

FINAL CONCLUSIONS - COMPENSATION
FOR POSSESSIONS

August 2008



OFFICE OF RAIL REGULATION

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Executive Summary

1. Possessions are where Train Operators' normal use of the network is restricted, usually through engineering works. Possessions can involve the network being blocked so that train services have to be cancelled or diverted.
2. Currently Network Rail pays compensation to Train Operators for possessions through two mechanisms:
 - (a) Schedule 4 to the track access contract ("Schedule 4") provides compensation for possessions but only in defined circumstances which vary between franchised operators, open access operators, and freight operators;
 - (b) Part G of the Network Code (the common set of industry rules), which provides compensation for possessions associated with Network Change.
3. Schedule 4 is intended to incentivise Network Rail to plan engineering work early (by providing discounts for early notification) and efficiently (by ensuring that Network Rail takes into account both the impact on its own costs and the costs of Train Operators when developing a possessions strategy).
4. It has been generally recognised that the current compensation regimes for possessions are not working as effectively as they should. We therefore remitted the industry in January 2007, through the industry steering group¹, to review the compensation arrangements for possessions and to put forward proposals for changes to Schedule 4 and Part G of the Network Code. This document sets out our final conclusions following our review of the proposals submitted by the industry together with details of the required changes to Schedule 4 (for each of franchised passenger operators, open access passenger operators and freight operators), and Part G of the Network Code.

¹ The industry steering group contains representatives of franchised and open access passenger train operators, freight train operators, Network Rail and government.

5. The main effect of these conclusions is that compensation for possessions will now be paid mainly through Schedule 4 rather than a combination of Schedule 4 and Part G of the Network Code. These changes provide greater transparency on the compensation payable for any possessions that Network Rail takes to maintain and improve the network and reduce the transaction costs associated with identifying the impact of such possessions on Train Operators.
6. For franchised passenger operators the new regime provides a tiered approach to compensation, in return for the payment of an access charge supplement:
 - (c) formula based revenue compensation and cost compensation for all possessions, significantly extending the scope of cost compensation;
 - (d) possibility of actual cost compensation for single possessions greater than 60 hours; and
 - (e) possibility of compensation for actual costs and revenue losses for significant disruption - defined as possessions of over 120 hours or where forecast revenue losses or costs exceed a defined threshold.
7. Open access passenger operators will not be required to pay an access charge supplement and will receive compensation for significant disruption only. If open access passenger operators wish to have the same regime as franchised operators, they can, in return for the payment of an access charge supplement.
8. Freight operators will receive, in addition to compensation paid for late notice possessions, compensation for planned possessions that create significant disruption. As with the passenger regime there will be a tiered approach to compensation:
 - (a) a reduced flat rate sum for diversions of over 10 miles, delays of more than 60 minutes or more demanding length or weight restrictions;
 - (b) a higher flat rate sum for cancellations, additional or substitute locomotives or more demanding gauge restrictions;

- (c) possibility of actual costs where the origin or destination is blocked, there is no applicable gauge cleared route for more than 60 hours, freight has to be transported by another mode, an additional locomotive or substitute locomotive is required, or where additional route learning knowledge is required.
9. Freight operators will not be required to pay an access charge supplement for this compensation.
 10. As nearly all compensation for possessions will now be made through Schedule 4, changes are also required to Part G of the Network Code. These changes remove the ability for compensation to be paid for possessions taken in relation to Network Change, except in association with a Competent Authority change. The provision for Competent Authority possessions has been amended so that Network Rail is required to use reasonable endeavours to obtain compensation for associated possessions and pay this to Train Operators. We are introducing the changes to Part G of the Network Code via Condition C8 of the Network Code.

1 Introduction

Purpose of this document

- 1.1 This document sets out our conclusions on the changes to the way in which compensation is paid to Train Operators when Network Rail restricts their normal use of the network to undertake engineering work. It also includes a copy of the notice given by us to allow us to make the required changes to the common set of industry rules in the document known as the Network Code (formerly the Railtrack Track Access Conditions 1995), as modified from time to time.

Background

- 1.2 Compensation for possessions is currently paid through Schedule 4 and for Network Change (for example enhancements), through Part G of the Network Code. Schedule 4 is intended to encourage Network Rail to plan engineering work early (by providing discounts for early notification) and efficiently (by ensuring that Network Rail takes into account the impact on itself and Train Operators when developing a possessions strategy).
- 1.3 We established from discussions with Network Rail and Train Operators that the current compensation arrangements for possessions are not working as effectively as they should. We therefore requested the industry in January 2007, through the industry steering group, to review the compensation arrangements for possessions. In response to our request the industry has put forward proposals for changes to Schedule 4 for passenger and freight operators and Part G of the Network Code (for both passenger and freight operators). In line with our request the industry proposed changes that would allow all compensation for possessions to be paid through Schedule 4, with compensation for possessions being removed from the Network Code.
- 1.4 After considering the industry recommendations we proposed and consulted on a number of proposed changes to compensation arrangements for possessions, including the removal of possessions compensation from the Network Code. This document sets out our conclusions and the consequent changes to Schedule 4 and Part G of the Network Code.

- 1.5 This document meets the requirement in Condition C8 of the Network Code that, following consultation, we must notify each person that we were required to consult on our proposals as to our conclusions in relation to these proposals (including by providing to each such person a copy of the text of the proposed modifications) and the reasons for our conclusions.

Structure of this document

- 1.6 The rest of this document is structured as follows:
- Chapter 2 sets out the background and our conclusions on the changes to Schedule 4 of passenger (franchise and open access) operator track access contracts;
 - Chapter 3 sets out our conclusions on the changes to Schedule 4 of freight operator track access contracts;
 - Chapter 4 sets out our proposed changes to Part G of the Network Code and gives our reasons for using the C8 modification process;
 - Annex 1 provides a copy of the required notice under Condition C8 of the Network Code, and the modifications to Part G of the Network Code being implemented as a schedule to that notice; and
 - Annexes 2, 3 and 4 provide, respectively, a clean copy of Schedule 4 for the franchised passenger operator, open access passenger operator, and freight operator.

Use of defined terms

- 1.7 Within this document we have only used capitalisation where the context requires and where we refer to a defined term (as defined in the Network Code or the track access contract).

Implementation of conclusions

- 1.8 For the reasons set out elsewhere in this document and in our earlier consultations we have concluded that it is essential to set out the changes to Schedule 4 and Part G at the same time because of the interconnected nature of the changes that are being made. This approach is consistent with the

manner in which we, and the industry, have consulted on these changes. However our conclusions will be implemented by two different means:

- (a) the amendments to Schedule 4 will be included in the review notice(s) that we will be publishing in December 2008. The conclusions that are set out in this document in respect of the changes to Schedule 4 will therefore be incorporated in our final determinations that are scheduled for publication on 30 October 2008. Our intention to do this was set out in our draft determination on 5 June 2008.²

The versions of Schedule 4 which are included in this document do not take into account any bespoke provisions in operators' track access contracts and we are aware that certain operators have bespoke provisions. We will engage with Network Rail and the relevant operators to ensure that the modifications that are made in our review notice take into account any bespoke provisions, as part of our periodic review on access charges – for the period commencing 1 April 2009.

- (b) the changes to Part G, which are being made as a consequence of the changes to Schedule 4, are being made by means of the Condition C8 process under the Network Code. This process enables us to make changes to the Network Code under defined circumstances (including consulting on the proposal for change), if specific conditions are satisfied.

We have included conditions in respect of the time at which the modified Part G would become effective to ensure that contractual alignment between Part G and Schedule 4 is maintained. These are explained in further detail in paragraphs 4.38 to 4.42 below.

- 1.9 As we explain above we are setting out our conclusions on changes to Schedule 4 before we reach our conclusions on other changes to access contracts to be made as part of PR08 because of the interconnected nature of the changes to Part G and Schedule 4.

² Periodic review 2008: Draft determinations, Office of Rail Regulation, June 2008. This document can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/368.pdf>

1.10 For the reasons set out elsewhere in this document the modifications to Schedule 4 have been determined in advance of the modifications to other parts of operators' access contracts for PR08. We are currently consulting on proposed changes to Schedule 7 and 8.³ There are areas where there is a close linkage between Schedule 4 and 8 (e.g. the provisions relating to Late Notice Cancellation in freight access contracts). We consider that there might need to be consequential changes to Schedule 4, to ensure that it remains aligned with Schedule 8, as a consequence of the changes that have been proposed to Schedule 8 and which are currently being consulted upon. We do not consider that any such changes would impact on our conclusions in respect of the changes to be made to Part G.

³ Periodic review 2008 (PR08) consultation on draft Schedules 7 and 8 of track access contracts, 18 July 2008. This document can be accessed at:
http://www.rail-reg.gov.uk/upload/pdf/pr08_con_sched7-8_170708.pdf

2 Passenger Train Operators

Introduction

2.1 This chapter sets out our conclusions on changes that are to be made to the compensation for possessions provisions that are in passenger (franchised and open access) operators' Schedule 4. The changes are based on industry recommendations and take into account subsequent comments made in any consultation responses received. Overall the changes aim to provide a consistent, transparent approach to compensating Train Operators for the effects of possessions, based on:

- (a) the degree of disruption suffered;
- (b) compensation levels which more accurately reflect the cost and revenue losses Train Operators suffer; and
- (c) reducing transaction costs.

Current regime

2.2 Passenger operators receive compensation for possessions and amended timetables through the following components:

- (a) Under Schedule 4, in return for the payment of an access charge supplement, franchised passenger operators receive formula based compensation for revenue losses from planned possessions and, for significant disruption (generally longer than a weekend) or for possessions related to a major project (and in each case not related to Network Change), compensation for certain categories of costs (but not any additional revenue loss). Schedule 8 provides formula based revenue compensation for unplanned possessions (including possession overruns).
- (b) Some open access passenger operators have different parts of the Schedule 4 provisions set out above, whilst others have no Schedule 4 provisions at all.

- (c) Under Part G of the Network Code, for possessions associated with Network Change, most passenger and freight operators can claim for full revenue losses (over and above that receivable under the Schedule 4 to the track access contracts formula) and for costs, direct losses and expenses (including loss of revenue), net of any benefits.

Concerns with the current regime

2.3 We understand from Network Rail and Train Operators that although the current regime has strengths it also has a number of weaknesses, namely:

- (a) issues around the boundaries between Schedule 4 and Part G;
- (b) an inconsistent approach to compensating Train Operators for the effects of possessions;
- (c) concerns over the accuracy of compensation arrangements and the resulting economic signals;
- (d) a lack of transparency in the Part G and Schedule 4 processes; and
- (e) unnecessarily high transaction costs.

2.4 Partly in response to these concerns we asked the industry to undertake a review of possessions compensation arrangements. One of the key outputs that we sought from this review was the incorporation of all possessions compensation in Schedule 4.⁴

Industry recommendations on passenger regime

2.5 The industry recommendations were consulted on and provided to us on 31 January 2008 and 14 March 2008.^{5,6,7}

⁴ Our letter and remit for the industry is given in train operator compensation for possessions, Office of Rail Regulation, January 2007. This document can be accessed at: http://www.railreg.gov.uk/upload/pdf/pr08-toc_comp.pdf

⁵ Periodic review 2008: Consultation on the possessions compensation regime, Schedule 4 policy group, September 2007. This document can be accessed at: http://www.railreg.gov.uk/upload/pdf/cnslt_poss_comp_regime_270907.pdf

⁶ Periodic review 2008: Recommendation to ORR on changes to the regime for compensating disruptive possessions, Schedule 4 policy group, January 2008. This

2.6 The industry recommendations on the passenger regime centred on the development of a tiered structure of compensation for possessions in Schedule 4. For franchised passenger operators, in return for the payment of an access charge supplement this would provide formulaic cost and revenue compensation for all possessions, but with additional compensation available depending on the level and impact of disruption. As a consequence Part G compensation for possessions would be withdrawn. In summary the characteristics of each of the proposed tiers were:

- type 3 possessions: single possession greater than 120 hours (includes public holidays), would receive formulaic compensation as default but with the possibility of actual revenue losses and costs (subject to a materiality threshold);
- type 2 possessions: single possession greater than 60 hours, but equal to or less than 120 hours, (excludes public holidays), would receive formulaic compensation as default but with the possibility of actual costs (subject to a materiality threshold and in respect of categories of direct costs only) mirroring existing Significant Restrictions of Use arrangements; and
- type 1 possessions: all other possessions would receive formulaic based revenue and cost compensation.

2.7 In addition to this it was also proposed to compensate for sustained planned disruption on a similar basis to type 3 possessions, which would be triggered when:

- the revenue loss compensation;
 - over 3 consecutive periods is greater than 20% of defined Service Group revenue; or

document can be accessed at:

http://www.rail-reg.gov.uk/upload/pdf/pr08-poss-recs_comp_regime_310108.pdf

⁷ Periodic review 2008: Recommendation to ORR on changes to the regime for disruptive possessions, Schedule 4 policy group, March 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-rcmd_flwup_290208.pdf

- over 7 consecutive periods is greater than 15% of defined Service Group revenue; or
 - the difference between formulaic cost compensation and reasonably incurred costs is greater than £0.5m over 3 consecutive periods or £1m over 7 consecutive periods (apart from Chiltern, Merseyrail, C2C and open access operators where values of £0.25m and £0.5m respectively were used to reflect the limited ability of smaller operators to absorb exceptional costs).
- 2.8 Open access passenger operators would be able to claim compensation for type 3 possessions and sustained planned disruption (i.e. compensation for significant disruption), but would need to pay an access charge supplement (like franchised operators) to be able to claim compensation for type 1 and type 2 possessions.
- 2.9 One of the main industry recommendations was the development of a cost formula to compensate for bus and train mileage costs resulting from possessions, made up of:
- rail replacement bus costs – based on a new estimated bus miles (EBM) parameter which takes into account the number of trains operating, the mileage affected and, through weighting, the actual impact on the service; and
 - net effect on costs of changes in train mileage – taking into account track access charges, fuel costs, etc.
- 2.10 The industry also recommended an increase to the notification discount factors (increasing the amount of revenue compensation) to reflect better the way passengers perceive possessions (see tables 1 and 2 below):

Table 1: Revised notification factors for Service Groups with delay multiplier of 2.5

	By First Working Timetable	By Informed Traveller Timetable	By Actual Timetable
Existing notification discount factors	40% of MRE payable	60% of MRE payable	80% of MRE payable
New notification factors	55% of MRE payable	70% of MRE payable	85% of MRE payable

Note: MRE is marginal revenue effect

Table 2: Service Groups with delay multiplier 5.1/6.5

	By First Working Timetable	By Informed Traveller Timetable	By Actual Timetable
Existing notification discount factors	19%/15% of MRE payable	50%/48% of MRE payable	80%/80% of MRE payable
New notification discount factors	45% of MRE payable	65% of MRE payable	85% of MRE payable

2.11 Other changes recommended by the industry were:

- the inclusion of cost compensation from any unplanned extension of a Restriction of Use (i.e. possession overrun) as well as a planned Restriction of Use;
- compensation for competent authority possessions which do not result from Network Change should be paid through the Schedule 4 to the track access contracts possession regime - leaving it to Network Rail to recover associated costs directly from Competent Authorities; and
- Network Rail should only be obliged to compensate Train Operators for the effects of disruptive possessions resulting from Network Change attributable to a Competent Authority direction or Change of Law where,

and to the extent that, Network Rail recovers compensation from the Competent Authority or any other governmental body.

Our consultation and conclusions

2.12 In April 2008 we consulted⁸ on the following issues:

- the industry's recommendations, as described above;
- timing of implementation (where the industry had been unable to reach agreement), where we recommended that changes to Schedule 4 / Part G should be implemented on 1 April 2009;
- transitional arrangements, where we were not yet persuaded by the industry's recommendations to allow existing compensation arrangements to continue where the compensation or method has been agreed prior to the changes to the regime coming into operation and asked for evidence of any bespoke compensation arrangements which could extend beyond 1 April 2009; and
- implementation of changes to Part G of the Network Code, where we recommended that the changes be progressed through the C8 process (by which we can require a change to the Network Code).

2.13 In general, responses to our consultation supported the proposed changes to the regime and the introduction of the changes to the Network Code using the C8 mechanism. The responses did highlight some particular concerns on:

- the size of the notification discounts and whether an additional notification point at T-26 is appropriate;
- the operation of the cost formula in terms of how the number of EBMs is calculated and compensated and the calculation of train mileage compensation;

⁸ Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for passenger operators and Part G of the Network Code for all operators, Office of Rail Regulation, April 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_pass_090408.pdf

- the sustained planned disruption threshold and how it applies to specific operators and services;
- the “on–the-day” disruption and amended timetable effects in relation to open access operators;
- the potential transaction costs associated with implementation (although responses generally supported one-off implementation on 1 April 2009); and
- the transitional arrangements (two operators provided evidence of compensation arrangements extending beyond 1 April 2009 which had already been agreed). We have assumed that these bespoke arrangements will come under Part G and so no bespoke Schedule 4 drafting is required.

2.14 After careful consideration of the responses to our consultation we set out our conclusions in the draft determinations, making changes to our proposed approach in the following areas:⁹

- London Overground should be included in the definition of small rail operators;
- the drafting of Schedule 4 should be amended so that the party proposing changes to Annex B of Schedule 4 should pay 90% of the other party’s costs; and
- where compensation arrangements related to specific works on the West Coast Main Line (WCML) had already been agreed for the next control period, these should remain in place.

2.15 Since our draft determinations Arriva Trains Wales (ATW) has made further representations as to whether it should be defined as a small operator for the purposes of the sustained planned disruption threshold. In particular ATW has suggested that the Cardiff Valleys Service Group should be regarded as completely separate to mainline services and so should be included as a

⁹ Draft determinations, Office of Rail Regulation, June 2008. This document can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/368.pdf>

small operator for the purposes of the threshold. We have reviewed the evidence put forward by ATW. However we consider that on the basis proposed by ATW a number of other Train Operator Service Groups could be split on a similar basis. This could start to unravel the industry's recommendations. We therefore do not consider it appropriate to revisit the categorisation of Train Operators and consider that ATW should continue to be included in the definition of large operators. Further refinements can be made at future reviews based on the knowledge of the operation of the new regime.

Drafting changes since draft determinations

2.16 Since the draft determinations were issued we have considered further the concept and mechanism of Sustained Planned Disruption and have made some drafting changes to make clear:

- that the term “Sustained Planned Disruption” refers to a trigger mechanism rather than a period of time;
- that Sustained Planned Disruption is to apply on a per Service Group basis; and
- how it would be known that the party who had served notice of the Sustained Planned Disruption no longer believed it was occurring.

2.17 We have also considered further the effectiveness of the costs compensation formula and have made some amendments to this to make it work more appropriately.

2.18 We have removed the access charges re-opener from Part 5 because this provision was a re-opener relating to CP3 and is therefore redundant. All the access charges review re-openers for CP4 will be included in Schedule 7 of the relevant access contracts. We are currently consulting on our proposed changes to Schedule 7.¹⁰

¹⁰ Periodic review 2008 (PR08) consultation on draft Schedule 7 and 8 of track access contracts, July 2008. This document can be accessed at:
http://www.rail-reg.gov.uk/upload/pdf/pr08_con_sched7-8_170708.pdf

- 2.19 Finally, we have accepted some proposed drafting amendments that were suggested in consultation responses, including a revision to the wording of the indexation provision.
- 2.20 A clean copy of the Schedule 4 for franchised passenger operators and of the Schedule 4 for open access operators can be found at Annex 2 and Annex 3 respectively.

Access charge supplements

- 2.21 Schedule 4 for franchised passenger operators is funded by access charge supplements. In our consultation document we reviewed the assumptions underpinning Network Rail's calculations and calculated new access charge supplements by:
- revising network availability forecasts;
 - removing the uplift Network Rail applied to the marginal revenue effect (MRE) rates to reflect recent real revenue growth as the schedule 8 periodic review recalibration only intends to increase rates in line with inflation;
 - replacing Network Rail's forecast of expenditure for CP4 with our assessment given in the draft determinations; and
 - reducing the uplift for emergency timetable possessions from £8.5m to £5m, as we consider that Network Rail's estimate over represents the impact of extreme events.
- 2.22 Together these changes reduce access charge supplements due in the final year of CP4 by 29% compared to Network Rail's estimates in their Strategic Business Plan update. The resulting access charge supplements are shown in table 3.
- 2.23 Network Rail has subsequently reviewed the proposed access charge supplements and is content that the proposed changes are consistent with the draft determinations. However Network Rail considers that it would be appropriate that, were any of the assumptions further revised in our final determinations, the proposed access charge supplements be amended. We

consider that this is reasonable because the consultation period on our draft determinations is still running and will set out final access charge supplements in the final determinations in October 2008. We consider that this issue is a Schedule 4 specific issue that does not have any impact on our conclusions on the changes to Part G.

Table 3: Access charge supplements for franchised passenger operators.

£m 2006-07 prices	2009-10	2010-11	2011-12	2012-13	2013-14
Arriva Trains Wales	1.1	1.0	1.0	0.8	0.8
Arriva Cross Country	11.4	10.0	10.2	8.1	7.6
c2c	2.0	1.7	1.8	1.4	1.3
Chiltern	2.2	2.0	2.0	1.6	1.5
East Midlands	6.2	5.5	5.5	4.4	4.1
First Capital Connect	6.2	5.5	5.6	4.4	4.1
First Great Western	32.3	28.5	28.9	23.1	21.6
First ScotRail	5.1	4.5	4.6	3.7	3.4
First Trans Pennine Express	1.8	1.6	1.6	1.3	1.2
Gatwick Express*	2.5	2.2	2.3	1.8	1.7
Heathrow Connect	0.1	0.1	0.1	0.1	0.1
London Midland	1.9	1.7	1.7	1.3	1.3
London Overground	0.4	0.4	0.4	0.3	0.3
South Eastern	3.1	2.7	2.8	2.2	2.1
Merseyrail	2.2	2.0	2.0	1.6	1.5
Northern	2.0	1.8	1.8	1.4	1.3
National Express East Coast	30.6	27.0	27.4	21.9	20.4
National Express East Anglia	7.0	6.2	6.3	5.0	4.7
Southern	6.7	6.0	6.0	4.8	4.5
South West Trains	14.8	13.1	13.2	10.6	9.9
Virgin West Coast	29.4	26.0	26.3	21.0	19.6
Total	169.1	149.5	151.3	121.0	112.9

Note: Gatwick Express is now part of the Southern franchise.

3 Freight Train Operators

Introduction

3.1 This chapter sets out our conclusions on the changes that, following consultation, are to be made to the compensation for possessions paid through freight operators' Schedule 4. The changes are aimed at providing a consistent approach to compensating freight operators for the effects of possessions, based on (i) the degree of disruption suffered, (ii) compensation levels for very disruptive possessions which reflect the costs freight operators suffer, and (iii) reducing transaction costs.

Current regime

3.2 Under Schedules 4 and 8 freight operators receive compensation for late notice possessions (after T-12) for a reason attributable to Network Rail and where the variation meets one or more of a list of criteria. These criteria are set out in Schedule 4 and are intended to cover circumstances, such as the use of a longer diversionary route or a delayed departure time, which are likely to cause the operator significant additional costs. Freight operators also receive compensation for cancellations notified after T-12. Although we do not currently specify the precise values of the Service Variation Sum and Cancellation Sum, we would expect them to be approximately £400 and £900 respectively (in 2006-07 prices). Freight operators are able to obtain higher compensation in return for the payment of an access charge supplement.

3.3 Under Part G, for possessions associated with Network Change, freight operators can claim for full revenue losses (over and above that receivable under the Schedule 4 formula) and for costs, direct losses and expenses (including loss of revenue), net of any benefits.

Industry recommendations on the freight regime

3.4 The concerns highlighted in paragraph 2.3 apply to the compensation regime for freight operators as well as passenger operators. We therefore asked the industry to develop recommendations for changes to the freight as well as the

passenger regime. The industry provided its main recommendations on changes to the freight regime in July 2008.¹¹

- 3.5 The industry recommended that freight operators' Schedule 4 should maintain the existing provisions for compensation for late notice (after T-12) service variations and cancellations (SV&C provisions).
- 3.6 The industry recommended that three new tiers of compensation be introduced for extreme planned disruption (notified before T-12). In return for the enhanced provisions, freight operators would no longer be able to claim compensation for possessions under Part G. The total compensation under the proposed regime would be on a similar scale to that currently available under Part G. The proposed criteria and categories of compensation for extreme planned disruption are set out in table 4.
- 3.7 The industry was unable to agree on the proposed levels of flat rate compensation available for category 1 or 2 disruption, save that the industry agreed that compensation for category 2 disruption should be around 10 times category 1. The industry was also unable to agree on a de minimis threshold for access to possible top-up compensation for category 3 disruption.

