

- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from Network Rail to the Train Operator under paragraph 2.5.4;
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Network Code.

2.4 *Effect of a Suspension Notice served by the Train Operator*

Where the Train Operator has served a Suspension Notice on Network Rail:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Network to provide the Services to the extent specified in the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to Network Rail under paragraph 2.5.4; and
- (c) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Network Code.

2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Train Operator Event of Default relates.

2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of the Network Rail Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Network Rail Event of Default relates.

2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:

- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
- (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.

- 2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3, whether in whole or in part, and it is reasonable for the suspension effected by the Suspension Notice to be revoked, whether in whole or in part, the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

3. Termination

3.1 ***Network Rail's right to terminate***

Network Rail may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 2.5.3;
- (c) where the Train Operator Event of Default specified in paragraph 1.1(a) has occurred and is continuing; or
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by Network Rail is not capable of being remedied and 3 months have elapsed from the service of that Suspension Notice.

3.2 ***Train Operator's right to terminate***

The Train Operator may serve a Termination Notice on Network Rail:

- (a) where Network Rail fails to comply with its obligations under paragraph 2.5.3;
- (b) where the Network Rail Event of Default specified in paragraph 1.3(a) has occurred and is continuing; or
- (c) where the Network Rail Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and 3 months have elapsed from the service of that Suspension Notice.

3.3 **Contents of Termination Notice**

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
 - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Train Operator to pay Track Charges or other amounts due, 7 days is a reasonable grace period).

3.4 **Effect of Termination Notice**

Where Network Rail or the Train Operator has served a Termination Notice on the other:

- (a) the service of the Termination Notice shall not affect the parties' continuing obligations under this contract up to the date of termination, which date shall be determined in accordance with paragraph 3.4(c);
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied; and
- (c) this contract shall terminate on the later of:
 - (i) the date and time specified in the Termination Notice for the contract to terminate (or such later date and time as the party which served the Termination Notice notifies to the other before the date and time so specified); and
 - (ii) the date on which a copy of the Termination Notice is given to ORR.

3.5 **Unilateral right of termination**

The Train Operator may at any time serve a notice on Network Rail to terminate this contract (a "**unilateral termination notice**"). In such circumstances, the Train Operator shall send a copy of the unilateral termination notice to ORR.

3.6 **Contents of unilateral termination notice**

The unilateral termination notice shall specify a date and time on which termination of this contract is to take effect (which shall not be earlier than 12 months from the date on which the unilateral termination notice is served on Network Rail).

3.7 **Effect of unilateral termination notice**

Where the Train Operator has served a unilateral termination notice on Network Rail:

- (a) the service of the unilateral termination notice shall not affect the parties' continuing obligations under this contract up to the date of termination specified in the unilateral termination notice; and
- (b) the contract shall terminate under Clause 3.5 on the later of:
 - (i) the date and time specified in the unilateral termination notice; and
 - (ii) the date upon which a copy of the unilateral termination notice is sent to ORR.

4. **Consequence of termination**

4.1 **Directions regarding location of Specified Equipment**

Immediately before, upon or following termination or expiry of this contract, the Train Operator shall comply or procure compliance with all reasonable directions given by Network Rail concerning the location of the Specified Equipment.

4.2 **Failure to comply with directions**

If the Train Operator fails to comply with any directions given under paragraph 4.1, Network Rail shall be entitled to remove from the Network or Stable any Specified Equipment left on the

Network or to instruct a third party to do so and any reasonable costs incurred by Network Rail in taking such steps shall be paid promptly by the Train Operator.

4.3 ***Evidence of costs***

Network Rail shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Train Operator shall reasonably request.

Schedule 7

(Track Charges and other payments)

1. Definitions

In this Schedule 7 unless the context otherwise requires:

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

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

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

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

"**Bimodal Electric Multiple Unit**" means an electric multiple unit that is capable of drawing current from the AC System and/or DC System and, in addition, being powered by an alternative source of energy, including but not limited to diesel;

"**Bimodal Locomotive**" means a train hauled by a locomotive that is capable of drawing current from the AC System and/or DC System, and, in addition, being powered by an alternative source of energy, including but not limited to diesel;

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

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

"**Coal Spillage Charge Rate**" means, in respect of each Coal Vehicle used in a Service, the coal spillage charge rate per kgkm for that Coal Vehicle, for the Relevant Year ending 31 March 2019 only, as set out in the track usage price list published by Network Rail on or around 20 December 2013 and adjusted in accordance with paragraph 2.7.2 of the version of this contract that was in force up until 31 March 2019;

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

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

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

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

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

"**CPI**" means the Consumer Prices Index (all items) whose value is published each month by the Office for National Statistics in its statistical bulletin on consumer price inflation, or:

- (a) if the Consumer Prices Index for any month in any year shall not have been published on or before the last day of the third month after such month, such index for such month or months as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances; or
- (b) if there is a material change in the basis of the Consumer Prices Index, such other index as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances;

"DC System" means the direct current system of electricity traction supply on the Network;

"Electrification Asset Usage Charge" means the charge calculated in accordance with paragraph 2.4.12;

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

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

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

"ESI Biomass Vehicle" means any vehicle in respect of which the Commodity is electricity supply industry biomass;

"ESI Coal Vehicle" means any vehicle in respect of which the applicable Commodity is electricity supply industry coal;

"Freight Specific Charge Rate" means:

- (a) in respect of each ESI Coal Vehicle, IO Vehicle and/or SNF Vehicle used in a Service the rate per kgtm for that ESI Coal Vehicle, IO Vehicle and/or SNF Vehicle (as applicable) which shall be the amount set out in the Track Usage Price List relating to the freight specific charge rate for an ESI Coal Vehicle, IO Vehicle or SNF Vehicle and, being an Indexed Figure, adjusted in accordance with paragraph 2.7.2:
- (b) in respect of each ESI Biomass Vehicle used in a Service the rate per kgtm for that ESI Biomass Vehicle which shall be:
 - (i) in respect of the Relevant Year commencing on 1 April 2019 the total of the amount set out in the Track Usage Price List relating to the freight specific charge rate for an ESI Biomass Vehicle for that year, multiplied by the Phased in Charges Indexation Adjustment calculated in accordance with paragraph 2.7.3(a); and
 - (ii) in respect of any other Relevant Year t, the total of the amount set out in the Track Usage Price List relating to the freight specific charge rate for an ESI Biomass Vehicle for that year multiplied by the Phased in Charges Indexation Adjustment for that year calculated in accordance with paragraph 2.7.3(b);

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

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

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

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

"Indexed Figures" means the Cancellation Sum, the VUC Default Rate, the Disruption Sum, the Electrification Asset Usage Rate, the Enhanced Planned Disruption Sum, the Freight Specific Charge Rate for the vehicles specified in paragraph (a) of the definition of "Freight Specific Charge Rate", the Incident Cap Access Charge Supplement Rate, the Late Notice Cancellation Sum, the Network Rail Cap, the Network Rail Payment Rate, the Normal Planned Disruption Sum, the Prolonged Disruption Amount, the Service Variation Sum, the Train Operator Cap and the Train Operator Payment Rate;

"Initial Indexation Factor" is derived from the following formula:

$$IIF = \left(1 + \frac{CPI_{2018} - CPI_{2017}}{CPI_{2017}}\right)^2$$

where:

IIF means the Initial Indexation Factor;

CPI₂₀₁₇ means the average value of the monthly CPI figures for the 12 months up to and including the month of December 2017; and

CPI₂₀₁₈ means the average value of the monthly CPI figures for the 12 months up to and including the month of December 2018.

The value derived from this formula shall be rounded to three decimal places;

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

"kgtm" means 1000 Gross Tonne Miles;

"kWh" means kilowatt hours;

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

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

"Locomotive Miles" means, in relation to a locomotive, the Contract Miles travelled by that locomotive;

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

"Metered Train m" means, as the context requires, either:

- (a) a train of a particular type; or
- (b) a specific train having a train ID,

as specified in Appendix 3 of this Schedule 7;

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

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

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

"ORR's Qualifying Modification Criteria" means the criteria issued by ORR as described in paragraph 2.9.1;

"Phased in Charges Indexation Adjustment" has the meaning ascribed to it in paragraph 2.7.3;

"Proposed Review Notice" means the most recently proposed Review Notice given by ORR, in accordance with Schedule 4A of the Act;

"QM Threshold" means a level of costs in relation to a modification to the Operating Constraints determined in accordance with ORR's Qualifying Modification Criteria;

"Qualifying Modification" means a modification to the Operating Constraints in excess of their level as at 1 April 2019, which:

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

"Qualifying Modification Benefit Charge" means, in relation to any Qualifying Modification, a charge which shall:

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

"Relevant Year" means a year commencing at 00:00 hours on 1 April and ending at 23:59 hours on the following 31 March;

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

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

“Review Implementation Notice” has the meaning given to “review implementation notice” in paragraph 7 of Schedule 4A of the Act;

“Review Notice” has the meaning given to “review notice” in paragraph 4 of Schedule 4A of the Act;

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

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

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

"tariff band j" means the tariff zone and time band in which the train in question is operated;

"Track Usage Price List" means the document entitled "Track Usage Price List" published by Network Rail on or about 20 December 2018 which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 to this contract or a freight track access contract previously held by the Train Operator;

"Traction Electricity Charge" means the charge calculated in accordance with paragraph 2.4;

"Traction Electricity Modelled Consumption Rates List" means the document entitled "Traction Electricity Modelled Consumption Rates List" published by Network Rail on or about 20 December 2018 and specifying freight and passenger traction electricity modelled consumption rates which, for the purposes of this contract, shall be deemed to incorporate any supplements to that document consented to or determined pursuant to paragraph 2.2.10 of Schedule 7 of this contract or a freight track access contract previously held by the Train Operator;

“Traction Electricity Usage Occurrence Data” means information as to when a Bimodal Electric Multiple Unit or Bimodal Locomotive is either drawing current from the AC System and/or DC System, or is being powered by an alternative source of energy;

“Traction-Train Compatible” means a situation in which a Bimodal Electric Multiple Unit or Bimodal Locomotive is located on the Network with a system of electricity traction supply that the Bimodal Electric Multiple Unit or Bimodal Locomotive is capable of drawing current from;

"train category" means train category i as identified in the table in the Traction Electricity Modelled Consumption Rates List entitled "Freight Traction Electricity Modelled Consumption Rates for CP6";

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

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

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

"VUC Default Period" means the period from the later of:

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

C_i means the modelled consumption rate:

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

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

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

UE_{igjt} means the actual volume of usage (in electrified Vehicle Miles in relation to passenger electric multiple units or electrified kgm in relation to locomotive hauled units and all freight traffic), if any, of trains operated by or on behalf of the Train Operator in train category i, in Geographic Area g, in tariff band j and in Relevant Year t, pursuant to this contract; provided that where train category i is a Bimodal Electric Multiple Unit or Bimodal Locomotive operating in a Traction-Train Compatible situation, it shall be deemed that all mileage (in Vehicle Miles in relation to passenger electric multiple units or kgm in relation to locomotive-hauled units and all freight traffic), if any, of such trains is electrified.

