



Model freight customer contracts

March 2019

Introduction

1. This module provides detailed guidance on completing the model contracts for freight beneficiaries (freight customers) who wish to hold track access rights in their own name and the freight operating companies (freight operators) that they appoint to move their goods by rail:
 - the model freight customer track access contract (freight customer contract); and
 - the model freight customer specific track access contract for freight operators (freight operator customer contract).

Apart from where specified otherwise, this guidance applies to both model contracts. We encourage the use of the relevant model contracts by Network Rail and freight customers and operators.

2. The freight customer contract is between a freight customer and Network Rail, and permits a freight customer to secure track access rights direct from Network Rail. The freight operator customer contract is a separate agreement between the freight operator and Network Rail. This contract allows a freight operator to operate on behalf of the freight customer once formally appointed to do so through a Drawdown Notice. A further Revocation Notice acts as a mechanism to withdraw the freight customer's access rights from being used by the nominated freight operator.
3. This guidance is not intended to replace any professional legal advice the parties may wish to take when producing a draft contract or amendment for approval, especially in exceptional circumstances where special arrangements may apply to a freight operator or customer. It is important that those drafting a contract consider their specific contractual requirements and any bespoke arrangements that may be necessary.

4. We encourage early discussions with us, especially if a contract is not straightforward or departs from the terms of our model contracts. Please contact us at any time if you would like to discuss any aspect of your case¹.

The front end of the contract

5. The model contracts contain a 'front end' which sets out the rights and obligations of the parties to the contract, as well as incorporating various schedules that detail the nature of those rights and obligations.
6. We recognise that in certain circumstances there may be grounds for the adoption of bespoke provisions. Any customisations that are made should not change the numbering of the subsequent template standard provisions. Where provisions are not required, the text should be deleted and replaced with "Not used". Any inclusion or exclusion of provisions should be explained in the Form F for the application.

The date of the contract

7. The very first line of the contract, just after the contents page, provides for the insertion of the date on which the contract is signed (and therefore made). The contract should be signed and dated only after ORR has directed Network Rail to enter into the track access contract with the freight customer or operator. It is not sufficient merely to put the date on the front cover of the contract as this is not legally part of the contract.

Parties to the contract

8. This section should contain the company name, address and company number, as registered with Companies House, of Network Rail and the freight customer or operator, who is the beneficiary to the contract.

Clause 1.1 – Definitions

9. The key terms used in the contract are defined in clause 1.1. Some of these definitions require the parties to insert specific information, as set out below.
10. The following definitions require the insertion of the date the freight operator may first operate services under the contract:
 - a) Contract Year (this date should normally be the same as the Effective date in clause 3.1) (freight operator customer contract).

¹ Email us at: track.access@orr.gov.uk

- b) Drawdown Commencement Date (this date may be the same as the Effective date in clause 3.1) (freight customer contract).
 - c) Engineering Access Statement (EAS).
 - d) Timetable Planning Rules (TPR).
11. The expiry date of the contract is the date on which the contract will expire as provided for by clause 3.5 (freight operator customer contract) or clause 3.1 (freight customer contract), unless the contract:
- a) lapses under clause 3.4 because of the non-fulfilment of the conditions precedent listed in clause 3.2 (freight operator customer contract); or
 - b) is terminated under Schedule 6 (because of an Event of Default).
- The expiry date needs to be specified by the parties.
12. When considering the duration of a contract the parties should have regard to our guidance module *Duration of framework agreements*².
13. The Longstop Date is the date by which the contract will lapse under clause 3.4 if the conditions precedent have not been met. The parties need to specify this date (freight operator customer contracts).

Clause 3.1 – Effective date (freight operator customer contract)

14. This requires the insertion of the date on which the provisions of the contract (aside from clause 5) take effect. Clause 5 is the clause by which Network Rail grants the freight operator permission to use the network. The contract will only take effect once:
- a) the conditions precedent in clause 3.2 have been fully satisfied; and
 - b) all other provisions in the contract have taken effect (as provided for by clause 3.1).

It is the effective date, and not the date of signature, which will normally bring the contract into force. It is therefore important to ensure that the effective date is a date which is earlier than all of the dates on which the operative clauses within the contract take effect.