Our consultation

- 3.8 As the industry recommendations seemed well-founded and had broad industry support we did not make large-scale changes when we consulted on the proposed changes. We did however propose changes in four areas:

¹¹ Periodic review 2008: Recommendation to ORR on changes to the regime for compensating disruptive possessions – freight, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-ISG_recs_fgt_comp_010708.pdf

Table 4: Proposed triggers for different levels of compensation treatment for planned disruption

	Disruption	Threshold (Where due to a possession advised in all material aspects before T-12)	Compensation treatment
"claimable events"	Category 1 disruption	<ul style="list-style-type: none"> The end to end journey of the service is affected by more than 10 miles; or The planned departure time of the service differs by more than 60 minutes; or The planned arrival time of the service at destination differs by more than 60 minutes; or More demanding length or weight restrictions for the affected service are imposed. 	Flat rate sum of [£a] per service affected (payable only once per service)
	Category 2 disruption	<ul style="list-style-type: none"> The affected service is cancelled (subject to the 28-day test as currently applied within SV&C provisions¹²); or More demanding gauge restrictions for the affected service are imposed; or The use of at least one additional locomotive on the affected service is required; or The use of a diesel locomotive as a substitute for an electric locomotive is required. 	Flat rate sum of [£b] ¹³ per service affected (payable only once per service)
"yellow flag events"	Category 3 disruption	<ul style="list-style-type: none"> The access from Origin or to Destination is blocked (included where a suitable alternative gauge cleared route is not available for longer than 60 hours);¹⁴ or Any of the freight conveyed on the service has to be transported by other means; or The use of at least one additional locomotive on the affected service is required;¹⁵ or The use of a diesel locomotive as a substitute for an electric locomotive is required.¹⁵ 	Flat rate sums apply as set out above Possibility of top-up compensation based on actual costs/losses (net of benefits) – only where the total liquidated damages sums compensation under compensates by more than [£X] per service or per possession (subject to further discussion)
No compensation for other forms of planned disruption			

Note: Existing provisions for compensating late notice service variations and cancellations would be retained

¹² This need not necessarily be included in the contractual drafting but could for example be addressed in Criteria and Procedures documentation

¹³ Where "b" equals approximately 10 X "a" (to reflect the more significant impact of the events listed under Category 2 disruption)

¹⁴ "Origin" and "Destination" as per the definitions in Clause 1 of the freight track access contract

¹⁵ EWS and Network Rail proposed that this provision should apply only where there is a need for the additional locomotive to be procured from a third party

- the level of flat rate compensation for planned disruption (before T-12), where the industry could not reach agreement. Based on the evidence provided to us and the work undertaken by Faber Maunsell on behalf of the industry,¹⁶ we suggested compensation of £100 per train for category 1 disruption and £900 per train for category 2 disruption (in 2007-08 prices and £97 and £872 in 2006-07 prices). This, together with the compensation available for category 3 possessions, gave estimated total additional possessions compensation of £9m per year, the level of compensation that we considered may be available for freight operators under Part G for 2007-08;
- the level of a de minimis threshold for category 3 compensation, where the industry could also not reach agreement. As there is no de minimis threshold for Part G compensation and there would only be a small number of category 3 events (and hence transaction costs would be small), each of which would be distinct and Train Operators would need to apply for compensation; we therefore considered that there should be no de minimis threshold;
- triggers for category 3 disruption where English Welsh and Scottish Railway Limited (EWS) and Network Rail (but not the rest of the industry) recommended that full compensation should only be available for additional or diesel substitute locomotives where such locomotives have to be hired in from third parties. We considered that this could create perverse incentives to hire in additional locomotives and could be difficult to validate. We therefore recommended that full compensation should be available for all uses of additional or diesel substitute locomotives.
- compensation rates for late notice disruption, where we considered the current arrangements could result in Network Rail adopting a differentiated approach between operators and so recommended common rates across all operators of £493 per service variation and £942 per cancellation (2006-07 prices).

¹⁶ Technical Support for Shadow Running of Compensation Regime for Freight Operators, Faber Maunsell, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-techsup_shadowrun_fgtops_080709.pdf

Consultation responses

- 3.9 We received ten responses to our consultation of July 2008. Five of these responses were concerned with changes to the Part G regime and are addressed in Chapter 4. The remaining responses raised the following issues in relation to the freight Schedule 4 to the track access contracts regime.
- 3.10 Consultees supported the proposed structure of the regime, in particular the two tier liquidated damages regime with the ability to claim actual costs in cases of extreme disruption.
- 3.11 Freightliner and EWS were concerned that the compensation available under the new regime was not comparable to that currently available. Freightliner and EWS suggested a number of reasons for this, in particular:
- Overall level of compensation: Freightliner suggested that the regime should be calibrated to provide £10m compensation, as was the case in the supporting consultancy study by Faber Maunsell. EWS and Network Rail have made separate, confidential, representations that the current level of Part G compensation (on which the regime is calibrated) is higher or lower than £9m.
 - Inaccuracies in the data from the shadow running period. Freightliner and EWS suggested that the regime had been incorrectly calibrated as the number of cancellations had been overstated. Freightliner suggested that the number of cancellations would be biased by the inclusion of Easter in the shadow running period. Freightliner further suggested that due to the nature of the 28 day rule (where a service is not deemed as cancelled if it has not operated in the last 28 days) a high proportion of those services reported as cancelled would not have caused any actual costs or losses, in part due to the 28 day rule. EWS suggested that cancellations had incorrectly included alternative routings of Channel Tunnel services. EWS further suggested that, for some locomotive substitutions, it would claim category 2 compensation only.
 - Inaccuracies in the annualisation factor used to expand the results of the two periods of shadow running so that they reflect a whole year, therefore allowing the regime to be calibrated. Freightliner and EWS suggested that

Faber Maunsell's proposed annualisation factor of 7.7 was too high. EWS suggested that, given the uncertainties around the factor, it would be more appropriate to use a simple pro-rata factor of 6.5 (13/2), with Freightliner suggesting a factor of 6.35 based on an earlier Faber suggestion based on the relative number of possessions in the shadow running period compared to the full year.

- Liquidated damages compensation was too low. Freightliner and EWS also suggested that the levels of category 1 and 2 liquidated damages compensation were too low, with Freightliner suggesting rates of £375/£1,300 and EWS suggesting £350/£1,200. First Group stated that they considered the proposed rates of £100/£900 as reasonable.
- Category 3 (actual cost) compensation should be available for special route learning. Both Freightliner and EWS further suggested that special route learning should be included in the list of category 3 events where full compensation was available.
- Freightliner suggested that category 3 compensation should be available for possessions of longer than 48 hours between 05:00 Monday and 23:59 Friday) to cover weekday blockades.

3.12 Freightliner suggested that category 3 (actual cost) compensation should be paid regardless of whether the possession was notified before or after T-12. Our consultation document only provided for actual cost compensation to be claimed for possessions notified prior to T-12. Freightliner was concerned that this could create perverse incentives on Network Rail to delay the notification of possessions.

3.13 Freight operators welcomed the harmonisation of compensation for late notice possessions, although Network Rail suggested that rates should be harmonised at a lower level sufficient to maintain financial neutrality for Network Rail. Freightliner and EWS suggested that compensation for late notice cancellations should be increased so that it was the same as that proposed for on the day cancellations under Schedule 8, in part as EWS considers that any late notice cancellations would represent a licence breach.

- 3.14 Freight operators supported the exclusion of a de minimis threshold for access to category 3 actual cost compensation, although Network Rail was concerned that the regime would not be self regulating due to its own transaction costs.
- 3.15 EWS asked whether compensation for possessions agreed before the proposed regime applies, but implemented subsequently, would be covered by the existing regime or under the new regime. Both Freightliner and Transport for London (TfL) raised the issue of compensation for the North London Railway Infrastructure Project, where TfL and Freightliner have a negotiated agreement. Freightliner were concerned that the proposed compensation would not be sufficient where there were large repetitive possessions such as those on the North London Line.
- 3.16 Network Rail suggested that, given the short calibration period and the uncertainty in identifying the proposed compensation values, there should be a re-opener to allow the regime to be recalibrated if compensation varied from the expected amount by more than 25%.
- 3.17 EWS noted that the proposed regime would not cover infrastructure services which are operated on a separate unregulated contract which incorporates the Network Code.
- 3.18 Freightliner suggested that the proposed drafting should include a timescale for Network Rail to process claims or make payments due to concerns that have arisen in the operation of the current system.
- 3.19 Both Freightliner and EWS raised concerns that the finalisation of the sums in the regime does not need to be completed by the time we publish conclusions in the week commencing 11th August 2008.

Our conclusions

- 3.20 We have considered carefully the points raised by consultees. First, it is important to emphasise that the compensation paid for planned disruption is not intended to provide full compensation for possessions, rather it is to provide a measure of compensation, approximately equal in total to that currently paid for possessions under Part G of the Network Code. If operators wish to receive greater compensation then they can pay an access charge

supplement. Nevertheless we consider that a number of the points raised by operators about the calibration may have merit. We consider each of the points raised by consultees below.

Overall level of compensation from regime

- 3.21 We have considered the representations from freight operators and Network Rail. We consider that Network Rail has successfully answered some of the points identified by freight operators, although some uncertainty remains over the current level of Part G compensation. Given this uncertainty we consider that it would be appropriate to continue to calibrate the regime based on a value of £9m per year, rather than the £6-7m proposed by Network Rail.

Data from the shadow running period

- 3.22 We have investigated further the cancellations identified in the shadow running period. We do not consider that there would be undue bias due to the presence of Easter in the shadow running period as this would be reflected in the total number and duration of possessions in the period and so will be reflected in the annualisation factor. We have reviewed the cancellations identified by EWS relating to Channel Tunnel traffic and agree that the number of actual cancellations would have been much lower. We also agreed that for some locomotive substitutions EWS would have claimed category 2 compensation only. We have amended the data from the shadow running period accordingly.
- 3.23 We have also reviewed the application of the 28 day rule, where a service is only identified as cancelled if it has not operated in the last 28 days. We consider that this could lead to some services being identified as being cancelled that may not have operated. To ensure that compensation is focused on areas where it is required we consider that the 28-day rule should apply separately for weekday and weekend traffic. This would apply to all cancellations and not only those notified before T-12. We have reduced the number of cancellations identified in the shadow running period accordingly.

Annualisation factor

- 3.24 Faber Maunsell suggested an annualisation factor of 7.7 based on the relative number of possession hours in the shadow running period compared to the

whole year. Freightliner suggested that the annualisation should be 6.35 based on the number of possession hours. We acknowledge that there are some concerns with the annualisation factor proposed by Faber Maunsell, for example compensation is determined much more by the level of disruption rather than the number of possession hours or the number of possessions. Given these concerns we are content to use a simple pro-rata annualisation factor of 6.5.

Triggers for category 3 compensation

- 3.25 We have reviewed the additional costs that can be associated with route learning. We accept that these costs can be large and can be related to specific exceptional events. We have therefore included “agreed special route learning in exceptional circumstances” to the list of category 3 triggers.
- 3.26 We have reviewed whether there should be a category 3 trigger for weekday possessions longer than 48 hours. Freightliner did not provide any evidence as to why such possessions should be included as a trigger. Such possessions are likely to be extremely rare and given that freight operators have a number of other triggers for category 3 compensation we do not consider that a further trigger is necessary.
- 3.27 We have considered whether compensation would be sufficient for large repetitive possessions. We are content that where the impact of possessions on freight operators is significant they would be covered by the new regime and additional triggers are not required.

Harmonisation of compensation for late notice possessions

- 3.28 Network Rail has reviewed further the harmonisation of compensation for late notice possessions and established that the additional costs would be small. On that basis we are content that each operator should receive the same compensation (in the absence of an access charge supplement). We do not consider that the compensation paid to freight operators should necessarily be the same for late notice cancellations as on the day cancellations. Further we consider that having a lower rate of compensation for late notice cancellations could help to incentivise Network Rail to notify possessions as early as possible.

Extension of the ability to claim category 3 compensation for late notice possessions

3.29 We are concerned that the compensation available to freight operators may be lower for category 3 disruption notified late (after T-12). This could create perverse incentives on Network Rail to delay the notification of possessions. Network Rail has subsequently stated that it would be content if the additional costs were included within the overall £9m estimated total cost of the regime and included in the re-opener provision. On this basis we consider that actual cost compensation should be available for a late notice cancellation or a service variation that also meets one of the relevant triggers for category 3 disruption regardless of when possessions are notified by Network Rail.

De minimis threshold

3.30 Whilst we acknowledge Network Rail's point that they would bear transaction costs as well as freight operators, from the changes that we set out in this document we believe that such transaction costs will be significantly less than incurred through the Part G process. We therefore remain content not to have a de minimis threshold for the reasons set out in our July 2008 consultation document.

Liquidated damages compensation

3.31 Taking into account the changes described above we have recalculated the level of liquidated damages compensation for category 1 and 2 disruption. The revised compensation rates are £375 for category 1 disruption and £1,000 for category 2 disruption (in 2007-08 prices, £360 and £959 in 2006-07 prices¹⁷). Further we consider that it would be appropriate to increase the compensation for late notice cancellations to £1,350 (in 2007-08 prices, £1,295 in 2006-07 prices). We consider that these levels of compensation are consistent with total additional possessions compensation of £9m per year. We consider that this should provide compensation to freight operators equivalent to that which they would be entitled to under existing arrangements, while noting that higher rates would be available on the payment of an access charge supplement.

¹⁷ Consistent with the draft determinations these figures have been converted to 2006-07 prices based on RPI inflation between November 2006 and November 2007.

Timescales for processing claims

3.32 We agree with Freightliner, that Network Rail should be subject to a defined timescale to agree claims and we have included appropriate drafting in paragraph 3.3.3 of Schedule 4

Review

3.33 We have considered the case for a provision to enable us to review discrete aspects of the compensation regime. We consider the points raised by freight operators and Network Rail are valid and it is important that any regime is properly calibrated. We have therefore included a new provision to allow the compensation sums and related provisions to be revisited after a year of operation of the new regime if they are not providing broadly the level of compensation envisaged.

3.34 Our criteria are that:

We intend the compensation sums and criteria will need to be revised where the total of:

- any compensation that Network Rail is liable to pay to freight operators under Schedule 4 in respect of the Financial Year 2009-10 relating to possessions notified in all material aspects prior to the relevant possession notice date;
- any additional compensation that Network Rail is liable to pay to freight operators under Schedule 4 for the Financial Year 2009-10 as a consequence of the increase in the Late Notice Cancellation Sum from £942 to £1,308 (2006-07 prices); and
- any additional compensation that Network Rail is liable to pay to freight operators under Schedule 4 for the Financial Year 2009-10 as a consequence of extending the coverage of category 3 (actual cost) compensation to Late Notice Cancellations and Service Variations which satisfy the appropriate criteria

is 50% greater or less than £9m (in 2007-08 prices, £8.63m in 2006-07 prices) (being the level of total compensation assumed at the date of these conclusions) after taking into account the difference in the level of disruption to

freight operators by possessions on the Network and the change in the level of freight train mileage.

- 3.35 We decided that in view of the changes to Schedule 4A introduced by the Railways Act 2005 it would not be appropriate to provide that this review should be done by means of an access charges review as Network Rail proposed. We have however drafted the provision in a manner which would require Network Rail, as it will have access to information for each operator, to make a reference to us. We would therefore expect Network Rail to make a reference in respect of all operators whose contracts incorporated this provision at the same time unless there was a valid reason for it not doing so. We have also made it clear that although this is a modification provision contained in a bilateral contract that we would consult all affected operators on any proposed modifications because we accept that this is an issue which affects all operators and in which they have a legitimate interest.

Transitional arrangements

- 3.36 In line with the changes to the passenger possessions compensation regime we consider it appropriate that there should be transitional provisions to preserve any existing bespoke compensation arrangements that extend beyond 1 April 2009 that have already been agreed between parties. We understand that bespoke arrangements have been agreed between Freightliner and TfL for the North London Line Railway Infrastructure Project. Given this we are content that such bespoke arrangements should continue to be valid, although if they are to be through the track access contract, we consider that each of the relevant possessions are agreed and notified to Network Rail before 31 December 2008. We have assumed that such bespoke arrangements will be made under Part G but if bespoke changes are required to Schedule 4 then these can be made at a later stage. In the absence of such transition provisions, the new arrangements would take effect in full on 1 April 2009 and bespoke arrangements negotiated in advance of that date could be negotiated against the background of the new arrangements.

Compensation for infrastructure services

3.37 We consider that compensation arrangements for unregulated contracts are a matter for the parties involved rather than ORR.

Further drafting changes to Schedule 4

3.38 We have made drafting changes to Schedule 4 to reflect the changes described above. We have also made a number of further drafting changes to remove errors in the earlier drafting and improve understanding. The main drafting changes are as follows:

- the sums for category 2 and category 1 compensation (termed in the legal drafting as the enhanced and planned disruption sums) have been added;
- the definition of the category 3 disruption trigger has been revised to take into account the absence of a de minimis threshold;
- the wording of category 3 disruption dealing with a lack of a gauge cleared route for more than 60 hours has been clarified. This is to make clear that it captures where there is no Revised Based Service at all because of the lack of gauge cleared route between the Origin and Destination which has existed or exists for a 60 hour period or where the Revised Base Service runs within a window of 60 hours where there is no applicable gauge cleared route at the relevant location between the Origin and Destination;
- a timeframe for Network Rail to respond to actual cost claims has been included (paragraph 3.3.3);
- some revisions have been made to ensure consistency between Schedules 4 and 8;
- references to late notice cancellations have been revised so that they only refer to late notice possessions and exclude disruptive events to the working timetable. This is consistent with the original intention of the policy;
- some revisions have been made so that actual costs compensation is available for late notice cancellations and service variations which also fall within the relevant category 3 disruption triggers;

- titles and various drafting changes have been added to improve understanding.

A clean copy of the Schedule 4 for freight operators is attached at Annex 4.

- 3.39 Our review notice will provide for any consequential changes to Schedules 5 and 8. Specifically, the review notice will provide for two minor changes that will be made to Schedule 5 which are that the term "Revised Base Service" will be added to categories of Service included in paragraph 4.1 and the term will be added and defined in the definitions in paragraph 1.1. The change to paragraph 4.1 is required to ensure that Schedule 5 also applies to services provided under Part 2 of Schedule 4.

Final structure of freight possessions compensation regime

- 3.40 The final structure of the freight possessions compensation regime is made up of:

- two parts, based on whether the possession was notified before or after T-12; and
- three tiers, depending on the level of disruption caused to rail services.

- 3.41 A summary of the regime is given in Table 5.

- 3.42 Compensation is also available for on the day disruption, paid through Schedule 8. The current proposals for freight operator's Schedule 8, as described in our draft determinations are that:

- Network Rail performance better than benchmark = £1,500 per service cancellation (2006-07 prices);
- Network Rail performance worse than benchmark = £4,000 per service cancellation (2006-07 prices).

Table 5: Final structure of freight possessions compensation regime (2006-07 prices)

Possession notified before T-12	Possession notified after T-12
<p>Category 1 compensation – £360 per service</p> <ul style="list-style-type: none"> <input type="checkbox"/> Additional end to end journey distance greater than 10 miles; or <input type="checkbox"/> Planned departure time from Origin differs by more than 60 minutes; or <input type="checkbox"/> Planned arrival time at Destination differs by more than 60 minutes; or <input type="checkbox"/> More demanding length or weight restrictions imposed. 	<p>Service variation - £493 per service</p> <ul style="list-style-type: none"> <input type="checkbox"/> Additional end to end journey distance is greater than five miles; <input type="checkbox"/> the addition of at least one Planned reversing movement; <input type="checkbox"/> more demanding length, weight or gauge restrictions imposed; <input type="checkbox"/> the use of at least one additional locomotive <input type="checkbox"/> the use of a diesel instead of an electric locomotive is required; <input type="checkbox"/> Planned departure time from Origin differs by more than 30 minutes; <input type="checkbox"/> Planned arrival time at Destination differs by more than 30 minutes; <input type="checkbox"/> The service is treated as a Spot Bid
<p>Category 2 compensation - £959 per service</p> <ul style="list-style-type: none"> <input type="checkbox"/> The affected service is cancelled; or <input type="checkbox"/> More demanding gauge restrictions; or <input type="checkbox"/> The use of at least one additional locomotive is required; or <input type="checkbox"/> The use of a diesel locomotive as a substitute for an electric locomotive. 	<p>Late notice cancellation - £1,295 per service</p> <ul style="list-style-type: none"> <input type="checkbox"/> The service is cancelled
<p>Category 3 compensation – possibly of actual costs/losses in addition to liquidated damages</p> <ul style="list-style-type: none"> <input type="checkbox"/> Access from Origin or to Destination is blocked (inc. where a suitable gauge cleared route is not available for longer than 60 hours); or <input type="checkbox"/> Any of the freight conveyed on the service has to be transported by other means; or <input type="checkbox"/> The use of at least one additional locomotive is required; or <input type="checkbox"/> The use of a diesel locomotive as a substitute for an electric locomotive is required. 	<p>Category 3 compensation – possibly of actual costs/losses in addition to liquidated damages</p> <ul style="list-style-type: none"> <input type="checkbox"/> Access from Origin or to Destination is blocked (inc. where a suitable gauge cleared route is not available for longer than 60 hours); or <input type="checkbox"/> Any of the freight conveyed on the service has to be transported by other means; or <input type="checkbox"/> The use of at least one additional locomotive is required; or <input type="checkbox"/> The use of a diesel locomotive as a substitute for an electric locomotive is required.

Note: Origin and Destination as per the definitions in Clause 1 of the freight track access contract

4 Conclusions in respect of Part G of the Network Code

Introduction

- 4.1 In asking the industry (through the Industry Steering Group),¹⁸ in January 2007, to undertake a review of how possession compensation was paid, and in setting out the key issues that we believed should be addressed, we indicated that we were minded to undertake any resultant modifications to Part G of the Network Code using the Condition C8 modification process.
- 4.2 This chapter sets out the:
- (a) changes that we are making to Part G of the Network Code;
 - (b) the consultation responses received and our consideration;
 - (c) why we are using the Network Code C8 modification process (as opposed to the C5 modification process); and
 - (d) conditions under which a notice under Condition C8 can apply, our C8 notice, and our reasoning for why a C8 notice is applicable.

Changes to Part G

- 4.3 We set out our proposed changes to Part G of the Network Code in our consultation in April 2008. The changes proposed were aimed at ensuring that Part G continued to align with Schedule 4 once the proposed changes come into operation on 1 April 2009 as part of the periodic review.
- 4.4 Following consideration of consultation responses we consulted on a revised version of Part G in July 2008. This version incorporated only minor amendments to the version consulted on in April 2008 and these changes were clearly marked up against the April 2008 version.

¹⁸ Our letter and remit for the industry is given in *Train operator compensation for possessions*, Office of Rail Regulation, January 2007. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-toc_comp.pdf

- 4.5 The main effect of the changes being made to Part G is to exclude Part G compensation being payable by Network Rail to Train Operators in respect of any costs, direct losses or expenses incurred by Train Operators as a consequence of any Restriction of Use in connection with the implementation of a proposed Network Change.
- 4.6 The drafting changes to Part G also cover changes to the treatment of Competent Authority compensation. Where a Competent Authority requires a possession or series of possessions that is not related to an enhancement of the network, compensation will now be paid through Schedule 4 to the track access contracts, leaving Network Rail to recover associated costs directly from Competent Authorities, rather than each Access Party recovering their own costs, as is currently the case. This increases the certainty about the recovery of costs as the possessions regime will be more transparent.
- 4.7 Network Rail will only be obliged to compensate Train Operators for the effects of disruption resulting from Network Change attributable to a Competent Authority direction or Change of Law where, and to the extent that, Network Rail recovers compensation from the Competent Authority or any other governmental body. To the extent Network Rail recovers such compensation, it will then be required to share that compensation with the relevant parties. Network Rail will be obliged to use reasonable endeavours to secure the compensation the operator would otherwise receive under Schedule 4 to the track access contracts. Where Network Rail is unable to recover any compensation then losses will lie where they fall.

Consultation Responses

- 4.8 Of the ten consultation responses that we received to our consultation in July 2008, five commented on the changes to Part G. The majority of comments received were correcting cross-referencing, but specific comments were received from:
- (a) FirstGroup, which suggested that paragraph (b) of the definition of “Relevant Costs” should be amended to read a “Network Rail Restriction of Use”;

- (b) Govia, which questioned the use of “**are reasonably incurred or** can reasonably be expected to be incurred” in Condition 2.4(a) as Condition 2.2 has the words “which can reasonably be expected to be incurred”. Govia interpret this as meaning that Condition G2.2 relates to prospective costs, direct losses and expenses (i.e. those that can reasonably be expected to be incurred) whereas, under Condition 2.4(a), by including “are reasonably incurred or” that Condition also covers actual costs, direct losses and expenses. Govia proposed that 2.2 is amended to read the same as 2.4(a).