Calculation of consumption using metered consumption data

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

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

where:

Σ means the summation across all Geographic Areas g, as appropriate;

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

$$E_{tme g} = \Sigma \left((CME_{mgjt} \cdot EF_{gjt}) - (RGB_{mgjt} \cdot EF_{gjt}) \right)$$

where:

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

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

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

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

2.4.1.4

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

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

where:

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

E_{tmugAC} is derived from the following formula:

$$E_{tmugAC} = \sum (CME_{mgtAC} \cdot EF_{gjt}) \cdot \lambda_{ACg}$$

where:

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

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

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

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

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

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

where:

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

E_{tmugDC} is derived from the following formula:

$$E_{tmugDC} = \sum (CME_{mgtDC} \cdot EF_{gjt}) \cdot \lambda_{DCg}$$

where:

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

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

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

λ_{DCg} means the Network Rail Distribution System Loss Factor for the DC System in Geographic Area g.

Metered Bimodal Electric Multiple Units and Bimodal Locomotives – deemed electrified mileage

2.4.1.5

- (a) Where Metered Train m is a Bimodal Electric Multiple Unit or Bimodal Locomotive, the Train Operator shall, as a minimum, within seven days of the end of each of the third, sixth, tenth and thirteenth Periods, provide to Network Rail the Traction Electricity Usage Occurrence Data for such Metered Train m. The Traction Electricity Usage Occurrence Data provided: within seven days of the end of the third Period shall cover Periods one, two and three; within seven days of the end of the sixth Period shall cover Periods four, five and six; within seven days of the end of the tenth Period shall cover Periods seven, eight, nine and ten; and within seven days of the end of the thirteenth Period shall cover Periods eleven, twelve and thirteen.
- (b) Where, after seven days, any Traction Electricity Usage Occurrence Data is missing in respect of any such Bimodal Electric Multiple Unit or Bimodal Locomotive, all mileage, if any, of such Bimodal Electric Multiple Unit or Bimodal Locomotive operated by or on behalf of the Train Operator shall be deemed, for billing purposes, to be electrified in Traction-Train Compatible situations, and paragraphs 2.4.1.3 and 2.4.1.4 shall apply in respect of all such mileage.

2.4.2 *Not used.*

2.4.3 *Not used.*

2.4.4 *Not used.*

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

- 2.4.5 If the Train Operator wishes to propose the introduction of On-Train Metering to measure traction electricity consumption for a vehicle or vehicles of a vehicle type that the Train Operator operates for the purposes of being invoiced by Network Rail for traction electricity, it shall notify Network Rail of any required changes to the contract in connection with that proposal.
- 2.4.6 Any notice under paragraph 2.4.5 shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.
- 2.4.7 Promptly following any response served by Network Rail under paragraph 2.4.6, the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and, if so, the amendments.
- 2.4.8 If the parties agree an amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, that amendment shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed, the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.
- 2.4.9 Any agreed amendment to the contract in connection with the proposal referred to in paragraph 2.4.5, which is approved by ORR under section 22 of the Act, shall apply with effect from the date agreed by the parties.
- 2.4.10 If the parties fail to reach agreement within 90 days after service of a notice under paragraph 2.4.5, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify ORR and request that ORR determines the matter. The parties shall, within such timescales as ORR may specify, furnish ORR with such

information and evidence as ORR shall require to determine the matter. If a party fails to furnish such information and evidence within the specified timescale, ORR shall be entitled to determine the matter without that information and evidence and the party in default shall have no grounds for complaint in that respect.

2.4.11 Where ORR determines the matter pursuant to paragraph 2.4.10, it may issue a notice to the parties setting out the amendments to be made to the contract and the date, which may be retrospective, from which they shall take effect.

2.4.12 *Electrification Asset Usage Charge*

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

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

where:

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

EV_{tk} means an amount in respect of the Electrification Asset Usage Rate, expressed in pounds sterling per electrified kgtm and rounded to four decimal places;

UV_{tk} means the actual number of electrified kgtm on route type k in the relevant Charging Period in Relevant Year t operated by or on behalf of the Train Operator. Where the Train Operator operates a Bimodal Electric Multiple Unit or Bimodal Locomotive, the actual number of electrified kgtm on route type k in Relevant Year t shall be calculated:

- (i) where the Bimodal Electric Multiple Unit or Bimodal Locomotive is operating in a Traction-Train Compatible situation and is not a Metered Train m, in accordance with the proviso to the definition of UE_{igt} in paragraph 2.4.1.2 above; or
- (ii) where the Bimodal Electric Multiple Unit or Bimodal Locomotive is a Metered Train m, in accordance with paragraph 2.4.1.5 above.

2.5 ***Not used.***

2.6 ***Incident Cap Access Charge Supplement***

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

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

where:

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

ICACSR means the Incident Cap Access Charge Supplement Rate.

2.7 ***Price variation***

2.7.1 For each Relevant Year commencing on and from 1 April 2019, the Indexed Figures shall be adjusted in accordance with paragraph 2.7.2.

2.7.2

- (a) For the Relevant Year commencing on and from 1 April 2019, the Indexed Figures shall be adjusted as at 1 April 2019 by multiplying them by the Initial Indexation Factor.
- (b) For the Relevant Year commencing on and from 1 April 2020, and for each subsequent Relevant Year, the adjusted Indexed Figures from the preceding Relevant Year shall be further adjusted as at the applicable 1 April by multiplying them by the Adjustment Factor for the Relevant Year in question (rounded to three decimal places).

For the purposes of this paragraph 2.7.2(b), the Adjustment Factor in respect of a Relevant Year shall be calculated in accordance with the following formula:

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

where:

CPI_{t-1} means the average value of the monthly CPI figures for the 12 months up to and including the month of December immediately preceding 1 April in the Relevant Year in question; and

CPI_{t-2} means the average value of the monthly CPI figures for the 12 months up to and including the month of December which falls 16 months before 1 April in the Relevant Year in question.

- (c) If this contract takes effect after 1 April 2019, the Indexed Figures shall be adjusted in accordance with paragraphs 2.7.2(a) and (b) as if this contract had been in effect on and from 1 April 2019.

2.7.3 The Phased in Charges Indexation Adjustment shall be derived:

- (a) in respect of the Relevant Year commencing on 1 April 2019, from the following formula:

$$PCIA_{2019} = \text{Initial Indexation Factor}$$

where:

$PCIA_{2019}$ means the Phased in Charges Indexation Adjustment in respect of the Relevant Year commencing on 1 April 2019; and

- (b) in respect of any Relevant Year t commencing on or after 1 April 2020, from the following formula:

$$PCIA_t = \left(1 + \frac{(CPI_{t-1} - CPI_{2018})}{CPI_{2018}}\right) \cdot \text{Initial Indexation Factor}$$

where:

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

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

CPI_{2018} means the average value of the monthly CPI figures for the 12 months up to and including the month of December 2018.

The value derived from this formula shall be rounded to three decimal places.

2.8 **Incremental Costs**

2.8.1 Where:

- (a) the Train Operator makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request;
- (b) the operation of the Service requested would exceed the Operating Constraints applying as at 1 April 2019;
- (c) the Train Operator notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2019 in a manner so as to permit the operation of the Service requested under this contract;
- (d) Network Rail is reasonably able to effect such modifications in a timescale that meets the Train Operator's requirements; and
- (e) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed £300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

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

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

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

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

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

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

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

2.8.7 Where:

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

- (b) the operation of the Service requested:
 - (i) would exceed the Operating Constraints applying as at 1 April 2019; and
 - (ii) is permitted under the Operating Constraints applying as at the date of the request by reason of a Qualifying Modification,

then paragraph 2.8.8 shall apply.

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

2.8.9 Where:

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

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

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

2.8.11 If the Train Operator disputes:

- (a) the amount of any Qualifying Modification Benefit Charge payable by it under paragraph 2.8.8; or
- (b) the amount of any rebate payable to it under paragraph 2.8.9,

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

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

- (a) notifying such freight train operator of the referral for resolution; and
- (b) giving to such freight train operator the opportunity to become a party to the proceedings in respect of such resolution.

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

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
 - (i) the matters in respect of which duties are imposed on ORR by virtue of section 4 of the Act; and

- (ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;
 - (c) not make a determination which is inconsistent with any provisions of the Network Code; and
 - (d) give its reasons.
- 2.8.14 Network Rail undertakes to the Train Operator that, subject to the approval of ORR, in any regulated access agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with a freight train operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.
- 2.8.15 Where, in relation to any Qualifying Modification, the determination of any Qualifying Modification Benefit Charge, or corresponding rebate of Incremental Costs, is referred to expert determination by any person under the provisions of any regulated access agreement (other than this contract):
- (a) such determination shall be binding on Network Rail and the Train Operator; and
 - (b) Network Rail and the Train Operator shall make any necessary adjustments of payments between them under this contract to give effect to such determination.
- 2.8.16 Network Rail shall be the legal and beneficial owner of all modifications to Operating Constraints effected by or on behalf of Network Rail under this paragraph 2.8.
- 2.9 ***Office of Rail and Road's Qualifying Modification Criteria***
- 2.9.1 ORR may at any time issue criteria:
- (a) specifying how the QM Threshold for any Qualifying Modification shall be determined, which may vary for different types of Qualifying Modification; and
 - (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.
- 2.9.2 ORR's criteria under paragraph 2.9.1(a) above shall not have effect unless ORR has:
- (a) consulted the parties in relation to the issues to be dealt with in such criteria;
 - (b) taken into account any representations made by the parties in response to the consultation under paragraph 2.9.2(a); and
 - (c) notified the parties as to its conclusions in relation to the issues to be dealt with in such criteria and the reasons for those conclusions.
- 2.10 ***Not used.***
- 2.11 ***Not used.***
- 2.12 ***Not used.***
3. **Freight charging review**
- 3.1 ORR may carry out one or more access charges reviews of all or part of this contract such that amendments to this contract to give effect to the conclusions of such an access charges review

come into operation on and from 1 April 2024 or such later date as may be specified in that review.

