OFFICE *of the*
RAIL REGULATOR

MIDLAND MAIN LINE LIMITED - LONDON & CONTINENTAL STATIONS & PROPERTY LIMITED: RAIL REGULATOR'S CONCLUSIONS ON APPLICATION UNDER SECTION 17, RAILWAYS ACT 1993

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Contents

1. Introduction

Background

1.1 The Regulator received an application under section 17 of the Railways Act 1993 ("the Act") by Midland Main Line Limited ("MML") on 15 October 2002 for directions to be given to London & Continental Stations & Property Limited ("L & C") to enter into a station access contract in respect of St Pancras Station, where L & C is the station facility owner, to replace its existing access agreement that will expire on 28 April 2003.

1.2 MML made the application under section 17 of the Act because it could not reach agreement with L & C on the levels of compensation payable by L & C to MML for the disruption caused by the construction of the international terminal at St Pancras Station, as part of the Channel Tunnel Rail Link project.

1.3 The Regulator has concluded that it would be appropriate for him to direct L & C to enter into an agreement, though with certain material amendments to the draft contract submitted with MML's application, and he has accordingly issued directions to that effect. The directions stipulate that the contract must be entered into not later than **16.00 hrs on Friday, 25 April 2003**.

1.4 The purpose of this document is to set out the Regulator's reasons for his conclusions, including his reasons for making material amendments to the draft contract submitted by MML.

1.5 The remainder of this chapter sets out the Regulator's duties and describes the process he has followed in reaching his decision on the application. It summarises his conclusions and the key changes that he is making to the draft contract submitted by MML in its application. His directions have been issued separately to the parties and are published on the ORR website (http://www.rail-reg.gov.uk/).

1.6 Details of MML's application, and subsequent representations made by L & C and MML are set out in Chapter 2.

The Railways Act 1993

1.7 In considering the application and in reaching his conclusions as to appropriate directions, the Regulator has had regard to his duties under section 4 of the Act,

complied with the statutory procedures, and adhered to the timescales set out in Schedule 4 to the Act.

1.8 Section 4 of the Act places duties on the Regulator to exercise his functions under Part 1 of the Act (which includes the Regulator's power to direct railway facility owners to enter into access contracts) in such a way as to:

(a) facilitate the furtherance by the Strategic Rail Authority of any strategies which it has formulated with respect to its purposes (section 4(1)(za));

(b) protect the interests of users of railway services (section 4(1)(a));

(c) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that he considers economically practicable (section 4(1)(b));

(d) contribute to the development of an integrated system of transport of passengers and goods (section 4(1)(ba));

(e) contribute to the achievement of sustainable development (section 4(1)(bb));

(f) promote efficiency and economy on the part of persons providing railway services (section 4(1)(c));

(g) promote competition in the provision of railway services for the benefit of users of railway services (section 4(1)(d));

(h) promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator (section 4(1)(e));

(i) impose on the operators of railway services the minimum restrictions which are consistent with the performance of his functions under Part I of the Act (section 4(1)(f));

(j) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g));

(k) take into account the need to protect all persons from dangers arising from the operation of railways, taking into account, in particular, any advice given to him in that behalf by the Health and Safety Executive (section 4(3)(a));

(l) have regard to the effect on the environment of activities connected with the provision of railway services (section 4(3)(b));

(m) have regard to any general guidance given to him by the Secretary of State about railway services or other matters relating to railways (section 4(5)(a));

(n) act in a manner which he [the Regulator] considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which the Regulator has functions under or by virtue of Part I of the Act (whether or not the activities in question are, or are to be, carried on by those persons in their capacity as holders of such licences) (section 4(5)(b));

(o) have regard to the financial position of the Strategic Rail Authority in discharging its functions under Part I (section 4(5)(c));

(p) have regard to the ability of the Mayor of London, London Regional Transport and Transport *for* London to carry out the functions conferred or imposed on them by or under any enactment (section 4(5)(d)); and,

(q) in performing his duty under subsection (1)(a) of the Act so far as relating to services for the carriage of passengers by railway or to station services, the Regulator shall have regard, in particular, to the interests of persons who are disabled (section 4(6)).

1.9 In applying these duties, the Regulator necessarily has to exercise his judgment to achieve the right balance, taking into account the particular circumstances of each case. In considering his section 4 duties in relation to a case of this nature, the Regulator has had particular regard to sections 4(1)(za); 4(1)(a); 4(1)(c); 4(1)(f); 4(1)(g); 4(3)(a); 4(5)(c); 4(5)(d); and 4(6).The Regulator is satisfied that none of the limitations, in section 17(1) of the Act, on his power to consider the application and grant such directions as he considers appropriate apply because:

(a) the railway facility which is the subject of the application, St Pancras Station, is not an exempt facility by virtue of section 20 and therefore the Regulator is not prevented from giving directions by section 17(1)(a) which states that no directions may be given if and to the extent that the facility is an exempt facility;

(b) the Regulator does not consider that the performance of an access contract as contemplated by the directions would necessarily involve L & C being in breach of an access agreement or an international railway access contract;

(c) on the basis that he has consulted widely and that L & C has not advised him otherwise, the Regulator is satisfied that L & C does not require the consent of some other person before it can enter into the proposed access agreement and therefore the provisions of section 17(1)(c) do not apply; and

(d) the Regulator does not consider that permission to use St Pancras Station could be applied for under subordinate legislation made for the purpose of implementing Council Directive 95/19/EC on the allocation of railway infrastructure capacity and the charging of infrastructure fees and therefore the provisions of section 17(1)(d) do not apply.

The Channel Tunnel Rail Link Act 1996

1.10 Access to St Pancras Station is currently subject to sections 17 to 22A of the Act. This position will change when the station becomes a "rail link facility", defined in the Channel Tunnel Rail Link Act 1996 as a facility used wholly or partly in connection with carrying passengers or goods on the rail link (section 17 of the Channel Tunnel Rail Link Act 1996). Under section 17 of the Channel Tunnel Rail Link Act 1996, once a station becomes a rail link facility it gains exemption from sections 17 and 19 of the Act, and access agreements which are restricted only to the part of the station servicing the rail link are exempt from section 18. St Pancras Station will become a rail link facility when goods or passengers are first carried on the rail link serving the station. Until that time the Regulator's statutory powers under sections 17 to 22A of the Act continue to apply.

1.11 The Regulator also has an overriding duty in section 21(1) of the Channel Tunnel Rail Link Act 1996 "to exercise his regulatory functions in such a manner as not to impede the performance of any development agreement". This is considered further in Chapter 4 of this document (paragraphs 5.100, 5.101 and 5.102).

The consultation process

1.12 In accordance with the provisions of the Act, the Regulator consulted the Strategic Rail Authority (section 4(1)(za) and section 4(5)(c)), the Health & Safety Executive (section 4(3)(a)), the Mayor of London (section 4(5)(d)), Transport for London (section 4(5)(d)) and London Regional Transport (section 4(5)(d)) on the application

made by MML. He also directed L & C to furnish the names and addresses of every interested person, as defined in paragraph 1 of Schedule 4 to the Act[1]. As L & C informed the Regulator that there were no interested persons, as defined in the Act, he did not carry out the consultation prescribed in paragraph 4(2) of Schedule 4 to the Act.

1.13 ORR consulted all potentially affected parties within the industry, including those with station access agreements at London St Pancras, the Department for Transport, the London Transport Users' Committee (LTUC), the Rail Passengers Council, Rail Passengers' Committees for Southern England and the Midlands, and the Association of Train Operating Companies. The consultation period began on 22 October 2002, with responses invited by 5 November 2002. A summary of consultation responses is given in Chapter 3. A full list of consultees is at Annex 1, and copies of each response can be reviewed on the ORR website (http://www.rail-reg.gov.uk/).

Economic advice

1.14 ORR employed independent transport consultants, MVA, to give the Regulator advice on the appropriate arrangements for providing compensation to MML in respect of construction work at St Pancras Station, and on the appropriate levels of compensation. MML and L & C were consulted on the draft terms of reference, and their comments were reflected in the final instructions to MVA.

1.15 MVA produced a draft report on 23 December 2002, which was copied to the parties. In sending this draft report to the parties, it was stated (in a letter to the parties, dated 23 December 2002) that the report was entirely the work of MVA and did not necessarily represent the views of the Regulator. The letter went on to state that the Regulator would have regard to MVA's recommendations, but that he also wanted to hear the views of the parties on the matters contained in MVA's report.

1.16 MVA reviewed and revised its report in response to comments made by the parties, and MVA's final report was made to the Regulator on 4 February 2003.

[1] "Interested person" means any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of this Act, before the facility owner may enter into the required access contract.

1.17 MVA's report is discussed further in Chapter 4. The final MVA report (in redacted form[2]), which includes the terms of reference is available on ORR's website (http://www.rail-reg.gov.uk/).

Hearing

1.18 The parties were given a further opportunity to make representations at a hearing held with the parties and the SRA at the Regulator's offices in Holborn, London on 24 January 2003. The hearing was an opportunity to test out the provisional recommendations made to ORR by MVA on the form and level of compensation, and ensure all relevant issues had been identified.

1.19 The hearing was held in closed session with the parties, ORR and SRA because:

(a) it concerned the draft recommendations from MVA prior to their publication;

(b) of the sensitivity of public disclosure of commercial and financial data relevant to MML's business; and

(c) of the limited wider interests affected by the application.

1.20 Those attending the hearing raised a number of new issues in respect of MVA's provisional recommendations. In the light of those matters raised, MVA reviewed and revised its recommendations to the Regulator in its final report.

1.21 A redacted version of the transcript of the hearing has been published on the ORR website[3].

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[2] Section 71(2) of the Act states: "In arranging for the publication of any such information or advice the Regulator shall have regard to the need for excluding, so far as that is practicable-

(a) any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of the Regulator, seriously and prejudicially affect the interests of that individual; and

(b) any matter which relates specifically to the affairs of a particular body of persons, whether corporate or unincorporated, where publication of that matter would or might, in the opinion of the Regulator, seriously and prejudicially affect the interests of that body."

The Regulator accepted representations made by MML that the publication of certain matters would seriously and prejudicially affect the interests of MML and has, therefore, published in redacted format certain documents received by him in connection with the application from MML.

[3] Applications and decisions (http://www.rail-reg.gov.uk/licensing_access/la841.html)

Interpretation of the existing walking time compensation provisions

1.22 Late in the course of the section 17 process, it emerged that the parties had sought to agree an interpretation of the walking time compensation provisions in the existing access agreement which provide the instructions on how to calculate this element of compensation. The Regulator does not agree with the interpretation of the agreement which the parties appear, from the evidence they have provided, to have adopted. In his directions, the Regulator has included provisions which implement a revised compensation regime, and has clarified how this should be interpreted. In future, therefore, there should no longer be any doubt about how walking time compensation should be calculated.

1.23 However, comparisons between the likely financial impact of the new regime contained in the Regulator's directions, and the current compensation arrangements, are complicated by the difference of view over how the current provisions should be interpreted. Where possible, the Regulator has provided comparisons with both what he regards as the proper reading of the current agreement and the interpretation adopted by the parties.

1.24 This matter is considered in more detail in paragraphs 5.61 to 5.67.

Conclusions

1.25 The Regulator has concluded his consideration of MML's application, and considered carefully all the arguments that have been put to him by the parties and other correspondents. He has now made directions under section 17(1) of the Act, which require L & C to enter into a new station access contract with MML on expiry of its current agreement on the terms laid down by the Regulator.

1.26 The Regulator has concluded that his directions should reflect the final recommendations made by his independent transport consultants, MVA, which have been subject to considerable scrutiny and testing through the section 17 process. MVA's recommendations are based on a modified version of the current compensation regime which, the Regulator considers, reflects more accurately MML's revenue loss and strengthens the economic incentives on L & C to minimise the effects of the CTRL construction works on MML, its passengers and staff.

