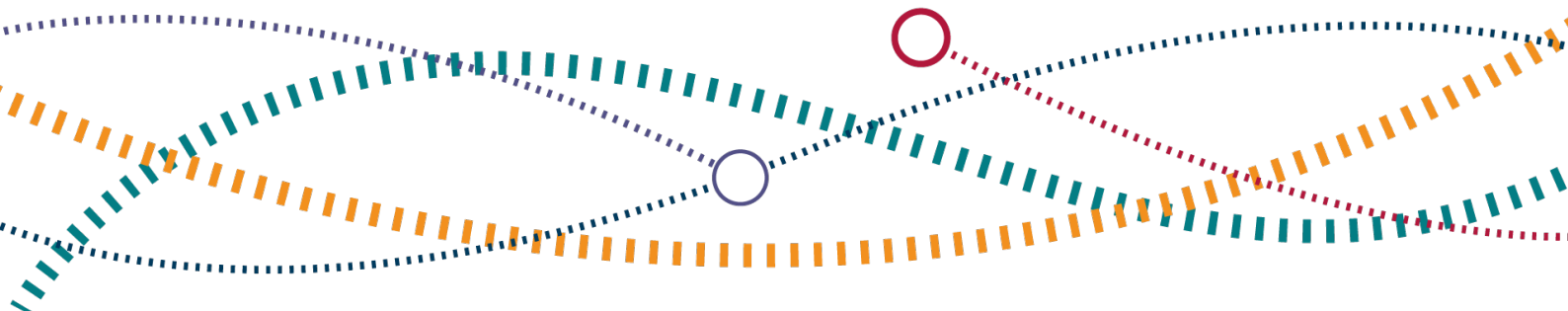




The use of capacity

29 July 2022



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Introduction

1. When directing or approving new or amended access rights, we must ensure the fair and efficient allocation of network capacity. That entails making judgements about:
 - (a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements; and
 - (b) the operational integrity of the services in a proposed contract and their wider implications for network performance.

2. This module discusses the issues we expect to consider when in making these judgements. It addresses in turn:
 - (a) capacity allocation and utilisation;
 - (b) the Long Term Planning Process;
 - (c) safety;
 - (d) operational integrity;
 - (e) Defeasance;
 - (f) capacity choices;
 - (g) rights must be used;
 - (h) enhancement;
 - (i) Congested infrastructure; and
 - (j) ancillary movements.

Capacity allocation and utilisation: our role

3. Our role is to oversee the fair and efficient allocation of network capacity by the infrastructure manager, and determine that allocation in certain circumstances, for example, where an operator has been unable to reach agreement with the infrastructure manager.
4. In order to do this we need to understand the views of other train operators, potential train operators, and funders whose services or potential services may be affected by an application for access rights. Please refer to our module on the '[industry code of practice for track access application consultations](#)' which was, in itself, developed in consultation with the industry.
5. We are obliged by our statutory duties to have regard to the funds available to the Secretary of State for the purposes of his functions relating to railways and railway services, and any general guidance from the Secretary of State, Scottish Ministers or Welsh Ministers. The Department for Transport (DfT), Scottish and Welsh Ministers, Combined Authorities, Integrated Transport Authorities (ITAs) and Passenger Transport Executives (PTEs) (which are accountable to ITAs) will also be interested in any application which has a potential impact on securing value for money, given their respective budgets.
6. We will ensure that these organisations have the opportunity to make representations, where relevant, on individual applications for track access contracts. Their views of network capacity should be informed by the work that Network Rail is undertaking on the Long Term Planning Process, which will also help to inform our decisions on the allocation of capacity for specific applications, particularly when we are considering likely changes to the pattern of services over time.

Long Term Planning Process (LTPP)