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

3.3 *Interim treatment prior to implementation*

If the terms of a Proposed Review Notice proposing amendments to the contract are not implemented in accordance with paragraph 7 of Schedule 4A to the Act on the date stipulated that they will come into operation in the Proposed Review Notice for any reason, then, irrespective of such terms not having been so implemented, each proposed amendment to the contract set out in the Proposed Review Notice shall have effect for the period (the "Interim Period") commencing on that date (or from any later date (or dates) specified in the Proposed Review Notice in respect of any individual amendment), in each case until such time as:

- (a) following the service of a Review Implementation Notice relating to the Proposed Review Notice, the changes specified in that Review Implementation Notice come into operation; or
- (b) following a reference to the Competition and Markets Authority in accordance with paragraph 9 of Schedule 4A to the Act, any amendments to the contract, made in accordance with paragraphs 12(8), 12(9) or 14(3) of Schedule 4A to the Act, come into operation.

3.4 *Reconciliation payment*

- (a) Within 28 days after the end of the Interim Period, Network Rail shall calculate whether a reconciliation payment is due to or from the Train Operator. In order to calculate such reconciliation payment, Network Rail shall compare (i) the sums paid by the Train Operator during the interim period, with (ii) the sums which would have been payable if the amendments required by either paragraphs 3.3(a) or (b) above had taken effect on the date(s) stipulated in the Proposed Review Notice, and shall provide to the Train Operator:
 - (i) a statement of the amount due to or from the Train Operator; and
 - (ii) such background data and workings as may reasonably be required for a proper understanding of the calculation.
- (b) Within 14 days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in paragraph 3.4(a) above, the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, the Train Operator shall be deemed to have agreed the contents of the statement.
- (c) If any dispute is notified under paragraph 3.4(b) above it shall be resolved according to the following procedure:
 - (i) within seven days of service of the relevant notice, the parties shall meet to discuss the disputed aspects with a view to resolving all disputes in good faith;
 - (ii) if, for any reason, within seven days of the meeting referred to in paragraph 3.4(c)(i) above, the parties are still unable to agree any disputed aspects, each party shall promptly and in any event within seven days prepare a written summary of the disputed aspects and the reasons for each such dispute and submit such summaries to the senior officer of each party;

- (iii) within 28 days of the first meeting of the parties, the senior officers of the parties shall meet with a view to resolving all disputes; and
 - (iv) if no resolution results before the expiry of 14 days following that meeting, then either party may refer the matter for resolution in accordance with the ADRR.
- (d) Within 28 days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in paragraph 3.4(a) above (if not disputed) or 28 days of resolution or determination of any dispute in accordance with paragraph 3.4(c) above, any amount due shall be invoiced (or presented in a credit note, as the case may be) for payment, and payable, as provided under this contract.

4. **Not used**

Appendix 1

(Not used)

Appendix 2

(Not used)

Appendix 3

"Metered Trains M" for the purposes of paragraph 2.4.1.1 of Part 2

Train Type	Train ID	Traction Type
Class 88	All	AC / Diesel (UK Dual)

Schedule 8

(Performance regime)

1. Definitions

In this Schedule 8 unless the context otherwise requires:

"100 Train Operator Miles" means the distance travelled by the Services operated by the Train Operator on the Network in any Charging Period as recorded in Network Rail's billing systems (unless there is a manifest error in such figure), divided by 100;

"30% Exposure" has the meaning ascribed to it in paragraph 11.1.1;

"Actual Mileage t" has the meaning ascribed to it in paragraph 10.1.4(a);

"Adjusted MDNR" has the meaning ascribed to it in paragraph 6.2.1;

"Adjusted MDTO" has the meaning ascribed to it in paragraph 4.2.1;

"Adjustment Fraction" means the number of Charging Periods or parts of a Charging Period in the first or final Financial Year, divided by 13;

"Aggregate Net Liability" has the meaning ascribed to it in paragraph 9.1.7;

"Annual Contract Mileage" has the meaning ascribed to it in paragraph 10.2.2(a);

"Annual Contract Mileage Variation" has the meaning ascribed to it in paragraph 10.2.2(b);

"Attributable to both the Train Operator and Network Rail" means, in respect of any delay to or cancellation of a Service or a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules, that both the Train Operator and Network Rail are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of "Attributable to the Train Operator" or "Attributable to Network Rail");

"Attributable to Network Rail" means, in respect of any delay to or cancellation of a Service or any other matter:

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail;
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network; or
- (e) prior to the implementation of any ETCS Amendments in accordance with paragraph 12, any delay to or cancellation of a Service occurring on the Network or that prevents that Service accessing the Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication directly caused by the Deliberate Act of the Train Operator) that has been allocated as the responsibility of the Train Operator in the

Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules,

and which excludes any such delay to or cancellation of a Service or any other matter arising as a result of a Planned Incident, in all cases having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules;

"Attributable to the Train Operator" means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator's staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment (with the exception of those failures, defects or miscommunications contemplated in sub-paragraph (e) of the definition of "Attributable to Network Rail") relating to a Service (including where Network Rail shall have refused to permit the Service to move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
 - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
 - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
 - (i) any delay to or cancellation of a Service Attributable to the Train Operator;
 - (ii) any Train Operator Omission; or
 - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

- (aa) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules; and
- (bb) ignoring any delay or cancellation under paragraph (d) of the definition of "Attributable to Network Rail";

"Baseline Annual Contract Mileage" has the meaning ascribed to it in paragraph 10.2.2(b);

"Benchmarks" means the Train Operator Benchmark and the Network Rail Benchmark;

"Cancellation" has the meaning ascribed to it in paragraph 8.1;

"Cancellation Threshold" has the meaning ascribed to it in Appendix 1;

"Contract Miles" has the meaning ascribed to it in Schedule 7;

"Deliberate Act" means any act or omission committed by the Train Operator which:

- (a) is a serious and substantial departure from good industry practice; and
- (b) shows a material disregard for any harmful, foreseeable and avoidable consequences that would be reasonably likely to result from such act or omission,

but shall not include an act or omission arising solely by way of an error of judgement or mistake unless such error of judgement or mistake is repeated on more than one occasion; and in the case of a Relevant Staff Member where such error of judgement or mistake occurs at least 6 months after the Relevant Staff Member has received training on the operational control of the relevant ETCS Equipment;

"Disruption Sum" means the Disruption Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

"Enhanced Planned Disruption Sum" has the meaning ascribed to it in Schedule 4;

"Empty Third Party Train" means any empty passenger train or any Ancillary Movement;

"ETCS" means the European Train Control System;

"ETCS Amendments" means any amendments made to this Schedule 8 and to any other provisions of this contract in accordance with paragraph 12 as a consequence of the introduction of ETCS NTC Mode on any part of the Network that is used by the Train Operator provided that the Train Operator's Specified Equipment has triggered the ETCS NTC Mode Reliability Target;

"ETCS Equipment" means the line replaceable units or equipment specified and described in Appendix 4, including all parts of such ETCS Equipment;

"ETCS Final Amendments" means any amendments made to this Schedule 8 and to any other provisions of this contract, in accordance with paragraph 12 as a consequence of the introduction of ETCS Level 2 Mode on any part of the Network that is used by the Train Operator provided that the Train Operator's Specified Equipment has triggered the ETCS Level 2 Mode Reliability Target;

"ETCS Level 2 Mode" means a level of ETCS application that allows movement authority to be passed to the train by GSM-R radio whilst track-based detection systems continue to be used to support safe train separation;

"ETCS Level 2 Mode Reliability Target" means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF;

"ETCS NTC Mode" means a level of ETCS application that allows the operation of the Specified Equipment with the National Train Control System;

"ETCS NTC Mode Reliability Target" means the achievement of 50,000 hours MTBSAF and 500,000 hours MTBMF across all track access contracts that include this definition;

"Exposure Level" has the meaning ascribed to it in paragraph 11.1.1;

"Financial Year t" has the meaning ascribed to it in paragraph 10.1.4;

"Financial Year t-1" means the Financial Year preceding Financial Year t;

"Financial Year t+1" has the meaning ascribed to it in paragraph 10.2.2;

"Full Cancellation" means, in relation to a Third Party Train, a cancellation of a train resulting in the train not operating at all;

"Incident Cap" in respect of each Financial Year, means the Incident Cap selected by the Train Operator in accordance with paragraph 11.1;

"Incident Cap Notice" has the meaning ascribed to it in paragraph 11.1.2;

"Initial Incident Cap Notice" has the meaning ascribed to it in paragraph 11.1.1;

"Late Notice Cancellation" means any Service which, pursuant to paragraph 5.6.1 of Schedule 4, is treated as a Cancellation for the purposes of paragraph 8.1(d);

"Late Notice Cancellation Sum" means the Late Notice Cancellation Sum specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

"MDNR" has the meaning ascribed to it in paragraph 6.2.1(b);

"MDTO" has the meaning ascribed to it in paragraph 4.2.1(b);

"Minutes Delay" means, in respect of a Trigger of a Recording Point, the number of minutes delay in respect of that Trigger calculated in accordance with Appendix 2;

"Mission Failure" means any irrecoverable incident that is deemed to have occurred as a result of ETCS functional failure where the Train Operator has taken all reasonable steps to correct such functional failure but has been unsuccessful, the occurrence of which during any operational day or before the start of the operational day, results in the Cancellation of the Service. Mission Failures are a sub-set of the Service Affecting Failures;

"MTBMF" or "Mean Time Between Mission Failures" means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Mission Failures;

"MTBSAF" or "Mean Time Between Service Affecting Failures" means the arithmetic mean of the time (measured using In Service Operating Hours) between successive independent Service Affecting Failures;