We note that Condition 4.2(a) and 4.4(a) are also similarly affected.

- (c) Govia also suggested that Condition G4.1.1(a)(iii) should be amended to make clear that the Restriction of Use referred to should be those relating to the specific proposed Network Change, and not any Restriction of Use for which compensation may be payable under the relevant track access contract.

Our Conclusions

- 4.9 We accept Govia’s proposal to amend Condition 2.2 to include the words “are reasonably incurred or” and amended Condition 2.2 to reflect this. We agree that this amendment adds clarity to the drafting. We have also amended Condition 4.2(a) and Condition 4.2(b) to align with Condition 4.4(a) in the same way, as it is similarly affected.
- 4.10 We accept Govia’s proposal to amend Condition 4.1.1(a)(iii) and have incorporated the wording “in connection with the implementation of the proposed change” to ensure that it is only in relation to a Network Change. In doing this we also note that Condition 2.1.1(a)(iii) is also similarly affected and have incorporated the same wording in this Condition. To achieve consistency in drafting we have included the same drafting in Condition 4.1.1(a)(iii).
- 4.11 The other changes we have made are to correct cross-referencing where necessary.
- 4.12 We do not agree with First Group’s proposal to refer to a Network Rail Restriction of Use in paragraph (b) of the definition “Relevant Costs”. The

definition for Restriction of Use can be found in Part A of the Network Code. The definition Network Rail Restriction of Use can only be found in franchised passenger operators' Schedule 4 to the track access contract. It is not intended to incorporate this definition within the Network Code.

New Part G

- 4.13 The modified Part G incorporating these changes is attached at Annex 1.
- 4.14 We consider that it would be helpful to set out the changes that have and have not been incorporated in the attached Part G as a consequence of a recent proposal for change which included changes to Part G. ORR approved a proposal for change (PfC) to the Network Code on 11 August 2008¹⁹ under the Condition C5 process. The principal purpose of this proposal was to make changes to the Network Code to cater for access options. The associated changes will take effect on 1 September 2008.
- 4.15 Our consultation on our PfC to Part G under C8 did not include the amendments agreed on 11 August 2008 because these changes had not at that time been made and were being taken forward under a separate consultation process. It would therefore not have been appropriate to include them in the C8 consultation. The version of Part G of the Network Code issued with the C8 notice does, however, incorporate the approved C5 amendments even though they have not yet come into effect - on the basis that they have been formally consulted and approved using the C5 modification mechanism and it is only a matter of time before they become effective. If we did not now include these changes in the version of Part G attached to our C8 notice, the C8 changes, when they come into operation, would override those that have already been approved following the C5 process. We do not consider such an outcome to be appropriate. We consider that in practice the issue is only about the form of our modifications (i.e. inserting a new version of Part G which we consider to be the user-friendly and transparent approach instead of making modifications on a word by word basis).

¹⁹ See our Network Code modifications page on our website:
<http://www.rail-reg.gov.uk/server/show/nav.248>

- 4.16 As a result of this, we should point out that there are a few areas in the attached Part G where references to 'Train Operator' (as opposed to the term 'Access Beneficiary', introduced under C5) have to remain because they were not included in the PfC under C5 (e.g. Condition G9). We acknowledge that this is a sub-optimal outcome. To rectify this, our proposed approach is that we will issue a further proposal for change, under the C5 mechanism, once the C8 changes have taken effect.

Reasoning for using the C8 modification process

- 4.17 We decided that the Network Code should be amended through the change mechanisms it contains because we were aware of at least one unregulated track access contract which incorporates the Network Code. To amend the Network Code, one of two change mechanisms set out within the Network Code should be used:

- (a) *the C5 modification process* – where a Class Member, Access Option Holder, person who proposes in good faith to enter into an Access Agreement or become an Access Option Holder, or ORR sponsor a PfC to the Network Code by submitting it to the Class Representative Committee (CRC). The CRC then issues the PfC for industry consultation and convenes a meeting to consider the PfC, consultation responses, and decide whether or not it should recommend to ORR that the PfC should be approved. Changes to the Network Code do not have effect until approved by ORR; or
- (b) *the C8 modification process* – where ORR is able to make changes to the Network Code under defined circumstances (including consulting on the proposal for change), and only if specific conditions are satisfied (the circumstances and conditions are discussed in more detail below).

- 4.18 Due to the nature of the changes proposed and the need to ensure that Schedule 4 to the track access contracts and Part G of the Network Code remain in alignment we indicated that we were minded to use the C8 modification process when we asked the industry to undertake the review of possessions compensation in January 2007. We then set out our reasoning and intention to use the C8 modification process in our consultation in April 2008 and sought consultee views on our proposed approach. Consultation

responses indicated that there was general support for using the C8 modification process on this occasion.²⁰

Condition C8

- 4.19 Condition C8 of the Network Code sets out various requirements that ORR must meet in relation to a proposed modification to the Network Code, including the serving of a notice.
- 4.20 Condition C8.1 enables ORR to amend the Network Code and the Access Dispute Resolution Rules as specified in any notice given by ORR for the purposes of Condition C8, provided that:
- (a) ORR shall be satisfied as to the need for the modification as provided in Condition C8.2;
 - (b) the procedural requirements of Condition C8.4 shall have been satisfied; and
 - (c) the modification shall not have effect until the date provided for in Condition C8.5.
- 4.21 Condition C8.3 sets out the circumstances where any notice issued by ORR under Condition C8 may not have effect.
- 4.22 Each of these conditions is set out below along with our reasoning for why we believe they have either been satisfied or do not apply.

Need for modification

- 4.23 Condition C8.2 states that a notice given by the ORR under Condition C8.1 shall have effect if we are satisfied on reasonable grounds that either or both of the following conditions have been satisfied:

²⁰ See the consultation responses to the Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for passenger operators and Part G of the Network Code for all operators, Office of Rail Regulation, April 2008. These can be accessed at: <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9125>

- (a) the modification in question is or is likely to be reasonably required in order to promote or achieve the objectives specified in section 4 of the Act; and
- (b) the interests of any relevant person or persons would be unfairly prejudiced if the modification in question were not made, and the need to avoid or remedy such unfair prejudice outweighs or is likely to outweigh any prejudice which will or is likely to be sustained by any other relevant person or persons if the modification is made, having due regard to the need to enable relevant persons to plan the future of their businesses with a reasonable degree of assurance.

4.24 At the moment compensation for possessions is received through two mechanisms:

- (a) in respect of all possessions, through Schedule 4 of a Train Operator's track access contract, but only where the Train Operator has paid an access charge supplement;
- (b) in respect of Network Changes (for example, enhancements) through Part G of the Network Code.

4.25 The industry has proposed, in line with our request, amendments to the possession compensation arrangements that will allow all compensation for possessions to be made through Schedule 4 of a Train Operator's track access contract.

4.26 We set out our conclusions on changes to be made to Schedule 4 to the track access contracts for passenger operators in our draft determinations.²¹ The amendments to Schedule 4 will be as part of our periodic review on access charges for the control period commencing on 1 April 2009 by:

- (a) incorporating the relevant conclusions in our final determinations that we will be publishing on 30 October 2008; and

²¹ Periodic review 2008: Draft determinations, Office of Rail Regulation, June 2008. This document can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/368.pdf>

- (b) including the changes to Schedule 4 (including any bespoke modifications) in the review notice(s) that we will be publishing in December 2008.

4.27 As amendments to the Network Code are not being made as part of a periodic review, this means that if the amendments to Schedule 4 go ahead and Part G is not amended then Train Operators would potentially be eligible to receive compensation for disruption associated with network change through both mechanisms. This could lead to an unfunded increase in compensation costs to Network Rail as Train Operators seek to use the mechanism that provides the largest compensation. Such an outcome would clearly be wrong and contrary to our Section 4 duties.

4.28 We consider that all of the proposed changes should be implemented together with the changes to Schedule 4 to the track access contracts, with effect from 1 April 2009. In respect of the test which is required to be made under Condition C8.2(a) we consider the changes provide a more transparent process, reduce the industry's administrative burden, and therefore contribute to furthering a number of our section 4 duties, including:

- (a) promoting efficiency and economy on the part of persons providing railway services – as, for example, it will ensure that Network Rail takes into account the full costs of a possession on a consistent basis irrespective of the reason for that possession. The use of a formula based approach for compensation for type 1 possessions and as the default for other possession types would reduce transaction costs and increase transparency;
- (b) promoting improvements in railway service performance by ensuring that Network Rail takes into account Train Operator costs of possession overruns. The new regime will ensure that, where possessions impacts are large, Network Rail takes the full costs into account. This is not the case with the current Schedule 4 and Part G regime; and
- (c) enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance by the increase in transparency from the removal of the different treatment of Network

Change and other possessions, and the provision of formula based cost and revenue compensation for less disruptive possessions.

- 4.29 We do not consider that there are any section 4 duties that would preclude us from making the proposed changes.
- 4.30 We also think the test in Condition C8.2(b) is met. This is because, given the whole industry benefit that would be delivered by the proposals and the broad support that they have received, we consider that the interests of Train Operators and Network Rail would be unfairly prejudiced if the changes were not made. We consider that the benefits of implementing these changes are likely to outweigh any prejudice which might be suffered by other relevant persons.

For example, we acknowledge that one off implementation could increase the transaction costs of clause 18.1/schedule 9 negotiations between DfT/Transport Scotland and franchised operators. We also note that the basis of compensation for the most disruptive possessions, type 3 possessions and Sustained Planned Disruption (where Network Change compensation is typically claimed), will be unchanged from the current treatment. However, we consider that these costs will be far outweighed by the benefits of ensuring all operators use the same regime with Network Rail under the same incentives for all types of possession. Further, we consider that any increase in transaction costs will be small if early agreement on clause 18.1/schedule 9 treatment can be reached between government and franchised operators. We consider that using the C8 process will enable relevant persons to plan the future of their businesses with a reasonable degree of assurance by ensuring that all operators have the same regime from 1 April 2009. If the C8 mechanism is not used and changes to Part G are not made then Train Operators would continue to have two different compensation mechanisms for Restrictions of Use in connection with a Network Change in the next control period. We do not consider that this would be in the interests of Train Operators or Network Rail.

When a notice may not have effect

- 4.31 Condition C8.3.1 indicates that a modification specified in a modification notice shall not have effect if its effect would, if made, be:

- (a) to prevent to a material extent a Train Operator or Access Option Holder exercising, or receiving the benefit of, a protected right; or
- (b) materially to increase any protected obligation of the Train Operator or Access Option Holder,

provided that no person shall be entitled to challenge or otherwise call into question the effectiveness of any such modification unless he shall have given notice to the ORR not more than 45 days after the date of the modification notice stating that the modification in question, would, if made, have on him any such effect. Any such notice must be accompanied by such relevant information in support of such statement as it shall be reasonable to expect the person making the challenge to be able to provide.

- 4.32 Condition C8.3.2 then specifies that any challenge or other procedure of the kind referred to in Condition C8.3.1 shall, unless the affected operator and the ORR shall otherwise agree, be determined by an arbitrator in accordance with the Access Dispute Resolution Rules within 180 days of the date upon which the affected operator shall have given notice to the ORR under Condition C8.3.1.
- 4.33 We believe that the modification proposed to Part G does not prevent to a material extent a Train Operator or Access Option Holder exercising, or receiving the benefit of, a protected right. As part of our consultation on the proposed changes we consulted on whether any protected rights existed and we are not aware that any do.
- 4.34 However, the consultation responses identified that there were some specific works associated with the WCML upgrade²² and North London Line upgrade for which there are particular bespoke arrangements which should remain in place for these specific schemes. We will work with Network Rail to establish how such arrangements are to be preserved.

²²

The specific works identified are the remodelling and renewals at Bletchley by the WCRM project for London Midland and all possessions included within documents NAUM-30 and the MKC PSN for Virgin West Coast Trains. We do not consider that possessions included in further NAUM documents associated with WCRM Upgrade works should be included as these can take into account the proposed new possession arrangements.

- 4.35 Taking account of the consultation responses received we do not believe that the proposed modifications to Part G materially increase any protected obligation of a Train Operator or Access Option Holder.

Procedural requirements

- 4.36 Condition C8.4 sets out the procedural requirements which must be followed for the purposes of Condition C8.1. These are:

- (a) in its consideration of the matters referred to in Condition C8.2, the ORR shall have consulted the Secretary of State, Network Rail and the CRC, together with all Class Members and any other persons which the ORR shall consider ought properly to be consulted, in relation to the modification which it proposes to make;
- (b) in the consultations referred to in paragraph 4.36(a) above, the ORR shall have made available to each person so consulted such drafts of the proposed modification as it shall consider are necessary so as properly to inform such persons of the detail of the proposed modification;
- (c) the ORR shall have given each person so consulted the opportunity to make representations in relation to the proposed modification and shall have taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the modification to be made;
- (d) the ORR shall have notified each person consulted pursuant to paragraph 4.36(a) above as to its conclusions in relation to the modification in question (including by providing each person a copy of the text of the proposed modification) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.36(d) above, the ORR shall have treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation shall, by notice in writing to the ORR or by endorsement on the representation of words indicating the

confidential nature of such representation, have specified as confidential information.

4.37 We have satisfied these requirements by:

- (a) consulting with the Secretary of State, Network Rail and the CRC, together with all Class Members and such other persons as we considered ought properly to have been consulted (including Transport Scotland and TfL) on our proposals:
 - (i) to amend the passenger possession compensation mechanism and Part G generally, including proposed drafting of passenger Train Operator's Schedule 4 and Part G on 9 April 2008;²³ and
 - (ii) to amend the freight possession compensation mechanism and Part G generally, including proposed drafting of freight operators' Schedule 4 and revised Part G drafting (taking account of comments received from the consultation on 9 April 2008) on 11 July 2008;²⁴
- (b) making available such drafts of the proposed modification so as to properly inform such persons of the detail of the proposed modification (as described in paragraph 4.36(b) above);
- (c) providing an opportunity for each person consulted to make representations in relation to the proposed modification:
 - (i) in respect of our consultation issued on 9 April 2008 consultees were invited to respond by 7 May 2008; and

²³ Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for passenger operators and Part G of the Network Code for all operators, Office of Rail Regulation, April 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_pass_090408.pdf

²⁴ Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for freight operators, franchise operators access charge supplements and Part G of the Network Code, Office of Rail Regulation, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_fgt_cons_110708.pdf

- (ii) in respect of our consultation issued on 11 July 2008 consultees were invited to respond by 1 August 2008;
- (d) providing notice to each of the parties consulted as to our conclusions in relation to the modification to be made to Part G of the Network Code; and
- (e) treating as confidential any representation (including any submission of written material) which (and to the extent that) anyone has indicated to us is confidential.

Effective modification date

- 4.38 Condition C8.5 states that a notice served under Condition C8.1 shall have effect upon such date, or the happening of such event, as shall be specified in the notice, provided that it shall in no circumstances have effect earlier than 180 days after the date upon which it shall have been given.
- 4.39 As mentioned above, we intend for the Part G changes to be made at the same time as the changes to Schedule 4 of the track access contracts to ensure that contractual alignment is maintained. There are a number of different points in time when the changes to Schedule 4 may come into operation for each Train Operator on or after 1 April 2009. As a result, the notice attached (at Annex 1) enables the modifications to Part G to be made at these corresponding times.
- 4.40 For Train Operators, the date on which the changes to Schedule 4 come into operation (and therefore the date on which the Part G modifications are made) will depend on either: (i) the operation of the statutory process under Schedule 4A of the Railways Act 1993 (the "Act"); or (ii) the terms of a supplemental agreement which the operator may enter into with Network Rail, which will provide for the changes to come into operation at a specified date, irrespective of the date on which the changes would come into operation automatically under the statutory process.
- 4.41 We have encouraged Network Rail and Train Operators to enter into supplemental agreements to amend their existing track access contracts so that they provide for the periodic review changes to be implemented on 1 April 2009, even if this cannot happen automatically under the statutory process

(e.g. due to a reference to the Competition Commission (CC) which would lengthen the process).²⁵ This would ensure that Network Rail continues to receive its various income payments from the start of the new control period, pending the final implementation of the periodic review 2008. If such an agreement:

- (a) is not entered into, the statutory process would dictate the point at which the Schedule 4 changes come into operation;
- (b) is entered into before 1 April 2009, the changes to Schedule 4 would come into operation from 1 April 2009; and
- (c) is entered into after 1 April 2009 but before the changes to Schedule 4 have come into operation automatically under the statutory process, then those changes would come into operation from the date on which the agreement becomes effective. We assume that, in the first instance, Network Rail and the relevant operator will consider what date would be most appropriate for such a change to become effective.

Therefore, the notice under Condition C8.1 provides for the Part G modifications to have effect from the following corresponding times:

- (a) **1 April 2009**, if:
 - (i) this is the date on which the changes to Schedule 4 of the track access contracts come into operation automatically under the statutory process set out in Schedule 4A to the Act (i.e. there is no reference to the CC or any other lengthening of the process); or
 - (ii) a Train Operator has entered into a supplemental agreement with Network Rail before 1 April 2009 that provides for the

²⁵ Periodic review 2008 implementation, April 2008. This can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/pr08-implementationlet-230408.pdf>; and

Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for freight operators, franchise passenger operators access charge supplements and part G of the network code, July 2008. This can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_fgt_cons_110708.pdf

changes to Schedule 4 to come into operation as of 1 April 2009;
or

- (b) **a later date**, being:
- (i) the date on which the changes to Schedule 4 of the track access contracts come into operation automatically under the statutory process set out in Schedule 4A to the Act; or
 - (ii) for any Train Operators that have entered into a relevant supplemental agreement after 1 April 2009 but before the date in (b)(i) above, the date on which that agreement becomes effective.

4.42 In the event that ORR's periodic review 2008 is referred to the CC, it is possible that the outcome of the reference to the CC might be changes to the modifications in relation to Schedule 4 set out in ORR's review notice. This could result in follow-on changes being required to Part G of the Network Code. In these circumstances, we would need to consider how best to re-align Schedule 4 and Part G of the Network Code through Conditions C5 and C8.

***Annex 1 – Notice under condition C8 of
the Network Code and Part G (Network
Change) modifications***

[Copy of] Office of Rail Regulation's Notice of Modifications

NETWORK CODE: NOTICE OF MODIFICATIONS (PART G)

- 1 This notice:
 - (a) is given by the Office of Rail Regulation ("ORR") under Condition C8 of the document now known as the Network Code, formerly known as the Railtrack Track Access Conditions 1995, as modified from time to time (the "Network Code"); and
 - (b) specifies modifications (the "relevant modifications") to be made to the Network Code.
- 2 The relevant modifications are those modifications necessary to convert Part G of the Network Code into the form specified in Schedule 1 and shall have effect at the times specified in paragraph 4 below.
- 3 In this notice, the document entitled "Final Conclusions - Compensation for Possessions" and published by the ORR on 18 August 2008 is referred to as the "Final Conclusions".
- 4 The relevant modifications shall have effect:
 - (a) from:
 - (i) 1 April 2009 if the relevant changes (as that term is defined in paragraph 4(2) of Schedule 4A to the Act) in connection with ORR's 2008 periodic review of access charges ("PR08") which relate to schedule 4 to the Access Agreement for the relevant Train Operator come into operation pursuant to the provisions of Schedule 4A to the Act on that date; or
 - (ii) notwithstanding paragraph 4(b), such later date after 1 April 2009 on which the relevant changes in connection with PR08 which relate to schedule 4 to the Access Agreement for the relevant Train Operator come into operation pursuant to the provisions of Schedule 4A to the Act; or

- (b) where the relevant changes do not come into operation on 1 April 2009 pursuant to paragraph 4(a)(i) but without prejudice to paragraph 4(a)(ii):
 - (i) from 1 April 2009 for any Train Operator in respect of whose Access Agreement amendments relating to the incorporation of a mechanism to provide for the treatment of revised track access charges and certain other matters forming the subject of PR08 and as described in paragraph 4.41 of the Final Conclusions (the “PR08 Amendments”) become effective prior to 1 April 2009;
 - (ii) for any Train Operator in respect of whose Access Agreement the PR08 Amendments become effective on a date falling after 1 April 2009 but prior to the date on which the relevant changes referred to in paragraph 4(a)(ii) above come into operation, from the date on which such PR08 Amendments become effective.
- 5 The reasons why we are satisfied (a) of the need for the relevant modifications and (b) that we have complied with the procedural requirements specified in Condition C8.4 of the Network Code for the purposes of giving a notice under Condition C8.1 of the Network Code are, in each case, stated in the Final Conclusions.
- 6 The contents of the Final Conclusions are hereby incorporated into this notice.
- 7 In this notice, unless the context otherwise requires:
 - (a) reference to Schedule 1 is a reference to the schedule to this notice; and
 - (b) words and phrases defined in the Network Code have the same meanings in this notice, and the rules of interpretation contained in Condition A1 of the Network Code apply to the interpretation of this notice.

MICHAEL BESWICK
FOR AND ON BEHALF OF
THE OFFICE OF RAIL REGULATION
Dated 18 August 2008

Schedule 1
Revised Part G

DEFINITIONS

In this Part G, unless the context otherwise requires:

- “authorised variation” means a variation to an established Network Change, where:
- (a) the terms and conditions on which the Network Change in question was established contain a variation procedure;
 - (b) that variation procedure has been followed in accordance with its terms; and
 - (c) the result of the operation of that variation procedure is that the established Network Change has been varied;
- “change” includes:
- (a) improvement or deterioration, enlargement or reduction; and
 - (b) for the purposes of paragraph (b) of the definition of Network Change, a series of changes;
- “Complex Projects Procedure” means the procedure set out in Conditions G5 to G7;
- “Effective Date” means the date specified in a notice of proposal of a Short Term Network Change upon which the Short Term Network Change is proposed to become effective;
- “Established Date” means the first date upon which a Short Term Network Change can be implemented in accordance with Condition G10, whether or not the change is implemented on that day;
- “established Network Change” means a change falling within the definition of “Network Change” and which:

- (a) in the case of a Network Change proposed by Network Rail, Network Rail is entitled to carry out having complied with the procedural and other requirements of this Part G; and
- (b) in the case of a Network Change proposed by an Access Beneficiary, Network Rail is required by this Part G to carry out,

and “establish” and “establishment” of a Network Change shall be construed accordingly;

“Expiry Date” means the date specified in a notice of proposal in relation to a Short Term Network Change which shall not be more than two years, or such longer period as is agreed between Network Rail and each Access Beneficiary that may be affected by the implementation of the proposed Short Term Network Change or determined in accordance with Condition G11, from the later of the Effective Date and the Established Date;

“Governmental Body” means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal, or public or statutory person (whether autonomous or not and including the Office of Rail Regulation);

“method of delivery” includes the means of securing access to an operational document and the ability to make use of the data contained in an operational document;

“modification” includes additions, alterations and omissions, and cognate expressions shall be construed accordingly;

“Network Change” means, in relation to an Access Beneficiary:

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:
 - (i) the Network; or
 - (ii) trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that

Access Beneficiary on the Network; or

- (b) any change to the operation of the Network (being a change which does not fall within paragraph (a) above) which:
 - (i) is likely materially to affect the operation of trains operated by, or anticipated as being operated in accordance with the terms of any access option, by or on behalf of that Access Beneficiary on the Network; and
 - (ii) has lasted or is likely to last for more than six months,

including

- (x) a temporary speed restriction;
 - (y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or
 - (z) a change to the method of delivery of any operational documentation (other than Railway Group Standards) owned or used by an Access Party; or
- (c) any material variation to an established Network Change, other than an authorised variation,

but does not include a closure (as defined in the Railways Act 2005) or a change made under the Systems Code;

“Preparatory Works” means testing, trials, pilot activities, surveys and all other activities reasonably necessary to develop the proposed Network Change;

“Relevant Costs” means, in respect of any Network Change implemented in accordance with Condition G9:

- (a) in respect of Network Rail, all costs, direct losses and expenses (including loss of revenue and liabilities to other train operators but excluding liabilities under any Train Operator’s Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that

Network Change) incurred by Network Rail as a consequence of the implementation of that Network Change;

- (b) in respect of any Train Operator, the amounts which would otherwise be due under that Train Operator's Access Agreement as a consequence of any Restriction of Use in connection with the implementation of that Network Change;

"relevant response date"

means:

- (a) in relation to a proposal for a Network Change under Condition G1, the later of such dates as are reasonably specified by Network Rail under Condition G1.2(a) and Condition G1.3.2 as the date on or before which an Access Beneficiary is to give notice of its response to that proposal under Condition G2.1, having regard to:

- (i) the size and complexity of the change; and
- (ii) the likely impact of the change on the Access Beneficiary,

and which shall not be less than 30 days from the date on which the notice of the proposal for change is given; and

- (b) in relation to a proposal for a Network Change under Condition G3, the later of such dates as are reasonably specified by Network Rail under Condition G3.3.1(c)(i) and Condition G3.4.3 as the date on or before which it is to give notice of its response to that proposal under Condition G4.1, having regard to:

- (i) the size and complexity of the change; and
- (ii) the likely impact of the change on Access Beneficiaries,

and which shall not be:

(A) less than 60 days; or

(B) unless Network Rail and the Sponsor agree otherwise in writing, more than 90 days,

from the date on which Network Rail's notice under Condition G3.3.1(c) is given;

“Scope” means those elements of the scope of a proposed Network Change that are set out in a notice issued by Network Rail under Condition G5.4;

“Short Term Network Change” means a Network Change which Network Rail specifies as such in any proposal made under Condition G1, being a Network Change which involves only a temporary reduction in the capability of the Network for a defined period of time during which there is no reasonable expectation of a requirement for the capability being temporarily withdrawn;

“Sponsor” means, in relation to a proposal for a Network Change under Condition G3.1, the Access Beneficiary which has made the proposal;

“variation” means any modification to the terms or conditions (including as to the specification of the works to be done, their timing, the manner of their implementation, the costs to be incurred and their sharing, and the division of risk) on which an established Network Change is to be carried out, and “varied” and any other cognate words shall be construed accordingly; and

“variation procedure” means, in relation to an established Network Change, a procedure which:

(a) forms part of the terms and conditions on which the Network Change is established; and

(b) provides for the established Network Change itself to be varied after it has been first established.