7. Condition 2.6 of Network Rail's [network licence](#) requires it to “*establish and maintain long term plans to promote the long term planning objective*” and sets out the process that Network Rail must follow in establishing or amending a long term plan. This replaced the previous Route Utilisation Study (RUS) process.
8. We consider that the determination of what long term plans should be made for the network (and therefore, whether or not a LTPP study is fit for purpose) is a decision best managed between Network Rail (via the long term planning objective under the licence) and funders directly. We do not expect to comment on the proposals in any draft or final documents, nor contribute to individual studies, except where these reflect particular areas of regulatory focus. We will, however, continue to manage any situation in which a party is concerned that they have not been treated fairly under the LTPP.
9. The LTPP includes an extensive consultation process, after which Network Rail publishes the completed proposed long term plan. If a party considers it has been unfairly treated or its views have not been given due consideration during the development of a LTPP study it can make representations to ORR within 30 days of publication. If we receive no representations we take no further action and Network Rail, having taken into account the views of funders, may establish the study. If we receive any representations we will consider them along with Network Rail's response before deciding (within 60 days of publication) whether to issue a notice of objection together with an explanation of why we have objected. In this situation Network Rail should publish and provide ORR with a revised proposal which addresses any deficiencies previously identified.
10. Network Rail has established long term plans for all the various regions of the country, as well as a freight long term plan and a network long term plan. These long term plans will be reviewed periodically. See [Network Rail's website](#) for further information on the LTPP.
11. We will expect to take into account the strategies described within long term plans when making access decisions, and whether proposed new rights are consistent with the long term plans. Long term plans should not assume that existing rights can be overridden: indeed, they should reflect existing rights. But neither would we expect to reject an application for proposed additional rights solely on the basis that those rights are not explicitly mentioned in relevant long term plans.

12. In their application form, applicants should state how the proposed access rights relate to relevant long term plans (including the freight long term plan). If proposed access rights are not consistent with a long term plan, the application form should explain the reasons for this and describe any benefits that this divergence might have, as we would need to understand and agree the public interest reason for this.

Safety

13. We are unlikely to approve a track access contract or amendment to an existing contract if we believe it would give rise to safety issues that could not be properly addressed in time for the planned start date of services.
14. Our approval of access rights in no way lessens the responsibilities of the parties to ensure that the risks arising from their activities remain as low as is reasonably practicable. It is their responsibility to ensure that all appropriate risk control or mitigation measures have been taken and that they comply with relevant statutory regulations.
15. We expect that the operational rules for the network are designed to ensure that the timetable can be operated safely and that changes to access contracts in respect of the pattern and quantum of services can be accommodated safely. Changes to pattern and quantum may have wider effects, for example on Network Rail's ability to obtain access to the network for inspection and maintenance activity, and increasing the number of trains that pass over level crossings. Changes to the types of rolling stock which operators are permitted by their contracts to use on the network may also affect the risks arising from the operation of trains. Where changes to an access contract may generate such material changes to risk, we expect that the parties will have assessed these risks, identified adequate control or mitigation measures and progressed any necessary actions, including reporting the matter to ORR if necessary.

Operational integrity

16. In considering the operational integrity of the access rights sought, we will want to be satisfied that:
- (a) the rights sought can be exercised in a way that means that a beneficiary's own services and those of any other beneficiary using the same routes operate reliably, and that they would not preclude Network Rail having adequate access to the infrastructure for efficient maintenance and renewal;
 - (b) the applicant intends and will be in a position to operate the services or have the services operated on its behalf; and
 - (c) their operation would not necessarily conflict with the exercise of rights held under another access contract. We will not intentionally approve rights that cannot be met without Network Rail thereby failing to meet its obligations in track access contracts with other beneficiaries. For applications made under sections 17 and 22A of the Act, the Act expressly states that we may not direct the facility owner to enter into such contracts.

Defeasance

17. As mentioned above we are forbidden from directing new (under section 17(1) (b) of the Act) or revised (under section 22A (4) (b) of the Act) access rights that, if exercised, will necessarily clash with the exercise of a right held under an existing access contract, and we would never knowingly do this. However, in exceptional cases where there has been a risk that there might be such a clash, we have included a defeasance clause in the contract. The defeasance clause defeases (i.e. nullifies) any right in the new contract (rather than the whole contract) that is subsequently found to conflict with the exercise of a right held in another pre-existing contract to the extent and for the timetable periods necessary to avoid the conflict. A defeasance provision can also provide for appropriate compensation to be payable to the beneficiary by Network Rail.
18. We will only expect to consider directing the inclusion of a defeasance provision in an access contract where it has not been possible to be certain about the adequacy of capacity. In most circumstances Network Rail should be in a position to know what capacity exists and what it has sold. We would not expect a defeasance provision to be included in any access contract submitted to ORR under section 18 of the Act, as Network Rail should have agreed all aspects of the proposed access contract with the beneficiary, including the extent of the access rights within it.

Capacity choices

19. We consider that there are certain key choices which need to be made in the allocation of network capacity between:
 - (a) alternative uses of scarce capacity (i.e. whether for passenger or freight);
 - (b) different passenger and freight train operators (and funders) wishing to use the same scarce capacity;
 - (c) more trains and network performance; and
 - (d) the time required for safe, effective and adequate maintenance and renewal of the network.