"National Train Control System" means the traditional system used by Network Rail to control trains on its network using non-train based equipment which includes but is not limited to fixed signalling and track circuits;

"Network Rail Benchmark" or "NRB" means, in relation to each Charging Period within the relevant Financial Year, the Network Rail Benchmark in Minutes Delay per 100 Train Operator Miles specified in Appendix 1;

"Network Rail Cap" means the Network Rail Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Network Rail Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

"Network Rail Charging Period Limit" means 1/13th of the Network Rail Cap;

"Network Rail Payment Rate" means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

"Normal Planned Disruption Sum" has the meaning ascribed to it in Schedule 4;

"Other Train Operator Train" means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract;

"Part Cancellation" means, in relation to a Third Party Train, a cancellation of a train resulting in the train either not commencing at its Origin or not arriving at its Destination;

"Performance Data Accuracy Code" has the meaning ascribed to it in Part B of the Network Code;

"Performance Sum" means an amount for which the Train Operator or Network Rail is liable under one of paragraphs 4 and 6 following a Charging Period in relation to Minutes Delay in that Charging Period and the preceding Charging Periods, as adjusted in accordance with paragraph 10;

"Planned Incident" means an incident in connection with a Restriction of Use to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Working Timetable;

"Prolonged Disruption" means the operation of Services in accordance with the Working Timetable on any part of the Network (for which there is no reasonably practicable diversionary route) being prevented for more than one Week as a result of any event or circumstance Attributable to Network Rail, but excluding from such events and circumstances Restrictions of Use, strikes, any kind of industrial action (on the part of any person) and the direct effects of the weather;

"Prolonged Disruption Amount" means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7, expressed in pounds sterling and rounded to zero decimal places;

"Prolonged Disruption Sum" means the Prolonged Disruption Sum calculated in accordance with paragraph 7;

"Railway Operational Code" has the meaning ascribed to it in Part H of the Network Code;

"Recording Point" means a location at which Network Rail records the times at which trains arrive at, pass or depart from that location;

"Recovery Time" means additional time incorporated in the Working Timetable to allow a train to regain time lost in delay during an earlier part of its journey;

"Relevant Staff Member" means the person(s) appointed from time to time by the Train Operator to be in operational control of the relevant Specified Equipment;

"Service Affecting Failures" means an independent failure(s) that disrupts or delays a Service;

"Service Operating Hours" means the hours accumulated by Specified Equipment fitted with ETCS Equipment whilst operational. In the case of such Specified Equipment powered by diesel engines 'operational' means when the diesel engine is running and in the case of such Specified Equipment powered by electricity 'operational' means when the pantograph or collector shoe is connected to the overhead catenary or third rail as applicable;

"Service Variation" has the meaning ascribed to it in Schedule 4;

"Third Party Train" means a train other than a train operated by the Train Operator under this contract;

"Train Operator Benchmark" or "TOB" means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Charging Period, as specified in Appendix 1;

"Train Operator Cap" means the Train Operator Cap specified in Appendix 1 and in respect of the first and last Financial Year means the Train Operator Cap specified in Appendix 1 multiplied by the Adjustment Fraction, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7 and paragraph 10.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

"Train Operator Charging Period Limit" means 1/13th of the Train Operator Cap;

"Train Operator Payment Rate" means the Train Operator Payment Rate specified in Appendix 1, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7; and

"Train Operator Omission" means any failure of or defect in or damage to the Network (excluding fair wear and tear) arising from:

- (a) the improper operation of trains under this contract;
- (b) a breach of the Train Operator's Safety Obligations or of the terms of this contract; or
- (c) any act or omission of the Train Operator's staff or agents, contractors or sub-contractors in breach of this contract;

"Trigger" means the act of a train arriving at, passing or departing from a Recording Point; and

"Zero Exposure" has the meaning ascribed to it in paragraph 11.1.1.

2. **General**

2.1 ***Performance monitoring system recordings***

For the purposes of this Schedule 8, Network Rail shall use recordings made using the Performance Monitoring System, including the times at which Services and Third Party Trains Trigger a Recording Point. In respect of Services only, and where appropriate, Network Rail may require the Train Operator to make the relevant entry to record such times on the Performance Monitoring System. Network Rail and the Train Operator shall each comply with and be bound by the Performance Data Accuracy Code, and the provisions of the Performance Data Accuracy Code shall apply to this Schedule 8.

2.2 ***Liability for Short Notice Service***

Network Rail shall, notwithstanding that it shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service, have no liability under any provision

of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code.

2.3 ***Mitigation of delays***

The parties shall take reasonable steps to avoid and mitigate the effects of any incidents which cause delay to or cancellation of any trains, and any failure to take such steps shall be regarded as a separate incident.

2.4 ***Calculation of Minutes Delay***

Appendix 2 (Calculation of Minutes Delay) shall have effect.

3. ***Diagnosis of delays***

3.1 ***Attributing delays***

Network Rail shall, using the information recorded under paragraph 2.1, identify whether each minute of delay included in Minutes Delay in respect of a Service or Third Party Train is:

- (a) Attributable to the Train Operator;
- (b) Attributable to Network Rail; or
- (c) Attributable to both the Train Operator and Network Rail.

3.2 ***Delays Attributable to both the Train Operator and Network Rail***

If a delay is Attributable to both the Train Operator and Network Rail, the associated Minutes Delay shall be allocated equally to the Train Operator and to Network Rail.

3.3 ***Unexplained delays Attributable to Network Rail***

If the cause of the delay to or cancellation of a Service which occurs on the Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to Network Rail.

3.4 ***Unexplained delays Attributable to the Train Operator***

If the cause of the delay to or cancellation of a Service which occurs off the Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to the Train Operator.

3.5 ***Identifying delaying incidents***

The parties shall co-operate with each other by providing all such information to one another as is reasonably practicable regarding the identification of the incidents which cause delay to or cancellation of any Service or Third Party Train.

3.6 ***Performance statements***

Appendix 3 (Performance statements) shall have effect.

4. Minutes Delay in respect of Train Operator performance

4.1 Prescribed delay period

4.1.1 For the purposes of this paragraph 4, the aggregate Minutes Delay to Third Party Trains Attributable to the Train Operator arising as a result of any one incident or event shall be capped as follows:

- (a) where the Train Operator has elected to have no exposure above the Incident Cap in accordance with paragraph 11, any such minutes in excess of the Incident Cap shall be disregarded; or
- (b) where the Train Operator has elected to have 30% exposure above the Incident Cap in accordance with paragraph 11, 70% of such minutes in excess of the Incident Cap shall be disregarded.

4.1.2 Any Full Cancellation of a Third Party Train (other than an Empty Third Party Train) which is Attributable to the Train Operator shall equate to 30 Minutes Delay and any Part Cancellation of a Third Party Train (other than an Empty Third Party Train) which is Attributable to the Train Operator shall equate to 15 Minutes Delay.

4.2 Train Operator performance against TOB

4.2.1 In respect of each Charging Period:

- (a) the Minutes Delay to Third Party Trains which are Attributable to the Train Operator; and
- (b) that portion of Minutes Delay to Third Party Trains which are Attributable to both the Train Operator and Network Rail which is allocated to the Train Operator (the aggregate Minutes Delay under (a) and (b) being referred to as "**MDTO**"),

in each case as adjusted in accordance with paragraph 4.1, shall be converted into a per 100 Train Operator Miles figure (the "**Adjusted MDTO**") using the formula below:

$$\text{Adjusted MDTO} = \frac{\text{MDTO}}{100 \text{ Train Operator Miles}}$$

4.2.2 The Adjusted MDTO calculated in accordance with paragraph 4.2.1 shall then be compared with the TOB and:

- (a) if the Adjusted MDTO is less than TOB, Network Rail shall be liable to the Train Operator for a Performance Sum equal to:

$$\left((TOB - \text{the Adjusted MDTO}) \times \text{Train Operator Payment Rate} \right) \times \left(\frac{CPCM}{100} \right)$$

where:

CPCM means the total number of Contract Miles operated by the Train Operator in the relevant Charging Period;

- (b) if the Adjusted MDTO exceeds TOB, the Train Operator shall be liable to Network Rail for a Performance Sum equal to:

$$\left((\text{the Adjusted MDTO} - TOB) \times \text{Train Operator Payment Rate} \times \left(\frac{CPCM}{100} \right) \right)$$

where CPCM has the meaning ascribed to it in paragraph 4.2.2(a); and

- (c) if the Adjusted MDTO is equal to TOB, neither party shall be liable to the other for a Performance Sum under this paragraph 4.2.

5. **Cancellations of or delays to Restrictions of Use Attributable to the Train Operator**

If a Restriction of Use is cancelled or the commencement of a Restriction of Use is delayed, in either case for a reason Attributable to the Train Operator, then, in respect of the cancellation or delay to such Restriction of Use, the Train Operator shall be liable to pay Network Rail a sum equal to:

- (a) in the case of a cancellation of a Restriction of Use, the Disruption Sum; or
- (b) in the case of a delay to the commencement of a Restriction of Use, one quarter of the Disruption Sum multiplied by the number of hours by which the commencement is delayed, up to a maximum of 4 hours. For the purposes of this paragraph 5(b) part of an hour shall be treated as an entire hour.

6. **Minutes Delay in respect of Network Rail performance**

6.1 **Cancellations**

For the purposes of this paragraph 6, in respect of any Service which is a Cancellation:

- (a) if the Service is a Cancellation as defined in paragraph 8.1(a), there shall not be any Minutes Delay in respect of the Service Attributable to Network Rail;
- (b) if the Service is a Cancellation as defined in paragraph 8.1(b), there shall be disregarded any Minutes Delay in respect of the Service after the first 12 hours aggregate of Minutes Delay; and
- (c) if the Service is a Cancellation as defined in paragraph 8.1(c), there shall be disregarded any Minutes Delay in respect of the Service after the time at which the Service arrives at the point on or off the Network where it subsequently becomes a Cancellation.

