendments will be made to that Track Access Agreement without modification.*

*If a particular Track Access Agreement appears in Part 1 of this Annex 3, ORR proposes that the standard amendments will be made to that Track Access Agreement, modified to the extent specified in the paragraph or paragraphs of Part 1 of this Annex 3 relating to that Track Access Agreement.*

Each Track Access Agreement referred to in this Annex 3, in each case as amended in accordance with Annex 2, shall be further amended on the terms set out in this Annex 3.

## **1 Track Access Agreement between Network Rail and DB Schenker Rail (UK) Limited (the “DBS TAA”)**

1.1 In Appendix 3 to Schedule 8 of the **DBS TAA**, wherever the words "two Working Days" are used, delete them and replace them with the words "5 Working Days".

## **2 The DRS TAA**

2.1 In Appendix 1 to Schedule 8 of the **DRS TAA**, make the following amendments:

2.1.1 Immediately following the heading “Train Operator Performance”, delete the words “Train Operator Bonus Payment Rate £16.94 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.”;

2.1.2 Delete the following:

**“Train Operator Compensation Payment Rate                    £33.89”**

and replace it with the following:

**“Train Operator Payment Rate            £43.44”;**

2.1.3 Delete the figure immediately following the words “Train Operator Cap”, and replace it with the figure for the “Train Operator Cap” specific to the **DRS TAA**, which is attached separately in Part 2 of Annex 3 to this Review Notice;

2.1.4 Immediately following the words “Disruption Sum”, delete the figure “£1,942” and replace it with the figure “£2,126”;

2.1.5 Immediately following the heading “Network Rail Performance”, delete the following:

**“Network Rail Bonus Payment Rate** £8.74 per Minutes Delay to Services which are Attributable to Network Rail.”;

2.1.6 Delete the following:

**“Network Rail Compensation Payment Rate** £17.47”

and replace it with the following:

**“Network Rail Payment Rate** £19.13”;

2.1.7 Delete the figure immediately following the words “Network Rail Cap”, and replace it with the figure for the “Network Rail Cap” specific to the **DRS TAA**, which is attached separately in Part 2 of Annex 3 to this Review Notice;

2.1.8 Under the heading “Train Operator Benchmark”, immediately following the words “in relation to each Charging Period shall be” delete the figure “2.63” and replace it with the figure “2.37”;

2.1.9 Under the heading “Network Rail Benchmark”, immediately following the words “in relation to a Charging Period shall be”, delete the “:” and paragraphs (a) to (e) and replace them in their entirety with the words “7.20 Minutes Delay per 100 Train Operator Miles.”;

2.1.10 Under the heading “Cancellation Sum”, in paragraph (a) delete the sum “£1,656” and replace it with the sum “£1,813”, and in paragraph (b) delete the sum “£4,416” and replace it with the sum “£4,835”;

2.1.11 Under the heading “Late Notice Cancellation Sum”, delete the sum “£1,430” and replace it with the sum “£1,566”; and

2.1.12 Under the heading “Baseline Network Mileage”, delete the figure “317,782,800” and replace it with the figure “351,602,955”.

## **PART 2 (CONFIDENTIAL INFORMATION)**

### ***Explanatory Note:***

*As explained above, the confidential information is attached to this Review Notice in the following pages. Copies will be sent only to the parties to the relevant Track Access Agreement, the Secretary of State for Transport, the Scottish Ministers and the Treasury. The publication of that information would or might, in the opinion of ORR, seriously and prejudicially affect the interests of each Train Operator and/or Network Rail for the purpose of section 71(2) of the Act, and it is therefore not being published.*