Clause 5 – Permission to operate (freight customer contract)

15. This clause recognises that a freight customer is an access option holder as defined under section 17(6) (b) of the Railways Act 1993 (the Act). It provides a mechanism by which the freight customer can exercise its access rights by drawing them down

² <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

into the appointed operator's freight operator customer contract and provides a mechanism for the freight customer to revoke the appointed operator's right to operate the services. This clause also provides for a freight customer to appoint a timetable agent to participate in the timetabling process on its behalf.

Clause 5.10 – freight customer access rights (freight operator customer contract)

16. This clause defines what the freight operator's rights, obligations and liabilities are in relation to the access rights the freight customer allocates them and the mechanism by which the freight customer assigns the access rights to the freight operator. The clause also states that the freight operator customer's contract remains in place and expires subject to clause 3.5 even after the access rights a freight customer has designated them have been revoked.

Clause 11.3 – Restrictions on claims by freight customer (freight customer contract)

17. This clause specifies the limits of Relevant Losses that the freight customer can claim for indemnity. This excludes losses resulting from delays or cancellations but includes losses that the freight customer would not have suffered under the terms of the contract if not for the breach and credit for any savings as a consequence of incurring the amounts.

Clause 11.6.5 – Indexation of Indemnity Incident Cap (freight operator customer contract)

18. This clause requires the insertion of the value of the Indemnity Incident Cap for the first Contract Year and for indexation in future years in line with the Consumer Price Index.
19. The figure set for the indemnity cap in a freight operator's customer contract should match the indemnity cap set in the freight operator's own track access contract. This ensures that neither the freight operator's or Network Rail's liability increases as a result of drawing down rights from the freight customer contract. Accordingly there should be a common liability cap for all the freight operator's access contracts that are connected to its track access contract.

Clause 12 – Governing law

20. This clause provides for the contract to be subject to the laws of England and Wales. If both parties agree to the contract being subject to Scottish law, for example because the freight customer or operator is based in Scotland, the provisions of the contract will need to be adjusted appropriately.

Clause 13.1 – ADRR

21. This clause outlines that any Relevant Dispute will be resolved under the Access Dispute Resolution Rules (ADRR) unless one of the alternative avenues listed in the clause is used.
22. Any party that wishes to use ADRR as a resolution method must pay an annual levy fee to the Access Dispute Committee as a Resolution Service Party. This applies to all parties who have a track access contract with Network Rail, including freight customers.

Clause 16.1.2 – Delivery of invoices

23. This clause provides for the delivery of invoices by both facsimile transmission and/or email to the addresses specified in Schedule 1, if the parties wish to use these methods.

Clause 18.4.1 – Giving of notices

24. This clause provides for the giving of notices by both facsimile transmission and/or email to the addresses specified in Schedule 1, if the parties wish to use these methods.

Clause 18.5 – Counterparts

25. Clause 18.5 provides that the contract may be executed in counterparts. This enables each party to sign their own, identical copy of the contract so that, when assembled together alongside the other party's signed copy, they will form one fully signed contract. The parties will need to ensure that they are both signing the same version of the contract.

Clause 18.7 – Contracts (Rights of Third Parties) Act 1999

26. Clause 18.7 is designed to ensure that only the parties to the contract can enforce the terms of the contract. The only exception is ORR, which can enforce the rights given to it under the contract (including the Network Code). This clause should only be included in contracts governed by the laws of England and Wales.

Clause 18.7.3 – Contract Amendments (freight operator customer contract)

27. This clause requires the insertion of the date on which the freight operator wishes to start operating services under the contract. In the freight customer contract this date would be the Drawdown Commencement Date, which is specified in the freight operator customer contract, therefore no further date is required.

Clause 18.7.4 – Application to Appointed Operators (freight operator customer contract)

28. This clause permits the freight customer’s appointed freight operator to provide notice as specified in clause 18.4 of the contract.

Schedule 1 – Contact particulars

29. This schedule should set out the addresses and contact details of the parties for the service of notices. The parties may, under clause 18.4.2, make changes to this schedule without ORR’s approval. Any changes must be notified to the other party as soon as reasonably practicable and to ORR within 14 days of being made.