1.27 The Regulator has concluded that his directions should replicate the current contract, except where it is necessary to make amendments to give effect to the revised compensation regime or to make other changes of a consequential nature. In this

context, he has also retained the formatting and paragraph numbering style of the existing contract in his directions.

1.28 The key issues considered in reaching his conclusions together with the principal changes to the existing contract are explained in Chapter 5 of this document. Other changes of a minor or consequential nature are set out in Annex 2.

1.29 In summary, the key changes made by the Regulator to the current agreement are:

(a) Stations Code retrofit clause-provision to move the access agreement to the Regulator's proposed Stations Code in due course (paragraphs 5.5 below and 5.7 to 5.9 below);

(b) a recalculation of general damage compensation which takes account of MML's location within St Pancras during the CTRL works (paragraphs 5.27 to 5.28 and 5.38 to 5.57);

(c) a recalculation of the valuation of walking time taking out of the benefits of reduced walking time (paragraphs 4.11(b) to 4.14, 5.58 to 5.59 and 5.69 to 5.73);

(d) the removal of rounding up to one minute from walking time compensation calculation (paragraphs 5.59 and 5.74 to 5.75);

(e) the removal of variable or stepped payments from walking time compensation calculation (paragraphs 5.59 and 5.76 to 5.78);

(f) rebasing compensation on MML's current revenue data (paragraphs 5.59 and 5.79 to 5.82);

(g) provision for compensation for non-provision of a facility to be calculated on a pro-rata basis (paragraph 5.85);

(h) a reduction in the number of facilities where compensation of a proportion of full daily revenue is paid to MML in the event of their non-availability (paragraph 5.93); and

(i) a new definition of Commencement Date which avoids the need to amend the Station Access Conditions and the Annexes to the Station Access Conditions (paragraphs 5.98 to 5.99).

2. *The application and representations by the parties*

The application by Midland Main Line Limited

2.1 The application has been made by MML in respect of passenger station access. This concerns permission, granted by a station facility owner to a train operator, to use a station in order to get passengers to and from the train operator's trains, and the quantum and standard of facilities and services to be provided to the train operator's staff and passengers. It does not concern access by trains to the station, or track access within the station.

2.2 MML made an application to the Regulator for him to direct L & C to enter into a station access agreement because MML and L & C could not reach agreement on carrying forward, to a new station access agreement, the levels of compensation in Schedule 4 of its existing agreement.

2.3 In its application, MML sought to carry forward most of the terms and conditions of its existing agreement into a new contract. MML's draft contract proposed 11 amendments to the existing agreement, the minimum changes it considered necessary.

2.4 As in MML's existing station access agreement, the contract for which MML has applied contains safeguards to ensure that MML is able to continue to use St Pancras Station during the construction of the Channel Tunnel Rail Link (CTRL) international terminal and some protection regarding the provision and standard of facilities. It provides for L & C to compensate MML for loss of passenger revenue and for additional costs incurred in managing its business. Through the application of these terms, MML seeks to incentivise L & C to minimise the disruption caused by the CTRL works.

2.5 MML's draft contract, like the existing agreement, is based upon the Independent Station Access Agreement Template, which is a recognised standard industry document for access to major stations. The bespoke compensation provisions are contained within Schedule 4 to the draft contract.

2.6 In MML's application, as in the existing station access agreement, compensation payable to MML for the CTRL works is split into two broad categories:

(a) fixed compensation, based on an estimate of general damage to MML's business resulting from the effects of being part of a building site; and

(b) variable compensation, based on increased walking distances to defined facilities (or in the extreme, the non-provision of those facilities, plus additional labour costs where facilities have to be moved).

2.7 The fixed compensation also includes payments "for project liaison purposes", intended to cover the additional costs to MML arising from the need to remain informed about current and planned works and disruptions during the project. The variable compensation provisions include payment of a one-off movement fee for the movement of a facility.

2.8 MML has recalculated all of the compensation figures in its proposed contract in line with the Retail Price Index (RPI). MML has also proposed in its application that the figures are up-rated in line with RPI.

Initial representations by London & Continental Stations & Property Limited

2.9 On 6 November 2002, L & C responded to the Regulator's invitation to make written representations on the application, including MML's draft contract. In its representations, L & C accepted most of the form of MML's proposed contract, and of the compensation regime. However, L & C proposed revisions to the levels of compensation because it considered they:

(a) exceed the real damage to MML's business resulting from the adverse impact of the CTRL works;

(b) amount to a windfall benefit to MML; and

(c) add unnecessarily to the cost of a strategic rail project.

2.10 In particular, L & C sought a review of, and reduction in, the level of general damage compensation to take account of the benefits to MML and its passengers of the relocation between 2004 and 2006 of the entire MML operation to a temporary or "interim" location to the north east of the current Barlow trainshed.[4]

[4] The station was designed by WH Barlow (1812 to 1902), Engineer-in-Chief to the Midland Railway, and opened for passenger use in October 1868. The trainshed rises to a height of 105 feet above the rails, is 690 feet in length and 240 feet wide. At the time it was considered an engineering wonder and was the largest single-span enclosed space in the world.

2.11 L & C also proposed using values in the compensation tables taken from the look-up table for abatements for the non-provision of station facilities in ORR's "Review of the station access regime - provisional conclusions on the policy framework", published in August 2002.

2.12 L & C put forward a list of 48 amendments to MML's draft contract.

The response of Midland Main Line Limited

2.13 In response to L & C's initial representations, MML submitted further representations to the Regulator on 17 December 2002. In these further representations, MML argued that L & C had failed to show sufficient reason for any reduction in the levels of general damage and facilities compensation.

2.14 MML argued that the compensation tables taken from the look-up table for abatements for the non-provision of station facilities in ORR's "Review of the station access regime - provisional conclusions on the policy framework", published in August 2002 proposed by L & C (paragraph 2.11) are inappropriate because:

(a) the Regulator's proposals in the above document concern only abatement of charges (rather than compensation in the context of Schedule 4 of the draft contract), and L & C provided no justification for the proposed reductions in walking time compensation;

(b) the Regulator's proposals in the above document are designed to incentivise station facility owners to maintain facilities in order to prevent them from failing, whereas the facilities compensation in Schedule 4 of the draft contract is to incentivise L & C to provide facilities for the benefit of passengers where, under Part 18 of the St Pancras Station Access Conditions[5], it has a right to curtail such facilities;

(c) the Regulator's proposals in the above document are based on industry station classifications for franchised stations, whereas St Pancras Station has never been so classified; and

[5] Part 18 is part of the London St Pancras Station Access Conditions. It sets out the redevelopment provisions to take account of the works required for the CTRL at London St Pancras. These provisions grant rights to the Station Facility Owner to curtail/limit the rights of access otherwise granted to a User of the station; impose restrictions upon the Station Facility Owner in respect of the rights of curtailment/limitation; and set out the procedures to be followed when exercising such rights.

(d) the facilities compensation regime proposed by MML is based on detailed studies for each specific facility.

2.15 MML responded on a point-by-point basis to L & C' s representations. In particular, MML listed the disbenefits likely to arise from the temporary location of MML's operation at the interim station. These are considered later in this document.

2.16 MML argued that the draft contract, like the existing agreement, is a fair and balanced package that would provide certainty to both parties, enabling them to plan their respective businesses.

Further representations

2.17 MML and L & C were given copies of the third party consultation responses to MML's application, which are summarised in Chapter 3, and invited to comment on them. These comments can be found on the ORR website (see footnote 3).

2.18 The hearing on the application, held on 24 January 2003, provided the parties with the opportunity to comment on MVA's methodology and provisional recommendations. It also enabled MVA to respond to questions from ORR on points made in their representations. A transcript of the hearing, in redacted form (see footnote 2), is available on the ORR website (see footnote 3).

2.19 The parties were invited to a meeting at the Regulator's office on 14 March 2003 to be given an outline of the Regulator's conclusions on the application. At the meeting, the next steps in the determination process were identified and explained. They were sent a copy of the draft directions for comment and their comments are listed in the table at Annex 2 and reflected in the final directions.

2.20 The recommendations in MVA's report are described in Chapter 4 and the Regulator's decisions on all the key issues, including new issues raised at the hearing, and the reasons for his decisions are set out in Chapter 5.

3. *Summary of consultation responses*

3.1 The Regulator consulted organisations that, in his opinion, were likely to have an interest in MML's section 17 application. The Regulator also published the application (in redacted form) on his website[6]. The Strategic Rail Authority (SRA), the Department for Transport (DfT), the Mayor of London, Transport *for* London and the Health and Safety Executive (HSE) were sent full copies of the application. Other consultees were sent copies of the application in redacted format after consideration by the Regulator of representations made to him under section 71(2) of the Act by MML and L & C. A full list of consultees is included in Annex 1.

3.2 DfT stated that its chief concern was to ensure that the application "neither impedes the continued implementation of the CTRL development agreement nor threatens the continued operation of the MML franchise". It went on to state: "On the information currently available to the Department, it does not appear that MML's application is likely to result in either outcome". DfT confirmed this view after receiving, together with the Strategic Rail Authority, a copy of MVA's report (although DfT pointed out it had not conducted a full economic analysis of the report).

3.3 The SRA argued, essentially, that the existing compensation regime should be retained in the new contract, on the basis that MML would have planned its business (and therefore its franchise extension bid) on the assumption that the existing level of compensation would continue; and that there were no public interest benefits in disturbing the arrangements. It considered that the incentive effects have worked well and saw no good reason for revising the original risk allocation or disturbing the arrangements.

3.4 The HSE's only comments in respect of station access were that the changes proposed at the station would affect the parties' safety cases, and any changes to the respective safety cases would need to be agreed with HSE.

3.5 The only substantive comment made by other consultees was from passenger representatives, who argued that compensation should be directed towards specific passenger benefits, or that a proportion of the compensation should be paid to passengers.

[6] See footnote 3.

3.6 Although supporting the principle of compensation, LTUC and the Rail Passenger Committee (RPC) for the Midlands proposed that compensation should be ring-fenced and spent for the benefit of MML's customers because, according to LTUC, the "biggest losers will be the vast majority of their [MML's] passengers who continue to use the station" during the CTRL works. The RPC for the Midlands proposed that, because the CTRL implementation date was 6 June 2000 and the impact on MML was minimal before October 2001, compensation received between 6 June 2000 and an agreed date in mid 2001 should be offset against compensation payable from 2003 to 2007.

3.7 London Underground Limited supported L & C in trying to renegotiate some of the compensation provisions, as long as the overall regime remained fair and reasonable.

3.8 Thameslink commented on the importance of the protection of the right of the station beneficiary to adequate amenities and services, and compensation in the event of these being denied.

3.9 A further round of consultation was conducted once L & C's comments on MML's application were received. L & C was concerned that external consultees should have an opportunity to comment on both sides of the argument. However, no further substantive responses were received, other than from the SRA (in which SRA stated that it had not changed its views).

4. MVA's recommendations

4.1 The Regulator has to be satisfied that his directions are consistent with his duties under section 4 of the Act. To assist him in reaching a decision, and after consulting MML and L & C (the parties) on the terms of reference, the Regulator appointed MVA as independent transport consultants to provide him with advice on the most appropriate compensation regime.

4.2 In appointing MVA, and considering MVA's recommendations, the Regulator has followed an open and transparent process, involving the parties at each stage of the work. In particular, he has:

(a) provided the parties with the opportunity to review and comment on the draft terms of reference to MVA;

(b) provided the parties with the opportunity to review and challenge MVA's draft conclusions, both in writing and by putting points directly to MVA at the hearing;

(c) in considering whether or not to accept MVA recommendations, given due weight to comments and views put forward by the parties; and

(d) assessed MVA's recommendations using his own expert economic team.

4.3 MVA was asked to provide advice on the following questions, set out in paragraph 6 of the terms of reference:

(a) whether the compensation regime proposed by MML in its section 17 application is appropriate to compensate MML for disruption caused by the CTRL works to its operation at St Pancras Station;

(b) if not, whether alternative arrangements would be more appropriate; and

(c) to the extent that the alternative arrangements differ from the existing regime, the justification for the difference.