6.2 **Network Rail performance against NRB**

In respect of each Charging Period:

6.2.1

- (a) the Minutes Delay to Services which are Attributable to Network Rail; and
- (b) that portion of Minutes Delay to Services which are Attributable to both the Train Operator and Network Rail which is allocated to Network Rail (the aggregate Minutes Delay under (a) and (b) being referred to as "**MDNR**"),

in each case as adjusted in accordance with paragraph 6.1, shall be converted into a per 100 Train Operator Miles figure (the "**Adjusted MDNR**") using the following formula:

$$\text{Adjusted MDNR} = \frac{\text{MDNR}}{100 \text{ Train Operator Miles}}$$

6.2.2 the Adjusted MDNR calculated in accordance with paragraph 6.2.1 shall then be compared with the NRB and:

- (a) if the Adjusted MDNR is less than NRB, the Train Operator shall be liable to Network Rail for a Performance Sum equal to:

$$((NRB - \text{the Adjusted MDNR}) \times \text{Network Rail Payment Rate}) \times \left(\frac{CPCM}{100}\right)$$

where:

CPCM means the total number of Contract Miles operated by the Train Operator in the relevant Charging Period;

- (b) if the Adjusted MDNR exceeds NRB, Network Rail shall be liable to the Train Operator for a Performance Sum equal to:

$$((\text{the Adjusted MDNR} - NRB) \times \text{Network Rail Payment Rate}) \times \left(\frac{CPCM}{100}\right)$$

where CPCM has the meaning ascribed to it in paragraph 6.2.2(a); and

- (c) if the Adjusted MDNR is equal to NRB, neither party shall be liable to the other for a Performance Sum under this paragraph 6.2.

7. Prolonged Disruption

7.1 Prolonged Disruption Sum calculation

In respect of each Week during which any Prolonged Disruption continues, the Prolonged Disruption Sum shall be calculated in accordance with the following formula:

$$\text{Prolonged Disruption Sum} = PDA \times S \times M$$

where:

PDA is the Prolonged Disruption Amount;

S is one quarter of the number of Services operated during the 4 Weeks immediately before the first Week of the Prolonged Disruption over that part of the Network subject to the Prolonged Disruption; and

M is the multiplier set out in the table below in respect of that Week of the Prolonged Disruption:

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2
Week 4	3
Week 5 to 13	2
Week 14 to 26	1.5

7.2 Subsequent Prolonged Disruption

No Prolonged Disruption Sum shall be payable in respect of Week 27 or any subsequent Week of a Prolonged Disruption.

7.3 **Network Rail liability**

7.3.1 Subject to paragraph 7.3.2 below, Network Rail shall be liable in any Charging Period for the Prolonged Disruption Sum in respect of each Prolonged Disruption of a Service Planned to depart its Origin in that Charging Period.

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement.

8. **Cancellation**

8.1 **Cancellation**

"Cancellation" means any Service:

- (a) which does not depart from its Origin within 12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within 12 hours after the time at which it is Planned to depart and arrives at its Destination more than 12 hours after the time at which it is Planned to arrive, and in respect of which no Diverted Service has been agreed; or
- (c) which departs from its Origin within 12 hours after the time at which it is Planned to depart but does not arrive at its Destination, and in respect of which no Diverted Service has been agreed,

in each case where at least 6 hours of the delay to the Service is Attributable to Network Rail; or

- (d) in respect of which Network Rail:
 - (i) nominates an Alternative Train Slot for a reason which is Attributable to Network Rail under paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such Train Slot and:
 - (A) does not propose a different Alternative Train Slot; or
 - (B) proposes a different Alternative Train Slot and this is not accommodated by Network Rail as a Train Operator Variation; or
 - (ii) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

8.2 **Network Rail liability**

8.2.1 Subject to paragraphs 8.2.2, 8.2.3 and 8.3 below, and paragraphs 4.5, 5.6 and 7.4 of Schedule 4, Network Rail shall be liable in any Charging Period for the Cancellation Sum in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

8.2.2 Network Rail shall not be liable under this paragraph 8 for any Cancellation Sum in respect of:

- (a) an Empty Service (save that, for the purpose of this paragraph 8, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement; or

- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

8.2.3 In respect of any Cancellation which is a Late Notice Cancellation, Network Rail shall not be liable for the Cancellation Sum in respect of that Late Notice Cancellation pursuant to paragraph 8.2.1 above but shall instead be liable for the Late Notice Cancellation Sum in respect of that Late Notice Cancellation.

8.3 ***Late presentation of Service***

Network Rail shall have no liability to the Train Operator under the terms of this Schedule 8 where a Service is presented to Network Rail after the time at which it is Planned to depart its Origin to the extent such late presentation leads to:

- (a) a Cancellation as a result of Network Rail meeting its commitments in terms of train regulation as set out in any relevant Train Regulation Policies established pursuant to the Railway Operational Code; or
- (b) a conflict with any restrictions on the use of the Network contained in the Timetable Planning Rules.

9. **Payment**

9.1 ***Aggregate Net Liability of Network Rail and the Train Operator for Performance Sums***

9.1.1 The Aggregate Net Liability of Network Rail for a Performance Sum in respect of any Charging Period shall not exceed the Network Rail Charging Period Limit.

9.1.2 Subject to paragraph 9.1.3, if Network Rail would otherwise be liable for a Performance Sum which exceeds the Network Rail Charging Period Limit, then the amount by which such claim exceeds the Network Rail Charging Period Limit shall be taken into account when calculating Network Rail's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.3 In respect of any Financial Year, the Aggregate Net Liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.

9.1.4 The Aggregate Net Liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.

9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit shall be taken into account when calculating the Train Operator's Aggregate Net Liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.6 In respect of any Financial Year, the Aggregate Net Liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.

9.1.7 In this paragraph 9.1, the "**Aggregate Net Liability**" of a party means, in respect of a Charging Period or Financial Year, its liability after setting off the liability of the other party to it under the same provisions in respect of the same period.

9.2 ***Issue of invoice or credit note***

9.2.1 In respect of each Charging Period, subject to paragraph 9.1, Network Rail shall:

- (a) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 11 of Appendix 3 within 28 days after the provision of such period final statement;
 - (b) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 12 of Appendix 3, within 28 days after the provision of such period final statement;
 - (c) issue a credit note in respect of the aggregate of all Normal Planned Disruption Sums and Enhanced Planned Disruption Sums for which Network Rail is liable in accordance with Schedule 4, if any, within 28 days after agreement of such liability.
- 9.2.2 In the event that (i) any of the period final statements referred to in sub-paragraphs 9.2.1(a) and 9.2.1(b) have not been provided within 28 days after the end of the Charging Period to which they relate or (ii) agreement referred to in sub-paragraph 9.2.1(c) has not been reached within those same 28 days, in both cases Network Rail may agree with the Train Operator that an interim payment be made. If such agreement is reached then the invoice or credit note (as appropriate) issued shall detail which of the relevant sums are thus settled and which remain outstanding; and any subsequent invoice or credit note (as appropriate) issued in respect of the same Charging Period under sub-paragraphs 9.2.1(a), 9.2.1(b) or 9.2.1(c) shall take account of the interim payments as well as remaining subject to paragraph 9.1.

9.3 ***Resolution of disputes***

- 9.3.1 Without prejudice to Clause 13, Part B of the Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.
- 9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

10. **Reviews of Network Rail Cap and Train Operator Cap**

10.1 ***Not used***

10.2 ***Adjustments to the Network Rail Cap and Train Operator Cap***

- 10.2.1 The Network Rail Cap and the Train Operator Cap that shall apply from 1 April in each Financial Year in relation to each Charging Period in that Financial Year shall be the Network Rail Cap and the Train Operator Cap, in each case as specified in Appendix 1 and as adjusted in accordance with this paragraph 10.2 and paragraphs 2.7.1 and 2.7.2 of Schedule 7, provided that no adjustment shall be made to the Network Rail Cap or the Train Operator Cap pursuant to the following subparagraphs of this paragraph 10.2 prior to 1 April 2020.
- 10.2.2 Within 28 days after the last day of Financial Year t, Network Rail shall notify the Train Operator in writing of:
- (a) the total number of Contract Miles operated by the Train Operator during Financial Year t (the "**Annual Contract Mileage**");
 - (b) Network Rail's determination as to whether or not the Annual Contract Mileage for Financial Year t exceeds or is less than the Baseline Annual Contract Mileage (as determined in accordance with paragraph 10.2.3 below ("**Baseline Annual Contract Mileage**")) by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual Contract Mileage (the "**Annual Contract Mileage Variation**"); and
 - (c) if Network Rail determines that there has been an Annual Contract Mileage Variation, Network Rail's proposal for an adjusted Network Rail Cap and/or Train Operator Cap in respect of the Financial Year immediately following Financial Year t ("**Financial Year t+1**"), in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

10.2.3

- (a) The Baseline Annual Contract Mileage that shall apply from 1 April in each Financial Year shall be the Baseline Annual Contract Mileage specified in Appendix 1, unless it is adjusted in accordance with paragraph 10.2.3(b).
- (b) If, in accordance with paragraph 10.2.2(b), Network Rail determines that there has been an Annual Contract Mileage Variation, then the Baseline Annual Contract Mileage for Financial Year t+1 and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Contract Mileage pursuant to this paragraph 10.2.3(b) shall be the Annual Contract Mileage for the Financial Year t in which the Annual Contract Mileage Variation has occurred.

10.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the parties shall endeavour to agree whether the Network Rail Cap and/or the Train Operator Cap should be adjusted in accordance with this paragraph 10.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2 shall be subject to the prior approval of ORR.

10.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Cap and/or the Train Operator Cap, the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.

10.2.6 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 10.2.2, either:

- (a) the parties fail to reach agreement; or
- (b) prior to the expiry of that 56 day period both parties agree that agreement is unlikely to be reached prior to expiry of that period,

the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine the matter. The parties agree to abide by any determination issued by ORR.

10.2.7 Any adjustment to the Network Rail Cap and/or the Train Operator Cap shall take effect only when it has been approved by ORR and, unless otherwise specified by ORR, any such adjustment shall take effect from 1 April in Financial Year t+1.

10.2.8 Promptly following any adjustment to the Network Rail Cap and/or the Train Operator Cap pursuant to this paragraph 10.2, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

- (a) any invoices and credit notes already issued; and
- (b) any payments already made in respect of Performance Sums,

in each case relating to the Charging Periods in Financial Year t+1.

10.2.9 Any statement issued by Network Rail pursuant to paragraph 10.2.8 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 9.2.