CONDITION GA - FACILITATION OF NETWORK CHANGE

A1 *Obligation to facilitate Network Change*

Network Rail shall take all reasonable steps to facilitate the development, establishment and implementation of any proposal for Network Change.

A2 *Limit of obligation*

Condition GA1 does not oblige Network Rail to do anything which it is not required to do under its network licence.

A3 *Facilitation*

The obligation of Network Rail under Condition GA1 includes:

- (a) the provision to an Access Beneficiary of such information concerning the condition, capacity and/or capability of the Network as:
 - (i) Network Rail is required at any time to hold or have appropriate access to under its network licence; and
 - (ii) that Access Beneficiary may reasonably request in connection with the development of a proposal for Network Change (whether the proposal is made by that Access Beneficiary or another person);
- (b) the publication on its website (subject to Condition A3 of the Network Code) of:
 - (i) every proposal for Network Change made by Network Rail under Condition G1.1 or by an Access Beneficiary under Condition G3.1;
 - (ii) every response to a proposal for Network Change made by an Access Beneficiary under Condition G2.1 or by Network Rail under Condition G4.1;
 - (iii) every determination of matters which have been referred to the relevant ADRR Panel or the Office of Rail Regulation under Condition G11.1 or G11.2;
 - (iv) every authorised variation;
 - (v) standard forms, produced after consultation with every other Access Party and approved by the Office of Rail Regulation, for the notification under this Part G of proposals for Network Change, and of responses to such proposals, which:

- (A) may include different forms for different types of Network Change having regard to the size, complexity and value of the change in question; and
 - (B) shall be used by any person notifying or responding to a proposal for Network Change under this Part G, unless it is not reasonably practicable for it to do so; and
- (vi) model terms and conditions, produced after consultation with every other Access Party and approved by the Office of Rail Regulation, by way of supplement to the terms of this Part G and on which Network Rail is prepared to contract for or in connection with the implementation of a Network Change which:
 - (A) shall provide appropriate and proportionate forms of contract for different types of Network Change having regard to the size, complexity and value of the change in question;
 - (B) may include variation procedures; and
 - (C) shall, so far as reasonably practicable, form the basis of any terms and conditions relating to the implementation of a Network Change which are proposed by Network Rail under Condition G1 or by a Access Beneficiary under Condition G3;
- (c) the provision of a preliminary response to a proposal for Network Change by an Access Beneficiary under Condition G3.4;
- (d) such consultation before a notice of a proposal for a Network Change is submitted by an Access Beneficiary as may reasonably be expected to enable that Access Beneficiary to assess the feasibility and affordability of the proposed change; and
- (e) such consultation with the persons specified in Condition G1.1(a) and G3.1(b) before a notice of a proposal for a Network Change is given by Network Rail or submitted by an Access Beneficiary as:
 - (i) Network Rail considers reasonably necessary; and
 - (ii) any person specified in Condition G1.1(a) and G3.1(b) may reasonably request,

to enable the proposal to be developed in an efficient and economical manner.

CONDITION G1 - NETWORK CHANGE PROPOSAL BY NETWORK RAIL

1.1 *Notice of proposal*

Subject to Conditions G1.9 and G1.10, if Network Rail wishes to make a Network Change, it shall:

- (a) give notice of its proposal for Network Change to:
 - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
 - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
 - (iii) the Office of Rail Regulation; and
 - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change; and
- (b) without delay publish on its website a summary of its proposal for Network Change.

1.2 *Content of notice of proposed Network Change*

A notice of a proposed Network Change given by Network Rail under Condition G1.1 shall:

- (a) state the relevant response date and the obligations of Access Parties under Conditions G1 and G2;
- (b) indicate whether and to what extent the proposed Network Change has been progressed using the Complex Projects Procedure;
- (c) indicate whether the proposed Network Change is a Short Term Network Change;
- (d) invite the persons specified in Condition G1.1(a)(ii)-(iv) to submit comments by the relevant response date;
- (e) contain:
 - (i) the reasons why it is proposed to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
 - (ii) a specification of the works to be done (including a plan showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);

- (iii) the proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;
 - (iv) Network Rail's proposals (if any) for the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change;
 - (v) in the case of a Short Term Network Change:
 - (A) Network Rail's proposals as to the Effective Date;
 - (B) Network Rail's proposals as to the Expiry Date;
 - (C) the estimated timescale in which the change could reasonably be reversed if so requested by an Access Beneficiary based on its reasonable expectations as to future use of the Network; and
 - (D) the capability of the relevant section of the Network before the proposed Short Term Network Change (and any Short Term Network Change which it succeeds) and the proposed reduction to that capability;
 - (vi) any additional terms and conditions which Network Rail proposes should apply to the change, including any proposed variation procedure;
 - (vii) the results of any consultation undertaken in accordance with Condition G5; and
 - (viii) the results of any Preparatory Works undertaken in accordance with Condition G6; and
- (f) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G1.1(a), to enable any such person to assess the likely effect of the proposed change on its business and its performance of any obligations or the exercise of any discretions which it has in relation to railway services.

1.3 Consultation

1.3.1 Network Rail shall, after giving notice of any proposal for Network Change under Condition G1.1, consult with each operator of railway assets likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform that operator of the change and to enable that operator to assess the consequences for it of the proposed change.

1.3.2 After consultation under this Condition G1.3, Network Rail may notify a later relevant response date to the persons to whom the notice of proposal for Network Change was given.

1.4 *Obligations on Access Beneficiaries to facilitate Network Change*

1.4.1 Except in the circumstances and to the extent specified in Condition G1.4.2, an Access Beneficiary shall, when consulted by Network Rail under Condition G1.3, take all reasonable steps to comply with any written request of Network Rail to provide Network Rail, within a reasonable period of time and at no cost to Network Rail, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G2.2; or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:
 - (i) be binding on the Access Beneficiary, unless the Access Beneficiary indicates otherwise; and
 - (ii) if it is negative, include reasons.

1.4.2 An Access Beneficiary shall not be obliged to comply with a request from Network Rail under Condition G1.4.1:

- (a) unless:
 - (i) the relevant response date is 60 or more days after the date on which the proposal for Network Change was given; and
 - (ii) the request is made at the same time as Network Rail gives its notice under Condition G1.1; or
- (b) to the extent that the Access Beneficiary is unable to comply with such a request, having regard to the information reasonably available to it.

1.5 *Reimbursement of costs*

Subject to Conditions G1.4 and G2, each Access Beneficiary shall be entitled to reimbursement by Network Rail of 75% of all costs incurred by that Access Beneficiary in assessing any Network Change proposed by Network Rail. Those costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out that assessment.

1.6 Further information regarding costs

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of assessing a proposal for Network Change proposed by Network Rail (as referred to in Condition G1.5) including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

1.7 Accuracy of estimates

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

1.8 Obligation to incur no further costs

An Access Beneficiary shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any proposal for Network Change made by Network Rail.

1.9 Changes to the operation of the Network

In the case of a Network Change within the meaning of paragraph (b) of that term's definition, Network Rail may commence implementing the procedure set out in this Part G and shall, upon notice being given by the relevant Access Beneficiary to Network Rail at any time after the expiry of the relevant period, promptly commence implementing and thereafter comply with that procedure as if that change were a Network Change proposed by Network Rail.

1.10 Network Change for safety reasons

To the extent that a Network Change within the meaning of paragraph (a) of that term's definition is required to be made by Network Rail for safety reasons, Network Rail shall not be obliged to implement the procedure set out in this Part G in relation to that change until the change has lasted for three months. Upon expiry of the relevant period, Network Rail shall promptly commence implementing and thereafter comply with the procedure set out in this Part G as if the relevant Network Change were a Network Change proposed by Network Rail.

CONDITION G2 - RESPONSE BY ACCESS BENEFICIARY TO NETWORK CHANGE PROPOSAL

2.1 *Obligation to give notice of response*

2.1.1 The Access Beneficiary shall give notice to Network Rail if it considers that:

- (a) one or more of the following conditions has been satisfied:
 - (i) the implementation of the proposed change would necessarily result in Network Rail breaching an access contract to which that Access Beneficiary is a party;
 - (ii) Network Rail has failed, in respect of the proposed change, to provide sufficient particulars to that Access Beneficiary under Condition G1.2;
 - (iii) the implementation of the proposed change would result in a material deterioration in the performance of that Access Beneficiary's trains which cannot adequately be compensated under this Condition G2 or in respect of a Restriction of Use in connection with the implementation of the proposed change under that Train Operator's Access Agreement; or
 - (iv) the proposed change does not adequately take account of the reasonable expectations of the Access Beneficiary as to the future use of the relevant part of the Network; and/or
- (b) one or more of the conditions set out in Condition G2.1.1(a) has been satisfied but it is prevented by Condition G5.7 from objecting to the proposed Network Change and the proposed Network Change is not, on the basis of the available evidence and taking account of the alternative solutions available and the progress made with the proposed Network Change, to the benefit of the industry as a whole; and/or

- (c) it should be entitled to compensation from Network Rail for the consequences of the implementation of the change either:
 - (i) in accordance with compensation terms proposed under Condition G1; or
 - (ii) on terms other than those proposed (if any) under Condition G1.

2.1.2 Any notice of the kind referred to in Condition G2.1.1(a) above shall include the reasons for the Access Beneficiary's opinion. Any notice of the kind mentioned in Condition G2.1.1(c)(ii) above shall include the reasons why the Access Beneficiary considers that any compensation terms proposed under Condition G1 are inappropriate and shall detail:

- (a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or
- (b) if the Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the methodology to be used to calculate the amount of compensation required; and in either case
- (c) the means by which the compensation should be paid, including any security or other assurances of payment which Network Rail should provide.

The notice referred to above shall contain such detail as is reasonable to enable Network Rail to assess the merits of the Access Beneficiary's decision.

2.2 *Amount of compensation*

Subject to Condition G2.3 and Condition G2.4.1, the amount of the compensation referred to in Condition G2.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Access Beneficiary as a consequence of the implementation of the proposed change.

2.3 *Benefits to be taken into account*

There shall be taken into account in determining the amount of compensation referred to in Condition G2.2:

- (a) subject to Condition G2.4.2, the benefit (if any) to be obtained or likely in the future to be obtained by the Access Beneficiary as a consequence of the proposed Network Change; and

- (b) the ability or likely future ability of the Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

2.4 *Restrictions of Use*

- 2.4.1 The amount of the compensation referred to in Condition G2.2 shall exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.
- 2.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G2.3 shall exclude the benefit (if any) to be obtained or likely in the future to be obtained by the Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

CONDITION G3 - NETWORK CHANGE PROPOSAL BY ACCESS BENEFICIARY

3.1 *Notice of proposal*

An Access Beneficiary shall, if it wishes Network Rail to make a Network Change:

- (a) submit to Network Rail a proposal for such change; and
- (b) permit Network Rail to consult with:
 - (i) each Access Beneficiary that may be affected by the implementation of the proposed Network Change;
 - (ii) the Secretary of State, and Scottish Ministers if they may be affected by the implementation of the proposed Network Change;
 - (iii) the Office of Rail Regulation; and
 - (iv) each Passenger Transport Executive that may be affected, Transport for London if it may be affected and the Welsh Assembly Government if it may be affected, by the implementation of the proposed Network Change,

to the extent provided for under Condition G3.3.1(b), subject to such requirements as to confidentiality as are reasonable.

3.2 Content of Sponsor's notice of proposal

A notice of a proposed Network Change given by the Sponsor under Condition G3.1 shall:

- (a) contain:
 - (i) the reasons why it is proposed to make the change, including the effects it is intended or expected to have on the operation of the Network or on trains operated on the Network;
 - (ii) a specification of the works to be done (including a plan or plans showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
 - (iii) the proposed times within which the works are to be done and when they are intended or expected to be begun and completed;
 - (iv) the Sponsor's proposals (if any) for the division of the costs of carrying out the change including any proposals in relation to the calculation or payment of compensation to Network Rail or any Access Beneficiary in respect of the change; and
 - (v) the additional terms and conditions (if any) which the Sponsor proposes should apply to the change, including any variation procedure; and
- (b) be prepared to a standard, and in such detail, as is reasonably necessary, having due regard to the level of knowledge and expertise reasonably to be expected of the persons specified in Condition G3.1(b), to enable:
 - (i) Network Rail; and
 - (ii) any person specified in Condition G3.1(b),

to assess the likely effect of the proposed change on its business and its performance of any obligations or exercise of any discretions which it has in relation to railway services.

3.3 Evaluation of proposal and consultation

- 3.3.1 If Network Rail receives a proposal for Network Change under Condition G3.1, it shall:

- (a) evaluate and discuss the proposal for change with the Sponsor for such period as is reasonable having due regard to the likely impact of the proposed Network Change on either or both of Network Rail and other operators of trains;
- (b) consult with each person specified in Condition G3.1(b) likely to be materially affected by the proposed change to the extent reasonably necessary so as properly to inform them of the change and to enable them to assess the consequences for them of the change; and
- (c) for the purpose of the consultation under Condition G3.3.1(b), within 30 days of the date on which the Sponsor's notice under Condition G3.1 was given, give a notice to the persons specified in Condition G3.1(b), with a copy to the Sponsor, inviting them to submit comments by the relevant response date and stating:
 - (i) the relevant response date and the obligations of Access Parties under Conditions G3 and G4;
 - (ii) the reasons given by the Sponsor under Condition G3.2(a)(i) for proposing to make the change;
 - (iii) Network Rail's estimate of the likely impact of the change on the operation and performance of the Network; and
 - (iv) Network Rail's own proposals as to:
 - (A) the arrangements for, and any proposed terms applicable to, the implementation of the change;
 - (B) the specification of the works to be done (including a plan or plans showing where the work is to be done and the parts of the Network and associated railway assets likely to be affected);
 - (C) the times within which the works are to be done and when they are intended or expected to be begun and completed;
 - (D) the division of the costs of carrying out the change, including any proposals in relation to the calculation or payment of compensation to Access Beneficiaries in respect of the change; and

- (E) any additional terms and conditions which should apply to the change, including any proposed variation procedure.

3.3.2 In preparing a notice under Condition G3.3.1(c), Network Rail:

- (a) shall comply with the standard specified in Condition G3.2(b); and
- (b) in respect of each of the matters specified in Condition G3.3.1(c)(iv):
 - (i) shall have regard to any relevant statements and proposals contained in the Sponsor's notice under Condition G3.1;
 - (ii) shall give reasons for any differences between those statements and proposals and its own proposals under Condition G3.3.1(c)(iv); and
 - (iii) may annex to its notice any proposal contained in the Sponsor's notice under Condition G3.1 with which it agrees, stating its agreement, and, where appropriate, that it has no proposals of its own on the matter concerned.

3.4 *Facilitation of Network Change by Network Rail*

3.4.1 Except in the circumstances and to the extent specified in Condition G3.4.2, Network Rail shall, when consulted by the Sponsor, take all reasonable steps to comply with any written request of the Sponsor to provide the Sponsor, within a reasonable period of time, and at no cost to the Sponsor, with:

- (a) a preliminary estimate of those costs, losses and expenses referred to in Condition G4.2 which may be incurred by Network Rail; and/or
- (b) a preliminary written response in respect of the proposed Network Change, which shall:
 - (i) be binding on Network Rail, unless Network Rail indicates otherwise; and
 - (ii) if it is negative, include reasons.

3.4.2 Network Rail shall not be obliged to comply with a request from the Sponsor under Condition G3.4.1:

- (a) unless:
 - (i) the relevant response date is 90 or more days after the date on which Network Rail's notice under Condition G3.3.1(c) was given; and

(ii) the request is made within 7 days of the Sponsor receiving Network Rail's notice under Condition G3.3.1(c); or

(b) to the extent that Network Rail is unable to comply with such a request, having regard to the information reasonably available to it.

3.4.3 After consultation with the Sponsor and under Condition G3.3.1(b), Network Rail may notify a later relevant response date to the Sponsor and the persons to whom it gave its notice under Condition G3.3.1(c).

3.5 *Reimbursement of costs*

Subject to Conditions G3.4 and G4, Network Rail shall be entitled to reimbursement by the Sponsor of 75% of all costs incurred by Network Rail in assessing any Network Change proposed by the Sponsor. Those costs shall be the minimum reasonably necessary for Network Rail to carry out that assessment.

3.6 *Provision of estimate of costs by Network Rail*

Network Rail shall, upon request from the Sponsor from time to time, provide the Sponsor with written estimates of the costs of assessing a proposal for Network Change submitted by the Sponsor (as referred to in Condition G3.5) including estimated costings of the work to be carried out and shall:

(a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that assessment before commencing such work; and

(b) upon request from the Sponsor from time to time provide the Sponsor or its agents with such information as may be reasonably necessary to enable the Sponsor to assess the reasonableness of any estimate.

3.7 *Accuracy of estimates*

Network Rail shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

3.8 *Obligation to incur no further costs*

Network Rail shall, if requested by the Sponsor at any time, incur no further costs (except any costs that cannot reasonably be avoided) in respect of any proposal for Network Change made by the Sponsor.

3.9 *Relationship with Vehicle Change*

If the implementation of a Network Change proposed by the Sponsor also requires the implementation of a Vehicle Change in respect of the trains operated by the Sponsor, the Sponsor shall follow the procedures and satisfy the requirements of both this Part G and Part F and the requirement for a Vehicle Change shall not preclude the right of the Sponsor to follow the procedure in this Part G for a Network Change or vice versa.

CONDITION G4 - RESPONSE BY NETWORK RAIL TO NETWORK CHANGE PROPOSAL

4.1 *Obligation to give notice of response*

4.1.1 Network Rail shall give notice to the Sponsor if:

- (a) it considers that one or more of the following conditions has been satisfied:
 - (i) the implementation of the proposed change would necessarily result in Network Rail breaching any access contract (other than an access contract to which the Sponsor is a party);
 - (ii) the Sponsor has failed in a material respect to comply with its obligations under Condition G3.2 provided that Network Rail shall first have given the Sponsor a reasonable opportunity to remedy that failure;
 - (iii) the implementation of the proposed change would result in a material adverse effect on the maintenance or operation of the Network or the operation of any train on the Network which in any such case cannot adequately be compensated under this Condition G4 or in respect of a Restriction of Use in connection with the implementation of the proposed change under the relevant Train Operator's Access Agreement; or
 - (iv) the proposed change does not adequately take account of the reasonable expectations of an Access Party (other than the Sponsor) as to the future use of the relevant part of the Network;

- (b) any Access Beneficiary shall have given notice to Network Rail that it considers that any of the conditions specified in paragraph (a) above has been satisfied;
- (c) it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
 - (i) in accordance with compensation terms proposed under Condition G3; or
 - (ii) on terms other than those proposed (if any) under Condition G3; and/or
- (d) any Access Beneficiary shall have given notice to Network Rail that it considers that it should be entitled to compensation from the Sponsor for the consequences of the implementation of the change either:
 - (i) in accordance with compensation terms proposed under Condition G3; or
 - (ii) on terms other than those proposed (if any) under Condition G3.

4.1.2 Any notice of the kind referred to in Conditions G4.1.1(a) and (b) above shall include the reasons for the opinion in question. Any notice of the kind mentioned in Conditions G4.1.1(c)(ii) and (d)(ii) above shall include the reasons why Network Rail or the relevant Access Beneficiary considers that any compensation terms proposed under Condition G3 are inappropriate and shall detail:

- (a) the amount of compensation required and the methodology used to calculate the amount of compensation required; or
- (b) if Network Rail or the relevant Access Beneficiary is not reasonably able to provide details of the amount of compensation required, the methodology to be used to calculate the amount of compensation required; and in either case
- (c) the means by which the compensation should be paid, including any security or other assurances of payment which the Sponsor should provide.

The notice referred to above shall contain such detail as is reasonable to enable the Sponsor to assess the merits of Network Rail or the relevant Access Beneficiary's decision.

4.2 Amount of compensation

Subject to Condition G4.3, the aggregate of the amount of the compensation referred to in Condition G4.1 shall be:

- (a) subject to Condition G4.4.1 an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by Network Rail or the relevant Access Beneficiary in question as a consequence of the implementation of the proposed change other than any such costs, losses or expenses which are attributable to the Sponsor improving its ability to compete with other operators of railway assets; and
- (b) an amount equal to the amount of costs, direct losses or expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by Network Rail as consequence of implementing a Network Change including the recovery of any payments made by Network Rail to the relevant Train Operator under that Train Operator's Access Agreement for the relevant Restriction(s) of Use.

4.3 Benefits to be taken into account

There shall be taken into account in determining the amount of compensation referred to in Condition G4.2:

- (a) subject to Condition G4.4.2 the benefit (if any) to be obtained or likely in the future to be obtained by Network Rail or the relevant Access Beneficiary as a consequence of the implementation of the proposed change; and
- (b) the ability or likely future ability of Network Rail or the relevant Access Beneficiary to recoup any costs, losses and expenses from third parties including passengers and customers.

4.4 Restrictions of Use

4.4.1 The amount of the compensation referred to in Condition G4.2 shall in respect of any Train Operator exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change.

4.4.2 The benefits taken into account in determining the amount of the compensation for the proposed change under Condition G4.3 shall in respect

of any Train Operator exclude the benefit (if any) to be obtained or likely in the future to be obtained by that Train Operator as a consequence of any Restriction of Use in connection with the implementation of the proposed change (with that exclusion including any compensation payable to that Train Operator in respect of that Restriction of Use under its Access Agreement).

CONDITION G5 - SCOPE OF COMPLEX PROJECTS

5.1 *Consultation prior to making a proposal for Network Change using the Complex Projects Procedure*

Before submitting a proposal for Network Change which Network Rail intends to establish using the Complex Projects Procedure, Network Rail shall provide the following information to each Access Beneficiary which it considers may be affected by the implementation of the proposed Network Change:

- (a) that Network Rail intends to initiate the Complex Projects Procedure in respect of the proposed Network Change;
- (b) the details of the proposed Network Change which Network Rail can reasonably make available;
- (c) the reasons why Network Rail believes that the proposed Network Change is required including the effects it is intended or may reasonably be expected to have on the operation of the Network or on trains operated on the Network;
- (d) the reasons why Network Rail believes that the proposed Network Change should be established in accordance with the Complex Projects Procedure;
- (e) any other information Network Rail reasonably believes an affected Access Beneficiary may reasonably require to understand the proposed Network Change;
- (f) a draft plan setting out the intended stages and timetable for the Complex Projects Procedure; and
- (g) the Scope that Network Rail intends to propose under Condition G5.4.

5.2 *Consultation with affected Access Beneficiaries*

Network Rail shall, having provided the information set out in Condition G5.1, consult with each Access Beneficiary which it considers may be affected by the proposed change. During the consultation process Network Rail shall give due consideration to the views of each Access Beneficiary and, where

Network Rail disagrees with the views of an Access Beneficiary, shall provide that Access Beneficiary with a written response setting out the reasons why Network Rail disagrees with the views of that Access Beneficiary.

5.3 *Facilitation by Access Beneficiaries*

Access Beneficiaries consulted under Condition G5.2 shall take all reasonable steps to make the consultation process effective, including:

- (a) the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the proposal for Network Change under Condition G5.1; and
- (b) the provision to Network Rail of a response to Network Rail's consultation under Condition G5.2 in relation to the proposed Network Change within 30 days of being consulted by Network Rail, or such longer period as Network Rail may specify.