4.4 MVA has reported that it took fully into consideration all the views and comments put forward by the parties and consultees, including MML's application, L & C's initial representations, and the range of further representations and information supplied by

both parties. MVA sought to apply sound economic principles based on standard and accepted rail industry modelling techniques.

4.5 The methodology adopted by MVA was to:

(a) establish the economic principles regarding the compensation regime;

(b) formulate these into a benchmark regime which would accurately provide the correct level of compensation;

(c) develop a recommended regime, which would in certain ways be simpler than the benchmark, but where the trade-off between the economic principles and simplicity was transparent; and

(d) to seek to avoid unnecessary change from the existing regime.

4.6 MVA identified three potential purposes of a compensation regime:

(a) compensating MML for loss of revenue and additional costs;

(b) providing compensation to customers for loss of amenity; and

(c) incentivising L & C and MML to minimise the impact on passengers subject to value for money.

4.7 Costs and revenue loss are the basis for compensation in the existing agreement. MVA recommended that costs and revenue loss remain the basis for compensation, noting that loss of revenue is a reasonable proxy, in aggregate, for the loss of consumer surplus (which in this case is equivalent to the loss of customer amenity). MVA's recommended approach would also ensure that L & C is appropriately incentivised, as L & C would be taking full account of all benefits to MML for any efforts to minimise disruption.

4.8 ORR invited and received detailed comments from the parties on MVA's draft final report and further tested MVA's recommendations at the hearing. MVA took account of the comments by the parties, providing ORR with a detailed response to each of the points made and revising its draft final report and recommendations in the light of those comments.

4.9 MVA's final report[7] contains a detailed explanation of the work conducted by MVA, and justification for the recommendations made to the Regulator.

4.10 Throughout its study, MVA employed industry best practice, using the latest edition of the Passenger Demand Forecasting Handbook (PDFH)[8] (August 2002) which captures industry knowledge, research and experience on rail passenger demand forecasting.

4.11 The effects of the disruptions to MML's passengers during the CTRL works may arise due to:

(a) non-provision of facilities previously available or lower standard of facilities provided;

(b) additional walking time to relocated station facilities;

(c) quality of the station environment, including noise, dust and visual intrusion; and

(d) changing the location of facilities (leading to confusion for passengers and costs for MML).

4.12 MVA assessed the effect of each of these factors on the various users of the station and constructed a compensation regime based on the economic principles set out in paragraphs 4.5 and 4.6 above.

4.13 MVA quantified the effects of additional walking time by calculating its impact on MML's revenue. They advised that the best available industry research suggests that passengers at St Pancras value one additional minute of walking time at the same level as 1.6 minutes of travel time on a train, so walking time can be converted to Generalised Journey Time, a standardised measure of passenger benefit, by applying the factor of 1.6. The total change in passengers' benefit due to additional walking

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[7] *St Pancras – economic advice in relation to the application under section 17, Railways Act 1993, by Midland Main Line Limited (MML) for access to St Pancras Station*, London, MVA, February 2003.

[8] The Passenger Demand Forecasting Handbook summarises knowledge of the effects of service quality, fares and external factors on rail passenger demand, and provides guidance on applying this knowledge to the preparation of forecasts for investment and business planning. Intellectual property rights to PDFH, and its research, are owned by the Passenger Demand Forecasting Council and administered by the Association of Train Operating Companies.

time to reach a facility, expressed in Generalised Journey Time, can then be calculated by multiplying this factor of 1.6 by the additional walking time and by the number of passengers using the facility. Additional walk time will be measured using the methodology set out in Schedule 4 to the current agreement. For the purposes of estimating the impact of MVA's recommended regime, additional walk time was estimated by MVA from changes in distance based on plans provided to the Regulator by L & C.

4.14 In order to estimate the change in revenue arising from this reduction in passengers' benefit (the disbenefit), MVA analysed data provided by MML on the estimated change in its revenues for several scenarios leading to a change in passengers' benefit, in terms of additional travelling time to St Pancras Station. MVA's analysis showed that a linear relationship was appropriate, from which MVA estimated values for compensation payable for one minute of additional walking time for each facility, reflecting the impact on MML's revenue.

4.15 The effects of non-provision of passenger facilities were treated in the same way as the effects of additional walking time, by assuming that non-provision is equivalent to a large additional walking time. Passengers are assumed not to be willing to walk more than eight additional minutes to key facilities (such as toilets) and five additional minutes to other facilities: these values were used to compensate MML for non-provision of these passenger facilities. These values were based on evidence from PDFH and by reference to the existing station access agreement.

4.16 MVA recommended that staff facilities be treated differently from passenger facilities: disruption to MML staff, leading to staff disbenefits, will generally result in additional costs to MML. MVA advised that the provisions in the existing agreement relating to relocation and non-provision of staff facilities are appropriate and meet the objectives of the compensation regime, subject to appropriate indexation and removal of the current provision which rounds walk times up to the nearest minute (see paragraphs 5.74 and 5.75).

4.17 MVA has used evidence from PDFH to estimate appropriate compensation due to general building site effects arising from noise, dust and visual intrusion affecting departing passengers as a result of the building works. MVA estimated the effect of this element of disruption on MML's revenue using a factor reflecting passenger disbenefit, expressed as a proportion of revenue from departing passengers, derived from PDFH and applied to total MML revenue through St Pancras from departing passengers.

4.18 In its final report, MVA provided a full and detailed justification for the changes it was recommending to the existing regime, which are summarised as follows (and described in more detail in Chapter 5 of this document):

(a) fixed compensation for general damages relating to "general building site effect" is recalculated using standard and accepted rail industry modelling techniques, and also takes account of MML's relocation within St Pancras during the construction period (introducing a variable element and strengthening the incentive effect but also significantly reducing the level of compensation payable);

(b) the valuation of walking time has been recalculated, again in line with standard and accepted rail industry modelling techniques, and takes account of benefits that can be attributed to reduced walking times (leading to an overall increase in compensation payable despite introducing the principle of netting off to the calculation of compensation compared with the existing regime);

(c) the calculation of compensation has been streamlined by:

(i) removing the perverse incentive created by rounding up the first additional minute of walking time to one whole minute; and

(ii) removing variable (or stepped) payment rates, for which MVA argue there is no economic justification; and

(d) compensation has been calculated on the basis of current MML revenue data (as opposed to 1996 levels indexed by RPI).

4.19 Although the regime recommended by MVA is different from the existing agreement, the Regulator has concluded that the regime recommended by MVA is appropriate and justified because it is based on robust economic principles, and standard and accepted rail industry modelling techniques for assessing the financial impact of disruption. The Regulator also considers that this regime will provide the most appropriate way of protecting the interests of railway users (section 4(1)(a) of the Act), and will promote efficiency and economy on the part of those providing railway services in connection with St Pancras station (in accordance with section 4(1)(f) of the Act).

5. The key issues

The form of station access contract

The current station access agreement

5.1 The current station access agreement between MML and L & C, under which MML obtains station access to St Pancras Station, is substantially in the form of the template independent station access agreement, which was developed at the time of rail privatisation for use at the "major" London and regional termini, now operated by Network Rail. The key difference from the standard template is that it incorporates an additional schedule, Schedule 4, which sets out the compensation regime which applies in respect of the impact of CTRL construction work on MML.

5.2 The current regime provides for compensation covering:

(a) general damage to MML's business;

(b) compensation for increased walking time, based on a standard valuation of walking time, with stepped increases in value within three "time bands" (up to two minutes excess walking time; between two and eight additional minutes; and greater than eight minutes);

(c) compensation when use of facilities is curtailed;

(d) one-off fees when facilities are moved; and

(e) MML's liaison costs.

5.3 As with all other station access agreements, this agreement incorporates by reference a set of standard terms and conditions which apply to all station access agreements at the station, called "station access conditions" (again, in the case of St Pancras Station, modelled on the Independent Station Access Conditions used for all major stations). The station access conditions for St Pancras Station were customised in 1996 to take into account the fact that major CTRL construction work would be taking place at the station. The key difference between the St Pancras Station Access Conditions and the Independent Station Access Conditions is that changes to the station associated with CTRL construction do not have to be progressed through the normal station change procedures in Part 3 of the conditions, but instead are covered by a new Part 18

(which sets out the terms under which L & C may curtail the use of facilities at the station to accommodate CTRL works). Part 18 is the main power in the station access regime for St Pancras Station under which L & C undertakes CTRL construction work. The conditions also included several additional annexes covering those facilities regarded as "essential" to beneficiaries (Annex 12), the standard to which facilities must be provided and their permissible siting (Annex 13), and notice periods for curtailment (Annex 14).

5.4 The parties had reached agreement over the form of the station access contract to supersede (or extend) the existing contract when it expires, and the *form* of compensation regime. However, they failed to agree over the *levels* of compensation to be paid under the regime.

5.5 In his approach to MML's application, the Regulator has had regard to the following key issues:

(a) the parties are in agreement over the form of the proposed access contract, which follows the template independent station access agreement;

(b) neither the Regulator nor any consultees identified any material issues that warrant attention in respect of this template under the present section 17 application, bearing in mind that, ultimately, it is intended that access to St Pancras Station will be covered by the Stations Code[9]; and

(c) the material issue to be decided by the Regulator surrounds the form and level of compensation to be paid by L & C to MML in respect of disruption from the Channel Tunnel Rail Link works at St Pancras Station.

5.6 The Regulator has therefore concluded that the template independent station access agreement remains appropriate and that his directions should replicate the current contract, except where it is necessary to make amendments to give effect to the revised compensation regime or to make other changes of a consequential nature.

[9] As part of his on-going review of the station access review, the Regulator published on 21 August 2002, provisional conclusions which proposed new and improved contractual processes, and a restructuring of the matrix of contracts to simplify and streamline the stations regime by drawing together all the common elements of station access agreements, station access conditions and the station specific annexes together into a single stations code. This publication (*Review of the station access regime – provisional conclusions on the policy framework*, ORR, London August 2002) is available on the ORR website at http://www.rail-reg.gov.uk/pub_list.cfm.

5.7 It is the Regulator's aim that, ultimately, St Pancras Station will be covered by the Stations Code, in order that all stations on the rail network benefit from the proposed simplified and streamlined arrangements that the Code will encompass, and the Regulator therefore invited the parties' comments on a proposal to include in his directions a retrofit clause to move the contract into the Stations Code once it is established.

5.8 L & C expressed itself content with this approach. MML, however, expressed concerns, given that the compensation arrangements and the St Pancras Station access conditions are bespoke and specific to the relationship between L & C and train operators at St Pancras Station.

5.9 The Regulator accepts that it is important that any Stations Code retrofit clause recognises these bespoke arrangements. It is intended that the Stations Code will continue to allow such customisation at station level where it is appropriate, and the retrofit clause included in the directions provides sufficient flexibility for bespoke arrangements, such as the St Pancras Station compensation regime, to be transferred to the Code. The Regulator does not believe that the bespoke arrangements are an impediment to moving St Pancras into the Code structure. Therefore, the Regulator has concluded that his directions should include the necessary retrofit provisions.

The duration of the station access contract

5.10 The contract will run until the date on which St Pancras is first used as a rail link facility as such term is defined in the CTRL Act or 28 April 2008 whichever is the earlier. This is because it is expected that arrangements will be put in place at that time for Network Rail to become the station facility owner. Furthermore, on the expiry of the contract, the bespoke compensation arrangements set out in the Regulator's directions, which are only applicable whilst CTRL work is undertaken, are expected to be replaced by station access on standard terms, i.e. the standard terms in the Stations Code, bringing the benefits of the proposed simplified and streamlined contractual arrangement mentioned in paragraph 5.7 above. The directed compensation arrangements will, therefore, fall away at that time (unless the contract is extended or replaced by one with similar terms), whether or not the agreement has migrated into the Stations Code.