11. Selection by the Train Operator of the Incident Cap and Exposure Level

11.1 Selection by the Train Operator of the Incident Cap and Exposure Level

11.1.1 Subject to paragraph 11.1.3, on or before the date on which this paragraph 11.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Incident Cap and the level of exposure above the Incident Cap ("**Exposure Level**") it wishes to apply, being either no exposure above the Incident Cap, as described in paragraph 4.1.1(a) ("**Zero Exposure**"), or 30% exposure above the Incident Cap, as described in paragraph 4.1.1(b) ("**30% Exposure**") (such notification being the "**Initial Incident Cap Notice**"). The Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the level of Incident Cap selected by the Train Operator in the Initial Incident Cap Notice until it is replaced by a different level of Incident Cap and Exposure Level selected by the Train Operator in an Incident Cap Notice issued pursuant to paragraph 11.1.2.

11.1.2 Subject to paragraph 11.1.3, the Train Operator may change the level of Incident Cap and Exposure Level previously selected by it (either in the Initial Incident Cap Notice or any subsequent Incident Cap Notice issued pursuant to this paragraph 11.1.2) with effect from 1 April in any Financial Year by notifying Network Rail in writing of the level of Incident Cap and Exposure Level it wishes to apply for that Financial Year (the "**Incident Cap Notice**"). Any such Incident Cap Notice must be served by the Train Operator on Network Rail by no later than 6 weeks prior to 1 April in the Financial Year from which the Train Operator wishes the new level of Incident Cap and Exposure Level to apply, and the Incident Cap Access Charge Supplement Rate applicable for that and each subsequent Financial Year shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the level of Incident Cap selected by the Train Operator in the Incident Cap Notice until it is replaced by a different level of Incident Cap and Exposure Level selected by the Train Operator in an Incident Cap Notice issued pursuant to this paragraph 11.1.2.

11.1.3 For the avoidance of doubt, if the Train Operator selected an Incident Cap prior to Financial Year 2019/20, and did not issue a subsequent Incident Cap Notice in respect of Financial Year 2019/20 selecting 30% Exposure, the Train Operator shall be deemed, for the purposes of paragraphs 11.1.1 and 11.1.2, to have selected Zero Exposure for Financial Year 2019/20.

11.2 Level of Incident Cap, Exposure Level and Incident Cap Access Charge Supplement Rate

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps and, in respect of the relevant Incident Cap, the Exposure Level as set out in either Column B or C:

A	B	C
Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period) expressed in pounds sterling and rounded to four decimal places – Zero Exposure above the Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period) expressed in pounds sterling and rounded to four decimal places – 30% Exposure above the Incident Cap
1,000 minutes	0.2045	0.1432
2,000 minutes	0.1057	0.0740
3,000 minutes	0.0623	0.0436

A	B	C
Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period) expressed in pounds sterling and rounded to four decimal places – Zero Exposure above the Incident Cap	Incident Cap Access Charge Supplement Rate (£ per Contract Mile operated in a Charging Period) expressed in pounds sterling and rounded to four decimal places – 30% Exposure above the Incident Cap
4,000 minutes	0.0403	0.0282
5,000 minutes	0.0280	0.0196
6,000 minutes	0.0217	0.0152
7,000 minutes	0.0172	0.0121
8,000 minutes	0.0135	0.0095
9,000 minutes	0.0101	0.0071
10,000 minutes	0.0067	0.0047
No Incident Cap	None	None

12. **ETCS Amendments and ETCS Final Amendments**

12.1 ***Circumstances in which ETCS Amendments and ETCS Final Amendments can be made***

- (a) Either party may by notice to the other propose ETCS Amendments or ETCS Final Amendments.
- (b) ORR may make ETCS Amendments, subject to complying with paragraph 12.3.

12.2 ***ETCS Amendments and ETCS Final Amendments agreed by the parties***

- (a) A party that wishes to make ETCS Amendments or ETCS Final Amendments shall serve a notice on the other party that:
 - (i) specifies as far as possible the proposed ETCS Amendments or proposed ETCS Final Amendments and the date from which they are to have effect;
 - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments or proposed ETCS Final Amendments and setting out the reasons for making them; and
 - (iii) gives broad effect to the principle that the liability of the parties under this Schedule 8 (all other things being equal) is no greater after the implementation of any ETCS Amendments or ETCS Final Amendments than it was prior to the implementation of those ETCS Amendments or ETCS Final Amendments.
- (b) The party receiving a notice under paragraph 12.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, and in any event within 20 Working Days following service of a response pursuant to paragraph 12.2(b), the parties shall use reasonable endeavours to agree

the wording of the proposed ETCS Amendments or proposed ETCS Final Amendments and the date on which they are to have effect.

- (d) If:
- (i) the parties agree to make ETCS Amendments or ETCS Final Amendments pursuant to paragraph 12.2(c); or
 - (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 12.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,

they shall notify ORR.

12.3 *ORR right to approve, determine or make ETCS Amendments or ETCS Final Amendments*

- (a) If ORR:
- (i) receives a notification under paragraph 12.2(d); or
 - (ii) proposes to make ETCS Amendments or ETCS Final Amendments itself,
- then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments or ETCS Final Amendments it shall:
- (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments or the proposed ETCS Final Amendments; and
 - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments or ETCS Final Amendments shall have effect.
- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 12.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

12.4 *Amendments to sub-paragraph (e) of the definition of "Attributable to Network Rail" as a consequence of ETCS Amendments*

With effect from the implementation of any ETCS Amendments in accordance with paragraphs 12.2 and/or 12.3, sub-paragraph (e) of the definition of "Attributable to Network Rail" in paragraph 1 shall be replaced with the following wording:

"any delay or cancellation occurring on or off the Network caused by the failure, defect or miscommunication of ETCS Equipment fitted to the Specified Equipment (excluding any such failure, defect or miscommunication of such ETCS Equipment when operating in NTC Mode or directly caused by the Deliberate Act of the Train Operator) that has been allocated as the responsibility of the Train operator in the Performance Monitoring System in accordance with the guidance on allocation of responsibility for incidents set out in the Delay Attribution Principles and Rules"

12.5 *Amendments to Schedule 8 as a consequence of ETCS Final Amendments*

With effect from the implementation of any ETCS Final Amendments in accordance with paragraphs 12.2 and/or 12.3, the amendments to Schedule 8 listed in Appendix 5 shall have effect.

12.6 ***Amendments to Schedule 8 as a consequence of ETCS Amendments or ETCS Final Amendments***

The parties acknowledge and agree that any amendments made to Schedule 8 pursuant to this paragraph 12 must also apply to any other operator whose Access Agreement in relation to track includes a provision similar to this paragraph 12 and, accordingly, each party agrees to participate in any referral for resolution under paragraph 12.2(d)(ii) even if, either:

- (a) pursuant to paragraph 12.2, the Train Operator has notified Network Rail that it agrees with Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments; and/or
- (b) the determination of any ETCS Amendments or ETCS Final Amendments by ORR differs from Network Rail's proposed ETCS Amendments or proposed ETCS Final Amendments with which the Train Operator agreed.

Appendix 1

Performance

Train Operator Performance

Train Operator Payment Rate	£54.04 per Minutes Delay to Third Party Trains which are Attributable to the Train Operator.
Train Operator Cap	£∞
Disruption Sum	£2,375

Network Rail Performance

Network Rail Payment Rate	£21.38 per Minutes Delay to Services which are Attributable to Network Rail.
Network Rail Cap	£∞
Prolonged Disruption Amount	means an amount equal to the Late Notice Cancellation Sum.

Benchmarks

Train Operator Benchmark

The Train Operator Benchmark (TOB) in relation to each Charging Period shall be 3.10 Minutes Delay per 100 Train Operator Miles.

Network Rail Benchmark

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be 7.82 Minutes Delay per 100 Train Operator Miles;

Cancellation Sum

The Cancellation Sum shall be calculated as follows:

- (a) the Cancellation Sum shall be £2,025 for each Cancellation below the Cancellation Threshold;
- (b) the Cancellation Sum shall be £5,401 for each Cancellation equal to or above the Cancellation Threshold; and
- (c) the "**Cancellation Threshold**" in any Charging Period shall be 0.40 per cent of the total number of Services operated by the Train Operator in that Charging Period.

Late Notice Cancellation Sum

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £1,749.

Baseline Annual Contract Mileage

The Baseline Annual Contract Mileage shall be 871,499.

Appendix 2

Calculation of Minutes Delay

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
 - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
 - (b) in respect of each other recorded Trigger, the lesser of:
 - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
 - (ii) the greater of $((A1 - A2) + B)$ and zero,

where:

A1 is the number of minutes between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);

A2 is the Planned time between the Triggers mentioned in (a) above; and

B is any Recovery Time between such Triggers.
2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

Appendix 3

Performance Statements

Interim statements provided by Network Rail

1. Using all reasonable endeavours, Network Rail shall provide to the Train Operator an interim statement listing all incidents which are in connection with Services which were Planned to depart from their Origin during each day. Such interim statements shall be issued on the eighth day after the end of each particular day (or, if the eighth day is not a Working Day, on the next Working Day thereafter) indicating:
 - (a) which incidents are Attributable to the Train Operator and, in respect of such incidents, the Minutes Delay to Third Party Trains;
 - (b) which incidents are Attributable to Network Rail and, in respect of such incidents, the Minutes Delay to Services;
 - (c) which incidents are Attributable to both the Train Operator and Network Rail, and in respect of such incidents (i) that portion of Minutes Delay to Third Party Trains which is allocated to the Train Operator and (ii) that portion of Minutes Delay to Services which is allocated to Network Rail; and
 - (d) which incidents in categories (a) to (c) above remain, at the time of production of the interim statement, under further investigation following a referral by the Train Operator under Condition B2.3.2 of the Network Code.
2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, Network Rail shall provide to the Train Operator an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable under paragraph 5 of Schedule 8.
3. As soon as reasonably practicable after the end of each Charging Period, and using all reasonable endeavours to provide such interim statement within six Working Days after the end of each Charging Period, Network Rail shall provide to the Train Operator an interim statement listing:
 - (a) the total Contract Miles; and
 - (b) the total number of Services,in each case operated by the Train Operator during that Charging Period.