20. These choices need to be well informed by analysis and quantification of the physical and economic trade-offs involved.

Capacity choices: Consideration of alternative access rights

21. The access rights sought may need the timing of other beneficiaries' services to be changed (within their existing rights), or constrain the aspirations of other beneficiaries to amend their access rights and/or seek new access rights in future. In these cases, we expect to have regard to the firmness of any other beneficiaries' alternative plans for the capacity being sought (e.g. the extent to which they are backed up by availability of suitable rolling stock, the state of negotiations with the facility owner etc.). In comparing alternatives to the rights sought, we will expect to consider:
 - (a) the relative benefits to the users of railway services of the different service patterns, including the implications for performance and reliability;
 - (b) the extent to which the allocation of the rights would impact on the funds available to the Secretary of State for the purposes of his or her functions relating to railways and railway services, and the extent to which rights sought and the plans of other operators reflect a contractual commitment to a relevant funder;
 - (c) the likelihood of more efficient capacity utilisation resulting (e.g. where there are proposals to run longer trains or trains with improved specified equipment); and

- (d) the extent to which an increase in the capacity available might be involved, as a result of associated funding of network enhancement.
22. To encourage the right balance between accommodating additional services and Network Rail's requirements for network access for maintenance and renewal, the variable cost element of the access charge is designed to reflect additional maintenance and renewal costs arising from additional traffic. Furthermore, the arrangements for establishing the Engineering Access Statement (EAS) under Part D should enable the facility owner to restrict access to permit efficient maintenance and renewal. All access rights, including firm rights, are subject to the EAS and Timetable Planning Rules (TPR). Where new or amended access rights materially increase the costs of efficient maintenance and renewal, there would need to be appropriate compensation for Network Rail. (Charging is discussed further in our modules on [Charging and Performance](#)).

Capacity choices: capacity vs. performance

23. As more trains run on the network, there comes a point where the disbenefits of extra services in terms of poorer train service performance outweigh the benefits of the additional services to passengers or freight customers. Given the need to use track capacity efficiently, we carefully examine any proposals for new services that would run over parts of the network that are already heavily used.
24. The charging arrangements in the current charging structure are designed to incentivise Network Rail to identify and pursue the most appropriate solution when considering the trade-off between accommodating additional services and sustaining operational performance.
25. It may sometimes be desirable to reserve some unused capacity to maintain or improve performance. We expect to take this requirement into account, and would not expect to approve or direct new rights where there is a material risk that performance disbenefits (both at the particular location and across the network) outweigh the benefits of the new service. In reaching such a conclusion we would take into account the available performance modelling, and also the views and information provided by affected operators and other interested parties.
26. In some cases, services may be discontinued because the adverse performance effect outweighs the benefits to users of passenger and freight rail services. The removal of such services could arise from a decision by a beneficiary, by Network Rail, or through ORR's not approving the continuation of some existing rights when a track access contract comes up for renewal. In circumstances where improving

performance is the reason for a service being withdrawn, we would not expect to approve rights for another operator to use the released capacity unless there had been a material change (e.g. an enhancement to the relevant part of the network that increased its capacity and its ability to recover from disruptions). In such circumstances, our usual procedures would give all relevant operators, and any affected freight customers, an opportunity to comment.

27. In approving or directing new access rights which could affect performance, we expect to have regard to:
 - (a) the impact on the overall resilience and integrity of the network or parts of it, particularly insofar as these may not be adequately reflected in the charging arrangements; and
 - (b) the impact on delivery of specific national, regional or route performance objectives.
28. We will require supporting performance information as part of an application particularly where:
 - (a) there is disagreement between the parties;
 - (b) there are unresolved issues arising from Network Rail's consultation of potentially affected beneficiaries regarding the likely operational performance impact;
 - (c) the application is complex and the associated changes to access rights may have a significant effect on performance; or
 - (d) any other circumstances where we consider this necessary in order to satisfy our statutory duties.
29. Such further information might include:
 - (a) specimen timetables demonstrating that the required capacity is available;
 - (b) reports on performance modelling;
 - (c) a statement of any access rights that are being surrendered;
 - (d) details of the anticipated impact that the rights will have on the industry's operational performance (including, where appropriate, the achievement of performance targets such as PPM (Public Performance Measure), Train

Punctuality at Station Stops and Passenger's Charter and any specific actions being taken to mitigate this impact;