The rationale for compensating MML

5.11 The Regulator has decided that MML should continue to receive compensation under its station access contract for the disruption to its business caused by the construction

of the CTRL international terminal at St Pancras Station, for the reasons set out in paragraph 5.19 below.

5.12 The parties are in broad agreement over the rationale for compensation.

5.13 In its application, MML quoted from a joint response of the parties (at that time Midland Main Line Limited and Union Railways Limited[10]) to the Regulator's questions in October 1995 following the submission of the existing station access contract to the Regulator for his approval. This joint response discussed the safeguards aimed at protecting access to St Pancras Station and its facilities. The safeguards were to enable MML to insist on a minimum level of station facilities; to incentivise L & C to consult MML on CTRL works, to minimise disruption and give MML advance notice of likely disruption; and "in any event compensate MML" for loss of passenger revenue and additional costs in managing its business.

5.14 MML consistently argued in its representations that the compensation arrangements are important to being able to plan its business with a reasonable degree of assurance. MML expected the CTRL project to have been completed by the time that its existing agreement expired and, it argued, the fact that it had not been completed was no fault of its own. MML had an expectation that the compensation provisions agreed to in 1996 would last until the end of the project. At the hearing, MML referred to the regime in the draft contract being a balanced package reflecting the diminution of the rights which would normally accrue to a station access beneficiary under the station access conditions, as a result of the impact of Part 18 of the St Pancras Station Access Conditions.[11]

5.15 L & C stated in its representations that it was seeking balanced and justified changes to the compensation regime that did not affect the underlying safeguards to MML's business. L & C supported the principle of compensation but considered the figures populating the compensation regime in MML's draft contract to be excessive. At the hearing L & C argued that compensation should be capped at the level of the station access charge and that the expected levels of compensation were disproportionate to MML's net profit[12]. L & C also further argued that the nature of the CTRL work and its impact on MML's operations is better understood now than in 1996, and that the

[10] Union Railways Limited was transferred to London & Continental Stations & Property Limited following its designation as the successful promoter of the Channel Tunnel Rail Link.

[11] Page 5, lines 25 to 31, of the transcript of the hearing.

[12] Page 9, lines 19 to 21, of the transcript of the hearing.

provision of an interim station was not envisaged at that time, and that these factors should be taken into account in considering the appropriate level of compensation.

5.16 L & C also described the levels of compensation as "bottom line windfalls" imposing a burden on strategic projects like CTRL making them disproportionately expensive.[13] Whilst L & C explicitly stated, in a letter dated 10 December 2002, that it was not seeking to argue that the compensation envisaged in the current station access agreement could impede the performance by L & C of the CTRL development agreement, in a further letter in response to the Regulator's draft directions, dated 26 March 2003, L & C appear to resile from this position, stating: "The resulting significant increases in the compensation regime may well serve to impede the continued implementation of the CTRL development". This is considered fully in paragraphs 5.100 and 5.102 below.

5.17 At the hearing, MML stated: "Overall we think that Schedule 4 has operated successfully since the CTRL implementation date".[14] L & C agreed that "the principle of compensation works", adding: "it is no secret that the only dispute that we have with Schedule 4 at this point is the amount that has been paid". L & C drew attention to other aspects of its relationship with MML that were successful in delivering enhanced passenger benefits but did not rely upon the compensation regime[15].

5.18 The Regulator notes that MML's original franchise, and the CTRL concession, were priced on the basis of the existing regime, in the fore-knowledge that this would expire in 2003. He also notes that when MML negotiated an extension of its franchise, it would have been aware of the need to negotiate a new station access agreement with L & C before the completion of the CTRL works. Given the uncertainties that MML faced, the Regulator considers it important, as MML argued at the hearing, that in going forward his directions provide the certainty and assurance for business planning that the parties need[16].

5.19 In the light of the above considerations, the Regulator has concluded, in accordance with his duties, and in particular his duties under section 4(1)(a) and 4(1)(g) of the Act, that it is appropriate to include in his directions compensation provisions to

[13] Page 10, lines 32 to 35 of the transcript of the hearing.

[14] Page 28, lines 21 to 22, of the transcript of the hearing.

[15] Page 29, lines 34 to 36, and page 30, lines 1 to 18, of the transcript of the hearing.

[16] Page 37, lines 30 to 35 of the transcript of the hearing.

protect the interests of users of railway services, and to enable both MML and L & C to plan the future of their businesses with a reasonable degree of assurance, on the premise that the regime he is directing will hold MML financially neutral from the effects of the disruption caused by the CTRL works.

Passenger benefits

5.20 Two consultees, the LTUC and the RPC for the Midlands, representing passenger interests, raised the issue of ring-fencing compensation for passenger benefits. The SRA strongly expressed the view, at a meeting with ORR on 4 December 2002, that passenger benefits are part of the package of outputs delivered under the franchise agreement, and the Regulator should not attempt to identify any particular existing train operator revenue stream with specific additional benefits, since this could undermine delivery of the overall package. The Regulator accepts the view of the SRA that the promotion of passenger benefits is a matter for the SRA rather than private negotiation under a station access agreement. There is no mechanism under a station access agreement to give effect to the proposals from LTUC and the RPC for the Midlands to benefit existing passengers, or those that have been deterred from using St Pancras Station altogether. Moreover, MML confirmed at the hearing that its franchise bid and franchise extension bid were made by MML on the assumption that compensation from its access agreement would remain at current levels. On this basis, MML agreed with the SRA to deliver a package of passenger benefits, including new trains.

5.21 For these reasons, the Regulator has decided that it would not be appropriate to incorporate in the station access regime, which concerns the relationship between the station facility owner and the train operator, provisions relating to the relationship between the train operator (MML) and its passengers.

5.22 The RPC for the Midlands also suggested in its consultation response that, because the CTRL implementation date was 6 June 2000 and the impact on MML was minimal before October 2001, compensation received between 6 June 2000 and an agreed date in mid 2001 should be offset against compensation payable from 2003 to 2007.

5.23 The existing agreement does not contain a provision for retrospective adjustment of compensation payments, and, therefore, MML may have a legitimate expectation that benefits derived under the existing station access agreement would be retained within its business. Neither MML nor L & C proposed a retrospective adjustment provision

in the new contract or that account be taken of any on-going effects of the CTRL works on MML after 2007. The Regulator has, therefore, concluded that such a provision is not warranted and would, if made, create additional uncertainty for the parties, contrary, in particular, to his duty under section 4(1)(g) of the Act.

The appropriate form of compensation

5.24 The parties are in broad agreement on the form and structure of the compensation regime that they would wish to see in their new contract. They questioned the methodology that MVA used to arrive at the recommendations in its draft report, and the rationale for the changes.

5.25 MML argued against any change to the current compensation regime. It considered that MVA's recommendations would be costly to implement and administer and that the Regulator should consider the negative effects on its business planning of altering the basis of compensation in its existing agreement. It believed that the recommended changes would add to the complexity of the compensation arrangements.

5.26 L & C was more concerned about the effects of the recommendations on the levels of compensation payable, and questioned the methodology that MVA used in arriving at these levels. L & C did not agree, for example, that MML's current revenue levels should form the basis of any compensation calculation, because, L & C has argued, it is only obliged under the CTRL development agreement to provide sufficient platform capacity at St Pancras Station to enable MML to deliver its 1994 timetable.

5.27 Broadly speaking, the compensation regime contained in the directions is expected to provide overall levels of compensation in the region of those sought by MML, rather than those offered to MML by L & C. However, the level of fixed compensation (general damage), which is based on a proportion of MML's current revenue levels, is reduced, with greater weight being placed on variable compensation for increased walking distances. This will provide a better reflection of the loss of revenue to MML resulting from the different elements of disruption.

5.28 The Regulator does not accept that linking general damage compensation to MML's relocation within the station would make the general damage regime materially more complicated, but considers that it will more accurately reflect loss of revenue to MML. He considers that the other changes will simplify and streamline the regime, removing perverse incentives and strengthening positive incentives (for example, to optimise decision making about the relocation of facilities to the benefit of passengers). Where the Regulator considers that there is no justification for change in

respect of specific elements of the contract and the compensation regime, the existing provisions have been left intact. The Regulator has also agreed with MVA's conclusion that: "The benefit of the recommended regime is that it provides a best estimate of the damages to MML's business caused by these future works and disruptions."

The views of the parties on the appropriate level of compensation

5.29 MML, in its further representations, argued that the compensation figures in the existing agreement were agreed as a "genuine pre-estimate of MML's losses" and that any changes should be upward because MML has built up its business since 1996. MML, however, would prefer to maintain them as they are, for the sake of certainty. It drew attention to the professional basis on which the calculation of the compensation figures in the existing agreement was undertaken, in 1995, and the time and effort expended at that time to arrive at a position agreed between the parties on Schedule 4, with help from the Department for Transport.

5.30 At the hearing L & C agreed that the figures in the existing contract were a "genuine pre-estimate of loss", but argued that the figures cannot simply be rolled forward without taking account of what has happened, and been learnt, since 1996.[17]

5.31 L & C questioned, in its comments on the draft MVA report and at the hearing, the correlation between walk times and MML revenue, given what it described as the "considerable growth" in MML's business during construction work at St Pancras Station.[18] To effect a downward revision of the figures, L & C suggested an alternative approach to compensation for increased walking distances. The proposal, at Appendix 2 to Schedule of Amendments in its representations,[19] is a full revised facility compensation table using the look-up table for abatements for the non-provision of station facilities. This follows the proposal contained in Chapter 4 of the ORR document, "Review of the station access regime - provisional conclusions on the policy framework" (published in August 2002).

5.32 However, the abatement regime proposed in that document was included for the purpose of consultation: it was not a definitive or final proposal. It has since been subject to review by ORR, and is subject to further work based on PDFH

[17] Page 56, lines 29 to 36 and page 57, line 1, of the transcript of the hearing.

[18] Page 62, lines 32 to 36, and page 63, lines 1 to 3, of the transcript of the hearing.

[19] Applications and decisions (http://www.rail-reg.gov.uk/licensing_access/la841.html)

methodology. Furthermore, it was based on proportions of the station long term charges which were themselves calculated according to a "top down" allocation of the fixed element of station access charges determined at the last periodic review of Network Rail's charges. Long term charges at other stations, therefore, reflect the cost of running Network Rail. The Regulator considers that this does not provide an appropriate basis for assessing compensation for disruption for CTRL works at St Pancras Station.

5.33 In a letter to ORR, dated 3 February 2003, L & C made an alternative proposal, to accept the principle of the original agreement, but to update the current walking time compensation values. L & C's alternative proposal suggested applying a multiplying factor of 1.6 to walk times to calculate the change in passenger benefits using the concept of Generalised Journey Time (see paragraph 4.13), which L & C believed MML "would be happy to accept".

5.34 In the course of ORR's consideration of the application L & C made a proposal for annual general damage compensation that was considerably less than the figure in the draft contract proposed by MML. L & C did not provide any justification for the offer and later withdrew it after it was rejected by MML.

5.35 MML in its further representations argued that L & C has failed to show sufficient reason for any reduction in general damage or facilities compensation, arguing that the growth in its business resulted from, for example, investment in new rolling stock and at stations where MML is the station facility owner.

5.36 Having considered all these points, the Regulator has concluded that MVA's methodology underlying the calculation of compensation and the recommendations in its final report in respect of the levels of compensation offers the most appropriate approach in light of his statutory duties and in particular will:

(a) best protect the interests of users of railway services (section 4(1)(a)), because the regime will incentivise the parties to make decisions which, overall, will minimise the impact of CTRL work on passengers and MML operations;

(b) promote efficiency and economy on the part of persons providing railway services (section 4(1)(c)), by encouraging the parties to make timely and efficient decisions about the provision of services, and incentivise the efficient implementation of work at St Pancras Station;

(c) impose on the operators of railway services the minimum restrictions which are consistent with the performance of his functions (section 4(1)(f)); and

(d) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g)) by creating a clear regime which will hold MML financially neutral to the impact of CTRL work at the station.