Schedule 2 – Information to assist submitting an access proposal or train operator variation request

30. This schedule sets out the process by which a freight operator or freight customer (or its timetable agent) can obtain information about the network from Network Rail that is not contained in certain rail industry documents in order for it to make an access proposal for a train slot. For a timetable agent to be able to exercise these rights, it will need to be appointed by the freight customer and the freight customer will need to notify Network Rail in accordance with clause 5.6.2.
31. The schedule also sets out a process if the parties fail to agree on the nature of the information to be provided by Network Rail. No customisation is required for this schedule.

Schedule 3 – Collateral agreements (freight operator customer contract)

32. This schedule lists any collateral agreements which, under clause 3.2(c), must have been entered into (executed and delivered) before the freight operator’s “permission to use” the network under clause 5 takes effect. Schedule 6 provides that the breach of a collateral agreement may amount to an Event of Default, which could lead to the suspension or termination of the contract.

Schedule 3 – Forms of notice (freight customer contract)

33. This schedule sets out the notices which the freight customer will use when drawing down or revoking its services from an Appointed Operator.

Part A – Form of Drawdown Notice

34. The Drawdown Notice is used by the freight customer when drawing down its services to an Appointed Operator. This will need to be completed by the freight customer and sent to Network Rail, copying in ORR.
35. Paragraph (e) will require the freight customer to select which options provided are needed, depending on whether the freight customer has exercised its rights under Schedule 4 or not. If the freight customer has not exercised its rights, (i) should be used.
36. If the freight customer has exercised its rights under Schedule 4, it will need to state if any of its services are excluded from being drawn down to the Appointed Operator. It will also need to add which Train Slots, and any Alternative Train Slots, are to be incorporated into the Appointed Operator's freight operator customer contract.
37. There is also a table provided in the Drawdown Notice to list any Train Slots where Network Rail has exercised its Flexing Rights, pursuant to D4.3.2 of the Network Code, and the freight customer has consented to the changes.

Part B – Form of Revocation Notice

38. The Revocation Notice is used by the freight customer when revoking the Appointed Operator's right to run specific services on its behalf. In Paragraph 2, the date and time inserted should correspond to a date and time immediately following operation of the Final Service.

Schedule 4 – Variations to services

39. This schedule sets out the process whereby a freight operator is compensated for variations to its services by Network Rail, including where services have been drawn down in the freight customer contract. With the exception of the alternative train slot provisions, the compensation arrangements are not incorporated into freight customer contracts as the freight customer is not operating the services.
40. In the freight customer contract, any arrangements for an alternative train slot established under this schedule before a Drawdown Notice is issued to an Appointed Operator forms part of the Drawdown Notice. Once the freight customer has appointed a freight operator, then the Schedule 4 provisions in the relevant freight operator customer contract are used and those in the freight customer contract can no longer be invoked.

41. The general operation of Schedule 4 is discussed in further detail in our *Possessions* module³.

Schedule 5 – Services

42. Schedule 5 describes in detail the services the freight operator or customer may run on the network (i.e. the number of trains) and the characteristics of those rights (for example, arrival and departure windows, route, types of trains).
43. The model contracts do not restrict access across Network Rail's network as it is recognised that freight operators and freight customers need the greatest flexibility possible to meet their customer and commercial requirements. Permission to use the whole network does not mean that a freight operator or customer has firm rights for all the services it wishes to run, but means that it can make train operator variation requests for train paths on any part of the network. The terms of a freight operator or freight customer's permission to use the network will always be subject to the Network Code and the Operating Constraints.
44. Schedule 5 has been retained substantially in the freight customer contract, on the basis that the freight customer will itself make an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request under Schedule 5. The freight customer can also appoint a Timetable Agent to do so on its behalf (see clauses 5.6.2 to 5.6.6) or require an Appointed Operator to exercise its corresponding rights under Schedule 5 to its freight operator customer contract in relation to the Drawdown Services that it has the right to operate.
45. Operating Constraints are defined in the model contracts as the EAS, TPR and the working timetable and all appendices to the working timetable including sectional appendices as defined in the working timetable and all supplements to the sectional appendices.
46. Paragraph 2.4 provides for the specification of arrangements for the treatment of Public Holidays. The parties will need to insert their desired provisions here.
47. Paragraph 4.3 allows the parties to add rows to the Rights Table, labelled "Non-contractual Comments" that are for information only and do not form part of the contract.
48. Paragraph 5 provides a mechanism for the parties to amend the Rights Table after the Principal Change Date in 2019 and to appeal to ORR if they cannot reach

³ <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

agreement⁴. This is in addition to the requirements set out in sections 22/22A of the Act.