- (e) details of how the changes will affect contingency planning and traffic management arrangements in the relevant area once the new services are operating;
 - (f) details of any specific actions being taken by the parties to ensure an effective implementation of the changes;
 - (g) a statement of how the new rights will affect maintenance and renewal requirements on the route and the availability of access for safe, effective and adequate maintenance and renewal; and
 - (h) a statement explaining the consistency of the rights sought with any relevant LTPP.
30. We would normally expect Network Rail to carry out performance modelling or any performance analysis on behalf of the beneficiary, although it may charge for this work. If the beneficiary considers that its performance modelling requirements are not being met, it should contact us.
31. We will have regard to the benefits and costs of proposals for new or modified access rights, compared with alternative uses of the capacity. We may take into account cost-benefit analysis of the proposals and alternatives in order to facilitate this and, if such evidence is presented, any difference in assumptions compared with the appraisal criteria in [WebTAG](#) (Transport Analysis Guidance), [Scottish Transport Analysis Guidance](#) (STAG) or [Welsh transport appraisal guidance](#) (WeITAG), as appropriate, should be highlighted.
32. We will also use the following approach to assess applications for their impact on network performance:
- (a) any performance modelling completed in support of a new access application for access rights over congested network should factor in any perturbation that may occur on associated routes and compliance with the TPR;
 - (b) the level of current performance before the rights to any additional capacity are approved;
 - (c) use of appropriate timetabling and performance modelling;

- (d) use of any performance improvement plans to develop robust mitigation for a decline in performance;
 - (e) use and combination of rolling stock for any new services; and
 - (f) where a proving period is included, the mechanism should include an obligation on the train operator to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision must oblige the parties to meet promptly to take remedial action.
33. The above criteria have been developed from previous decisions where the performance implications of a track access application have been a factor.
34. We recognise that in some cases it may be appropriate to give additional weighting to certain factors such as:
- (a) the benefits of providing completely new services as against an increase in the frequency of existing services. This is likely to be particularly important where certain passenger markets have particularly poor services;
 - (b) specific requirements in competitive markets, such as availability of paths at short notice for freight;
 - (c) the existence of direct funding support for a service or an associated network enhancement provided by a PTE, ITA or other public body; and
 - (d) the efficient use of scarce or expensive resources.
35. As noted above, we will ensure that any relevant funder has been consulted on all applications, as it will be concerned with the implementation of:
- (a) its long-term plans for the development of the railway as set out in the High Level Output Specification (HLOS); and
 - (b) any LTPPs published by Network Rail.
36. We will also have regard to the funds available to the Secretary of State for the purposes of his or her functions in relation to railways and railway services and any constraints on his or her ability to fund enhancements, as well as any general guidance from the Secretary of State, Scottish or Welsh Ministers (and indeed our other statutory duties).

37. We will also consult and have regard to the views of other beneficiaries and known potential beneficiaries, Passenger Focus and, depending on where the services are to run, Scottish and Welsh Ministers, the Mayor of London, TfL, London TravelWatch and any PTE or ITA likely to have an interest.

Capacity choices: competing passenger services

38. Where a passenger operator is seeking to introduce a new service that competes with the existing services of one or more other such operators, we will consider the extent to which such additional services would benefit passengers and not be primarily abstractive of the existing operator's revenue. The application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth.
39. Where a beneficiary is seeking to make a significant investment and seeks to protect this investment, we would not approve any 'moderation of competition' provisions which would in effect restrict competition over that route. Protection for such investment can be achieved through other contractual mechanisms that we have developed such as long term track access contracts and the rebate mechanism for investment in infrastructure.
40. ORR's policy on rebate mechanisms for network investments provides for train operators and others who invest significantly in on-network enhancements to be paid a rebate where a third party competing train operator benefits from that enhancement. A competing third party operator would need ORR approval of specific access rights to run such services and a condition of this would be the inclusion of a rebate mechanism in their contract.

Capacity choices: competing applications for limited capacity

41. In cases where two or more applicants apply for alternative uses of the same capacity, we will conduct both the NPA test and an economic cost-benefit analysis (CBA) to inform our decision. The results of the CBA will be included when weighing our public interest duties under section 4 of the Act.
42. Where we have competing applications, we will aim to set clear criteria (including deadlines) for how we will group competing applications. Generally, applications for limited capacity on the same infrastructure, received within specified timeframes, will be considered alongside one another. Aspirations for alternative uses of the capacity,

either by TOCs, funders or others, where no application has been received, will generally not be considered as part of our process.