5.4 *Notice of intended Scope*

Once the consultation procedure set out in Conditions G5.2 and G5.3 has concluded, Network Rail may, if it wishes to proceed with the proposed Network Change using the Complex Projects Procedure, issue a notice of intended Scope to each Access Beneficiary which it considers may be affected.

5.5 *Response to notice of intended Scope*

Each Access Beneficiary that receives a notice of intended Scope from Network Rail under Condition G5.4 shall, within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, respond to Network Rail in writing stating either that it:

- (a) agrees to the Scope set out in the notice; or
- (b) does not agree to the Scope set out in the notice and it considers that there is a reasonable likelihood that, if the Scope were to be proposed as part of a Network Change under Condition G1, the Access Beneficiary would be likely to succeed in preventing the Network Change being established solely due to it being entitled to give notice under Condition G2.1.1(a).

Any notice under (b) above that an affected Access Beneficiary does not agree to the Scope set out by Network Rail in the notice of intended Scope

shall include the reasons why the affected Access Beneficiary does not so agree.

If an Access Beneficiary receives a notice of intended Scope from Network Rail under Condition G5.4 and fails to respond to Network Rail in writing within 30 days, or such longer period as Network Rail specifies, of the receipt of such notice, the affected Access Beneficiary shall be deemed to have agreed to the Scope as if the affected Access Beneficiary had given notice to Network Rail under Condition G5.5(a).

5.6 *Failure to agree Scope*

If an Access Beneficiary does not agree to the Scope under Condition G5.5(b), then Network Rail and the Access Beneficiary may enter into discussions with a view to agreeing the Scope, including any changes to the Scope which may be appropriate. At any time after an Access Beneficiary serves a notice under Condition G5.5(b) any Access Party may refer the issue to the relevant ADRR Panel for determination in accordance with Condition G11.

5.7 *Effect of agreement of Scope*

Once the relevant Scope of the proposed Network Change has been agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6 with an Access Beneficiary, that Access Beneficiary shall not be entitled to give notice to Network Rail subsequently under Condition G2.1.1(a) to challenge any elements of the Network Change to the extent included in the Scope except where there is a change to the Scope which is likely materially to affect the Access Beneficiary since the Scope was agreed under Conditions G5.5 or G5.6 or determined under Condition G5.6.

5.8 *Costs incurred by Access Beneficiaries due to the consultation process*

An Access Beneficiary shall be entitled to reimbursement by Network Rail of 100% of all costs reasonably incurred by that Access Beneficiary in complying with its obligations under Conditions G5.3 and G5.5. The costs shall be the minimum reasonably necessary for that Access Beneficiary to carry out the assessment.

5.9 *Further information regarding costs*

Each Access Beneficiary shall, upon request from Network Rail from time to time, provide Network Rail with written estimates of the costs of complying with its obligations under Conditions G5.3 and G5.5 including estimated costings of the work to be carried out and shall:

- (a) be entitled to require reasonable assurances of payment in respect of any material work to be carried out for the purposes of that evaluation before commencing such work; and
- (b) upon request from Network Rail from time to time, provide Network Rail with such information as may be reasonably necessary to enable Network Rail to assess the reasonableness of any estimate.

5.10 Accuracy of estimates

Each Access Beneficiary shall ensure that any estimates given by it are, so far as reasonably practicable, accurate on the basis of the information reasonably available to it.

5.11 Obligation to incur no further costs

An Access Beneficiary shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any consultation in respect of a proposed Network Change to which this Condition G5 applies.

5.12 Further agreement of Scope

If, at any time before Network Rail issues a notice of proposed change under Condition G1.1, Network Rail wishes to agree further elements of the proposed Network Change to be included in the Scope, Network Rail may issue further notices of intended Scope in respect of such further elements in accordance with Conditions G5.1 to G5.11 and once agreed or determined in accordance with Conditions G5.5 or G5.6 such further elements will be included in and form part of the Scope.

CONDITION G6 - PREPARATORY WORKS

6.1 Network Rail's obligations in relation to Preparatory Works

Network Rail may, if it wishes to proceed with a proposed Network Change using the Complex Projects Procedure, make proposals for the implementation of Preparatory Works under Condition G1, and except as provided in this Condition G6, Access Beneficiaries shall have the same rights in respect of such proposals as if each proposal of Preparatory Works was a separate Network Change proposal.

6.2 Obligations of Access Beneficiaries in relation to Preparatory Works

Each Access Beneficiary which is likely to be affected by the Preparatory Works shall take all reasonable steps to facilitate the Preparatory Works which are undertaken by Network Rail including by the taking of all reasonable steps to provide Network Rail with such information as Network Rail reasonably requests in connection with the development of the Preparatory Works.

6.3 Further Preparatory Works

If at any time Network Rail is reasonably of the view that further Preparatory Works are required, Network Rail shall propose such further Preparatory Works in accordance with this Condition G6.

CONDITION G7 - COMPLEX PROJECTS NETWORK CHANGE

If, having previously agreed or determined the Scope in accordance with Conditions G5.5 or G5.6, Network Rail wishes to implement a Network Change which it has progressed using the Complex Projects Procedure, it shall propose the Network Change in accordance with Condition G1.

CONDITION G8 - SHORT TERM NETWORK CHANGE

8.1 Reversal of a Short Term Network Change

- 8.1.1 An Access Beneficiary may request in writing that Network Rail reverse the effect of a Short Term Network Change before its Expiry Date if the effect of the Short Term Network Change would prevent the Access Beneficiary using the Network in a manner consistent with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network.
- 8.1.2 The Access Beneficiary shall include with any notice requesting the reversal of the effect of a Short Term Network Change served under Condition G8.1.1 evidence to support the Access Beneficiary's claim of reasonable expectations as to the future use of the relevant part of the Network which requires that reversal.
- 8.1.3 The Access Beneficiary shall provide Network Rail with such further information as Network Rail may reasonably require to enable Network Rail to assess the reasonableness of the Access Beneficiary's request to reverse the effect of a Short Term Network Change.
- 8.1.4 Upon receipt of a notice to reverse the effect of a Short Term Network Change served under Condition G8.1.1, Network Rail shall:
 - (a) reverse the effect of the Short Term Network Change at its own cost by the later of the following:

- (i) the earlier of:
 - (A) the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; and
 - (B) the timescale within which Network Rail can complete the reversal without incurring any greater cost than would have reasonably been incurred by Network Rail had the effect of the Short Term Network Change been reversed in accordance with the estimated timescale for reversal set out in the notice of proposed Network Change served under Condition G1.1; or
- (ii) the earliest use for which the Access Beneficiary can demonstrate a reasonable expectation as to future use; or
- (b) respond to the Access Beneficiary in writing within 30 days stating that Network Rail does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network and giving reasons for its decision.

Network Rail shall not be liable to any Access Beneficiary if and to the extent that the date of the requested reversal is earlier than the date by which Network Rail must reverse the effect of the Short Term Network Change as calculated under Condition G8.1.4(a).

8.2 *Expiry of a Short Term Network Change*

Network Rail shall restore at its own cost any part of the Network which has been subject to a Short Term Network Change to its original capability as set out in the notice of proposal for the Short Term Network Change by the Expiry Date unless and to the extent that:

- (a) a Network Change has been implemented in place of the Short Term Network Change; or
- (b) a further Short Term Network Change has been implemented.

8.3 *Notification of reversal of a Short Term Network Change prior to the Expiry Date*

Network Rail shall publish details of each Short Term Network Change which is reversed prior to the Expiry Date.

CONDITION G9 - CHANGES IMPOSED BY COMPETENT AUTHORITIES

Where Network Rail is required (other than at its own request or instigation) to implement a Network Change as a result of any Change of Law or any Direction of any Competent Authority other than the Office of Rail Regulation exercising any of its functions which do not fall within the definition of 'safety functions' as defined in section 4 of the Act:

- (a) Network Rail shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions G1.1 and G1.2 (other than Condition G1.2(e)(iv)) in respect of that Network Change;
- (b) each Access Beneficiary shall make such alterations (if any) to its railway vehicles and its Services as are reasonably necessary to accommodate that Network Change and shall, except to the extent that the relevant Change of Law or Direction otherwise requires, comply with Conditions F2.1, F2.2 and F2.3 (other than Conditions F2.2(a)(vi) and F2.3.1(c)(v)(B) and (D));
- (c) subject to Condition G9(d), each Access Party shall bear its own costs or losses arising out of the implementation of the Network Change or the consequences thereof;
- (d) where Network Rail recovers compensation in respect of that Network Change from a Competent Authority or some other Governmental Body, it shall pay to Train Operators:
 - (i) where any compensation paid to Network Rail in relation to that Network Change is sufficient to cover the Relevant Costs of the Train Operator and of Network Rail, the Relevant Costs of the Train Operator; and
 - (ii) where such compensation is not so sufficient, such proportion of that compensation as the Train Operator's Relevant Costs bears to the sum of Network Rail's Relevant Costs and all the Train Operators' Relevant Costs in respect of that Network Change; and
- (e) Network Rail shall use reasonable endeavours to negotiate with the relevant Competent Authority or Governmental Body (as applicable) a level of compensation in respect of that Network Change which is sufficient to ensure that the Train Operator receives compensation for all of its Relevant Costs. Network Rail shall from time to time consult with the Train Operator and keep

the Train Operator informed in reasonable detail of the progress of such negotiations.

CONDITION G10 - ESTABLISHMENT AND IMPLEMENTATION

10.1 *Implementation of a Network Rail proposed Network Change*

10.1.1 Network Rail shall be entitled to implement a proposed Network Change if:

- (a) it has not received a notice from any Access Beneficiary under Condition G2.1 by the relevant response date; or
- (b) it has received notice by the relevant response date from an Access Beneficiary under Condition G2.1(c) and either the amount of any compensation referred to in Condition G2.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and
- (c) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between Network Rail and any affected Access Beneficiary.

10.1.2 Network Rail may, if it considers it expedient to do so in order to confirm whether or not Condition G10.1.1 has been satisfied, issue a notice to all affected Access Beneficiaries when it reasonably believes it is entitled to implement a proposed Network Change.

10.1.3 Network Rail's entitlement to implement a proposed Network Change shall be treated as confirmed 21 days after it has served a notice in respect of that Network Change in accordance with Condition G10.1.2 unless it receives notice from an Access Beneficiary within those 21 days disputing Network Rail's entitlement to implement that proposed Network Change under Condition G10.1.1 and giving full particulars of its reasons.

10.1.4 If Network Rail does not agree with the contents of a notice served by an affected Train Operator in accordance with Condition G10.1.3, Network Rail may:

- (a) refer the matter for determination pursuant to Part A of the Access Dispute Resolution Rules and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

10.2 *Implementation of a Sponsor proposed Network Change*

10.2.1 The Sponsor shall be entitled to instruct Network Rail to implement a proposed Network Change if:

- (a) Network Rail has not given notice under Condition G4.1 by the relevant response date; or
- (b) Network Rail has given notice by the relevant response date under Condition G4.1.1(c) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; or
- (c) Network Rail has received notice from an Access Beneficiary under Condition G4.1.1(d) and either the amount of any compensation referred to in Condition G4.1 has been agreed, or resolved, or the method by which such compensation is to be calculated has been agreed or resolved under Condition G11; and
- (d) there is no other unresolved dispute under this Part G (whether under this Condition G10 or otherwise) as regards the proposed change between the Sponsor and any Access Party.

10.2.2 The Sponsor may, if it considers it expedient to do so in order to confirm whether or not Condition G10.2.1 has been satisfied, instruct Network Rail to issue a notice to all affected Access Beneficiaries when the Sponsor reasonably believes that it is entitled to instruct Network Rail to implement a proposed Network Change and Network Rail shall then serve such a notice within 7 days of the instruction.

10.2.3 The Sponsor's entitlement to instruct Network Rail to implement a proposed Network Change shall be treated as confirmed 35 days after Network Rail has served a notice in respect of that Network Change in accordance with Condition G10.2.2 unless:

- (a) Network Rail gives notice to the Sponsor within 35 days disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons; or
- (b) Network Rail receives notice from a Access Beneficiary within 21 days of the notice served by Network Rail disputing the Sponsor's entitlement to require the implementation of that Network Change under Condition G10.2.1 and giving full particulars of its reasons.

10.2.4 If the Sponsor does not agree with the contents of a notice served by Network Rail or an affected Access Beneficiary in accordance with Condition G10.2.3, the Sponsor may:

- (a) refer the matter for determination pursuant to Part A of the Access Dispute Resolution Rules and Condition G11 shall apply; or
- (b) withdraw the proposed Network Change.

10.3 *When a Network Change may not be implemented*

10.3.1 Network Rail shall not be entitled, and a Sponsor shall not be entitled to require Network Rail, to implement a proposed Network Change unless it is so entitled to implement, or require the implementation of that Network Change under Condition G10.1.1 or Condition G10.2.1.

10.3.2 For the purposes of the Conditions G10.1.1 and G10.2.1, unresolved disputes shall include:

- (a) a notice has been served under Condition G2.1.1(a) or (b) or Condition G4.1.1(a) or (b) which has not been withdrawn, resolved under Condition G11 or agreed not to apply; and
- (b) a notice has been served under Condition G2.1.1(c) or Condition G4.1.1(c) or (d) which has not been agreed or resolved as referred to in Condition G10.1.1(b) or G10.2.1(b) or (c) or otherwise agreed, resolved or withdrawn.

CONDITION G11 - APPEAL PROCEDURE

11.1 *Right of referral to relevant ADRR Panel*

If any Access Party is dissatisfied as to:

- (a) any matter concerning the operation of the procedure in this Part G;
- (b) the contents of any notice given under Condition G2.1, G4.1, G5.5, G8.1.1 or G10 (and, in particular, the amount of any compensation referred to in those Conditions);
- (c) any estimate referred to in Condition G1.6 or G3.6;
- (d) the:
 - (i) proposed Expiry Date; or

(ii) estimated timescale in which a Short Term Network Change can be reasonably reversed,

in a notice of proposed Network Change given under Condition G1.1; or

(e) the reasons given by Network Rail as to why it does not believe that the effect of the Short Term Network Change is preventing the Access Beneficiary using the Network in accordance with the reasonable expectations of that Access Beneficiary as to the future use of the relevant part of the Network under Condition G8.1.4(b),

that Access Party may refer the matter to the relevant ADRR Panel for determination under Part A of the Access Dispute Resolution Rules.

11.2 *Right of appeal*

If any Access Party or Potential Access Party is dissatisfied with any decision of the relevant ADRR Panel in relation to any matter referred to it under Condition G11.1, that Access Party may refer the matter to the Office of Rail Regulation for determination under Part M.

***Annex 2 – Schedule 4 of franchised
passenger operators track access
contracts***

SCHEDULE 4: RULES OF THE ROUTE, RULES OF THE PLAN AND RESTRICTIONS OF USE

PART 1 NOT USED

PART 2 NOT USED

PART 3: COMPENSATION FOR RESTRICTIONS OF USE

1 Definitions

1.1 *Defined terms*

In this Part 3 and its Appendices, unless the context otherwise requires:

- “Applicable Timetable”** means, in respect of any day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D1.6.1 as at 22:00 hours on the day prior to that day;
- “Bi-annual Timetable”** means either of the following:
- (a) the Corresponding Day Timetable for all days in the period from and including the Principal Change Date up to but excluding the immediately following Subsidiary Change Date; or
 - (b) the Corresponding Day Timetable for all days from and including the Subsidiary Change Date up to but excluding the immediately following Subsidiary Change Date or Principal Change Date, as the case may be;
- “Cancellation Minutes”** shall have the meaning ascribed to it in Schedule 8;
- “Cap”** shall have the meaning ascribed to it in Schedule 8;
- “Corresponding Day”** means, in respect of any day (the **“first day”**):
- (a) a day which is contained in the same Timetable Period as the first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or
 - (b) if no day is found under paragraph (a) above, then a day which is contained in the equivalent Timetable Period for the time of year, in the year immediately

	preceding the Timetable Period which includes the first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or
	(c) if no day is found under paragraph (a) or (b) above, such other day as the parties may agree or as may be determined in accordance with paragraph 12.2;
“Corresponding Day Timetable”	means, in relation to a Corresponding Day, the First Working Timetable or such other timetable as may be agreed between the parties or otherwise determined in accordance with paragraph 12.2;
“CTRL Possession”	shall have the meaning ascribed to it in Part 4 or Part 6 of this Schedule 4 as appropriate;]
“Day 42 Statement”	shall have the meaning ascribed to it in paragraph 13.1(a);
“Disrupted”	means: <ul style="list-style-type: none"> (a) cancelled; (b) diverted off the Route over which it was scheduled to run in the Corresponding Day Timetable; and/or (c) starting or finishing short in comparison with the Service as timetabled in the Corresponding Day Timetable;
“First Restriction”	shall have the meaning ascribed to it in paragraph 2.12(a)(i);
“First Restriction Period”	shall have the meaning ascribed to it in paragraph 2.12(a)(ii);
“First Working Timetable”	means, in respect of any day, the version of the Working Timetable for that day provided by Network Rail in accordance with Condition D3.2.7, as amended pursuant to Condition D3.2.9;
“Further Restriction”	shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(B);
“High Speed Diversion”	means a situation in which a Train is diverted between successive Monitoring Points such that it travels a longer distance at a higher average speed than that normally scheduled and arrives at its destination at a time later than that specified in the First Working Timetable;
“Monitoring Point”	shall have the meaning ascribed to it in Schedule 8;
“Network Rail Restriction of Use”	means any Restriction of Use other than an Operator Restriction of Use, a CTRL Possession or, if applicable, a Thameslink Possession;
“Notification Factor” or “NF”	shall have the meaning ascribed to it in paragraph 9;

“Operator Restriction of Use”	means a Restriction of Use of the type referred to in paragraph 2.3;
“Over-run”	shall have the meaning ascribed to it in paragraph 2.12(a);
“Period”	means each consecutive period of 28 days during the term of this contract commencing at 00:00 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;
“Public Holiday”	means any day other than Saturday or Sunday on which the banks in the City of London are not open for business;
“Recovery Allowance”	means an allowance for additional time incorporated in the First Working Timetable or (where the Train Operator requests that the allowance is not incorporated in the First Working Timetable and Network Rail complies with that request) the Applicable Timetable to allow a Train to regain time lost during an earlier part of its journey;
“Restriction of Use”	<p>means, in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:</p> <ul style="list-style-type: none"> (a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day; and/or (b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;
“Restriction of Use Day”	means a day on which a Network Rail Restriction of Use is taken or deemed to be taken;
“RoU Claim Notice”	means a notice issued by either party pursuant to paragraph 2.8;
“RoU Direct Costs”	<p>means the aggregate amount of:</p> <ul style="list-style-type: none"> (a) bus and taxi hire costs; (b) publicity costs; (c) train planning and diagramming costs; and (d) other costs directly related to the organisation and management of the Train Operator’s response to a Type 2 Restriction of Use, <p>reasonably incurred by the Train Operator as a result of a Type 2 Restriction of Use, adjusted by:</p>

	(i) adding any increase in RoU Variable Costs; and
	(ii) deducting any decrease in RoU Variable Costs;
“RoU Liability”	means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator (including any increase in RoU Variable Costs but net of any benefit arising from the taking of a Restriction of Use including any decrease in RoU Variable Costs) as a consequence of a Type 3 Restriction of Use or any Restriction(s) of Use covered by an SPD Claim;
“RoU Losses”	means any RoU Direct Costs or RoU Liability (as applicable);
“RoU Trigger Date”	means, in respect of any Period, the later to occur of the following: <ul style="list-style-type: none"> (a) the date on which Network Rail issues a Day 42 Statement; and (b) in the event of any dispute in respect of Network Rail’s Day 42 Statement, the date on which such dispute is agreed or determined;
“RoU Variable Costs”	means any Train Operator costs which vary as a result of a Restriction of Use or where applicable an Over-run arising directly from changes in train mileage including maintenance, fuel or the Traction Electricity Charge, the Variable Track Usage Charge and the Capacity Charge;
“SPD Claim”	has the meaning specified in paragraph 2.10(c);
“SPD Notice”	means a notice issued by either party pursuant to paragraph 2.10(a);
“SPD Period”	means the period of any 3 or 7 (as the case may be) consecutive Periods in which it is agreed or determined that Sustained Planned Disruption has occurred in respect of the Train Operator, together with any subsequent consecutive Period up to but excluding the first Period to occur in respect of which it is agreed or determined that the test for Sustained Planned Disruption is not satisfied in respect of the Train Operator;
“SPD Cost Threshold No.1”	means $[\pounds 500,000]/[\pounds 250,000]^1$;
“SPD Cost Threshold No.2”	means $[\pounds 1,000,000]/[\pounds 500,000]^2$;
“SPD Revenue Threshold No.1”	means $[\bullet]^3$;

¹ The difference between formulaic costs compensation and reasonably incurred costs where this is more than £0.5m over 3 consecutive Periods or £1m over 7 consecutive Periods will apply to all train operators except Chiltern, Merseyrail, C2C, London Overground Rail Operations Limited and open access operators for whom the values of £0.25m over 3 consecutive Periods and £0.5m over 7 consecutive Periods will be used.

² Ibid.

³ The methodology for calculating the threshold will be set out in the Criteria and Procedures. The SPD Revenue Thresholds will be 20% and 15% over 3 and 7 Periods respectively of the defined Service Group.

- “SPD Revenue Threshold No.2”** means [●];⁴
- “SPD Termination Notice”** has the meaning specified in paragraph 2.10(c);
- “Sustained Planned Disruption” or “SPD”** means a circumstance where:
- (a) the aggregate of the compensation payable in respect of a Service Group calculated in accordance with paragraph 3 for any Restriction of Use during:
 - (i) 3 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.1; or
 - (ii) 7 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.2,
 and that the difference between the RoU Liability calculated in accordance with paragraph 8 and the compensation calculated in accordance with paragraph 3 and paragraph 4 for such Restrictions of Use during that period would be more than £10,000; or
 - (b) in respect of any Restriction of Use during :
 - (i) 3 consecutive Periods the difference between the Train Operator’s RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator’s costs calculated under paragraph 4 would be more than SPD Cost Threshold No. 1; or
 - (ii) 7 consecutive Periods the difference between the Train Operator’s RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator’s costs calculated under paragraph 4 would be more than SPD Cost Threshold No. 2;
- “Service Code”** shall have the meaning ascribed to it in Schedule 8;
- “Service Group”** shall have the meaning ascribed to it in Schedule 8;
- [“Thameslink Possession”** shall have the meaning ascribed to it in Part 4;]
- “Train”** shall have the meaning ascribed to it in Schedule 8;
- “Train–Bus–Train Pattern”** means a situation where:
- (a) a Restriction of Use occurs on any section of track between:
 - (i) successive Monitoring Points; or
 - (ii) the station of origin and the next Monitoring Point; and

⁴ Ibid.

- (b) the Train Operator uses a substitute bus or other alternative road service between any pair of stations situated:
 - (i) between or including such successive Monitoring Points; or
 - (ii) at or between the station of origin and the next Monitoring Point;

“Type 1 Restriction of Use” means any single Restriction of Use which does not fall within the definition of Type 2 Restriction of Use or Type 3 Restriction of Use;

“Type 2 Restriction of Use” means:

- (a) a single Restriction of Use of more than 60 consecutive hours (excluding any part of that Restriction of Use which occurs during a Public Holiday); and
- (b) which results in a Service being Disrupted

but excluding any Restriction of Use which falls within the definition of Type 3 Restriction of Use;

“Type 3 Liability Claim” has the meaning specified in paragraph 2.7(b);

“Type 3 Restriction of Use” means a single Restriction of Use of more than 120 consecutive hours (including any part of that Restriction of Use which occurs during a Public Holiday);

“Unplanned Over-run Period” shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(A);

“Viable Transfer Point” a station normally served by the services operated by the Train Operator, and equipped to enable the efficient and safe transfer of trainloads of passengers to and from alternative modes of transport, and/or services operated by other Train Operators, and which the parties have agreed, and set out in Annex B, shall be used for the purpose of providing Replacement Bus Services, and for calculating Equivalent Bus Miles Compensation in accordance with the provisions of paragraph “4 Cost Compensation for Network Rail Restrictions of Use”;

“Week” means a period commencing at 00:00:00 hours on any Saturday and ending at 23:59:59 hours on the next following Friday; and

“White Period” means any period during which the taking of a Restriction of Use would not result in any compensation being payable in accordance with paragraph 3.

1.2 *Suspension Notices*

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of Clause 3.6 and not of this Schedule 4. A Restriction of Use shall only be treated as a Restriction of Use to the extent that it involves a Restriction of Use of all or any part of the Routes which is not covered by the restriction under that Suspension Notice.