Guidance on completing Schedule 5 Rights Table

49. Annexed to Schedule 5 of the model contracts is a Rights Table. It describes the details and the number of services a freight operator may operate, or a freight customer may appoint a freight operator to run on its behalf (that is, the number of trains) and the characteristics of those rights (for example, Origin and Destination, Arrival and Departure Windows).
50. Schedule 5 has been designed so that the consistent description of access rights in the Rights Table matches the characteristics of train slots in the timetable that a freight operator needs to operate its services, or that a freight customer wants to be operated on its behalf. The process by which access rights are used to develop the timetable is set out in Part D of the Network Code (Part D).
51. The Rights Table provides for freight operators or customers to have two types of access right: firm rights and contingent rights. A firm right is a right to a train slot with specific arrival and departure windows on specified days of the week. These windows will be for one to 24 hours. A contingent right, whilst not being a firm right, will have similar characteristics. Contingent rights may not always be granted a train slot by Network Rail as it must first satisfy all other operators' firm rights.
52. Network Services, as defined in section 82(2) of the Act, should not be included in the Rights Table.

Rights Table

53. The Rights Table is divided into seven groups of columns:

Columns A-C (For Information)

54. These columns cover the Service Group Reference, Flow Number and Train Reporting Number. Completion of these columns is not mandatory. Whilst these columns do not form part of the contract, entering appropriate details here helps to identify particular access rights against specific train services.
55. The Service Group Reference is intended to identify access rights relating to particular customers. They can also inform the process of transferring access rights

⁴ For further information, read "*Improving Schedule 5 of the Model Freight Track Access Contract: ORR conclusions*", January 2016, http://orr.gov.uk/data/assets/pdf_file/0019/20638/schedule-5-of-the-model-freight-track-access-contract-conclusions-2016-01-20.pdf.

(under the process in Part J of the Network Code) between freight operators where, for example, a customer freight haulage contract is re-tendered and won by another freight operator. The parties may, by mutual agreement, amend the Train Reporting Number without our approval.

Columns 1-6 (Origin Data) and 7-11 (Destination Data)

56. These two groups of columns provide details of service origins and destinations, including minimum turnaround times, departure and arrival windows, days of the week on which services may be operated, and unique stanox numbers to show the location where the train begins and ends its journey. Departure and arrival windows must not be completed for contingent rights.

Columns 12-15 (Additional Data)

57. These columns set out a number of other characteristics of the access rights including the routing of services, intermediate calling points and the minimum time that a train must spend at such points. They also identify any special terms relating to the train, such as train length exceeding the EAS. Again, routing and minimum dwell time at intermediate points must not be completed for contingent rights.

Columns 16-19 (Equipment Characteristics)

58. These columns provide for the expression of certain information to identify the characteristics of the service to be operated. In the interests of flexibility, we wish freight operators and customers to be able to vary the rolling stock they operate on particular services or service groups. However, such flexibility cannot be open-ended because the right to run stock with different operational characteristics such as speed, acceleration and deceleration could have an adverse effect on the efficient use of capacity in restricting the compilation of the timetable. It could also constrain Network Rail's ability to model future timetables and thus impede its ability to be clear about the extent of capacity available.
59. Therefore, these columns will need to express a timing load. The Timing Load is used in creating the timetable and represents the type of locomotive, the trailing load and the maximum speed (or an equivalent locomotive type and associated trailing load which the actual locomotive and formation to be used will be able to maintain). The firm rights held on a route are only valid if an access proposal is made under Part D to operate the Standard Specified Equipment (Timing Load) – or to better it.
60. The Equipment Characteristics columns of the Rights Table also set out the maximum permissible length of the train and the loading gauge of the train. These are only to be populated where these characteristics exceed those normally permitted within the Operating Constraints.

Column 20 (Contract Miles)

61. The parties negotiate and agree the miles to be travelled for each service. This figure is used to calculate the track access charges in Schedule 7, and forms the basis of the calculation of the freight capacity charge. This also means that, where a train is diverted over a longer route because of restrictions of use, the freight operator or customer does not pay more while being disadvantaged.