The ‘not primarily abstractive’ test

43. We would not expect to approve competing services that would be primarily abstractive of an incumbent’s revenue; that is to say, abstractive without providing sufficient compensating economic benefits. To enable us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage test which we would apply when:
- (a) a new open access service would compete with public service operator (PSO) services and so impact on the public sector funder’s budget;
 - (b) a new PSO service which would compete with an existing PSO service, where we would expect to focus the test on areas where the competing PSO services are operated on behalf of different funders or where for some other reason there are particular concerns over the impact on a funder’s budget; and
 - (c) a new service, which might be open access or PSO, which would compete with an existing open access service and which, if it caused the existing open access operator to withdraw from the market, could reduce overall competition on the network.
44. In addition to applying the five-stage test we also consider our statutory duties, but generally we would not expect to approve applications with ratios of generation to abstraction below 0.3 to 1. Our experience is that net economic benefits are likely to diminish or not arise when the ratio is below that level.
45. Further information is provided in the separate module on [the not primarily abstractive test](#).

Capacity choices: competing passenger and freight services

46. When assessing competing passenger and freight applications for the same capacity we will use transport appraisal methodology (such as WebTAG) to estimate freight user benefits in any cost benefit analysis where freight may be materially affected as well as in complex cases with alternative uses of capacity. We will calculate freight user benefits using generic values of time and reliability. We will also have regard to trade-off between passenger and freight where this has already been assessed and appraised in the LTPP and any context-specific values of passenger or freight time.

Complex or competing applications: further information required

47. In some cases we will require applicants to share with us, other applicants or wider industry, further information. This could be in complex cases, or in cases with competing applications. Examples of the types of additional information we may require include:
- (a) Business cases which highlight key uncertainties and details of how and when applicants intend to close these issues down;
 - (b) Details of what internal approvals applicants have secured for their plans and what approvals remain to be given by whom in the event we approve access;
 - (c) In the case of competing applications, indicative timetables to be shared as part of the industry consultation; and
 - (d) Economic modelling undertaken by the applicant based on the methodology in our NPA test.

Rights must be used

48. We would not normally expect to approve access rights unless the beneficiary satisfies us as to its clear intention and ability to use the capacity in question in order to ensure capacity is not reserved for services which have little prospect of being operated. We would therefore want to see evidence supporting an operator's intention and ability to use that capacity.
49. For a public service operator or concession passenger operator, such information might include details of their public service contract or concession requirements. For an open access passenger operator, we would look at business case information, including details of resourcing plans.
50. For a freight operator, this might include confirmation of a contract, or negotiation of a contract, with the proposed customer, details of resourcing arrangements for the proposed services and evidence of any other relevant preparations. However, we would make allowance for prospective new freight flows, where the operator may need to have demonstrated that it had firm rights approved by ORR before the potential customers would enter into haulage contracts with it. In such cases we would want to see clear evidence of the operator's prospects of winning sufficient business before approving or directing the rights sought. For a freight customer this might include a commitment to use rail to transport its goods.
51. A beneficiary may seek to increase the quantity of rights exercisable over time, for example where the availability of an increased number of train slots is dependent upon improvements to the infrastructure over a number of years. In such cases we will expect to see the step-up in rights expressed in separate entries (or perhaps, separate tables) within Schedule 5, indicating the dates from which each is to apply (or the stage of infrastructure improvements that have to be in place before the rights may apply), so that the actual extent of rights exercisable by operators at any one time is clear.

Consideration of a freight beneficiary's past usage of access rights

52. When considering applications from freight beneficiaries for new rights, especially over busy parts of the network, we may take into account the past usage of its access rights. We will do so if:

- (a) there is some doubt about whether the beneficiary needs the rights sought or whether it is likely to use the associated paths for a very high proportion of the time; or
 - (b) two or more beneficiaries are seeking rights to the same limited capacity (either with applications being considered simultaneously or where we believe that one or more other applications for use of the same capacity are likely to be made within a short time).
53. Past usage will be looked at by reference to the best available information on the use of paths for the traffic for which the applicant is seeking rights.

Part J of the network code

54. Part J enables the relinquishing of access rights which are not being used, or are being significantly under-used. This enables Network Rail to sell access to other network users or to transfer access rights between freight operators where the commercial contract for the movement of goods also transfers from one freight operator to another. Part J applies to all track access contracts incorporating the network code and provides:
- (a) a requirement for regular reviews of operators' access rights;
 - (b) 'use it or lose it' (UIOLI) arrangements;
 - (c) a freight transfer mechanism; and
 - (d) provisions for the voluntary adjustment or surrender of access rights.