5.37 The Regulator's reasons for this decision are set out below.

General damage

Key conclusions

5.38 A significant element of the current compensation regime relates to general damage from "general building site effects (e.g. noise and dust)". A key factor in considering the impact of these effects is the relocation of MML's operation at the station, planned for mid-2004, to an interim position in newly constructed platforms for the Kent domestic services that are outside of the existing Barlow trainshed.

5.39 The Regulator has concluded that payment of an annual fixed sum representing general damages due to the adverse impact on MML's business of construction work at the station should remain a feature of the compensation regime, because such compensation will be necessary to hold MML financially neutral for the effects of the disruption caused by the construction work and provides appropriate incentives on L & C to optimise decision making to minimise the adverse impact of the works on MML's passengers and operations. However, he has also concluded that the impact of the construction work will vary depending on the location of MML in the station. When MML is moved to the interim location, it will, to a significant extent, be insulated from the effects of construction work, and, therefore, the adverse impact on MML's revenue should decrease (although this will need to be balanced against the significant increase in passenger walking distances – see below). As noted in paragraph 4.18 above, MVA has made an assessment of the likely impact on MML's revenue of the construction site environment, using standard industry techniques. Having reviewed MVA's approach and calculations, and having consulted the parties on these and considered their responses, the Regulator is satisfied that MVA's conclusions represent the most accurate assessment of the likely effect on MML's business of the adverse effects of construction work.

5.40 The Regulator has, therefore, adopted the following levels of annual general damage payments (as a percentage of MML's total current revenue in respect of St Pancras Station) in respect of each of MML's locations at the station:

(a)	existing location	0.2%
(b)	temporary location	0.1%
(c)	final location (if fully fitted out)	0%
(d)	final location (if fitting out not complete)	0.1%

The effect of his decision will be to reduce substantially the level of compensation payable to MML for general damages from that which pertains in the current station access agreement.

The components of general damage compensation

5.41 The existing agreement includes a fixed level of compensation for general damages over the term of the agreement, stated as covering "general building site effects (e.g. noise and dust)". During the Regulator's consideration of the section 17 application, MML argued that additional factors should be taken into account in calculating this compensation.

5.42 In MML's comments on MVA's draft report, MML argued against a reduction in the level of general damage compensation because it believed that noise and dust will increase and have a detrimental effect on passengers. MML also referred to the disruptive effects on passengers and MML staff of two station and platform moves; visual intrusion from hoardings and portakabins; continuing dust from within and around MML's operations; and crowding at peak times during the Thameslink blockade[20]. MML further argued that changing the general damage compensation with each relocation of MML within the station will make the compensation regime more complex, and that the reduction of general damage compensation to zero in the final location failed to take account of the ongoing impact on revenue of previous disruptions.

[20] The CTRL works include the replacement of Thameslink's King's Cross station by a new station in a "box" under St Pancras. During construction work due to begin on 26 June 2004, Thameslink's cross-city line will be cut for 25 weeks with southbound services terminating at St Pancras station. This work is referred to as the Thameslink blockade.

5.43 At the hearing, MML argued that general damages should include, in addition to noise and dust quoted as examples in the existing agreement, compensation for the Thameslink blockade and the lost opportunity to invest in St Pancras Station.[21]

5.44 In a letter dated 31 January 2003, MML developed the argument it put forward at the hearing as to why the loss of opportunity to develop St Pancras Station should be included in the general damage compensation, in summary, arguing that:

(a) compensation for compulsory acquisition of land includes "the potentialities or possibilities of development of the land";

(b) personal injury compensation includes compensation for potential future earnings;

(c) the normal method of calculating compensation in the UK is to put a person in the situation that they would have been, had it not been for the compensatable event;

(d) MML would have sought to invest in St Pancras Station based on the importance of the station and MML's record of station investment; and

(e) PDFH could be used to measure how its revenue would have grown as a result of the investments made.

5.45 In respect of the Thameslink blockade, ORR tested the views of the parties on whether to take account of the effects of crowding on walk times by consulting them on the issue in MVA's draft report, and then taking evidence at the hearing. The Regulator has concluded that specific provisions in his directions are not necessary to deal with the effects of crowding on walk times as a result of the Thameslink blockade because he considers that the potential gains in precision and accuracy of the compensation regime are outweighed by the increased complexity, administration and uncertainty in attempting to model such factors.

5.46 The Regulator does not accept the arguments put forward by MML to include the loss of opportunity to develop St Pancras Station, because:

(a) there is no evidence to suggest that the levels of general damages in the existing agreement were set at a level to reflect a loss of opportunity to develop the station. The language of the current compensation regime, and the

[21] Page 46, lines 30 to 35, and page 52, lines 24 to 26, of the transcript of the hearing.

approach taken in Part 18 of the station access conditions, is expressed in terms of the impact of the CTRL work on the physical characteristics of the station, and, for example, the standard to which work must be undertaken. Instead, this opportunity cost should be reflected in the overall financial package for access to St Pancras Station, including the level of the long term charge. This is consistent with the principle that, where a station access beneficiary wants to undertake an enhancement to a station, it will make a proposal for change to be implemented, usually, by the station facility owner, who is remunerated through an increase to the long term charge[22];

(b) in any event, MML has not provided evidence of any opportunities sought by MML to develop St Pancras Station. In the absence of any evidence, the general damages regime would be based on an assessment of hypothetical developments that might have been undertaken and the benefits that might have resulted. This forecasting exercise would import substantial levels of uncertainty into the regime without any clear benefit to the parties; and

(c) any enhancements proposed by MML would have to be put forward, under Part 3 of the St Pancras Station Access Conditions, as a proposal for change and agreed under the processes set out in that Part (or referred for dispute resolution) and there is no guarantee that any such proposal for change would have been accepted.

5.47 The Regulator has therefore concluded that there is no need to modify the existing compensation regime to accommodate any loss of development opportunity by MML.

Passenger perceptions of the interim station

5.48 MML and L & C did not agree over the way passengers will perceive the station at the interim location.

5.49 In its further representations (dated 17 December 2002), MML stated that the quality of the interim station, as proposed by L & C, will not be of the standard MML would expect of other similar stations. Furthermore, MML believed that, because the location will be surrounded by hoardings and portakabins, and will involve

[22] Agreed changes in long term charges are, of course, subject to the approval of the Regulator under section 22 of the Railways Act 1993. In considering applications for his approval of changes to charges, the Regulator needs to be satisfied that the increase properly reflects the cost of providing the agreed enhancement (which may include an appropriate rate of return).

substantially longer walking times to London Underground facilities, passengers are unlikely to place much value on the new facilities of the interim location.

5.50 L & C argued that the interim location will provide MML with brand new facilities, isolated from the construction site, which will benefit MML's business and for which it should receive some credit under the compensation arrangements.

5.51 L & C, in a letter to the Regulator dated 3 February 2003, said it is spending £30 million on the station at the interim location and that its consultation with MML over the facilities has facilitated special arrangements for MML, such as the planned branding of the station in MML colours. It questioned whether MML should receive compensation for any detrimental effects, given that MML had itself said that investment in stations had helped to grow its business. L & C also referred in its letter to information in the SRA publication "On Track", which L & C has interpreted as implying that passengers appear less concerned with station quality than late trains.

5.52 Finally, L & C referred to the PDFH and argued that the typical value for increased revenue due to station refurbishment is 5%, and that the effect of the move to the interim location on MML's revenue is likely to reach 10% or an increase in the order of £10 million per annum.

5.53 Neither party has been able to supply compelling evidence to support their opposing positions, which are based on a subjective view of passengers' perceptions of the expected quality of the interim location. Moreover, in the specific context of St Pancras Station, the positive and negative impacts on passenger perception are difficult to balance because new station facilities will be situated adjacent to construction activities and will be segregated by hoardings and other temporary structures. MVA has advised that, in view of the subjective nature of this assessment, general damages should be limited to an assessment of the impact of noise, dust and visual intrusion alone. The Regulator agrees and has decided that it would not be appropriate to extend the coverage of general damages compensation to reflect passengers' perceptions of the interim station.

Assessing the impact of noise, dust and visual intrusion

5.54 The Regulator accepts the conclusion of MVA, based on PDFH modelling, that the impact of noise, dust and visual intrusion is likely to have only a limited adverse impact on MML's revenue during CTRL construction.

5.55 However, MML has questioned the figures used in MVA's calculations for noise, dust and visual intrusion, claiming that these understate the likely impact.

5.56 Standard and accepted rail industry modelling techniques refer to the cleanliness of stations, rather than noise and dust due to building work. Nevertheless, MVA argues, and the Regulator agrees, that cleanliness provides a close parallel to noise and dust, and therefore the factors for cleanliness in PDFH can be used to assess the impact of building works. This assessment has been undertaken by MVA (section 4.10 of the MVA report).

5.57 Following consideration of the formal noise surveys and analysis by the MVA team, MVA argued that the impact of noise and dust due to works will be limited, as the station environment is inherently noisy and dirty due to diesel trains (which inevitably degrade an interior environment). However, MVA recommended adding visual intrusion as an impact under the general damage regime and accepted that this element may be of importance in the current and interim station before MML can operate in the fully fitted-out final location. The Regulator agrees with this recommendation for the reason given by MVA.

Valuation of walking time

Key conclusions

5.58 A key element of the current compensation regime is the compensation provided by L & C to MML when the walking distances to certain specified facilities are increased (or those facilities are not provided at all). MVA assessed the methodology and levels of compensation contained in this element of the regime in the existing agreement and recommended to the Regulator that the principle of compensation for increases in passenger and staff walking distances is economically sound. However, MVA also recommended certain modifications to the existing regime. These modifications will:

(a) ensure that the regime more accurately reflects lost revenue to MML resulting from the CTRL works at the station;

(b) provide incentives on L & C to reduce walking times; and

(c) eliminate certain ambiguities in the current regime which could result in perverse incentives.

5.59 The specific modifications MVA recommended to the current walking time compensation regime are as follows:

(a) the "netting off" of the benefits of decreased walking time against the value of increased walking time;

(b) removing the current provision under which any increase in walking time under one minute is rounded up to one whole minute;

(c) removal of the "stepped" (or "banded") increases in the value of walking time;

(d) the calculation of walking time compensation figures using the change in passenger benefit (based on Generalised Journey Time) to model the impact of increases in walking time on MML's business; and

(e) the re-basing of all data on up-to-date revenue data from MML.

5.60 After carefully considering all the matters raised by the parties in response to MVA's recommendations on walking time which are discussed in more detail below, the Regulator has concluded that these recommendations should be fully adopted in his directions.

Interpretation of the existing walking time compensation provisions

5.61 The Regulator sought clarification from the parties on how they had interpreted the walking time compensation provisions in the existing agreement. Essentially, the parties interpreted the levels of compensation in the walking time compensation tables as providing a flat rate of compensation in each compensation "band" (i.e. the same rate of compensation applies to any additional walking time within the band). The parties also assumed that compensation for additional walking time within the "permissible range" (as defined in the station access conditions) should be capped at the level of compensation in the first compensation band for movement of facilities outside the permissible range. This assumption was made to avoid a possible perverse incentive, which arises as a result of the parties' interpretation of the agreement, of compensation for moves within the permissible range attracting more compensation than moves outside the permissible range. The information supplied by the parties indicated that they were still discussing how to interpret these provisions in the agreement in September 2002 and the parties appeared to have agreed on their interpretation of these provisions in October 2002. They did not, however, seek to clarify the drafting of Schedule 4 of the current agreement by agreeing an amendment to the wording and submitting it for the approval of the Regulator under section 22 of the Act. Moreover, the information provided by the parties during the section 17 process was inconclusive as to their approach to interpretation, and further

clarification was only provided in March 2003 after the completion of MVA's report and the hearing.