Non-contractual comments

62. The freight operator or customer may present its preferred routings, paths or additional detail in its Rights Tables as 'non-contractual comments', as described in paragraph 4.3. These rows can inform and assist planners. However they do not form part of the contract and are not binding on the parties.

Completion of columns by access right type

63. The requirement for completion of individual columns by access right type is discussed below.

Firm rights

64. The following specific information should be inserted into the Rights Table:

Origin data

- a) Minimum Turn Around Time at Origin (column 1) – the time needed in minutes to load the train.
- b) Days per Week (column 2) – the days of the week on which the service is to run. The abbreviations to be used are defined in paragraph 1 of Schedule 5.
- c) Departure Window (columns 3 and 4) – the departure window in which the service leaves at its destination (for example between 1300 hours and 1400 hours).
- d) Origin (column 5) – the point where the service starts (for example, Hams Hall).
- e) Origin Stanox (column 6) – the numerical identifier of the point of origin (for example 66219 for Hams Hall), which Network Rail will supply.

Destination data

- a) Destination (column 7) – the point where the service ends.
- b) Arrival Window (columns 8 and 9) – the arrival window in which the service leaves at its destination (for example. between 1800 hours and 1900 hours).

- c) Destination Stanox (column 10) – the numerical identifier of the point of destination, which Network Rail will supply.
- d) Minimum Turn Around Time at Destination (column 11) – usually, the time required, in minutes, for unloading/loading/reloading before the train may be timetabled away from the destination.

Additional Data

The inclusion of the following details in the Additional Data section of the Rights Table is not mandatory:

- a) Routing (column 12) – details of the route over which the service will operate. This column should only be completed where there is an exceptional reason for a service to use a particular route, in order to allow Network Rail flexibility in timetabling.
- b) Intermediate Points (column 13) – this column details where the service will stop for an intermediate point. We would expect to see intermediate points specified in exceptional circumstances, where traffic is to be attached or detached, connections made, or where it is necessary to exchange locomotives or crews, or for other operational reasons such as reversals but not, for example, stops for token collection or exchange.
- c) Minimum Dwell Time at Intermediate Points (column 14) – gives the minimum time the service requires to stay at any intermediate point. This may be important to a freight operator or customer who requires a minimum period of time to load/unload or attach/detach at a given point.
- d) Special Terms (column 15) – this column should be completed when it is necessary to indicate any further characteristics which are specific to the service in question but which cannot be given in any other column. This might include details about connections to be made between two services for the transfer of vehicles, any Y Path for the service, path loading/unloading direct from the network or any other unusual characteristics of the service. This column could also be used where a service would require a brief stop to comply with drivers' hours requirements, to define the requirements for other Intermediate Points or to provide the justification for requested Routing in exceptional circumstances.

Service Planning Characteristics

- a) Timing Load (column 16) – this must be completed and will, typically, include the maximum speed of the train, any special indications about speed

restrictions applying and/or whether the train conveys containers or heavy axle load vehicles, the locomotive class number, whether the train is to be single or double headed (one or two locomotives) and a shorthand for the weight of the trailing load (e.g. 12 = 1,200 to 1,299 tonnes). Thus, a double headed class 86 hauled container train with a trailing load between 1,200 and 1,299 tonnes and a maximum speed of 75 mph would have a Timing Load of 75C86D12.

- b) Maximum Length of Train (column 17) – this should only be completed where a train is likely to be longer than the normal maximum permitted for the normal planned route that a service would take (i.e. it exceeds the relevant operating constraints). As a longer train length over a specific route may make it more difficult for Network Rail to recess the train in available loops and thereby reduce its flexibility to make best use of capacity and ability to timetable these and other services, we would expect the application to justify the proposed use of a longer train.
- c) Route Availability Code (RA) and Loading Gauge (columns 18 and 19) – these two columns provide the opportunity for the parties to agree that a service will have specific characteristics of route availability and loading gauge, where these are pertinent to the rights being sought. They should only be completed where the relevant operating constraints are exceeded. A specific RA code and loading gauge may restrict Network Rail in the routes it has available, or specific speed restrictions may apply for heavier axle-load or larger containers, which would affect the timings that would have to be incorporated in the working timetable. Such a request would need to be justified by the operator or freight customer.

Contract Miles

- a) Contract Miles (column 20) – to be used to express the distances in miles agreed with Network Rail.