1.3 *Possession*

Any reference in this contract to the term “possession”, whether on its own or in composite, should be construed as “Restriction of Use” as defined in this Part 3.

1.4 *White Period*

In respect of any Type 1 Restriction of Use, Type 2 Restriction of Use or Type 3 Restriction of Use, where a Restriction of Use starts before and/or ends after a White Period, the entire length of the Restriction of Use shall be taken into account when counting the cumulative total hours.

2 Application of this Part

2.1 *Entry into effect*

This Part 3 shall apply in respect of Restrictions of Use.

2.2 *Applicable Rules of the Route and the Network Code*

The provisions of this Part 3 shall be without prejudice to:

- (a) Network Rail’s right to take Restrictions of Use under or pursuant to the Applicable Rules of the Route;
- (b) the establishment of any amended Working Timetable under Part H of the Network Code; and
- (c) any rights pursuant to the Network Code that the Train Operator may have to challenge any decision of Network Rail.

2.3 *Operator Restriction of Use*

Network Rail shall not be obliged to make any payments to the Train Operator for any one or more Restrictions of Use to the extent:

- (a) required as a result of any damage to the Network or Environmental Damage which in each case:
 - (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and
 - (ii) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator;
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
- (c) required in connection with a Network Change proposed by the Train Operator under Condition G3.

2.4 *Network Rail payments*

Subject to paragraph 2.3, Network Rail shall make payments to the Train Operator (in accordance with the procedure in paragraph 13) in respect of Restrictions of Use calculated on the following basis:

- (a) for each Network Rail Restriction of Use, in accordance with paragraphs 2.5 to 2.7 and 2.10 where applicable; and
- (b) for each CTRL Possession and Thameslink Possession, in accordance with Part 4.

2.5 *Type 1 Restriction of Use*

Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 1 Restriction of Use.

2.6 *Type 2 Restriction of Use*

- (a) Except where paragraph 2.6(c) applies, Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 2 Restriction of Use.
- (b) If either party reasonably believes or expects that the difference between RoU Direct Costs calculated in accordance with paragraph 6 and the costs calculated under paragraph 4 would exceed £10,000 then that party will be entitled to require that the costs be calculated in accordance with paragraph 6 by serving an RoU Claim Notice within the time periods set out in paragraph 2.8.
- (c) Following a request in accordance with paragraph 2.6(b), if it is agreed or determined that the difference between RoU Direct Costs calculated in accordance with paragraph 6 and the costs calculated under paragraph 4 exceeds £10,000 then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 6.

2.7 *Type 3 Restriction of Use*

- (a) Except where paragraph 2.7(c) applies, Network Rail shall make payments (in accordance with the procedure in paragraph 13) calculated in accordance with paragraphs 3 and 4 to the Train Operator in respect of any Type 3 Restriction of Use.
- (b) If either party reasonably believes or expects that the difference between RoU Liability calculated in accordance with paragraph 7 and the costs and losses calculated under paragraphs 3 and 4 would exceed £10,000 then that party will be entitled to require that the costs and losses be calculated in accordance with paragraph 7 instead by serving an RoU Claim Notice within the time periods set out in paragraph 2.8 (a "Type 3 Liability Claim").
- (c) Following a request in accordance with paragraph 2.7(b), if it is agreed or determined that the difference between RoU Liability calculated in accordance with paragraph 7 and the costs and losses calculated under paragraphs 3 and 4 exceeds £10,000 then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 7.

2.8 *RoU Claim Notice*

- (a) Either party wishing to make a request pursuant to Clause 2.6(b) or Clause 2.7(b) must notify the other that a Restriction of Use is a Type 2 Restriction of Use or a Type 3 Restriction of Use and that the circumstances in paragraph 2.6(b) or 2.7(b) (as applicable) apply within 56 days of the RoU Trigger Date relating to the Period in which that Restriction of Use commences.
- (b) The notice referred to in paragraph 2.8(a) must, if provided by the Train Operator, include details of the estimate of the RoU Direct Costs or RoU Liability (as applicable) which the Train Operator has incurred in respect of the relevant Restriction of Use.

2.9 *Changes to Restrictions of Use*

- (a) Where a single Restriction of Use falls within the definition of one type of Restriction of Use and there is a change which means that no Restriction of Use occurs or that the Restriction of Use occurs as another type of Restriction of Use, then that Restriction of Use shall be treated, for the purposes of the calculation and payment of compensation, as if it had always been the latter type of Restriction of Use (or, where applicable, as if it had not been a Restriction of Use).
- (b) For the purposes of paragraph 2.9(c), a Restriction of Use shall be deemed to be taken if and to the extent that it results in any difference between timetables of the type referred to in the definition of "Restriction of Use" when notified, whether or not the restriction giving rise to that Restriction of Use was subsequently cancelled in whole or in part.
- (c) Where a change to a Restriction of Use reduces the impact of the Restriction of Use and accordingly changes its type or means that there is no Restriction of Use in accordance with paragraph 2.9(a), the Train Operator may, within 28 days of the date on which the change to the Restriction of Use was notified to the Train Operator by Network Rail, serve a notice on Network Rail which sets out any costs to which the Train Operator is already committed or has already incurred and any costs associated with responding to the Restriction of Use (both before and after the change). The Train Operator shall be entitled to recover such costs provided that such costs are reasonable and were properly committed or incurred in the circumstances. For the purposes of this Clause 2.9(c), references to "costs" shall mean those categories of costs which the Train Operator would have been entitled to recover under this Schedule 4 for that type of Restriction of Use which the Restriction of Use was classified as prior to its change.

2.10 *Sustained Planned Disruption*

- (a) If either party reasonably believes that a Sustained Planned Disruption has occurred then that party will be entitled to require that the costs and losses for the Restrictions of Use for the relevant services during the relevant SPD Period be calculated in accordance with paragraph 8 by serving a notice on the other (an "SPD Notice") in accordance with paragraph 2.10(b).
- (b) Unless otherwise agreed in writing, an SPD Notice must be served no later than the day falling 56 days after the issue of the Day 42 Statement which followed the end of the relevant SPD Period and must include a short explanation of why it reasonably believes a Sustained Planned Disruption has occurred and a statement of when the SPD Period commenced.

- (c) Following the issue of an SPD Notice, either party may serve a notice (an “SPD Termination Notice”) stating that it reasonably believes that the relevant Sustained Planned Disruption is no longer occurring, such notice to include a short explanation of why the party serving it reasonably believes that the Sustained Planned Disruption has ceased and stating the Period in which such cessation has occurred. A party receiving an SPD Termination Notice shall within 30 days of its receipt by notice to the serving party either accept or reject the SPD Termination Notice and where it rejects the notice it shall include with its rejection notice a short explanation of why it reasonably believes the Sustained Planned Disruption is continuing. If the parties fail to reach agreement within 30 days after service of a rejection notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify the other that the dispute resolution procedure set out in paragraph 13.3 is to apply (save that references to paragraph 13.2 shall be construed as being references to this paragraph).
- (d) Following the issue of an SPD Notice the party that issued that notice must serve a claim (an “SPD Claim”):
 - (i) no later than the day falling 112 days after the issue of the Day 42 Statement for the last Period in the relevant SPD Period; or
 - (ii) where an SPD Period has exceeded 13 consecutive Periods in length or upon the termination or expiry of this Access Agreement, whichever comes first, unless otherwise agreed in writing, no later than the day falling 112 days after the issue of the Day 42 Statement which followed the 13th consecutive Period or the termination or expiry of this Access Agreement (as applicable), whichever is the earlier.
- (e) Provided a party has issued an SPD Notice in accordance with paragraph 2.10(b), nothing in paragraph 2.10(d) shall prevent that party from issuing more than one SPD Claim in respect of the same Sustained Planned Disruption, provided that:
 - (i) each such SPD Claim relates to a different period within the said SPD Period (so there is no double-counting); and
 - (ii) no SPD Claim can be issued after the last day for serving notice specified under paragraph 2.10(d).
- (f) An SPD Claim must include details of when and why that party reasonably believes that a Sustained Planned Disruption has occurred and in particular:
 - (i) if the claim is made by the Train Operator, such details as may reasonably be available of the RoU Liability which the Train Operator has incurred or reasonably expects to incur in respect of the relevant Restrictions of Use during the SPD Period; or
 - (ii) if the claim is made by Network Rail, the reasons why Network Rail reasonably believes that the Train Operator has been overcompensated or may be overcompensated by more than the relevant amount.
- (g) Following the service of an SPD Claim, if and to the extent it is agreed or determined that a Sustained Planned Disruption has occurred in the period covered by the claim then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 8 in respect of

the SPD Period (or where applicable the part of the SPD Period) covered by the SPD Claim.

2.11 *Early notice of RoU Losses*

The parties may at any time engage in discussions on any matter likely to result in payments in respect of any RoU Losses and shall use reasonable endeavours to agree whether such RoU Losses calculated in accordance with paragraph 6, 7 or 8 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such RoU Losses. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it thinks such RoU Losses will arise or mitigating actions should be contemplated. Following any agreement or determination that such RoU Losses are likely to arise in connection with one or more future Restrictions of Use or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Restriction(s) of Use to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Restriction(s) of Use. Unless otherwise agreed, the timescales for claiming RoU Losses shall still apply.

2.12 Over-runs

- (a) For the purposes of this paragraph 2.12, an over-run ("Over-run") occurs where:
- (i) there is a Restriction of Use which is not an Operator Restriction of Use (the "First Restriction");
 - (ii) following the end of the relevant period of difference between timetables referred to in sub-paragraphs (a) and (b) of the definition of Restriction of Use which served to establish the existence of that Restriction of Use (the "First Restriction Period"), there is either:
 - (A) a further period of at least one hour during which Services are Disrupted due to (1) any incident attributed under Schedule 8 to circumstances arising from any restriction of operation of the Network which are a consequence of the First Restriction or (2) any act or omission in connection with any activities planned or undertaken which are directly attributable to the First Restriction (including any failure to remove the First Restriction by the time scheduled for its removal in the Applicable Rules of the Route) but excluding any act or omission by the Train Operator for which it would be allocated responsibility under this Contract (the "Unplanned Over-run Period"); and/or
 - (B) a further Restriction of Use is taken which is at the same location as all or part of the First Restriction and directly connected with or attributable to any activities undertaken or planned to be undertaken under the First Restriction (a "Further Restriction"),

in each case without there being any intervening period between the First Restriction and the relevant Unplanned Over-run Period or Further

Restriction, which is not either a White Period, Unplanned Over-run Period or a Further Restriction.

- (b) Where a Restriction of Use is subject to one or more Over-runs, then the entire duration from the start of the First Restriction to the end of the last Over-run in respect of the Restriction of Use shall be treated as making up a single Restriction of Use.
- (c) Where there is an Over-run which results in a Service being Disrupted which:
 - (i) is not part of either a Type 2 or Type 3 Restriction of Use;
 - (ii) lasts for more than one hour; and
 - (iii) results in the Train Operator incurring costs in the category of RoU Direct Costs in relation to the Over-run in excess of £10,000,then the Unplanned Over-run Period element of that Over-run (but not the relevant First Restriction Period or the period of any Further Restriction) shall for the purposes only of calculating RoU Direct Costs be deemed to constitute a Type 2 Restriction of Use.
- (d) For the purposes of calculating RoU Liability under paragraph 7 (when it is agreed or determined that the requirements of paragraph 2.7(c) are satisfied) or paragraph 8 when there is agreed or determined to be a Sustained Planned Disruption, the amount of the RoU Liability shall be calculated:
 - (i) including costs, direct losses and expenses (including loss of revenue and any increase in RoU Variable Costs) reasonably incurred or reasonably expected to be incurred by the Train Operator as a consequence of any Unplanned Over-run Period; and
 - (ii) offsetting any benefit as a consequence of the Unplanned Over-run Period including:
 - (A) any reduction in RoU Variable Costs;
 - (B) any payments made as result of paragraph 2.12(c); and
 - (C) any payments received by the Train Operator under Schedule 8.
- (e) This paragraph 2.12 shall not result in any Unplanned Over-run Period being subject to either revenue loss compensation for Network Rail Restrictions of Use under paragraph 3 or costs compensation for Network Rail Restrictions of Use under paragraph 4.

3 Revenue loss compensation for Network Rail Restrictions of Use

3.1 Basis for calculations

For each Period and for each Service Group, Network Rail shall calculate the compensation payable in respect of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying, in accordance with paragraphs 3.2 and 3.3, the formulae in paragraphs 3.4, 3.5 and 3.6. For the purposes of determining for this paragraph 3 to which

Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

3.2 *Separate calculations*

In applying the formula in paragraph 3.4, Network Rail shall calculate the compensation payable separately in respect of all:

- (a) Network Rail Restrictions of Use which are taken into account in the First Working Timetable; and
- (b) Network Rail Restrictions of Use which are not so taken into account but are taken into account in the Applicable Timetable.

3.3 *Meaning of T1 and T2*

In paragraph 3.4:

- (a) where Network Rail is making the calculation for the purpose of paragraph 3.2(a), T1 shall mean the Corresponding Day Timetable and T2 shall mean the First Working Timetable for the Restriction of Use Day; and
- (b) where Network Rail is making the calculation for the purpose of paragraph 3.2(b), T1 shall mean the First Working Timetable for the Restriction of Use Day and T2 shall mean the Applicable Timetable for the Restriction of Use Day.

3.4 *Formula*

The formula referred to in paragraph 3.1 is as follows:

$$RP = \sum((WACM + NREJT) \bullet BF \bullet MRE \bullet NF)$$

where:

- (a) Σ is the sum across all Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) WACM is the weighted average of Cancellation Minutes for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$WACM = (CM - NRPP) \bullet \frac{\sum(MPW \bullet CS)}{SS}$$

where:

- CM is the Cancellation Minutes for the Service Group in question specified in column J of Appendix 1 to Schedule 8;

NRPP is the Network Rail performance point for the Service Group in question specified in column B of Appendix 1 to Schedule 8;

Σ is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to the Monitoring Point, as specified in column O of Appendix 1 to Schedule 8;

CS is the number by which the number of stops at that Monitoring Point scheduled for that day in T2 is less than SS as a result of the Network Rail Restriction of Use; and

SS is the number of stops at the Monitoring Point scheduled for that day in T1;

(c) NREJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group, for the Restriction of Use Day, being Services which are not cancelled, calculated according to the following formula:

$$\text{NREJT} = \text{EJT} \cdot \left(1 - \frac{\Sigma (\text{MPW} \cdot \text{CS})}{\text{SS}}\right)$$

where:

Σ , MPW, CS and SS have the meanings ascribed to them in paragraph 3.4(b) above; and

EJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group calculated according to the following formula:

if no Train in that Service Group is scheduled in T2 for that day, then EJT shall equal 0;

if otherwise,

EJT is the lesser of:

(i) the number of minutes specified as the Cap for the Service Group in column K of Appendix 1 to Schedule 8; and

(ii) $\text{AJT} \cdot ((u-v)/v)$,

provided always that if v equals or is greater than u, EJT shall equal 0;

where:

AJT is the average Journey Time for Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the Journey Times scheduled in T1 in respect of such Trains divided by the aggregate number of Journeys scheduled in T1 in respect of such Trains;

u is the average speed of Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the number of miles scheduled to be run in T1 by such Trains divided by the aggregate of the Journey Times scheduled in T1 in respect of such Trains; and

- v is the speed to which the average speed of Trains in the Service Group scheduled for that day in T2 is reduced as a result of the Network Rail Restrictions of Use (calculated by reference to the aggregate of the number of miles which such Trains are scheduled to run in T2 divided by the aggregate of the end to end Journey Times scheduled in T2 in respect of such Trains),

and for the purposes of this paragraph 3.4:

“Journey”

means the journey of the Train scheduled in the relevant timetable from its station of origin to its destination station; provided that if a Train crosses a Service Group boundary then in respect of each Service Group the Train’s station of origin and destination station shall respectively mean the station at which the Train commences that part of its journey in that Service Group and the station at which it ends that part of its journey in that Service Group; and that where any Train splits to become more than one Train then that part of the Train’s journey up to the station where it splits shall be treated as one journey and each Train into which the Train splits shall be treated as making a separate journey; and

“Journey Time”

shall be calculated in respect of each journey by reference to the difference in minutes between the time of departure from the station of origin and the time of arrival at the destination station;

- (d) BF is the busyness factor, as calculated for each Service Group according to the following formula:

$$BF = \frac{\sum (MPW \bullet SS)}{AS}$$

where:

AS is the average number of stops at the Monitoring Point (being the Monitoring Point referred to in the definition of MPW) per day scheduled in the Tri-annual Timetable; and

MPW and SS have the meanings ascribed to them in paragraph 3.4(b); and

- (e) MRE is the marginal revenue effect specified in column C of Appendix 1 to Schedule 8, as indexed according to the relevant provisions of Schedule 8.

3.5 High Speed Diversions

Where there is a High Speed Diversion and WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero then the following formula shall apply:

$$ANRP = \frac{TDR_{SG}}{TDT_{SG}} \bullet (CM - NRPP) \bullet MRE \bullet BF \bullet NF$$

where:

ANRP is the additional Network Rail payment;

TDR_{SG} is, in respect of each Service Group and each Restriction of Use Day on which a High Speed Diversion applies, the number of Trains in the Service Group scheduled in T2 to be subject to the High Speed Diversion;

TDT_{SG} is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3; and

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4.

In such a situation, the Train Operator shall provide Network Rail with evidence, either that the High Speed Diversion has been common for the Services in question in the past or that the High Speed Diversion would arise as a result of a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

3.6 *Train-Bus-Train Patterns*

If any Service Group on any day is subject to a Train-Bus-Train Pattern on account of a Network Rail Restriction of Use, and where WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero, then Network Rail shall pay to the Train Operator an additional payment calculated as follows:

$$ANRP = \frac{TTS_{SG}}{TTR_{SG}} \bullet (CM - NRPP) \bullet DV \bullet MRE \bullet BF \bullet NF$$

where:

ANRP is the additional Network Rail payment;

TTSSG is the total number of Trains scheduled in T2 to be run in the Service Group for that Restriction of Use Day to terminate at a destination other than that shown for those Trains due to a Train-Bus-Train Pattern in T1;

TTR_{SG} is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3;

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4; and

DV shall have the value of 0.125,

provided that if:

TTR_{SG} is less than TTS_{SG} then $\frac{TTS_{SG}}{TTR_{SG}}$ shall be deemed to have the value of one.

In such a situation the Train Operator shall provide Network Rail with evidence, either that the Train-Bus-Train Pattern resulting from the Network Rail Restriction of Use is an arrangement that has been commonly used in the past by that Train Operator on the Services in question, or that it has arisen due to a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued

reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

4 Costs compensation for Network Rail Restrictions of Use

4.1 Basis for calculations

For each Period and for each Service Group, Network Rail shall calculate the compensation payable in respect of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying the formulae in paragraph 4.2. For the purposes of determining for this paragraph 4 to which Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

4.2 Cost compensation formula

The formula referred to in paragraph 4.1 is as follows:

$$\text{Cost compensation} = \sum (\text{RRBC} + \text{TMC})$$

where:

- (a) \sum is the sum across all applicable Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) RRBC is the rail replacement bus cost, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$\text{RRBC} = \text{EBM} \times \text{EBMPR}$$

EBM is the number of estimated bus miles for the Operator; and

EBMPR is the payment rate per EBM, which is £[•]⁵.

If there is full bus replacement

$$\text{EBM} = \text{EBMW} \times \text{FBRmiles}$$

If there is partial bus replacement

$$\text{EBM} = \text{EBMW} \times 0.5 \times \text{PBRmiles} \times \text{ITS}$$

where:

EBMW is the weighting applicable to the affected section of route, as set out in Annex B to this Part 3 of Schedule 4;

FBRmiles	is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which full bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;
PBRmiles	is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which partial bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;
ITS	is 1 or the percentage of trains stopping at intermediate stations for those cases where EBMW = 50%. and

- (c) TMC is the cost or saving resulting from train mileage change, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$TMC = TM \times TMPR$$

where:

TM is the change in train mileage; and

TMPR is the payment rate per train mile, as stipulated in Annex C to this Part 3 of Schedule 4.

5 Estimated Bus Miles change mechanism⁶

5.1 Circumstances in which parties agree to amend Annex B

Either party may by notice to the other propose that Annex B be amended in accordance with this paragraph 5.

5.2 Procedure for amendments to Annex B

- (a) The party who wishes to amend Annex B shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:
- (i) where such change relates to a forthcoming timetable change, on or before the first day of the month which falls 6 months before the relevant Principal Change Date or Subsidiary Change Date on which that timetable change is due to occur; and
 - (ii) in any other case prior to the date from which it proposes such change shall have effect.
- (b) Any notice under sub-paragraph 5.2(a) shall specify as far as possible that party's proposed amendments to Annex B. Promptly following the service of any such notice the parties shall endeavour to agree whether Annex B should be amended in accordance with this paragraph 5 and if so the amendments.

- (c) If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
 - (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
 - (ii) each of the parties shall abide by the rules and procedures established by the expert; and
 - (iii) the parties shall direct the expert to have regard to any relevant criteria issued by the Office of Rail Regulation.
- (d) Any amendment to Annex B 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 or determined in accordance with this paragraph 5, the parties shall use all reasonable endeavours to ensure that ORR is furnished with such amendment and sufficient information and evidence as it shall require to determine whether or not to approve the amendment.
- (e) Any amendment to Annex B shall apply with effect from:
 - (i) the relevant Principal Change Date or Subsidiary Change Date (where paragraph 5.2 (a) (i) applies); or
 - (ii) subject to paragraph 5.2 (d) the date proposed by the party requesting the change in accordance with paragraph 5.2 (a) (ii) (unless otherwise agreed by the parties or determined by the expert in relation to the change).

5.3 *Costs of implementing amendment*

The party proposing the amendment to Annex B shall (subject to any determination of an expert as to costs, where a matter is referred to that expert under paragraph 5.2(c)) pay 90 percent of costs incurred by or on behalf of the other party in assessing and implementing the amendments to Annex B, provided that those costs shall be the minimum reasonably necessary to assess and implement that amendment.

6 RoU Direct Costs compensation for Type 2 Restrictions of Use

6.1 *Compensation arrangements*

- (a) Following receipt of an RoU Claim Notice in respect of a Type 2 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Direct Costs compensation to be paid by one party to the other in respect of such Type 2 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 6.1(a) has been agreed or determined (and has been compared against any amounts calculated under paragraph 4 together with any other amounts paid or due to the Train Operator from Network Rail in relation to such Restriction of Use) then, in the event of:

- (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Direct Costs actually incurred by the Train Operator less any amounts calculated under paragraph 4 which have already been paid or are due for such Restriction of Use and any other amounts in respect of any RoU Direct Costs received by the Train Operator from Network Rail in respect of such Restriction of Use; or
 - (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator which was calculated under paragraph 4 and the RoU Direct Costs actually incurred by the Train Operator in respect of such Restriction of Use.
- (c) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 6 and paragraph 10 to be payable in respect of any Type 2 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.

7 RoU Liability compensation for Type 3 Restrictions of Use

7.1 Compensation arrangements

- (a) Following receipt of an RoU Claim Notice in respect of a Type 3 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by one party to the other in respect of the Type 3 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 7.1(a) has been agreed or determined (and has been compared against the aggregate of any amounts calculated under paragraphs 3 and 4 together with any other amounts paid or due to the Train Operator from Network Rail in relation to such Restriction of Use) then, in the event of:
 - (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts calculated under paragraphs 3 and 4 which have already been paid or are due for such Restriction of Use and any other amounts received by the Train Operator from Network Rail in respect of such Restriction of Use; or
 - (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator which was calculated under paragraphs 3 and 4 and the RoU Liability actually incurred by the Train Operator in respect of such Restriction of Use.
- (c) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 7 and paragraph 10 to be payable in respect of any Type 3 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.

