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Dear Sir or Madam,

Error in CP5 Schedule 8 passenger train operator payment rates

1. Further to my letter of 14th September 2015, I am writing to you to summarise the responses we received and to set out the next steps for addressing the error.
2. In summary, we intend to proceed with implementing that proposal as planned, that is:
 - I. We recommend that all operators change their payment rates prospectively;
 - II. In the event of a dispute under Paragraph 17 of each TOC's Schedule 8, we will be minded to determine that the rates should be changed prospectively;
 - III. Parties can agree not to change the payment rates; and
 - IV. Although we do not expect this to occur in many cases: if both parties (i.e. the TOC and Network Rail) agree to, and submit, a retrospective rate change request under section 22 of Railways Act 1993 (the Act), we would review such a request on a case by case basis.
3. Next steps for implementation are set out below.
4. We received responses from eleven operators and Network Rail. We would like to thank all those who responded.
5. There were no objections to our proposal but two key issues were raised which were as follows:

Issue 1: When should the prospective amendment take effect?

6. Some respondents asked whether we would be stating a common date from which prospective amendments should take effect.
7. Our position is that, where an operator and Network Rail agree to a prospective amendment, the parties should have the flexibility to choose a convenient date from when that amendment should take effect. We recognise that some operators may wish to include this in forthcoming contract amendments, and that these may differ between operators, so we do not intend to stipulate a particular date.

8. However, to avoid the burden (for all parties) involved in making mid-period adjustments, **we recommend that prospective amendments take effect from the beginning of a Network Rail billing period.**
9. In the event that parties fail to reach agreement and, having been referred to us, we determine that a prospective rate change should be made, we will determine that the rate change should take effect from the start of a Network Rail billing period (which one will depend on what is appropriate in light of our determination).

Issue 2: How will rates that have been re-calibrated since the start of CP5 be dealt with?

10. To incorporate new services or the re-mapping of existing services, some operators have had their operator payment rates re-calibrated since 1st April 2014 (i.e. since the start of CP5). These re-calibrations will have carried forward the error to the operator payment rates, and are therefore in need of re-calculation.
11. CH2M have agreed to ensure that all re-calibrated service groups have rates that have been re-calculated without the error. We welcome their continuing support in rectifying this error.
12. If the confidential Annex to my letter of 14th September 2015 entitled “Re-calculated schedule 8 rates and impact of error” (hereafter the “Rates Annex”) did not reflect all re-calibrations of your operator payment rates, then please contact CH2M (Sch8TOCPR@ch2m.com) to arrange re-calculation.

What are the next steps?

13. Given the responses received, and noting that there were no objections to our proposal, we intend to proceed with implementing it as planned. To that end we set out the available courses of action below:
 - I. Where both parties to the contract agree to a prospective amendment of the operator payment rates:
 - The attached template supplemental agreement should be completed with the relevant information and submitted to ORR for approval (Scottish operators will need to amend this agreement to be consistent with Scottish law).
 - If your rates have not been re-calibrated since 1st April 2014: The payment rates submitted with your supplemental agreement should be those set out in the “Recalculated 2012/13” column of Table 1 of the Rates Annex.

- If your rates have been re-calibrated since 1st April 2014: You should ensure, together with CH2M, if necessary, that the rates you supply reflect the re-calibrated rates without including the error.


- II. Where parties fail to reach agreement on a proposed rate change: parties should follow the procedures set out in Paragraph 17 of Schedule 8 for resolving such disputes. As we have already indicated, if parties fail to reach agreement and either party refers the matter to us for determination, we will elect to determine it and we will be minded to determine that a prospective change should be implemented (although we will not make any final decision in relation to each individual disagreement until we have considered both parties' arguments).
- III. Where both parties agree to leave the existing rates unchanged: no further action need be taken.
- IV. Where both parties agree to a retrospective rate change: We suggest that parties consult with ORR before submitting a formal application. Before approving any such application we will need to be assured that the arguments in favour of retrospective change outweigh those against it, in light of our statutory duties.

14. We apologise, again, for any inconvenience this has caused you. We will be reviewing the lessons learned from this error and will seek to incorporate them into the policies and processes for the 2018 Periodic Review (PR18). As work for PR18 progresses we will be keen to discuss with operators and other stakeholders what steps we, and the industry, can take to avoid a material error occurring in any part of the regimes in PR18.

15. For the purposes of submitting an application for approval, or of notifying us of a dispute, please contact us on the following address: lan.Williams@orr.gsi.gov.uk.

16. If you have any other queries regarding this matter please contact us on the following email address: rme.admin@orr.gsi.gov.uk.

Yours faithfully



John Larkinson