5.62 The wording in paragraph 6.2 of Schedule 4 of the existing agreement, which provides the instructions on how to compute compensation, states:

> "The compensation payable..[for increased distance]…in respect of the relevant Facility during the relevant period shall for each day of that period be a sum equal to the amount shown for that Facility in the applicable Compensation Facility Table (by reference to the excess of the Time over the Existing Time for that facility as set out in whatever of the columns under the general heading "Compensation payable per day or part day for each additional minutes walking time" of that Compensation Facility Table is applicable to such excess) multiplied by the amount of that excess."

5.63 The phrase "Compensation payable per day or part day for each additional minute's walking time" is included in the walking time compensation tables as a title situated above all the compensation bands. The phrase "for each additional minute of walking time" suggests that the amount of compensation stated as being applicable to each band should be multiplied by the number of additional minutes walking time, and this is supported by the phrase "multiplied by the amount of that excess" in paragraph 6.2 of Schedule 4.

5.64 MML's section 17 application contained exactly the same drafting as the existing agreement for paragraph 6.2 of Schedule 4. Subsequently, in its representations, L & C proposed a variation to the drafting of this paragraph, and MML stated that it agreed with L & C's proposed amendment.

5.65 In comparing the likely level of compensation under MVA's recommended regime with an estimate of the compensation likely to be payable if the existing regime was simply rolled forward, MVA based its calculations on the text of the existing agreement.

5.66 The differences in interpretation of the provisions in the existing agreement make direct comparisons between the likely levels of compensation resulting from the existing regime, if it were simply to be rolled forward, and the anticipated levels of compensation under the regime recommended by MVA, problematic. MVA recognise this in their report (Appendix D, page D2). Table 1 below sets out the Regulator's best estimate of a comparison between MVA's estimates of compensation likely under its recommended regime, MVA's and the Regulator's interpretation of the

existing agreement and the parties' interpretation of the existing agreement (Appendix D of the MVA report provides a summary of the overall effect of MVA's recommended regime, including general damages and other costs).

Table 1

Estimated walking time compensation, expressed as a percentage of estimated total MML revenue through St Pancras for the year 2003 to 2004, at Q3 2002 prices			
	MML in current location	MML in interim location	MML in final location
MVA recommended regime	0.53%	3.99%	1.17%
MVA interpretation of existing agreement	0.88%	3.76%	3.85%
MML and L&C interpretation of existing agreement	0.88%	1.9%	1.56%

Source: MVA data and Appendix D of MVA report.

5.67 Differences of interpretation of the current agreement are only relevant to a comparison of how compensation levels will differ between the existing regime (as interpreted by the parties) and MVA's recommended regime, MVA's proposals are not dependent on obtaining a definitive interpretation of the existing regime. They encompass a new approach, independent of the existing regime, based on the methodology adopted by MVA, which itself is based on standard and accepted rail industry techniques. Interpreting the existing regime is relevant only to a comparison of the compensation payments likely to become payable under the existing regime to those which are likely to be payable under MVA's recommended regime.

5.68 The specific modifications to the current regime, proposed by MVA, are discussed in more detail below.

Netting off

5.69 "Netting off" provides credit in the compensation regime for reductions in walking distance for MML passengers that L & C is able to achieve by relocating facilities. In the current regime, there is no incentive on L & C to reduce walking distances to facilities from current levels. This process of netting off reductions in walking time against increases should more accurately capture the effect on MML's revenue of the

relocation of facilities during station works, as well as providing an appropriate incentive for L & C to manage the location of station facilities for the benefit of staff and passengers.

5.70 In its representations on MML's application, L & C argued that the current regime "penalises" L & C where alternate facilities are positioned further away, but provides no incentive to L & C to locate facilities closer than before.

5.71 MML is opposed to this change. In its further representations, MML argued that by promoting netting off, L & C is seeking to reduce the aggregate compensation payable, whereas it should provide the best location for each facility. According to MML, the proposal from L & C will result in facilities with low values in the facility tables being moved as far away as L & C can afford when such charges are offset against the gains to be made by moving higher value facilities closer.

5.72 MML contended that the location of facilities at St Pancras Station before the CTRL work started was an optimum lay-out and any reduction in walking distances would produce "potential crowding of facilities", and thus a passenger disbenefit. In its comments on MVA's report, it argued that it should not be required to pay for changes not requested, effectively, through the netting off provisions. Finally, it argued that the new arrangements would add unnecessary complexity to the agreement.

5.73 The Regulator notes the comments of both MML and L & C that the consultative process under Part 18 of the St Pancras Station Access Conditions (which deals with the implementation of CTRL works) has worked well. He also notes the comment from L & C that it will not be incentivised to play off movements of 'expensive' against 'cheaper' facilities, because the proposed regime takes into account level of usage of the facilities, and also the provisions in the directions for the continued payment of a movement fee. The Regulator is not persuaded by MML's argument that netting off would make the regime significantly more complicated to operate: the measurements and calculations are, essentially, the same as those to be performed for increased walking time. He therefore concludes that the improved incentives on L & C offered by netting off, together with the more accurate assessment of revenue loss to MML, make a compelling case for inclusion of this in the revised compensation regime.

Rounding up

5.74 The Regulator has decided to remove the current perverse incentive created by the rounding mechanism in the current agreement, which rounds up additional walking times of less than one minute to a whole minute. The current mechanism overcompensates MML for minor changes to the location of facilities, making payments volatile to a very small change in walk time, and may also inhibit L & C from making optimal decisions about the siting of facilities.

5.75 MML argued in its comments on MVA's draft report that this change would add complexity; that rounding up to one minute should continue to ensure there is no dispute over small amounts; and that L & C agrees this approach. However, at the hearing, MML admitted to being "not terribly concerned" about this issue.[23] The Regulator does not accept MML's argument about increased complexity, and considers that the regime can allow for small changes in walk time to be accurately measured without making it more complex, and without the unwarranted effects of rounding up.

Stepped payments

5.76 As a further simplification to the current regime, the Regulator has decided to remove the current variable payment rates applied to walking times, which vary according to distance (with the exception of certain staff facilities as described in paragraph 5.78 below), because there is no economic justification for the current stepped mechanism.

5.77 MML in its comments on MVA's draft report argued that it would add complexity to abolish the stepped regime. MML considered it should be retained to incentivise L & C to maintain facilities at the appropriate distance, and stated that L & C agreed this approach.

5.78 The recommended regime should provide the best approximation of changes in passenger benefit. However, the Regulator has recognised MML's concerns about the operational importance of certain staff facilities with low valuations. In the absence of accurate values, MVA addressed this point by recommending to the Regulator that the stepped increases in the value of walking time for these facilities should be retained, because the regime for these facilities has not been amended in any other way (other than to "up rate" the amounts of compensation in line with RPI), and therefore to remove the stepped increase in compensation may have the effect of unbalancing the

[23] Page 41, line 32, of the transcript of the hearing.

regime. The Regulator has accepted MVA's recommendation, for the reasons given by MVA.

Rebasing

5.79 The Regulator has decided to calculate compensation on the basis of MML's current revenue data using an estimate of the 2003 revenue figure (being the starting year of the new agreement), but providing for subsequent up rating annually in line with RPI.

5.80 MML, in its further representations, argued that, to the extent that a review of levels is appropriate, they should be increased on the basis that MML's passenger numbers have increased, such an increase being beyond that anticipated when the existing agreement was made. MML, in its comments on MVA's draft report, argued that the base for compensation should increase in line with MML revenue rather than RPI.

5.81 L & C was of a different view to MML. In its letter dated 3 February 2003 to the Regulator, L & C argued that it had not agreed that MML's current revenue levels form the basis of any compensation calculations and that, notwithstanding the existing station access agreement, it is only obliged to provide sufficient platform capacity to enable MML to deliver its 1994 timetable. In the comments attached to that letter, L & C stated that MVA's use of up-to-date revenue figures increases compensation by one third, compared with the original agreement (1996 revenue increased by RPI).

5.82 By rebasing the compensation levels using an estimate of MML's 2003 revenue figures, the Regulator has decided to recognise the substantial growth in both passenger numbers and revenue since 1996, and, in particular, the fact that more passengers will be affected by disruption and hence more revenue will be lost. This is consistent with the objective of holding MML neutral to the impact of the CTRL station works. The Regulator noted the consultation response of Rail Passenger Committee for the Midlands which supported the view that general damage to business "should … reflect the increase in passenger numbers since 1996."

5.83 The Regulator also considered the argument that future growth in MML's revenue should also be taken into account but rejected it on the following grounds:

(a) the franchise extension, granted on 9 August 2000, did not assume an increase in compensation in line with revenue; and

(b) there is merit in certainty, so that the parties know the level of compensation in advance (which would not be the case if it were decided that compensation levels should increase with future passenger volumes and revenue).

5.84 L&C argued that it was inconsistent to rebase compensation on MML's current revenue, whilst using walking times based on the physical state of the station before commencement of the CTRL works. The Regulator does not consider that there is any inconsistency in this, because the purpose of the compensation regime is to hold MML neutral against the impact of all CTRL station works at St Pancras, not just work that takes place after the commencement of the new contract.

Other issues

Non provision of a facility

5.85 Under the current agreement, where use of a facility is curtailed compensation for non-provision is paid to MML at the daily rate irrespective of whether the facility is closed for a whole day or just part of a day. L & C argued that this appeared to create a perverse incentive to close facilities for a whole day, even where work could be undertaken in less than a day. The Regulator agrees that the provision in the existing agreement could have such a perverse effect and therefore, in his directions, has included drafting causing compensation for non-provision for part of a day to be calculated based on the duration of closure of the facility as a proportion of the time the facility should be open on that day. Compensation is also paid, in a similar manner, where a facility is provided which does not conform to the required standard. Compensation is apportioned in relation to the duration of non-conformity, again, to avoid the potential perverse incentive, inherent in the existing regime, of rounding up part days of non-conformity to whole days.

Plans for the interim station

5.86 The parties failed to agree on whether the relocation of MML to the interim station was envisaged when the existing agreement was made. At the hearing, MML argued that the relocation was envisaged and therefore L & C must have known that the variable element of the compensation regime was likely to increase. This particular disagreement may affect the way the parties view the provision of and the effects of the interim station.

5.87 The relocation itself will have implications for the level of compensation payments. In fact, the increased compensation levels at the interim station may have the effect of incentivising L & C to delay MML's relocation. The revised balance between fixed

and variable compensation in the new regime should, nevertheless, incentivise L & C to move MML at the optimum time for passengers, while holding MML financially neutral from the revenue effects of disruption wherever it is located.

5.88 The Regulator does not consider the disagreement between the parties over when and what each side knew about the interim station to be relevant to his directions, because the directions are based on the current position and level of knowledge, not the historical one.

Factors affecting MML's revenue

5.89 L & C has argued that it is wrong to rely on compensation for revenue loss due to additional walk times when other factors, that have nothing to do with CTRL, may affect MML's growth forecast. It gave as examples the uncertainty of forecasting, the consequences for the network of the rail accident at Hatfield, and non-running trains as a consequence of the CTRL track works. However, in the directions, compensation has been based on current revenues, and, therefore, does not try to anticipate further revenue growth.

Usage figures for facilities

5.90 MVA based its estimated total compensation for a change in walking time to facilities on estimates of the average proportion of passengers using each facility. L & C, in its comments on MVA's draft report suggested that not all the usage figures in MVA's regime reflect the true utilisation of facilities. L & C followed this with comments attached to a letter dated 3 February 2003, and sent to ORR after the hearing, suggesting that all facilities at the station are factored by 50% of the St Pancras Station passengers. It quoted the example of the disabled toilets. This issue was also raised by MML in its comments on MVA's draft report, where it argued that the 50% usage figure for the Passenger Information System and Announcing System should, in fact, be 90%. The usage data was also used in the calculation of compensation for non-provision of a facility and for provision of a non-conforming facility (see paragraph 5.85 above).