Interim statements provided by the Train Operator

4. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, the Train Operator shall provide to Network Rail the following interim statements:
 - (a) an interim statement listing (i) all Cancellations occurring during that Week for which the Train Operator considers it is entitled to a Cancellation Sum, and (ii) any Late Notice Cancellations for which the Train Operator considers it is entitled to a Late Notice Cancellation Sum, in each case under paragraph 8 of Schedule 8;
 - (b) an interim statement listing all Prolonged Disruptions occurring or continuing during that Week for which the Train Operator considers it is entitled to a Prolonged Disruption Sum under paragraph 7 of Schedule 8; and

- (c) an interim statement listing all Service Variations arising during that Week for which the Train Operator considers it is entitled to a Service Variation Sum under Schedule 4.

Dispute of interim statement

- 5. Within two Working Days of receipt of any interim statement under paragraph 1, 2, 3 or 4 of this Appendix the recipient shall notify the provider of the interim statement of any reason why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.
- 6. Within the next five Working Days after notification of any dispute under paragraph 5 above, nominated representatives of the parties shall meet and attempt to resolve that dispute.
- 7. If any matter is still in dispute ten Working Days after the meeting held under paragraph 6 above, either party may refer such matter for resolution under paragraph 9.3.1 of Schedule 8.

Deemed agreement

- 8. Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph 5 above that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

Period final statements

- 9. After the resolution of any investigations listed in an interim statement in accordance with paragraph 1(d) above, and of any disputes notified under paragraph 5 above, Network Rail shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
 - (a) the total Cancellations and the aggregate of the Cancellation Sums payable under Schedule 8;
 - (b) the total Late Notice Cancellations and the aggregate of the Late Notice Cancellation Sums payable under Schedule 8;
 - (c) the total Service Variations and the aggregate of the Service Variation Sums payable under Schedule 4;
 - (d) the aggregate of the Disruption Sums payable under Schedule 8; and
 - (e) the aggregate of the Prolonged Disruption Sums payable under Schedule 8,in each case applicable to Services Planned to depart from their Origin during that Charging Period.
- 10. After the resolution of any incidents referred for further investigation under Condition B2.3.2 of the Network Code, Network Rail shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
 - (a) the total Performance Sum for which Network Rail is liable under Schedule 8; and
 - (b) the total Performance Sum for which the Train Operator is liable under Schedule 8in each case including such relevant calculations as the parties shall agree from time to time.

Statement of adjustment

- 11. If Condition B3.3 of the Network Code (Adjustment to prior results) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned

Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.

12. Any statement issued by Network Rail under paragraph 11 above shall be accompanied by an adjusting invoice or credit note.

Appendix 4

ETCS Equipment

European Vital Computer (EVC)
European Vital Computer
EVC fan
Driver Machine Interface (DMI)
Single DMI
DMI Switch
ETCS Loudspeaker
Train Interface Unit (TIU)
Cabinets (EVC, NVC, JRU housings)
Safe relays module
Braking Activation Device
Balise Antenna
Eurobalise Antenna
Juridical Recorder Unit (JRU)
JRU
JRU Health Indicator
Non-Vital Computer (NVC)
Non-Vital Computer
GSM-R roof antennas
Odometry System
Radar type I (Siemens)
Radar type II (Deuta)
Odometry Pulse Generator type I
Odometry Pulse Generator type II (if applicable)
Control and Maintenance Workstations
Maintenance laptop SW
Power Supply Units (PSU)
DC-DC converter
Overvoltage protection
Mini circuit breaker
Interface Equipment
Additional speed display
Cab holdover button
ETCS acknowledge button
ETCS isolation switch
Klip station
AWS/TPWS Equipment
TPWS Control Unit 4th generation
TPWS Driver Machine Interface 4th generation
AWS visual indicator unit
AWS audible indicator and speech unit
AWS isolation/fault indicator

Cables, connections, labelling and other miscellaneous items
Cables
Brackets
Sundries
Junction Boxes

Appendix 5

Amendments to Schedule 8 as a Consequence of ETCS Final Amendments

From the effective date of any ETCS Final Amendments agreed in accordance with paragraph 12, the following amendments to Schedule 8 shall also take effect:

- 1 Paragraph 1: definition of “Attributable to Network Rail”:
 - (a) delete “;or” from the end of sub-paragraph (d) and replace with a full stop; and
 - (b) delete sub-paragraph (e) in its entirety.

- 2 Paragraph 1: definition of “Attributable to the Train Operator”, delete the following wording from sub-paragraph (iii):

“(with the exception of those failures, defects or miscommunications contemplated in sub-paragraph (e) of the definition of “Attributable to Network Rail”)”

- 3 Paragraph 1: delete the following definitions:

“Deliberate Act”

“ETCS”

“ETCS Amendments”

“ETCS Final Amendments”

“ETCS Level 2 Mode”

“ETCS Level 2 Mode Reliability Target”

“ETCS NTC Mode”

“ETCS NTC Mode Reliability Target”

“Mission Failure”

“MTBMF”

“MTBSAF”

“National Train Control System”

“Relevant Staff Member”

“Service Affecting Failures”

“Service Operating Hours”

- 4 Delete paragraph 12 in its entirety

Schedule 9

(Limitation on liability)

1. Definitions

In this Schedule 9:

"Liability Cap" means:

- (a) in relation to the first Contract Year, the sum of £6,500,000; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{CPI_n}{CPI_1} \right]$$

where:

- (i) C_1 is the sum of £6,500,000;
- (ii) C_n is the Liability Cap in the nth subsequent Contract Year;
- (iii) CPI_n is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n;
- (iv) CPI_1 is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the month in which this contract became effective under Clause 3.1.

2. Application

The limitations on liability contained in this Schedule apply in the circumstances set out in Clause 11.5.

3. Limitation on Network Rail's liability

In relation to any claim for indemnity made by the Train Operator to which this Schedule 9 applies:

- (a) Network Rail shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and Network Rail shall have no further liability for it.

4. Limitation on Train Operator's liability

In relation to any claims for indemnity made by Network Rail to which this Schedule 9 applies:

- (a) the Train Operator shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and the Train Operator shall have no further liability for it.

5. Disapplication of limitation

To the extent that any Relevant Losses:

- (a) result from a conscious and intentional breach by a party; or
- (b) are in respect of obligations to compensate any person for liability for death or personal injury, whether resulting from the negligence of a party or the negligence of any of its officers, employees or agents or from a failure by a party to comply with its Safety Obligations,

such Relevant Losses:

- (i) shall not be subject to the limitation of liability in Schedule 9; and
- (ii) shall not be taken into account when calculating the amount of Relevant Losses in respect of claims admitted or finally determined in a Contract Year for the purposes of the limitations of liability in this Schedule 9.

6. Exclusion of legal and other costs

The limits on the parties' liabilities provided for in paragraphs 3 and 4 shall not apply to costs incurred in recovering any amount under a relevant claim, including legal, arbitral and other professional fees and expenses.

7. Exclusion of certain Relevant Losses

A party shall have no claim for Relevant Losses to the extent that such Relevant Losses result from its own negligence or breach of this contract.

8. Continuing breaches

Nothing in this Schedule 9 shall prevent a party making a new claim for indemnity in respect of a continuing breach of contract which:

- (a) is a continuing breach of contract which continues for more than 12 months;
- (b) is a continuing breach of contract which continues beyond a period within which it might reasonably be expected to have been remedied; or
- (c) is a breach of a Performance Order in relation to a breach of contract,

but any such new claim shall not include any sum which was the subject matter of a previous claim and was extinguished by virtue of paragraph 3(b) or 4(b).

9. Final determination of claims

For the purpose of this Schedule 9, a determination of a claim for Relevant Losses by a Court or other tribunal shall be treated as final when there is no further right of appeal or review from such determination or in respect of which any right of appeal or review has been lost, whether by expiry of time or otherwise.

Schedule 10

(Network Code and Traction Electricity Rules modifications)

1. Automatic effect

1.1 General

This contract shall have effect:

- (a) with the modifications; and
- (b) from the date,

specified by ORR in a modification notice as supplemented (where appropriate) by a notice of consent to requisite adaptations or a notice of determined requisite adaptations.

1.2 Retrospective effect

No relevant notice may have retrospective effect.

2. Modification notice

2.1 Meaning

A modification notice is a notice given by ORR to the parties for the purposes of this contract, which modifies specified provisions of this contract (other than this Schedule 10) by making such modifications as are consequential upon, or necessary to give full effect to, any change to the Network Code or the Traction Electricity Rules.

2.2 Contents of modification notice

A modification notice shall state:

- (a) the modifications which are to be made to this contract;
- (b) the date from which specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification; and
- (c) which of the specified modifications are to be subject to adaptation and the backstop date for the requisite adaptations in question.

3. Adaptation procedure

3.1 Application

This paragraph 3 applies in the case of specified modifications which are specified as being subject to adaptation.

3.2 Negotiation of Adaptations

In respect of the modifications in each modification notice:

- (a) within 14 days of the date of service of the relevant modification notice, the parties shall meet and in good faith negotiate and attempt to agree the requisite adaptations;
- (b) each party shall ensure that:

- (i) such negotiations are conducted in good faith in a timely, efficient and economical manner, with appropriate recourse to professional advice; and
- (ii) ORR's criteria are applied in the negotiations; and
- (c) the negotiations shall not continue after the backstop date.

3.3 ***Agreed adaptations - notice to the Office of Rail and Road***

If the parties have agreed the requisite adaptations on or before the backstop date, not later than 7 days after the backstop date the agreed requisite adaptations shall be sent by the parties to ORR for its consent, together with a statement, signed by or on behalf of both parties:

- (a) stating the reasons for the agreed requisite adaptations;
- (b) stating the extent to which and ways in which ORR's criteria have been applied in arriving at the agreed requisite adaptations and, in any case where they have not been applied, the reasons; and
- (c) giving such other information as ORR may have requested.

3.4 ***Agreed adaptations - Office of Rail and Road's consent***

If ORR is satisfied with the agreed requisite adaptations, and it gives a notice of consent to requisite adaptations, they shall have effect as provided for in paragraph 3.8.

3.5 ***Agreed requisite adaptations - Office of Rail and Road's refusal of consent***

If ORR gives notice to the parties that it is not satisfied with any or all of the agreed requisite adaptations, it may:

- (a) require the parties again to follow the procedure for negotiating requisite adaptations (with such modifications as to time limits as it specifies), in which case they shall do so; or
- (b) determine the requisite adaptations itself.