8 Sustained Planned Disruption payments

8.1 *Payment arrangements*

- (a) Following an agreement or determination that a Sustained Planned Disruption has occurred during an SPD Period, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by one party to the other in respect of the Restrictions of Use during the relevant SPD Period and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 8.1(a) has been agreed or determined (and has been compared against the aggregate of any amounts calculated under paragraphs 3 and 4 together with any other amounts paid or due to the Train Operator from Network Rail in respect of such Restriction of Use) then, in the event of:
 - (i) a shortfall for the Train Operator, the compensation to be paid by Network Rail to the Train Operator in respect of the Restrictions of Use during the relevant SPD Period shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts calculated under paragraphs 3 and 4 which have already been paid or are due for Restrictions of Use during the relevant SPD Period and any other amounts received by the Train Operator from Network Rail in respect of such Restrictions of Use; or
 - (ii) an overpayment by Network Rail to the Train Operator, the compensation to be paid by the Train Operator to Network Rail shall be the difference between the amount received by the Train Operator for Restrictions of Use during the relevant SPD Period and the RoU Liability actually incurred by the Train Operator during the same SPD Period.
- (c) Following any agreement or determination of an amount to be paid by one party to the other in respect of a Sustained Planned Disruption that amount shall (subject to the terms of any compensation arrangements agreed in writing between the parties) be due and payable by one party to the other in accordance with paragraph 13.1.
- (d) Where a Sustained Planned Disruption applies due to a circumstance which it is agreed or determined affects a part only of the Train Operator's services (including whether by reference to geographic location or Service Group), then in agreeing or determining the RoU Liability in respect of that SPD the RoU Liability in respect of the part of the Train Operator's services not affected by that circumstance shall (unless otherwise proven) be presumed to be equal to the payments made under paragraphs 3 and 4 of this Schedule 4 in respect of those other services

9 Notification Factors

9.1 *Early notification*

The Notification Factor in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column C of Annex A to this Part 3 if and to the extent that:

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or

- (b)
 - (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and
 - (ii) subject to paragraph 9.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (iii) where paragraph 9.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition [D4.8.3], the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

9.2 *Notification by Revision Notification Date*

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column D of Annex A to this Part 3 if and to the extent that paragraph 9.1 does not apply, and:

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by the Revision Notification Date; and
- (b)
 - (i) the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (ii) where paragraph 9.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

9.3 *Late Notification*

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column E of Annex A to this Part 3 if and to the extent paragraphs 9.1 and 9.2 do not apply but the Network Rail Restriction of Use is reflected in the Applicable Timetable, and includes where paragraph 9.1(b) or paragraph 9.2 would have been applicable but for a failure by Network Rail to fulfil the terms of paragraph 9.1(b)(ii) or paragraph 9.2(b)(i) respectively, notwithstanding the Train Operator having given a Revised Bid in accordance with Condition D4.8.3.

10 Dispute resolution

If the Train Operator and Network Rail fail to reach agreement as required under paragraph 2.6 (c), 2.7 (c), 2.10 (g), 2.11, 6, 7 or 8 within 28 days following provision of the RoU Claim Notice, either party may notify the other that the dispute resolution procedure set out in paragraph 13.3 is to apply. Such procedure shall then apply in accordance with its terms

(save that references to paragraph 13.2 shall be construed as being references to this paragraph 10).

11 Schedule 8 application

If and to the extent that a Network Rail Restriction of Use is not reflected in the Applicable Timetable for the Restriction of Use Day, the amount of compensation (if any) shall be calculated in accordance with Schedule 8 (to the exclusion of any compensation under this Schedule 4 except as provided in paragraph 2.12).

12 Restriction of Use Day and Corresponding Day

12.1 Information provision

In respect of any Restriction of Use Day for which compensation may be payable in a Period under paragraphs 3 and 4, Network Rail shall accurately record such information as it uses and as may properly and reasonably be required to make the calculations required under paragraphs 3 and 4 (including the determination of NF and the relevant version of the Working Timetable referred to in paragraph 9.1(b)(ii) or paragraph 9.2(b)(i). Network Rail shall maintain that information until the compensation payable under paragraphs 3 and 4 in respect of that Period is finally agreed or determined and provide such information to the Train Operator at its reasonable request.

12.2 Corresponding Day

- (a) If, for the purpose of identifying a Corresponding Day, no day is found under paragraph (a), (b) or (c) of the definition “Corresponding Day” and the parties have failed to reach agreement on the Corresponding Day by the date falling eight Weeks before the relevant Passenger Change Date then either party may require that the identification of the Corresponding Day be resolved by the relevant ADRR Panel.
- (b) The relevant ADRR Panel’s remit shall be that it shall:
 - (i) reach a decision which is fair and reasonable; and
 - (ii) identify the day in either any version of the Working Timetable or any Draft Timetable notified to the Train Operator on or before the end of the Drafting Period in either case which has been produced in accordance with the Network Code as at the Restriction of Use Day and which most closely reflects the Services which would have been scheduled on the first day (as that term is used in the definition of Corresponding Day [save that in respect of any Restriction of Use lasting more than two Timetable Periods, the first day may occur in any year preceding the Timetable Period]) but for Restrictions of Use reflected in the First Working Timetable for the first day; or
 - (iii) where a Corresponding Day cannot be identified in accordance with paragraph 12.2(b)(ii) above, determine a notional Corresponding Day. The relevant ADRR Panel may have regard, where appropriate, to any pattern of services which may reasonably be expected to be operated during the relevant period when the Restriction of Use is being taken in the event of the permanent absence of any Corresponding Day.

- (c) If either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that Condition C6.3 of those rules shall not apply).

13 Payment procedures

13.1 Network Rail Restrictions of Use

- (a) Within 14 days after the end of each Period, Network Rail shall provide to the Train Operator a statement (the "Day 42 Statement") showing:
 - (i) all Network Rail Restrictions of Use taken during that Period;
 - (ii) any compensation calculated in accordance with paragraphs 3 and/or 4 payable by Network Rail in respect of the Network Rail Restrictions of Use identified; and
 - (iii) following any agreement or determination in the Period referred to in paragraph 13.1(a) of any RoU Losses in respect of a Type 2 Restriction of Use, a Type 3 Restriction of Use or a Sustained Planned Disruption (as applicable), any payment to be made by one party to the other,

in sufficient detail to enable the Train Operator to make an informed assessment thereof.
- (b) The aggregate liabilities of Network Rail and the Train Operator, in respect of any and all compensation for which either is liable to the other under this Part 3 and under Part 5 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance (if any) shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of that Period.

13.2 Disputes

Within 10 days of receipt of a statement from Network Rail under paragraph 13.1, 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.

13.3 Dispute resolution

The procedure for resolving disputes notified under paragraph 13.2 shall be as follows:

- (a) within seven days of service of any notice under paragraph 13.2, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (b) if, within seven days of that meeting (the "first meeting"), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within seven days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;
- (c) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;

- (d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the relevant ADRR Panel; and
- (e) if either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that paragraph C6.3 of those rules shall not apply).

13.4 *Payments in the event of a dispute*

Where any amount under paragraph 13.1 is in dispute:

- (a) the undisputed amount shall be paid in accordance with paragraph 13.1;
- (b) the disputed amount shall be paid within 28 days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and
- (c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date on which such amount would but for such dispute have been due to be paid until the date of payment.

14 Indexation

14.1 The formula applicable to this paragraph 14 is:

$$R_t = R_{t-1} \left(1 + \frac{RPI_{t-1}}{100} \right)$$

where:

R_t is the relevant rate in the Relevant Year t;

R_{t-1} is the relevant rate in the Relevant Year t-1; and

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Prices Index published or determined with respect to November in the Relevant Year t-1 and the index published or determined with respect to November in the Relevant Year t-2.

14.2 Each of the EBMPR and TMPR (respectively defined in paragraph 4.2) shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 so that in relation to the Relevant Year commencing on [1 April 2009], R_t shall have the value specified in:

- (a) paragraph 4.2 in respect of the EBMPR; and
- (b) in Annex C to this Part 3 of Schedule 4 in respect of TMPR,

and in the next following Relevant R_{t-1} shall respectively have the same value.

14.3 Each of the SPD Cost Threshold No.1 and SPD Cost Threshold No.2 shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 but so that in relation to the Relevant Year commencing on [1 April 2009], R_t shall have the relevant value specified in paragraph 1.1 of this Schedule 4 and in the next following Relevant Year R_{t-1} shall respectively have the same value.

Annex A to Part 3 of Schedule 4 – Notification discount factors

Service Group Description	Service Group Code	Type	To FWT	FWT to ITWTT	from ITWTT
First Trans Penine Express					
North Trans Pennine	EA01	All Trains	0.55	0.7	0.85
South Trans Pennine	EA02	All Trains	0.55	0.7	0.85
North West	EA03	All Trains	0.55	0.7	0.85
National Express East Anglia					
Great Eastern Inners	EB01	Peak/Off Peak	0.55	0.7	0.85
Southend & Soutminster	EB02	Peak/Off Peak	0.55	0.7	0.85
Great Eastern Outers	EB03	Peak/Off Peak	0.55	0.7	0.85
Anglia Inter City	EB04	Peak/Off Peak	0.45	0.65	0.85
Anglia Locals	EB05	All Trains	0.55	0.7	0.85
West Anglia Outers	EB06	Peak/Off Peak	0.55	0.7	0.85
West Anglia Inners	EB07	Peak/Off Peak	0.55	0.7	0.85
Northern Rail					
Tyne, Tees & Wear	ED01	All Trains	0.55	0.7	0.85
Lancashire & Cumbria	ED02	All Trains	0.55	0.7	0.85
West & North Yorkshire Inter Urban	ED04	All Trains	0.55	0.7	0.85
West & North Yorkshire Local	ED05	All Trains	0.55	0.7	0.85
South & East Yorkshire Inter Urban	ED06	All Trains	0.55	0.7	0.85
South & East Yorkshire Local	ED07	All Trains	0.55	0.7	0.85
North Manchester	ED08	Peak/Off Peak	0.55	0.7	0.85
Merseyrail City Lines	ED09	All Trains	0.55	0.7	0.85
South Manchester	ED10	Peak/Off Peak	0.55	0.7	0.85
Heathrow Connect					
Heathrow Local Service	EE01	Peak/Off Peak	0.55	0.7	0.85
Hayes & Harlington Shuttle	EE02	All Trains	0.55	0.7	0.85
First Great Western					
London - Bristol	EF01	All Trains	0.45	0.65	0.85
London - South Wales	EF02	All Trains	0.45	0.65	0.85
London - Cotswolds	EF03	All Trains	0.45	0.65	0.85
London - West Of England	EF04	All Trains	0.45	0.65	0.85
Outer Thames Valley - London	EF05	Peak/Off Peak	0.55	0.7	0.85
Inner Thames Valley	EF06	Peak/Off Peak	0.55	0.7	0.85
Reading & Oxford Suburban	EF07	All Trains	0.55	0.7	0.85
Thames Valley Branches	EF08	All Trains	0.55	0.7	0.85
North Downs	EF09	All Trains	0.55	0.7	0.85
Bristol Suburban	EF10	All Trains	0.55	0.7	0.85
Devon	EF11	All Trains	0.55	0.7	0.85
Plymouth & Cornwall	EF12	All Trains	0.55	0.7	0.85
South Wales - South Coast	EF13	All Trains	0.55	0.7	0.85
First Capital Connect					
Bedford Mainline	EG01	Peak/Off Peak	0.55	0.7	0.85
Brighton Mainline	EG02	Peak/Off Peak	0.55	0.7	0.85
South London	EG03	Peak/Off Peak	0.55	0.7	0.85
Northern Inners	EG04	Peak/Off Peak	0.55	0.7	0.85
Northern Outers	EG05	Peak/Off Peak	0.55	0.7	0.85
Arriva CrossCountry					
CrossCountry Inter City	EH01	All Trains	0.55	0.7	0.85

CrossCountry Local & Provincial	EH02	All Trains	0.55	0.7	0.85
London Midland					
West Midlands - Snow Hill	EJ01	Peak/Off Peak	0.55	0.7	0.85
Trent Valley	EJ02	All Trains	0.55	0.7	0.85
West Midlands - New Street (Local)	EJ03	Peak/Off Peak	0.55	0.7	0.85
West Midlands Inter Urban	EJ04	All Trains	0.55	0.7	0.85
WCML : London - Northampton	EJ05	Peak/Off Peak	0.55	0.7	0.85
WCML : Branches	EJ06	All Trains	0.55	0.7	0.85
London Overground					
Orbitals	EK01	Peak/Off Peak	0.55	0.7	0.85
London - Watford (D.C Lines)	EK02	Peak/Off Peak	0.55	0.7	0.85
East Midlands Trains					
East Midlands Local	EM01	All Trains	0.55	0.7	0.85
East Midlands Regional	EM02	All Trains	0.55	0.7	0.85
Liverpool - Norwich	EM03	All Trains	0.55	0.7	0.85
East Midlands Inter City	EM04	All Trains	0.45	0.65	0.85
East Midlands Inter Urban	EM05	All Trains	0.45	0.65	0.85
First Scotrail					
Express	HA01	All Trains	0.55	0.7	0.85
East Coast Suburban	HA02	All Trains	0.55	0.7	0.85
South West Rural	HA03	All Trains	0.55	0.7	0.85
Highland Rural	HA04	All Trains	0.55	0.7	0.85
Strathclyde Electric	HA06	Peak/Off Peak	0.55	0.7	0.85
Strathclyde Pte Diesels	HA07	All Trains	0.55	0.7	0.85
Qualifying Sleepers	HA11	All Trains	0.55	0.7	0.85
National Express East Coast					
Anglo-Scottish	HB01	All Trains	0.45	0.65	0.85
West Yorkshire	HB02	All Trains	0.45	0.65	0.85
West Yorkshire (Kings X - Bradford - Hull)	HB04	All Trains	0.45	0.65	0.85
Anglo Scot (Aberdeen - Inverness)	HB05	All Trains	0.45	0.65	0.85
Merseyrail					
Northern Lines	HE01	All Trains	0.55	0.7	0.85
Wirral Lines	HE02	All Trains	0.55	0.7	0.85
Virgin West Coast					
Euston - Birmingham/Wolverhampton	HF01	All Trains	0.45	0.65	0.85
Euston - North Wales	HF02	All Trains	0.45	0.65	0.85
Euston - Manchester	HF03	All Trains	0.45	0.65	0.85
Euston - Liverpool	HF04	All Trains	0.45	0.65	0.85
Euston - Carlisle/Scotland	HF06	All Trains	0.45	0.65	0.85
Birmingham - Scotland	HF08	All Trains	0.45	0.65	0.85
Arriva Trains Wales					
South, West & Central Wales	HL02	All Trains	0.55	0.7	0.85
Wales - England	HL03	All Trains	0.55	0.7	0.85
Cambrian	HL04	All Trains	0.55	0.7	0.85
Cardiff Valleys	HL05	Peak/Off Peak	0.55	0.7	0.85
Marches	HL06	All Trains	0.55	0.7	0.85
North Wales Rural	HL07	All Trains	0.55	0.7	0.85
Inter Urban North Wales	HL08	All Trains	0.55	0.7	0.85
Chiltern					
Met	HO01	Peak/Off Peak	0.55	0.7	0.85
Birmingham	HO02	Peak/Off Peak	0.55	0.7	0.85
Joint	HO03	Peak/Off Peak	0.55	0.7	0.85

c2c					
London - Southend/Shoeburyness	HT01	Peak/Off Peak	0.55	0.7	0.85
Southeastern					
Kent Coast (Off Peak)	HU01	All Trains	0.55	0.7	0.85
Kent Link (Off Peak)	HU02	All Trains	0.55	0.7	0.85
Kent Rural	HU03	All Trains	0.55	0.7	0.85
Kent Coast (Peak)	HU04	All Trains	0.55	0.7	0.85
Kent Link (Peak)	HU05	All Trains	0.55	0.7	0.85
Southern					
Rural	HW01	All Trains	0.55	0.7	0.85
London - Sussex Coast (Peak)	HW02	All Trains	0.55	0.7	0.85
London - Sussex Coast (Off Peak)	HW03	All Trains	0.55	0.7	0.85
South London Lines (Off Peak)	HW04	All Trains	0.55	0.7	0.85
South London Lines (Peak)	HW05	All Trains	0.55	0.7	0.85
Rugby - Brighton	HW06	All Trains	0.45	0.65	0.85
Victoria - Gatwick Airport	HW07	Peak/Off Peak	0.45	0.65	0.85
South West Trains					
Main Suburban	HY01	Peak/Off Peak	0.55	0.7	0.85
Brighton - Portsmouth - Reading	HY02	All Trains	0.55	0.7	0.85
Waterloo - West England	HY03	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Farnham/Alton	HY04	Peak/Off Peak	0.55	0.7	0.85
Windsor Inners	HY05	Peak/Off Peak	0.55	0.7	0.85
Windsor Outers	HY06	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Portsmouth	HY07	Peak/Off Peak	0.55	0.7	0.85
Waterloo - Weymouth	HY08	Peak/Off Peak	0.55	0.7	0.85

Annex B to Part 3 of Schedule 4 – Lookup Table for EBM Weights

[This Annex will be agreed bilaterally between Network Rail and the relevant train operator]

Annex C to Part 3 of Schedule 4 – Payment Rate per train mile

[This annex contains information which is confidential as between Network Rail and the relevant train operator]

PART 4: CTRL AND THAMESLINK

[Customised arrangements to be submitted for approval]

PART 5: ACCESS CHARGE SUPPLEMENT FOR RESTRICTIONS OF USE

- 1** The Train Operator shall pay or procure the payment to Network Rail of an Access Charge Supplement for Restrictions of Use (ACSRU) in respect of each Period equal to 1/13 of the amount specified below (as indexed in accordance with paragraph 2) in respect of the Relevant Year commencing 1 April in which the first day of the relevant Period falls:

Year	£
2009-2010	[]
2010-2011	[]
2011-2012	[]
2012-2013	[]
2013-2014	[]

Each such payment shall be made within 35 days after the end of the relevant Period.

- 2** Each such amount specified in paragraph 1 shall be adjusted in respect of payments made relating to Periods in the Relevant Year t in accordance with the following formula:

$$ACSRU_{pt} = ACSRU_t \bullet \frac{(RPI_{t-1})}{RPI[2008]}$$

where:

$ACSRU_{pt}$ is the actual amount payable in the Relevant Year t ;

$ACSRU_t$ is the relevant amount specified in paragraph 1 of this Part 5 for the Relevant Year t (before indexation);

RPI_{t-1} means the Retail Prices Index published or determined with respect to November in the Relevant Year $t-1$; and

$RPI[2008]$ means the Retail Prices Index published or determined with respect to November 2008

but so that in relation to the Relevant Year commencing on 1 April 2009, $ACSRU_t$ shall have the relevant value specified in the relevant column of the table in paragraph 1.

***Annex 3 – Schedule 4 of open access
operator track access contracts***

SCHEDULE 4: RULES OF THE ROUTE, RULES OF THE PLAN AND RESTRICTIONS OF USE

PART 1 NOT USED

PART 2 NOT USED

PART 3: COMPENSATION FOR RESTRICTIONS OF USE

1 Definitions

1.1 *Defined terms*

In this Part 3 and its Appendices, unless the context otherwise requires:

- “Applicable Timetable”** means, in respect of any day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Condition D1.6.1 as at 22:00 hours on the day prior to that day;
- “Bi-annual Timetable”** means either of the following:
- (a) the Corresponding Day Timetable for all days in the period from and including the Principal Change Date up to but excluding the immediately following Subsidiary Change Date; or
 - (b) the Corresponding Day Timetable for all days from and including the Subsidiary Change Date up to but excluding the immediately following Subsidiary Change Date or Principal Change Date, as the case may be;
- “Cancellation Minutes”** shall have the meaning ascribed to it in Schedule 8;
- “Cap”** shall have the meaning ascribed to it in Schedule 8;
- “Corresponding Day”** means, in respect of any day (the **“first day”**):
- (a) a day which is contained in the same Timetable Period as the first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or
 - (b) if no day is found under paragraph (a) above, then a day which is contained in the equivalent Timetable Period for the time of year, in the year immediately preceding the Timetable Period which includes the

	<p>first day and on which the Services scheduled in the First Working Timetable are the same as would have been scheduled on the first day but for Restrictions of Use reflected in the First Working Timetable for the first day; or</p> <p>(c) if no day is found under paragraph (a) or (b) above, such other day as the parties may agree or as may be determined in accordance with paragraph 12.2;</p>
“Corresponding Day Timetable”	means, in relation to a Corresponding Day, the First Working Timetable or such other timetable as may be agreed between the parties or otherwise determined in accordance with paragraph 12.2;
[“CTRL Possession”	shall have the meaning ascribed to it in Part 4 or Part 6 of this Schedule 4 as appropriate;]
“Day 42 Statement”	shall have the meaning ascribed to it in paragraph 13.1(a);
“Disrupted”	<p>means:</p> <p>(a) cancelled;</p> <p>(b) diverted off the Route over which it was scheduled to run in the Corresponding Day Timetable; and/or</p> <p>(c) starting or finishing short in comparison with the Service as timetabled in the Corresponding Day Timetable;</p>
“First Restriction”	shall have the meaning ascribed to it in paragraph 2.12(a)(i);
“First Restriction Period”	shall have the meaning ascribed to it in paragraph 2.12(a)(ii);
“First Working Timetable”	means, in respect of any day, the version of the Working Timetable for that day provided by Network Rail in accordance with Condition D3.2.7, as amended pursuant to Condition D3.2.9;
“Further Restriction”	shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(B);
“High Speed Diversion”	means a situation in which a Train is diverted between successive Monitoring Points such that it travels a longer distance at a higher average speed than that normally scheduled and arrives at its destination at a time later than that specified in the First Working Timetable;
“Monitoring Point”	shall have the meaning ascribed to it in Schedule 8;
“Network Rail Restriction of Use”	means any Restriction of Use other than an Operator Restriction of Use, a CTRL Possession or, if applicable, a Thameslink Possession;
“Notification Factor” or “NF”	shall have the meaning ascribed to it in paragraph 9;

“Operator Restriction of Use”	means a Restriction of Use of the type referred to in paragraph 2.3;
“Over-run”	shall have the meaning ascribed to it in paragraph 2.12(a);
“Period”	means each consecutive period of 28 days during the term of this contract commencing at 00:00 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;
“Public Holiday”	means any day other than Saturday or Sunday on which the banks in the City of London are not open for business;
“Recovery Allowance”	means an allowance for additional time incorporated in the First Working Timetable or (where the Train Operator requests that the allowance is not incorporated in the First Working Timetable and Network Rail complies with that request) the Applicable Timetable to allow a Train to regain time lost during an earlier part of its journey;
“Restriction of Use”	<p>means, in respect of any day, any restriction of use of all or any part of the Routes (other than one caused by a Recovery Allowance which was contained in the Applicable Rules of the Plan relevant to that day notified to each Bidder on or before the end of the Drafting Period under Part D of the Network Code) which results in:</p> <ul style="list-style-type: none"> (a) a difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that day; and/or (b) a difference between the First Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;
“Restriction of Use Day”	means a day on which a Network Rail Restriction of Use is taken or deemed to be taken;
“RoU Claim Notice”	means a notice issued by either party pursuant to paragraph 2.8;
“RoU Liability”	means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator (including any increase in RoU Variable Costs but net of any benefit arising from the taking of a Restriction of Use including any decrease in RoU Variable Costs) as a consequence of a Type 3 Restriction of Use or any Restriction(s) of Use covered by an SPD Claim;
“RoU Variable Costs”	means any Train Operator costs which vary as a result of a Restriction of Use or where applicable an Over-run arising directly from changes in train mileage including maintenance, fuel or the Traction Electricity Charge, the Variable Track

	Usage Charge and the Capacity Charge;
“SPD Claim”	has the meaning specified in paragraph 2.10(c);
“SPD Notice”	means a notice issued by either party pursuant to paragraph 2.10(a);
“SPD Period”	means the period of any 3 or 7 (as the case may be) consecutive Periods in which it is agreed or determined that Sustained Planned Disruption has occurred in respect of the Train Operator, together with any subsequent consecutive Period up to but excluding the first Period to occur in respect of which it is agreed or determined that the test for Sustained Planned Disruption is not satisfied in respect of the Train Operator;
“SPD Cost Threshold No.1”	means [£500,000]/[£250,000] ¹ ;
“SPD Cost Threshold No.2”	means [£1,000,000]/[£500,000] ² ;
“SPD Revenue Threshold No.1”	means [●] ³ ;
“SPD Revenue Threshold No.2”	means [●] ⁴ ;
“SPD Termination Notice”	has the meaning specified in paragraph 2.10(c)
“Sustained Planned Disruption”	or means a circumstance where:
“SPD”	<p>(a) the aggregate of all of the Train Operator’s notional revenue losses calculated in accordance with paragraph 3 for any Restriction of Use during:</p> <ul style="list-style-type: none"> (i) 3 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.1; or (ii) 7 consecutive Periods is equal to or exceeds SPD Revenue Threshold No.2, <p>and that the difference between the RoU Liability calculated in accordance with paragraph 8 and the Train Operator’s notional revenue losses calculated in accordance with paragraph 3 and paragraph 4 for such Restrictions of Use during that period would be more than £10,000; or</p> <p>(b) in respect of any Restriction of Use during :</p> <ul style="list-style-type: none"> (i) 3 consecutive Periods the difference between the Train Operator’s RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator’s

¹ The difference between formulaic costs compensation and reasonably incurred costs where there is more than £0.5m over 3 consecutive Periods or £1m over 7 consecutive Periods will apply to all train operators except Chiltern, Merseyrail, C2C, London Overground Rail Operations Limited and open access operators for whom the values of £0.25m over 3 consecutive Periods and £0.5m over 7 consecutive Periods will be used.