5.91 MVA reviewed its work on usage figures in the light of the examples quoted and the comments made by the parties. Generally, the figures used have been estimated with data provided by MML following passenger surveys. However, in the case of disabled toilets, which do not have the same usage as other toilets, MVA has assigned them the same compensation value as other toilets, reflecting their importance to disabled passengers, and the obligation to provide facilities for the disabled when they are

provided for able-bodied people. This is consistent with the Regulator's duty to have regard to the interests of persons who are disabled (section 4(6) of the Act), and recognises the obligations of the owners and operators of stations under the Disability Discrimination Act 1995. The Regulator, therefore, agrees with MVA's views on this issue for the reasons given.

5.92 For the Passenger Information System and Announcing System, the basis of the figures used by MVA is that they are used by departing passengers only (that is 100% usage of both systems by departing passengers). On arrival, MVA assumed negligible use of either system. The Regulator agrees with this assessment.

Non-provision of a facility leading to station closure

5.93 The Regulator also agrees with MVA, that, where the non-provision of a facility results in the necessary closure of the station, an appropriate proportion of full daily revenue should be paid in compensation to MML (depending on the length of time the facility is unavailable) and that the payment should correspond with the importance of the facility and the estimated loss of revenue or additional cost to MML. The directions, like the current agreement, identify the facilities where a proportion of full daily revenue will be payable in the event that the facility is not available. However, the directions contain a smaller number of such facilities than the existing agreement, because the Regulator agrees with MVA's recommendations that non-availability of some of the facilities which accrue full daily revenue in the existing agreement is unlikely to lead to closure of the station. These facilities, nevertheless, continue to attract compensation for non-availability, based on the relative importance of the facility.

Lower compensation for certain facilities

5.94 L & C proposed in its comments on MVA's draft report, and in comments sent with a letter to ORR after the hearing (dated 3 February 2003), that there should be lower values for facilities which are not directly related to accessing the train. However, taking account of advice from MVA, the Regulator considers that the disbenefits of increased walk times to facilities relate to the overall additional encumbrance placed on passengers (and staff), not just to increased journey time. Hence, it applies equally to other facilities that are used (or desired to be used).

L & C's control over the positioning of facilities

5.95 L& C argued at the hearing that as the positioning of the interim station in relation to certain facilities (London Underground facilities) is outside its control, it is

inappropriate to pay compensation. However, if L & C were not undertaking major construction work at the station, MML would not need to relocate to the interim station. The fact that the relocation results in longer walking times to LUL facilities (in their current location) can be attributed to the work being undertaken by L & C. The Regulator, therefore, rejects L & C's arguments in this respect for these reasons.

Effect of stairs and escalators

5.96 L & C, in comments attached to its letter dated 3 February 2003, stated that values used by MVA ignore the fact that the walk time figures calculated in the agreement have already been increased to allow for stairs and escalators. Therefore, MVA should not include an additional factor in its valuation of walk time to account for increased walk time and congestion on and around stairs and escalators.

5.97 MVA has responded to L & C's comments, and advised the Regulator that the walk time methodology set out in the existing agreement has factors to convert distance into walk time. There are increased factors that apply to vertical distances on stairs and escalators (see section 3.5.15 of the MVA report). This represents the increased time taken to cover a certain distance. However, this includes no penalty for the increased discomfort due to crowding, climbing stairs etc. being referred to in PDFH. Therefore, once the actual time taken to walk a certain distance has been calculated, the relevant time spent on stairs or escalators needs to be allowed for in addition to take account of this additional discomfort. MVA believes that the overall value of walk time of 1.6 times generalised journey time (GJT) is a reasonable estimate. The Regulator agrees that this factor is appropriate, taking account of the reasons and analysis provided to him by MVA.

Commencement date

5.98 MML argued in its application that the definition of "Commencement Date" in the new contract should refer to the date of commencement of the existing agreement (i.e. 19 April 1996), to accord with certain provisions of the St Pancras Station Access Conditions and the associated annexes, which refer to the 1996 date. MML also proposed the insertion of a new term, the "New Commencement Date", to deal with the commencement date of the new contract. L & C disagreed, arguing that the commencement date of the new contract should be 29 April 2003 and that the date of commencement of the existing agreement ceases to be relevant under the new contract.

5.99 The Regulator agrees that that the commencement date of the new contract should be 29 April 2003 and that the commencement date of the original agreement ceases to be relevant. However, as regards the interaction between the Commencement Date of the Station Access Agreement and that of the Station Access Conditions, according to the Station Access Conditions "Commencement Date" has the meaning attributed to it in the Station Access Agreement. There are only limited parts of the Station Access Conditions which should, in order to retain their current meaning, refer to the date of commencement of the existing agreement, rather than the commencement date of the new agreement. Therefore these parts have been exempted from the general definition of Commencement Date (i.e. the date of the new contract), as proposed in MML's subsequent letter of 31 January 2003.

Channel Tunnel Rail Link Act 1996

5.100 As stated in paragraph 1.11 above, the Regulator has an overriding duty in section 21(1) of the Channel Tunnel Rail Link Act 1996 not to impede the performance of the CTRL development agreement.

5.101 L & C stated, in a letter dated 10 December 2002, that "we must emphasise that LCSP [L & C] have never maintained that being directed to renew the Station Access Agreement with the current levels of compensation preserved would impede the implementation of the CTRL development agreement". This view was supported by the Department for Transport, who commented, in response to consultation on MML's application, that it was of the view that, if the Regulator was to direct L & C to enter into a contract in the form of MML's application, this was unlikely to impede the performance of the development agreement. However, in a subsequent letter dated 26 March 2003, in response to the Regulator's draft directions, L & C stated: "The resulting significant increases in the compensation regime may well serve to impede the continued implementation of the CTRL development".

5.102 The Regulator has considered the points made by L & C carefully, in relation to all the evidence put before him. He does not consider there is any likelihood that directing L & C to enter into the access contract set out in his directions could have any adverse effect on the CTRL development because:

(a) the Department for Transport, having seen the recommendations made by MVA, that form the basis of the Regulator's directions, stated "there is nothing … in the recommendations which would appear to us to impede the continued implementation of the CTRL development agreement";

(b) the powers in the station access regime for St Pancras Station, under which L & C is able to implement CTRL construction work, are contained in Part 18 of the St Pancras Station Access Conditions (giving L & C the power to curtail the use of facilities at the station). The Regulator is not proposing any change to these provisions; and

(c) the total compensation likely to be payable by L & C to MML is less than 1% of the turnover of the CTRL project.

Other drafting points

5.103 Both MML and L & C have suggested a small number of minor amendments to MML's draft contract. These drafting points are aimed at dealing with matters that need updating, or are now redundant, because of the passage of time. The Regulator has considered all the amendments to the existing agreement proposed by the parties and has accepted those amendments where the parties are in agreement. The amendments not agreed between the parties are listed in Annex 2 together with the Regulator's decision on each contested amendment and the reasons for his decision.

Consequential changes to the station access conditions

5.104 No consequential changes are required to the St Pancras Station Access Conditions to give effect to the Regulator's directions.

Annex 1 – List of consultees

List of consultees

Alec McTavish	Association of Train Operating Companies
George Muir	Association of Train Operating Companies
Mark Lambirth	Department for Transport
Neil McNicholas	Direct Rail Services Limited
Philip Mengel	English Welsh & Scottish Railway Limited
Gordon Bye	Eurostar (UK) Limited
James Sherwood	GNER Holdings
Peter Woolgar	Health and Safety Executive
Suzanne May	London Transport Users' Committee
Malcolm Grant	London Underground Limited
Ken Livingstone	Mayor of London
Stewart Francis	Rail Passenger's Council
Paul Plummer	Network Rail PLC
Wendy Toms	RPC for Southern England
Philip Davis	RPC for the Midlands
Richard Bowker	Strategic Rail Authority
Mark Causebrook	Thameslink Rail Limited
Richard Wallace	Transport *for* London
Chris Green	Virgin Trains Limited
Pat Marshall	West Coast Railway Company

Annex 2 – Drafting amendments

The Regulator has amended the contract submitted by MML, first, to give effect to the changes he has decided to make to the terms of the contract, which are explained and justified in Chapter 5 of this conclusions document. Secondly, he has amended the contract in respect of certain changes agreed between MML and L & C. Thirdly, he has amended the existing contract where the parties disagreed on the amendments to be made. These amendments are set out and explained in Section 1 below. Fourthly, he has made a number of changes in the directions as a result of comments by the parties on the draft directions (sent to them for comment on 19 March 2003). These are set out and explained in Section 2 below. Section 2 also explains the Regulator's reasons where he has rejected a change to the draft directions proposed by one or other of the parties.

SECTION 1

REFERENCE	REASON
Clause 1.1 Definitions "Expiry Date"	The Regulator has defined "expiry date" in paragraph 4 of Schedule 1 as: "The earlier of: (a) the date on which the Station is first used as a Rail Link Facility as such term is defined in the CTRL Act; and (b) 28 April 2008." MML proposed in its application a new definition of "expiry date" that was intended to accord with the expiry date in its track access agreement. The proposed definition was as follows: "The date on which St Pancras Station being a Rail Link Facility as such term is defined in the CTRL Act which for the avoidance of doubt is the date on which London St Pancras is first used for the carriage of fare paying international passengers by trains through the Channel Tunnel." L & C proposed an alternative form of words to that proposed by MML to ensure that the new contract terminates on the expiry of MML's franchise agreement in the event of the CTRL station works not having been completed by then. L& C proposed that the "expiry date" should be (i) the earlier of the event in MML's definition, or (ii) the expiry or earlier termination of the Franchise Agreement, or (iii) 28 April 2008. The Regulator has agreed with MML that clause 5.2 (A)(7) of the

REFERENCE	REASON
	new contract termination of the contract if MML's franchise is terminated, and therefore it is unnecessary to cover this eventuality in the definition of "expiry date". He has decided to amend the wording of MML's definition of "expiry date" and also to include a long-stop termination provision relating to the termination of MML's track access agreement. The Regulator considers that the revised wording provides certainty and links to the provisions of section 17 of the Channel Tunnel Rail Link Act 1996, concerning the application of section 17, 18 and 19 of the Railways Act 1993 to rail link facilities (see also paragraph 1.10 of this document).
Clause 1.1 Definitions "Franchise Director":	The Regulator has amended the term "Franchise Director" in the new contract to read "the Strategic Rail Authority". MML argued in its further representations, that under section 25 of the Transport Act 2000, the term Franchising Director is deemed to mean the Strategic Rail Authority. The Regulator has accepted the amendment proposed by L & C because the section of the Transport Act 2000 quoted by MML was aimed at existing contracts, and it was not intended that new contracts should contain out-of-date information.
Clause 2.1(A)	The Regulator has added after the words "section 7 of the Act" the words "or section 16 of the Channel Tunnel Rail Link Act 1996." L & C proposed amending MML's contract by adding at the end of Clause 2.1(A) "or is not required to be so authorised under the CTRL Act" to reflect the exemption granted by the CTRL Act. MML argued that the amendment is unnecessary. The Regulator has not adopted the amendment proposed by L & C, but has amended the clause so that that it reflects the statutory position.
Clause 7.1	The Regulator has not deleted this clause as proposed by L & C. L & C argued that as the CTRL Implementation Date has passed, the clause should be deleted. MML argued that the deletion is unnecessary. The Regulator has accepted that the reference to a date that is passed is unnecessary and should be deleted. But he has decided to retain the provision that the station facility owner and the beneficiary should comply with their respective obligations "under Schedule 4".
Schedule 1-paragraph 8	MML proposed the wording "Access Charge for the period from the Commencement Date until 31 March 1997 £[redacted]".