3.6 ***Requisite adaptations - failure to agree or submit***

If the parties have failed to submit agreed requisite adaptations to ORR for its consent within 7 days after the backstop date, it may determine the requisite adaptations itself.

3.7 ***Notice of determined requisite adaptations***

A notice of determined requisite adaptations is a notice:

- (a) given by ORR to the parties for the purposes of this paragraph 3 following the failure of the parties to send to ORR within 7 days of the backstop date requisite adaptations to which it gives its consent; and
- (b) which states the requisite adaptations which ORR has determined should be made using its powers to do so under paragraph 3.5 or 3.6.

3.8 ***Effect of requisite adaptations***

Requisite adaptations established either:

- (a) by agreement of the parties and in respect of which ORR has given a notice of consent to requisite adaptations under paragraph 3.4; or

- (b) by the determination of ORR under paragraph 3.5 or 3.6 and stated in a notice of determined requisite adaptations,

shall have effect from such date as ORR states in the relevant notice of consent to requisite adaptations or (as the case may be) the relevant notice of determined requisite adaptations.

4. **Procedural matters**

4.1 ***More than one notice***

More than one modification notice may be given.

4.2 ***Differences etc as to requisite adaptations***

Any difference or question as to whether any thing is a requisite adaptation shall be determined by ORR:

- (a) on the application of either party; and
- (b) in accordance with such procedure (including as to consultation) as ORR may by notice to the parties determine.

4.3 ***Co-operation and information***

If ORR gives notice to either or both of the parties that it requires from either or both of them information in relation to any requisite adaptation or proposed requisite adaptation:

- (a) the party of whom the request is made shall provide the requested information promptly and to the standard required by ORR; and
- (b) if that party fails timeously to do so, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

4.4 ***Office of Rail and Road's criteria***

In relation to the negotiation of any requisite adaptation, ORR shall be entitled to:

- (a) give to the parties any criteria which it requires to be applied in the negotiations; and
- (b) modify the criteria after consultation.

4.5 ***Procedural modifications***

In relation to the procedure in paragraph 3 for the agreement or establishment of requisite adaptations (including the times within which any step or thing requires to be done or achieved):

- (a) such procedure may be modified by ORR by a notice of procedural modification given by it to the parties; but
- (b) ORR may give a notice of procedural modification only if it is satisfied that it is necessary or expedient to do so in order to promote or achieve the objectives specified in section 4 of the Act or if such a notice is requested by both parties.

4.6 **Dates**

In this Schedule 10:

- (a) where provision is made for a date to be specified or stated by ORR it may, instead of specifying or stating a date, specify or state a method by which a date is to be determined, and references to dates shall be construed accordingly; and
- (b) any notice given by ORR which states a date may state different dates for different purposes.

4.7 **Requirement for prior consultation**

No relevant notice shall have effect unless:

- (a) ORR has first consulted the parties and the Secretary of State in relation to the proposed relevant notice in question;
- (b) in the consultations referred to in paragraph 4.7(a), ORR has made available to the parties and the Secretary of State such drafts of the proposed relevant notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each party and the Secretary of State the opportunity to make representations in relation to the proposed relevant notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the relevant notice to be given;
- (d) ORR has notified the parties and the Secretary of State as to its conclusions in relation to the relevant notice in question (including by providing to each such person a copy of the text of the proposed relevant notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.7(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

4.8 **Consolidated contract**

Not later than 28 days after the giving of the last of:

- (a) a modification notice; and
- (b) a notice of determined requisite adaptations or a notice of consent to requisite adaptations (as the case may be),

Network Rail shall prepare and send to the Train Operator, ORR and the Secretary of State a copy of this contract as so modified.

4.9 **Saving**

Nothing in this Schedule 10 affects:

- (a) the right of either party to approach and obtain from ORR guidance in relation to the requisite adaptations; or
- (b) the right of ORR at any time to effect modifications to the Network Code under Condition C8 of that code, or the Traction Electricity Rules pursuant to the provisions contained therein.

5. **Definitions**

In this Schedule 10 unless the context otherwise requires:

"backstop date" means the date (being not earlier than 28 days from the date of the modification notice) specified as such in a modification notice (or such later date as may be established under paragraph 3.5(a), 4.5 or 4.6);

"modification notice" has the meaning ascribed to it in paragraph 2.1;

"notice of consent to requisite adaptations" means a notice given by ORR under paragraph 3.4;

"notice of determined requisite adaptations" has the meaning ascribed to it in paragraph 3.7;

"notice of procedural modification" means a notice given by ORR to the parties under paragraph 4.5 modifying any aspect of the procedure in this Schedule 10 for the agreement or establishment of requisite adaptations;

"ORR's criteria" means the criteria established by ORR for the purposes of the negotiation of requisite adaptations and given to the parties, or modified, under paragraph 4.4;

"relevant notice" means a modification notice, notice of consent to requisite adaptations, notice of determined requisite adaptations, notice of procedural modification or notice of modification of ORR's criteria;

"requisite adaptations" in relation to specified modifications, means the amendments (including the addition of information) to the provisions in question which are necessary or expedient so as to give full effect to them in the particular circumstances of the case, and **"adaptation"** shall be construed accordingly; and

"specified" means specified in a modification notice, and "specify" and "specifying" shall be construed accordingly.

Schedule 11

(Crossrail modifications)

1. **Automatic effect**

1.1 **General**

This contract shall have effect:

- (a) with the modifications ; and
- (b) from the date which shall not be earlier than 1 January 2015, specified by ORR in a modification notice.

1.2 **Retrospective effect**

A modification notice shall not have retrospective effect.

2. **Modification notice**

2.1 **Meaning**

A modification notice is a notice given by ORR to the parties for the purposes of this contract which modifies:

- (a) the specified provisions; and
- (b) any other provisions of this contract which require modification as a result of the modifications to the specified provisions,

by making such modifications as are, in ORR's opinion, necessary or desirable having regard to:

- (i) ORR's duties under section 4 of the Act;
- (ii) and the access rights under any Crossrail Track Access Contract if, and to the extent that, those access rights are inconsistent with the specified provisions.

2.2 **Contents of Modification notice**

A modification notice shall state:

- (a) the modifications which are to be made to this contract;
- (b) the date or dates from which the specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification;
- (c) the reasons for the modifications; and
- (d) the amount of compensation, if any, which shall be payable to the Train Operator under paragraph 4.1, including the reasons for ORR's determination of such amount.

3. **Procedural matters**

3.1 **Modification notice**

More than one modification notice may be given.

3.2 **Co-operation and information**

If ORR gives notice to either or both of the parties that it requires from either or both of them any information in relation to any proposed modifications (including information that a party would be required to provide, to the extent applicable, under Part G of the Network Code in respect of a Network Change proposed by Network Rail):

- (a) the party of whom the request is made shall provide the requested information to ORR in accordance with any timescales specified by ORR in its notice and to the standard required by ORR; and
- (b) if that party fails to provide the requested information in accordance with paragraph 3.2(a) and has not provided ORR with an explanation which is satisfactory to ORR for its failure to do so, including, to the extent applicable, any revised timescales within which that party shall provide the requested information, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

3.3 **Dates**

In this Schedule 11, a modification notice may:

- (a) instead of specifying or stating a date, specify or state a method by which a date shall be determined, and references to dates shall be construed accordingly; and
- (b) state different dates for different purposes.

3.4 **Requirement for prior consultation**

No modification notice shall have effect unless:

- (a) ORR has first consulted the parties, the Secretary of State and such other persons, if any, as it considers appropriate in relation to the proposed modification notice;
- (b) in the consultations referred to in paragraph 3.4(a), ORR has made available to the consultees such drafts of the proposed modification notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each consultee the opportunity to make representations in relation to the proposed modification notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on such notice;
- (d) ORR has notified the consultees as to its conclusions in relation to the modification notice in question (including by providing to each consultee a copy of the text of the proposed modification notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 3.4(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

3.5 **Consolidated contract**

Not later than 14 days after the giving of a modification notice Network Rail shall prepare and send to the Train Operator, ORR and the Secretary of State a copy of this contract as so modified.

4. **Train Operator compensation**

4.1 **Network Rail obligations**

- 4.1.1 Network Rail shall compensate the Train Operator in accordance with the terms of the modification notice.

Following Network Rail's entry into any Crossrail Track Access Contract, it shall notify the Train Operator (and send copies of this notice to ORR and the Secretary of State) as soon as reasonably practicable of the extent of any modifications to the specified provisions that it reasonably considers, at that time, may be required in relation to the Crossrail Project to enable the Train Operator to plan the future of its business.

4.2 **Compensation**

- 4.2.1 For the purposes of determining the amount of compensation under paragraph 2.2(d), the relevant provisions of Part G of the Network Code shall apply as if the implementation of the modifications was a consequence of implementing a Network Change proposed by Network Rail under Part G of the Network Code.
- 4.2.2 The Train Operator shall take reasonable steps to prevent, mitigate and restrict the circumstances which may give rise to an entitlement to compensation pursuant to this Schedule 11.

4.3 **Implementation of modifications**

No issue or procedure relating to the compensation of the Train Operator for the consequences of the implementation of the modifications shall entitle any party to delay the implementation of the modifications.

5. **Definitions**

Unless the context otherwise requires, in this Schedule 11:

"Crossrail Act" means the **"Crossrail Act 2008"**;

"Crossrail Project" means the railway transport system and connected matters as described in the Crossrail Act;

"Crossrail Track Access Contract" means any access contract (as defined in Section 17(6) of the Act) in respect of track which Network Rail has entered into (including, pursuant to directions by ORR under the Act) in relation to the Crossrail Project;

"modification notice" has the meaning ascribed to it in paragraph 2.1; and

"specified provisions" means the provisions in this contract relating to the Services which operate on the routes between:

- (a) Shenfield and Stratford; and
- (b) Paddington and Reading.

In witness whereof the duly authorised representatives of Network Rail and the Train Operator have executed this contract on the day first above written.

Signed by 

Print name ANDY SAUNDERS

Duly authorised for and on behalf of
Network Rail Infrastructure Limited

Signed by 

Print name Chris Connelly

Duly authorised for and on behalf of
Direct Rail Services Limited