Contingent rights

65. When completing the Rights Table for contingent rights, a number of the columns used in the expression of firm rights will be left blank or shaded grey because contingent rights relate to a quantum of train slots, with no specification as to their timing or routing. Where the columns in the table are completed, we will expect the same level of detail as set out above in respect of firm rights to be provided for contingent rights. The list below therefore only identify where the expression of contingent rights in the Rights Table will differ from that of firm rights:

- a) Special Terms (column 15) – for contingent rights, the term “contingent right” must be included in the Special Terms column; and

- b) Departure Window (columns 3 and 4), Arrival Window (columns 8 and 9) and Additional Data (columns 12 to 15) cannot be known for contingent rights, so these columns will be blank.

If the preferred timing and routing of certain services is known then consideration will need to be given by the parties to designating them as firm rights.

Ancillary Moves

- 66. Under Schedule 5 a freight operator or customer will have firm rights to Ancillary Movements to give full effect to its firm rights.

Schedule 6 – Events of Default, Suspension and Termination

- 67. This schedule sets out the Events of Default and provides for the suspension and termination of the contract where a party is in default.

Schedule 7 – Access charges

- 68. This schedule sets out the charges that the freight operator must pay to Network Rail in return for access to the network and for any electricity traction charges that are incurred.
- 69. Unlike in the model freight contract, Schedule 7 in the freight customer contract sets out only the incremental costs that may arise if the freight customer wants to operate services that do not fall within the Operating Constraints. Charges for the freight customer's services are paid under Schedule 7 in the appointed freight operator's customer contract with Network Rail. The appointed operator and the freight customer may then negotiate any pass through of these charges through an unregulated commercial contract between them.
- 70. The access charges and other figures referred to in Schedules 4, 7 and 8 of the freight operator customer contract are in 2017/18 prices. Paragraph 2.7 of Schedule 7 contains indexation provisions for these figures, providing for them to be adjusted each year from 1 April to reflect inflation. To cater for those contracts that were not in existence in prior years, the provisions provide for the adjustment to the figures to be calculated as if the contract had been in existence on and from 1 April 2019⁵.

⁵ The indexation provisions in the freight operator customer contract are worded slightly differently to those in freight contracts that were amended through PR13. The provisions in the latter were drafted on the basis of a contract being in place immediately prior to 1 April 2014. As this cannot be the case for new contracts in control period 5, the freight operator customer contract has slightly different wording. However, both sets of provisions yield the same result and the charges paid under them are the same.

71. See our *Charging* module⁶ for more information on the track access charging framework.

Schedule 8 – Performance regime (freight operator customer contract)

72. Schedule 8 contains the performance regime. This provides a compensation mechanism for poor operational performance and incentivises Network Rail and the freight operator to improve operational performance. It also helps drive decision making by Network Rail and the freight operators in relation to performance management. Further details are available in our performance regime module⁷.

73. The expectations outlined in our performance regime module will apply whether using the model freight contract provisions or where bespoke arrangements are proposed, although we consider that bespoke arrangements will be the exception rather than the rule.

74. The main body of Schedule 8 sets out the framework of the regime. Paragraph 11.12 contains a list of incident caps and associated access charge supplements per mile (in 2017/18 prices). These prices are the same for all freight operators.

European Train Control System

75. The model contract acknowledges the gradual introduction of the European Train Control System (ETCS) onto the network. The ETCS is an on-board signalling and control system designed to be compatible across the European rail network and will replace the traditional system as Network Rail renews its expired network. Paragraph 12 allows Network Rail or the freight operator to propose amendments to Schedule 8 to cater for the installation of ETCS on any part of the network that they operate on.

76. Any proposed amendments to Schedule 8 for ETCS must be submitted to ORR for our approval.

Appendix 1 to Schedule 8 - Performance

77. Appendix 1 contains most of the metrics for Schedule 8, such as the payment rates and benchmarks.

78. Due to the fact that the freight Schedule 8 is standardised, most of the numbers in Appendix 1 are the same for all freight operators. The only exceptions to this are the

⁶ <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

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Train Operator Cap and Network Rail Cap, which differ between freight operators depending on the scale of their operations:

- a) for small freight operators with a market share of less than five percent of total freight train miles in a given year, the default reciprocal annual cap of £695,394 (2017/18 prices) should be used; and
- b) for operators with a market share of total freight train miles of five percent or more, reciprocal annual caps are specific to each freight operator, as the appropriate level depends on the scale of operations. These caps are subject to our approval and should be set at a level where there is a low likelihood that they will be reached. Otherwise the cap would negate the incentive effect that the performance regime is intended to have.