REFERENCE	REASON
	L & C proposed instead "Access Charge for the period from the Commencement Date until 31 March 2004 £ [redacted] " because it represented the updated charge. MML argued against L & C' s proposal on the grounds that the updated figure is irrelevant. It stated that the figure MML used was intended to set out the proportion payable for the access charge for the period from 19 April 1996 to 31 March 1997, on the basis that there was not going to be a full financial year. The Regulator has decided to include the uprated figure supplied by L & C because this has now been accepted by MML as an appropriate figure.
Schedule 4-Part 1 "Base Index Figure"	The Regulator has updated to the base index figure for August (third quarter) 2002 as proposed by L & C for clarity.
Schedule 4-Part 1 "Route"	The Regulator has decided to amend paragraph (5) of this definition so that it reads, "is such that the relevant Facility is able to achieve the Overall Performance Requirement (as such expression is defined in Part 18 of the Station Access Conditions)". L& C proposed the deletion of paragraph 5 because it argued that a "Route" is not a "Facility" and therefore "Overall Performance Requirement" did not apply. MML argued against L & C's proposal stating that the Route to be measured had to be one that allowed for the facility to be suitable for its purpose and that, therefore, Overall Performance Requirement did apply. The Regulator has agreed with MML and has given effect to the proposal by the addition of the phrase "…such that the relevant Facility is able to achieve…".
Schedule 4-Part 1 Paragraph 11.1.1	The Regulator has decided to accept the amendment, proposed by L & C, to delete the reference to the CTRL Implementation Date because that date has now passed. L & C also proposed updating the compensation figure, contained in this paragraph, intended to cover project liaison costs. MML considered that there is a disadvantage in using the figure proposed by L & C if the base index used for uprating remains March 1996, and that change would require indexing the figures up to March 2003.

REFERENCE	REASON
	The Regulator disagrees with MML and has taken as the base August (third quarter) 2002.
Schedule 4-Part 1 Paragraph 11.1.2	The Regulator has decided to accept the amendment, proposed by L & C, to delete the reference to the CTRL Implementation Date because that date has now passed.
Schedule 4-Part 1 Paragraph 11.2.1	The Regulator has decided to accept the amendment on the lines proposed by L & C because of the reference of the existing agreement to the CTRL Implementation Date, which has passed. For the avoidance of doubt, he has also added the expiry date of the contract to such time, until which payment for general damage will continue.
Schedule 4-Part 1 Paragraph 11.2.2	The Regulator has decided to accept the amendment, proposed by L & C, to delete the reference to the CTRL Implementation Date because that date has now passed.
Schedule 4-Part 1 Paragraph 12.2	The Regulator has decided to retain paragraph 12.2 for use in the calculation of compensation for the non-provision of certain key facilities, the closure of which would lead to station closure, and has rebased fixed daily revenue on the figures for the financial year 2002/2003. L & C proposed that paragraph 12.2 be deleted because it proposed fixed sums for the non-provision of each facility, arguing that there was no link between non-provision of the facilities and MML's revenue. MML argued that fixed daily revenue is used only in relation to non-provision of those facilities that impact on the ability of the Station to remain open and that therefore that it remained a suitable base for compensation. The Regulator has concluded that facilities, the closure of which does not affect the ability of the station to remain open, should not be compensated on the basis of fixed daily revenue, but in accordance with their value to MML operations (calculated in line with standard industry techniques). However, for facilities that do affect the ability of the station to remain open, the Regulator sees a direct link with MML's revenue and concludes that the provisions in paragraph 12.2 are appropriate.
Schedule 4-Part II Paragraphs 3 and 4	The Regulator has decided not to delete these paragraphs. L & C proposed their deletion on the grounds that the routes have now all been agreed and measured.

REFERENCE	REASON
	MML argued that they provided useful guidance for measuring changes to routes. The Regulator, having taken note of the recent amendment to the Schedule of Agreed Walking times, has concluded that these paragraphs may provide a helpful reference point to the parties.
Schedule 4-Part III	The Regulator has decided to include Facility 48 in the facility compensation tables because it is included in Annex 13 to the St Pancras Station Access Conditions and he is not seeking to make any amendments which will require subsequent amendment of the station access conditions or the Annexes to the station access conditions.
Schedule 4-Part III	In respect of item 50, the Regulator has decided to amend the movement fee for poster sites to read "£ [redacted] + £ [redacted] per site as per Annex 13 of the Station Access Conditions". L & C proposed that the movement fee should only be triggered in case of relocation of all poster sites. MML argued that "half or more" should be inserted at the beginning. The Regulator's decision essentially retains the existing compensation provisions for posters, because this appears to be the most practical and measurable approach. Annex 13 sets out the standard and quantum of certain facilities to be provided during and after the construction work.

SECTION 2

COMMENTS FROM MIDLAND MAIN LINE LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
1.	Clause 1.1: Definition of "Certificate of Commencement"	The Regulator has deleted this definition because the definition is not used.
2.	Clause 1.1: Definition of "Franchise Commencement Date"	The Regulator has deleted this definition because the definition is not used.
SCHEDULE 1		
3.	Paragraph 8 of Schedule 1	The Regulator has inserted a fixed charge to apply from the commencement date to the end of the first year of the contract, being an apportionment of the full annual charge for that first year. This is because the contract will not commence on the beginning of a financial year.
SCHEDULE 3		
4.	Schedule 3 Paragraph 2	The Regulator has, at the request of MML, updated the MML's address in the contract as follows:- Post Code: DE1 2SA Fax No: 01332 2623008
SCHEDULE 4		
5.	Definition of Final Location	The Regulator revised the definition of "Beneficiary's Location" to provide a more appropriate reference to MML's current use of the station.
6.	Definition of "Interim Location"	This was also amended in line with item 5.
7.	Definition of "Original Time"	The Regulator has amended the definition to refer to Decimal Minutes for consistency and accuracy.
8.	Paragraph 5.1	MML was concerned that the text of the draft directions was too narrow, only providing compensation for curtailment where a curtailment notice was given. This was not the intention of the drafting, which has therefore been amended to cover the situation where no curtailment notice has

COMMENTS FROM MIDLAND MAIN LINE LIMITED ON DRAFT DIRECTIONS		
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		been given.
9.	Paragraph 5A:1	The text follows the text in paragraph 5.1 for the same reason.
10.	Paragraph 6.3	The Regulator agrees that the netting off of benefits should not be back-dated. However, where, on the commencement date of the new contract, a reduction in walking time has been achieved compared to the original walking time, the benefit of this reduction should be applied to compensation payments from the commencement date of the new contract. Clarificatory drafting to this effect has been inserted in paragraph 2.2.
11.	Paragraph 11.2.2	The Regulator has deleted the word "**not**" from line 2 in Clause 11.2.2, which was included in error.
12.	Part II - Annex	MML suggested that the reference to time in this annex should be qualified as being measured to two decimal places. However, the Regulator has concluded that there is no need to amend the directions because "Time" is already defined as being measured in Decimal Minutes to two decimal places.
13.	Part III - St Pancras Facility Movement Fee Table	Items 37 to 43 in the Movement Fee Table were omitted in error in the draft directions, and have now been included. Item 44 has been deleted by agreement of both parties. The reference number for computer hardware has been corrected from 46 to 37.
14.	Part V Compensation Facility Table (Transport)	MML questioned why bus stops had been combined with the Euston Road. Most buses will serve Euston Road. Bus stops may be moved for a variety of reasons outside of the CTRL works and different services may stop in different locations. The use of bus stops/routes is also clearly outside of L & C control. The Regulator considered, therefore, that pedestrian access to Euston Road will cover access/egress to buses and that this will avoid the possibility of disputes over the relevant stops from

COMMENTS FROM MIDLAND MAIN LINE LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
		which to make measurements and any future or temporary changes in bus routes and /or stops which may incur compensation. He considers it appropriate to classify bus passengers as pedestrians for the sake of the compensation provisions.
15.	Schedule 4 Part V Compensation Facility Table (Concourse) – Note B	The Regulator agrees with MML's suggestion that this note is unnecessary, and can be deleted so that the parties rely on the operative legal provisions in Clause 8.2.1.

COMMENTS FROM LONDON & CONTINENTAL STATIONS & PROPERTY LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
1	Paragraph 6.1 (1) and Paragraph 8 of Schedule 1 – inclusion or exclusion of a fixed charge from the commencement date of the new contract to the end of the first year.	See the response to MML's point 1 (above).
SCHEDULE 4		
2	Definition of "Distance":	The definition of "distance" requires distances to be expressed to two decimal places. L & C pointed out that this implies that one centimetre equates to a walking time of 0.00012 minutes. L & C argued that this is incompatible with the definition of "Time", which requires the time to be expressed in decimal minutes to two decimal places, and that Distance should be expressed to a more realistic degree of accuracy, i.e, to one rather than to two decimal places.

COMMENTS FROM LONDON & CONTINENTAL STATIONS & PROPERTY LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
		The Regulator considers there is no incompatibility in expressing walk distance to two decimal places and then expressing the respective walking time calculated from that distance also to two decimal places. The exact answer to the calculation may have more than two decimal places but this can easily be rounded. He has therefore made no change to the drafting of the directions on this point.
3	Paragraph 6.2.2	L & C proposed the deletion of the words "multiplied by the amount of minutes by which the Time agreed or determined pursuant to paragraph 4 exceeds the Original Time for the Facility", stating that this did not accord with the parties interpretation of the existing station access agreement. The issue of interpretation of the existing contract is considered in paragraphs 5.61 to 5.67 of this document. The Regulator's directions are intended to give effect to his conclusions, not to replicate the parties' interpretation of the existing compensation regime.
4	Paragraph 8.3	L & C noted that this paragraph in the draft directions, which referred to the rounding up to one minute of increases in walking time of less than a minute, should be deleted, because this rounding concept has been removed in the new contract. The Regulator agrees, and has made the necessary deletion.
5	Paragraph 11.2.2	The draft directions included a superfluous "not" in this paragraph, which the Regulator has removed.
6	Paragraph 17	L & C argued that the paragraph in the draft directions under which the parties expressly agreed that the compensation levels in the contract represent a genuine pre-estimate of the loss to MML's business, is inappropriate where the terms of the contract are being imposed in it by the Regulator under section 17 of the Railways Act 1993. Paragraph 17 reproduced

COMMENTS FROM LONDON & CONTINENTAL STATIONS & PROPERTY LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
		an identical paragraph in the existing agreement. The Regulator has undertaken a detailed and rigorous process to identify the future impact on MML's business of the CTRL construction work at St Pancras Station, as a basis for compensation to MML, as described in Chapter 5 of this document. He consider that his conclusions represent the most accurate assessment of this impact. However, he recognises that it may not be appropriate to **require** L & C to express a view that it does not hold. He has therefore omitted the relevant paragraph in his final directions.
7	Part II – Existing Public Routes Item 44 (Security Officer's Acc) should be deleted, as it is no longer required by MML. In this regard, please refer to Part B2 of MML's Response to LCSP's Written Representations of 6 November 2002 (points 45 and 46).	L & C argued that the Descriptions on pages 43 to 45 (paragraphs 3 and 4) of Part II of the directions are superfluous as they are replaced by the Schedule of Agreed Walking Times (pages 46 et seq.). However, following earlier representations made by MML on this point, the Regulator considers that it may be helpful to retain these provisions to provide guidance on methodology used. This is also consistent with his approach of minimising the volume of changes he has made in comparison to the existing agreement. The Regulator accepts the comment on Item 44 (Security Officer's Accommodation) for the reasons given and has deleted the item.
8	Part III	L & C pointed out that superfluous wording had been included in the draft directions relating to poster sites. This has, accordingly, been removed.
9	Part V	L & C pointed out that Part V of the draft directions contained a reference to "Existing Walking times". Since this term has been

COMMENTS FROM LONDON & CONTINENTAL STATIONS & PROPERTY LIMITED ON DRAFT DIRECTIONS		
ITEM NO	**REFERENCE IN DRAFT DIRECTIONS**	**COMMENT**
		replaced by the term "Original Time", the reference needed updating. The Regulator has made the necessary amendments. Also, the parties had reached agreement over amendments to the original time for certain facilities. These amended "base" times, set out in Part III of Schedule 4 to the contract, have now been included.
10	Annex II – Schedule of Agreed Walking Times	L & C pointed out that the title on the first page is incorrect. The Regulator has therefore deleted the word "Annex".