Enhancement

55. When considering an application based on enhancement works, our key concern will be to establish the certainty of those works proceeding, for example whether: the relevant processes for network and vehicle change have been completed; the facility owner or a third party is contractually committed to deliver the project; or full modelling has been undertaken to check that the capacity increase is viable and adequate etc. Where an enhancement project is covered by the terms of an access contract, we will wish to be satisfied that it has been agreed in compliance with our Investment Framework. For further information please refer to our guidance on [investing in the rail network](#).

Congested infrastructure

56. The [*The Railways \(Access and Management and Licensing of Railways Undertakings\) Regulations 2016*](#) (the Regulations) require that where an infrastructure manager cannot adequately accommodate a request for capacity, it must declare the relevant section of infrastructure to be congested (regulation 26). Within 6 months of the declaration it must then undertake and publish a capacity analysis identifying the reasons for the congestion and the measures which might be taken in the short and medium term to ease the congestion. Within 6 months of publication of the capacity analysis the infrastructure manager must publish a capacity enhancement plan detailing, amongst other things, the reasons for the congestion; likely future development of traffic; constraints on infrastructure development; and the options for and costs of capacity enhancement, and the potential effect on access charges. The plan must also include details of the action to be taken to enhance capacity and a timetable for the completion of the measures identified within it to resolve the congestion. However, the infrastructure manager is not required by the regulations to implement the plan. More information on Network Rail's management of congested infrastructure is available on its [website](#).
57. Where an application is made which relates to a part of the network that has been declared congested by Network Rail, this will not affect the process we undertake in considering that application.

Ancillary movements

58. Clause 5.2(c) of the model contract gives the train operator the right to make ancillary movements. An ancillary movement is defined in Part D of the network code as “*a train movement which is not an express part of any Service but which is necessary or reasonably required for giving full effect to the train movements which are an express part of a Service and shall include any such train movement as is referred to in paragraph (c) of the definition of “Services” to the extent that it is not expressly provided for in an Access Agreement*”. Paragraph (c) of the definition of “Services” in Part A is “*any other train movement for the purposes of testing the physical or operational characteristics or capabilities of any railway asset.*” The definition of “railway asset” in section 6(2) of the Act includes “any train”.
59. The definition of an ancillary movement is quite wide and covers most types of train movement which are not part of a service, including movements to stabling points and depots, driver training, mileage accumulation and train testing.
60. In addition to the general right to make ancillary movements, paragraph 2.6 of Schedule 5 of the passenger model contract and 2.4.2 of Schedule 5 of the freight model contract gives the train operator firm rights to make ancillary movements to the extent necessary or reasonably required to give full effect to the other firm rights of the train operator.
61. When a passenger operator adds new rolling stock to the specified equipment listed in paragraph 5.1(a) of Schedule 5 and it is included in the timing load for any service in Table 2.1 of Schedule 5, it will then have a firm right to any ancillary movements associated with that service.
62. As under paragraph 5.1(b) of Schedule 5, the train operator has a contingent right to operate any railway vehicles registered with Network Rail’s rolling stock library in order to provide the services, it follows that it also has a contingent right to ancillary movements for such services.
63. Most ancillary movements are commonplace, occur on parts of the network where the train operator normally operates services, represent no additional inherent risk or consequences to Network Rail, and the standard performance regime should apply. Under Schedule 8, if a train performing an ancillary movement causes an incident which leads to delay, that incident is attributed to the train operator and it will compensate Network Rail under Schedule 8 in the normal way. No compensation is

payable to the train operator in respect of delays or cancellations caused to ancillary movements.

64. However, there may be circumstances where there are increased risks to Network Rail over and above those modelled and reflected in Schedule 8 which would not adequately deal with the consequences. For example, if a train operator wanted to carry out mileage accumulation or train testing on a part of the network over which it did not normally operate services, it could cause a delay to other operators' services without affecting any of its own services. In such a scenario, the train operator would not make any payments to Network Rail under Schedule 8 while Network Rail would be compensating other operators. In such circumstances, Network Rail may require an amendment of the contract to include specific rights to mileage accumulation or train testing and a TOC-on-TOC indemnity regime in order to recover the cost of any payments to other operators as a result of delays caused the by train operator.
65. It is not necessary to disapply either Schedule 4 of the access contract or Part G of the network code as no compensation will be payable to the train operator for delays or cancellations caused to such movements.



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