79. The monetary values throughout Schedule 8 and Appendix 1 are all written in 2017/18 prices, and the contract provides for these to be uplifted to current prices through paragraph 2.7 of Schedule 7. Any new or revised monetary values inserted into Schedule 8 as part of a new or revised contract (such as the Train Operator Cap and Network Rail Cap) therefore must be written in 2017/18 prices regardless of the year of CP6 in which the contract will start.
80. The values for Train Operator Benchmark and Baseline Network Mileage are common to all freight operators with the standard freight Schedule 8 regime. These values were initially set during PR18 (on the basis of 2017/18 data) and Appendix 1 of the freight operator customer contract includes these initial 2017/18 values. As the values for both of these terms can change over time, the freight operator customer contract provides a mechanism in the contract to provide for them to be adjusted annually, as necessary.
81. However, the parties need to ensure that the values for Train Operator Benchmark and Baseline Network Mileage that are included in Appendix 1 correspond to the year in which the contract will take effect (this will be the same as the values being applied to other freight operators for that year). The Baseline Annual Contract Mileage should be written in Appendix 1 as the annual contract mileage for the freight operator during the year before the contract takes effect. For a new freight operator, this will be zero.
82. We have designed the freight operator customer contract so it works when the above amounts are known. In the event that any of them are not known at the time the contract is signed (for example, if the contract is signed before the relevant Train Operator Benchmark and Baseline Network Mileage have been calculated), then it might be necessary for Network Rail and the freight operator to agree some bespoke

amendments. This is to ensure that when the contract takes effect the amounts are consistent with the standardised Schedule 8 used by other freight operators

Appendix 2 to Schedule 8 – Calculation of Minutes Delay

83. Appendix 2 provides information on how minutes delay is calculated.

Appendix 3 to Schedule 8 – Performance Statements

84. Appendix 3 provides for the serving and receipt of interim statements by Network Rail and the freight operator in which performance related incidents and their associated costs are itemised. It also includes a dispute and statement adjustment mechanism.

Schedule 9 – Limitation on liability

85. This schedule sets out the limitations on the liability of each party. In the freight operator customer contract the liability cap in paragraphs 1(a) and 1(b) (i) is left blank and will need to be completed by the parties. The indexation provision in Schedule 9 of the freight operator customer contract should match the indexation provision in schedule 9 of the freight operator's existing freight track access contract to ensure that the Liability Cap under this contract matches the liability cap under that track access contract.

86. In the freight customer contract, the default cap of £6,500,000 in 2019/20 prices is included in the contract. The parties can agree to use a different liability cap in paragraphs 1(a) and 1(b) (i), having regard to our policy on the liability framework⁸.

Schedule 10 – Network Code and traction electricity rules modifications

87. This schedule sets out the mechanism by which consequential modifications may be made to the model contracts as a result of changes to the Network Code and, in the freight operator customer contract, the traction electricity rules. When changes are made to the Network Code, under the procedure in Part C of the Network Code, these are incorporated by reference into track access contracts and take effect even if the contract does not make specific reference to the changes. Consequential modifications to track access contracts may be needed, to provide clarity and to avoid ambiguities developing between provisions in a consolidated track access contract and in the Network Code (e.g. a defined term in the network code could be replaced or modified and consequential changes to track access contracts would bring them into line and avoid ambiguity).

⁸ <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

88. The traction electricity rules are a common set of regulations that apply to all operators who have elected to have their electrically powered services subject to on train metering so that their traction electricity consumption is charged according to their actual metered usage rather than by a modelled calculation. If applicable the rules form part of the freight operator customer contract. Modifications made to the traction electricity rules are incorporated into the track access contract with automatic effect when specified by ORR through a modification notice. Any operators wishing to transfer from modelled traction electricity charges to on train metering must have their track access contract amended with ORR's approval under section 22 of the Act.
89. This schedule does not require the applicant(s) to specify any particular information within it.



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