² Ibid.

³ The methodology for calculating the threshold will be set out in the Criteria and Procedures. The SPD Revenue Thresholds will be 20% and 15% over 3 and 7 Periods respectively of the defined Service Group.

⁴ Ibid

notional costs calculated under paragraph 4 would be more than SPD Cost Threshold No. 1; or

- (ii) 7 consecutive Periods the difference between the Train Operator's RoU Liability (excluding any loss of revenue) calculated in accordance with paragraph 8 and the Train Operator's notional costs calculated under paragraph 4 would be more than SPD Cost Threshold No. 2;

“Service Code”	shall have the meaning ascribed to it in Schedule 8;
“Service Group”	shall have the meaning ascribed to it in Schedule 8;
[“Thameslink Possession”	shall have the meaning ascribed to it in Part 4;]
“Train”	shall have the meaning ascribed to it in Schedule 8;
“Train–Bus–Train Pattern”	means a situation where: <ul style="list-style-type: none">(a) a Restriction of Use occurs on any section of track between:<ul style="list-style-type: none">(i) successive Monitoring Points; or(ii) the station of origin and the next Monitoring Point; and(b) the Train Operator uses a substitute bus or other alternative road service between any pair of stations situated:<ul style="list-style-type: none">(i) between or including such successive Monitoring Points; or(ii) at or between the station of origin and the next Monitoring Point;
“Type 3 Restriction of Use”	means a single Restriction of Use (including any Over-run) of more than 120 consecutive hours (including any part of that Restriction of Use which occurs during a Public Holiday);
“Unplanned Over-run Period”	shall have the meaning ascribed to it in paragraph 2.12(a)(ii)(A);
“Viable Transfer Point”	a station normally served by the services operated by the Train Operator, and equipped to enable the efficient and safe transfer of trainloads of passengers to and from alternative modes of transport, and/or services operated by other Train Operators, and which the parties have agreed, and set out in Annex B, shall be used for the purpose of providing Replacement Bus Services, and for calculating Equivalent Bus Miles Compensation in accordance with the provisions of

paragraph "4 Cost Compensation for Network Rail Restrictions of Use";

"Week"

means a period commencing at 00:00:00 hours on any Saturday and ending at 23:59:59 hours on the next following Friday; and

"White Period"

means any period during which the taking of a Restriction of Use would not result in any notional revenue loss being calculated in accordance with paragraph 3.

1.2 *Suspension Notices*

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of Clause 3.6 and not of this Schedule 4. A Restriction of Use shall only be treated as a Restriction of Use to the extent that it involves a Restriction of Use of all or any part of the Routes which is not covered by the restriction under that Suspension Notice.

1.3 *Possession*

Any reference in this contract to the term "possession", whether on its own or in composite, should be construed as "Restriction of Use" as defined in this Part 3.

1.4 *White Period*

In respect of any Type 3 Restriction of Use, where a Restriction of Use starts before and/or ends after a White Period, the entire length of the Restriction of Use shall be taken into account when counting the cumulative total hours.

2 Application of this Part

2.1 *Entry into effect*

This Part 3 shall apply in respect of Restrictions of Use.

2.2 *Applicable Rules of the Route and the Network Code*

The provisions of this Part 3 shall be without prejudice to:

- (a) Network Rail's right to take Restrictions of Use under or pursuant to the Applicable Rules of the Route;
- (b) the establishment of any amended Working Timetable under Part H of the Network Code; and
- (c) any rights pursuant to the Network Code that the Train Operator may have to challenge any decision of Network Rail.

2.3 *Operator Restriction of Use*

Network Rail shall not be obliged to make any payments to the Train Operator for any one or more Restrictions of Use to the extent:

- (a) required as a result of any damage to the Network or Environmental Damage which in each case:

- (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and
 - (ii) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator;
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
 - (c) required in connection with a Network Change proposed by the Train Operator under Condition G3.

2.4 *Network Rail payments*

Subject to paragraph 2.3, Network Rail shall make payments to the Train Operator (in accordance with the procedure in paragraph 13) in respect of Restrictions of Use calculated on the following basis:

- (a) for each Network Rail Restriction of Use, in accordance with paragraph 2.7 and 2.10 where applicable; and
- (b) for each CTRL Possession and Thameslink Possession, in accordance with Part 4.

2.5 NOT USED

2.6 NOT USED

2.7 *Type 3 Restriction of Use*

Where a Train Operator's RoU Liability exceeds £10,000 in respect of any Type 3 Restriction of Use Network Rail shall make payments to the Train Operator (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 7.

2.8 RoU Claim Notice

- (a) A Train Operator wishing to make a request pursuant to Clause 2.7 must notify Network Rail that a Restriction of Use is a Type 3 Restriction of Use and that the circumstances in paragraph 2.7 apply within [56] days of the date of the end of such Type 3 Restriction of Use.
- (b) The notice referred to in paragraph 2.8(a) must include details of the estimate of the RoU Liability which the Train Operator has incurred in respect of the relevant Restriction of Use.

2.9 *Changes to Restrictions of Use*

- (a) Where a single Restriction of Use falls within the definition of a Type 3 Restriction of Use and there is a change which means that no Restriction of Use occurs or that the Restriction of Use no longer falls within the definition of a Type 3 Restriction of Use, then that Restriction of Use shall be treated, for the purposes of the calculation and payment of compensation, as if it had never been a Type 3 Restriction of Use (or, where applicable, as if it had not been a Restriction of Use).

- (b) Where a single Restriction of Use does not fall within the definition of a Type 3 Restriction of Use and there is a change which means that the Restriction of Use then falls within the definition of a Type 3 Restriction of Use, then that Restriction of Use shall be treated, for the purposes of the calculation and payment of compensation, as if it had always been a Type 3 Restriction of Use.
- (c) For the purposes of paragraph 2.9(d), a Restriction of Use shall be deemed to be taken if and to the extent that it results in any difference between timetables of the type referred to in the definition of "Restriction of Use" when notified, whether or not the restriction giving rise to that Restriction of Use was subsequently cancelled in whole or in part.
- (d) Where a change to a Type 3 Restriction of Use reduces the impact of that Restriction of Use and accordingly changes it so that it no longer falls within the definition of a Type 3 Restriction of Use or means that there is no Restriction of Use in accordance with paragraph 2.9(a), the Train Operator may, within 28 days of the date on which the change to the Type 3 Restriction of Use was notified to the Train Operator by Network Rail, serve a notice on Network Rail which sets out any costs to which the Train Operator is already committed or has already incurred and any costs associated with responding to the Type 3 Restriction of Use (both before and after the change). The Train Operator shall be entitled to recover such costs provided that such costs are reasonable and were properly committed or incurred in the circumstances.

2.10 *Sustained Planned Disruption*

- (a) If either party reasonably believes that a Sustained Planned Disruption has occurred then that party will be entitled to require that the costs and losses for the Restrictions of Use for the relevant services during the relevant SPD Period be calculated in accordance with paragraph 8 by serving a notice on the other (an "SPD Notice") in accordance with paragraph 2.10(b).
- (b) Unless otherwise agreed in writing, an SPD Notice must be served no later than the day falling 56 days after the issue of the Day 42 Statement which followed the end of the relevant SPD Period and must include a short explanation of why it reasonably believes a Sustained Planned Disruption has occurred and a statement of when the SPD Period commenced.
- (c) Following the issue of an SPD Notice, either party may serve a notice ("an SPD Termination Notice") stating that it reasonably believes that the relevant Sustained Planned Disruption is no longer occurring, such notice to include a short explanation of why the party serving it reasonably believes that the Sustained Planned Disruption has ceased and stating the Period in which such cessation has occurred. A party receiving an SPD Termination Notice shall within 30 days of its receipt by notice to the serving party either accept or reject the SPD Termination Notice and where it rejects the notice it shall include with its rejection notice a short explanation of why it reasonably believes the Sustained Planned Disruption is continuing. If the parties fail to reach agreement within 30 days after service of a rejection notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, either party may notify the other that the dispute resolution procedure set out in

paragraph 13.3 is to apply (save the references to paragraph 13.2 shall be construed as references to this paragraph).

- (d) Following the issue of an SPD Notice the party that issued that notice must serve a claim (an “SPD Claim”):
 - (i) no later than the day falling 112 days after the issue of the Day 42 Statement for the last Period in the relevant SPD Period; or
 - (ii) where an SPD Period has exceeded 13 consecutive Periods in length or upon the termination or expiry of this Access Agreement, whichever comes first, unless otherwise agreed in writing, no later than the day falling 112 days after the issue of the Day 42 Statement which followed the 13th consecutive Period or the termination or expiry of this Access Agreement (as applicable),
whichever is the earlier.
- (e) Provided a party has issued an SPD Notice in accordance with paragraph 2.10(b), nothing in paragraph 2.10(d) shall prevent that party from issuing more than one SPD Claim in respect of the same Sustained Planned Disruption, provided that:
 - (i) each such SPD Claim relates to a different period within the said SPD Period (so there is no double-counting); and
 - (ii) no SPD Claim can be issued after the last day for serving notice specified under paragraph 2.10(d).
- (f) An SPD Claim must include details of when and why that party reasonably believes that a Sustained Planned Disruption has occurred and in particular:
 - (i) if the claim is made by the Train Operator, such details as may reasonably be available of the RoU Liability which the Train Operator has incurred or reasonably expects to incur in respect of the relevant Restrictions of Use during the SPD Period; or
 - (ii) if the claim is made by Network Rail, the reasons why Network Rail reasonably believes that the Train Operator has been overcompensated or may be overcompensated by more than the relevant amount.
- (g) Following the service of an SPD Claim, if and to the extent it is agreed or determined that a Sustained Planned Disruption has occurred in the period covered by the claim then the relevant party shall make payments to the other (in accordance with the procedure in paragraph 13) calculated in accordance with paragraph 8 in respect of the SPD Period (or where applicable the part of the SPD Period) covered by the SPD Claim.

2.11 *Early notice of RoU Liability*

The parties may at any time engage in discussions on any matter likely to result in payments in respect of any RoU Liability and shall use reasonable endeavours to agree whether such RoU Liability calculated in accordance with paragraph 6, 7 or 8 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such RoU Liability. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it thinks such RoU Liability will arise or mitigating actions should be contemplated. Following any agreement or determination that such RoU Liability are likely to arise in connection with one or more future Restrictions of Use or that mitigating actions should be contemplated, the

parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Restriction(s) of Use to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Restriction(s) of Use. Unless otherwise agreed, the timescales for claiming RoU Liability shall still apply.

2.12 Over-runs

- (a) An over-run ("Over-run") occurs where:
- (i) there is a Restriction of Use which is not an Operator Restriction of Use (the "First Restriction"); and
 - (ii) following the end of the relevant period of difference between timetables referred to in sub-paragraphs (a) and (b) of the definition of Restriction of Use which served to establish the existence of that Restriction of Use (the "First Restriction Period"), there is either:
 - (A) a further period of at least one hour during which Services are Disrupted due to (1) any incident attributed under Schedule 8 to circumstances arising from any restriction of operation of the Network which are a consequence of the First Restriction or (2) any act or omission in connection with any activities planned or undertaken which are directly attributable to the First Restriction (including any failure to remove the First Restriction by the time scheduled for its removal in the Applicable Rules of the Route) but excluding any act or omission by the Train Operator for which it would be allocated responsibility under this Contract (the "Unplanned Over-run Period"); and/or
 - (B) a further Restriction of Use is taken which is at the same location as all or part of the First Restriction and directly connected with or attributable to any activities undertaken or planned to be undertaken under the First Restriction (a "Further Restriction"),in each case without there being any intervening period between the First Restriction and the relevant Unplanned Over-run Period or Further Restriction, which is not either a White Period, Unplanned Over-run Period or a Further Restriction.
- (b) Where a Restriction of Use is subject to one or more Over-runs, then the entire duration from the start of the First Restriction to the end of the last Over-run in respect of the Restriction of Use shall be treated as making up a single Restriction of Use.
- (c) This paragraph 2.12 shall not result in any Unplanned Over-run Period being subject to either revenue loss compensation for Network Rail Restrictions of Use under paragraph 3 or costs compensation for Network Rail Restrictions of Use under paragraph 4.

3 Notional revenue loss for Network Rail Restrictions of Use

3.1 Basis for calculations

For each Period and for each Service Group, Network Rail shall calculate the notional revenue loss in respect of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying, in accordance with paragraphs 3.2 and 3.3, the formulae in paragraphs 3.4, 3.5 and 3.6. For the purposes of determining for this paragraph 3 to which Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

3.2 Separate calculations

In applying the formula in paragraph 3.4, Network Rail shall calculate the notional revenue loss separately in respect of all:

- (a) Network Rail Restrictions of Use which are taken into account in the First Working Timetable; and
- (b) Network Rail Restrictions of Use which are not so taken into account but are taken into account in the Applicable Timetable.

3.3 Meaning of T1 and T2

In paragraph 3.4:

- (a) where Network Rail is making the calculation for the purpose of paragraph 3.2(a), T1 shall mean the Corresponding Day Timetable and T2 shall mean the First Working Timetable for the Restriction of Use Day; and
- (b) where Network Rail is making the calculation for the purpose of paragraph 3.2(b), T1 shall mean the First Working Timetable for the Restriction of Use Day and T2 shall mean the Applicable Timetable for the Restriction of Use Day.

3.4 Formula

The formula referred to in paragraph 3.1 is as follows:

$$RP = \sum((WACM + NREJT) \bullet BF \bullet MRE \bullet NF)$$

where:

- (a) Σ is the sum across all Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) WACM is the weighted average of Cancellation Minutes for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$WACM = (CM - NRPP) \cdot \sum \frac{(MPW \cdot CS)}{SS}$$

where:

CM is the Cancellation Minutes for the Service Group in question specified in column J of Appendix 1 to Schedule 8;

NRPP is the Network Rail performance point for the Service Group in question specified in column B of Appendix 1 to Schedule 8;

Σ is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to the Monitoring Point, as specified in column O of Appendix 1 to Schedule 8;

CS is the number by which the number of stops at that Monitoring Point scheduled for that day in T2 is less than SS as a result of the Network Rail Restriction of Use; and

SS is the number of stops at the Monitoring Point scheduled for that day in T1;

(c) NREJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group, for the Restriction of Use Day, being Services which are not cancelled, calculated according to the following formula:

$$NREJT = EJT \cdot \left(1 - \frac{\sum (MPW \cdot CS)}{SS}\right)$$

where:

Σ , MPW, CS and SS have the meanings ascribed to them in paragraph 3.4(b) above; and

EJT is the extended Journey Time as a result of a Network Rail Restriction of Use in respect of Services in that Service Group calculated according to the following formula:

if no Train in that Service Group is scheduled in T2 for that day, then EJT shall equal 0;

if otherwise,

EJT is the lesser of:

(i) the number of minutes specified as the Cap for the Service Group in column K of Appendix 1 to Schedule 8; and

(ii) $AJT \cdot ((u-v)/v)$,

provided always that if v equals or is greater than u, EJT shall equal 0;

where:

AJT is the average Journey Time for Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the Journey Times scheduled in T1 in respect of such Trains divided by the aggregate number of Journeys scheduled in T1 in respect of such Trains;

- u is the average speed of Trains in the Service Group scheduled for that day in T1, and shall be equal to the aggregate of the number of miles scheduled to be run in T1 by such Trains divided by the aggregate of the Journey Times scheduled in T1 in respect of such Trains; and
- v is the speed to which the average speed of Trains in the Service Group scheduled for that day in T2 is reduced as a result of the Network Rail Restrictions of Use (calculated by reference to the aggregate of the number of miles which such Trains are scheduled to run in T2 divided by the aggregate of the end to end Journey Times scheduled in T2 in respect of such Trains),

and for the purposes of this paragraph 3.4:

“Journey”

means the journey of the Train scheduled in the relevant timetable from its station of origin to its destination station; provided that if a Train crosses a Service Group boundary then in respect of each Service Group the Train’s station of origin and destination station shall respectively mean the station at which the Train commences that part of its journey in that Service Group and the station at which it ends that part of its journey in that Service Group; and that where any Train splits to become more than one Train then that part of the Train’s journey up to the station where it splits shall be treated as one journey and each Train into which the Train splits shall be treated as making a separate journey; and

“Journey Time”

shall be calculated in respect of each journey by reference to the difference in minutes between the time of departure from the station of origin and the time of arrival at the destination station;

- (d) BF is the busyness factor, as calculated for each Service Group according to the following formula:

$$BF = \frac{\sum (MPW \bullet SS)}{AS}$$

where:

AS is the average number of stops at the Monitoring Point (being the Monitoring Point referred to in the definition of MPW) per day scheduled in the Tri-annual Timetable; and

MPW and SS have the meanings ascribed to them in paragraph 3.4(b); and

- (e) MRE is the marginal revenue effect specified in column C of Appendix 1 to Schedule 8, as indexed according to the relevant provisions of Schedule 8.

3.5 *High Speed Diversions*

Where there is a High Speed Diversion and WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero then the following formula shall apply:

$$\text{ANRP} = \frac{\text{TDR}_{\text{SG}}}{\text{TDT}_{\text{SG}}} \bullet (\text{CM} - \text{NRPP}) \bullet \text{MRE} \bullet \text{BF} \bullet \text{NF}$$

where:

ANRP is the additional Network Rail payment;

TDR_{SG} is, in respect of each Service Group and each Restriction of Use Day on which a High Speed Diversion applies, the number of Trains in the Service Group scheduled in T2 to be subject to the High Speed Diversion;

TDT_{SG} is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3; and

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4.

In such a situation, the Train Operator shall provide Network Rail with evidence, either that the High Speed Diversion has been common for the Services in question in the past or that the High Speed Diversion would arise as a result of a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

3.6 *Train-Bus-Train Patterns*

If any Service Group on any day is subject to a Train-Bus-Train Pattern on account of a Network Rail Restriction of Use, and where WACM, as defined in paragraph 3.4(b), has a value equal to or less than zero, then Network Rail shall pay to the Train Operator an additional payment calculated as follows:

$$\text{ANRP} = \frac{\text{TTS}_{\text{SG}}}{\text{TTR}_{\text{SG}}} \bullet (\text{CM} - \text{NRPP}) \bullet \text{DV} \bullet \text{MRE} \bullet \text{BF} \bullet \text{NF}$$

where:

ANRP is the additional Network Rail payment;

TTSSG is the total number of Trains scheduled in T2 to be run in the Service Group for that Restriction of Use Day to terminate at a destination other than that shown for those Trains due to a Train-Bus-Train Pattern in T1;

TTR_{SG} is the total number of Trains scheduled to be run in the Service Group in T1;

T1 and T2 shall have the meanings ascribed to them in paragraph 3.3;

CM, NRPP, MRE and BF shall have the meanings ascribed to them in paragraph 3.4; and

DV shall have the value of 0.125,

provided that if:

TTR_{SG} is less than TTS_{SG} then $\frac{\text{TTS}_{\text{SG}}}{\text{TTR}_{\text{SG}}}$ shall be deemed to have the value of one.

In such a situation the Train Operator shall provide Network Rail with evidence, either that the Train-Bus-Train Pattern resulting from the Network Rail Restriction of Use is an

arrangement that has been commonly used in the past by that Train Operator on the Services in question, or that it has arisen due to a change in circumstances.

In default of agreement, in relation to the adequacy of such evidence, between the Train Operator and Network Rail within 28 days after the First Working Timetable is issued reflecting the relevant Network Rail Restriction of Use, the mechanism and procedure for dispute resolution set out in paragraphs 13.2, 13.3 and 13.4 shall apply.

4 Notional costs consequent on Network Rail Restrictions of Use

4.1 Basis for calculations

For each Period and for each Service Group, Network Rail shall calculate the notional costs of all Network Rail Restrictions of Use on each Restriction of Use Day in that Period by applying the formulae in paragraph 4.2. For the purposes of determining for this paragraph 4 to which Service Group a particular Train is allocated, a Train (or portion of a Train) shall be treated as allocated to a particular Service Group by reference to its Service Code⁵, provided that where a particular Train (or portion of a Train) is given a different Service Code in the First Working Timetable from the Service Code given to it in the Applicable Timetable or a different Service Code in the Corresponding Day Timetable from the Service Code given to it in the First Working Timetable it shall be treated as part of the Service Group in relation to whichever of those Service Codes most correctly applies to that Train or, where both Service Codes could equally apply to that Train, to the Service Code applied to that Train in the First Working Timetable.

4.2 Notional cost calculation formula

The formula referred to in paragraph 4.1 is as follows:

$$\text{Notional cost} = \sum (\text{RRBC} + \text{TMC})$$

where:

where:

- (a) \sum is the sum across all applicable Network Rail Restrictions of Use and all Restriction of Use Days in the Period;
- (b) RRBC is the rail replacement bus cost, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$\text{RRBC} = \text{EBM} \times \text{EBMPR}$$

EBM is the number of estimated bus miles for the Operator; and

EBMPR is the payment rate per EBM, which is £[•]⁵.

If there is full bus replacement

$$\text{EBM} = \text{EBMW} \times \text{FBRmiles}$$

If there is partial bus replacement

⁵ There are two rates – one for London and the SE and one for the rest of the Network

$$\text{EBM} = \text{EBMW} \times 0.5 \text{ miles} \times \text{PBRmiles} \times \text{ITS}$$

where:

EBMW is the weighting applicable to the affected section of route, as set out in Annex B to this Part 3 of Schedule 4;

FBRmiles is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which full bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;

PBRmiles is the length of route, in miles, between the applicable pair of Viable Transfer Points over which train services are affected and for which partial bus replacement is required as set out in Annex B to this Part 3 of Schedule 4;

ITS is 1 or the percentage of trains stopping at intermediate stations for those cases where $\text{EBMW} = 50\%$.
and

(c) **TMC** is the cost or saving resulting from train mileage change, for the Service(s) (or part(s) thereof) in that Service Group as a result of a Network Rail Restriction of Use, calculated according to the following formula:

$$\text{TMC} = \text{TM} \times \text{TMPR}$$

where:

TM is the change in train mileage; and

TMPR is the payment rate per train mile, as stipulated in Annex C to this Part 3 of Schedule 4.

5 Estimated Bus Miles change mechanism⁶

5.1 Circumstances in which parties agree to amend Annex B

Either party may by notice to the other propose that Annex B be amended in accordance with this paragraph 5.

5.2 Procedure for amendments to Annex B

(a) The party who wishes to amend Annex B shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:

⁶ In due course ORR expects to include some guidance in its Criteria and Procedures on the circumstances when it would usually expect to approve changes under this paragraph

- (i) where such change relates to a forthcoming timetable change, on or before the first day of the month which falls 6 months before the relevant Principal Change Date or Subsidiary Change Date on which that timetable change is due to occur; and
 - (ii) in any other case prior to the date from which it proposes such change shall have effect.
- (b) Any notice under sub-paragraph 5.2(a) shall specify as far as possible that party's proposed amendments to Annex B. Promptly following the service of any such notice the parties shall endeavour to agree whether Annex B should be amended in accordance with this paragraph 5 and if so the amendments.
- (c) If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
 - (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
 - (ii) each of the parties shall abide by the rules and procedures established by the expert; and
 - (iii) the parties shall direct the expert to have regard to any relevant criteria issued by the Office of Rail Regulation.
- (d) Any amendment to Annex B 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 or determined in accordance with this paragraph 5, the parties shall use all reasonable endeavours to ensure that ORR is furnished with such amendment and sufficient information and evidence as it shall require to determine whether or not to approve the amendment.
- (e) Any amendment to Annex B shall apply with effect from:
 - (i) the relevant Principal Change Date or Subsidiary Change Date (where paragraph 5.2 (a) (i) applies); or
 - (ii) subject to paragraph 5.2 (d) the date proposed by the party requesting the change in accordance with paragraph 5.2 (a) (ii) (unless otherwise agreed by the parties or determined by the expert in relation to the change).

5.3 *Costs of implementing amendment*

The party proposing the amendment to Annex B shall (subject to any determination of an expert as to costs, where a matter is referred to that expert under paragraph 5.2(c)) pay 90 percent of costs incurred by or on behalf of the other party in assessing and implementing the amendments to Annex B, provided that those costs shall be the minimum reasonably necessary to assess and implement that amendment.

6 Not Used

7 RoU Liability compensation for Type 3 Restrictions of Use

7.1 Compensation arrangements

- (a) Following receipt of an RoU Claim Notice in respect of a Type 3 Restriction of Use, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by Network Rail to the Train Operator in respect of the Type 3 Restriction of Use and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 7.1(a) has been agreed or determined the compensation to be paid by Network Rail to the Train Operator shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts received by the Train Operator from Network Rail in respect of such Restriction of Use (including in respect of the period of any Unplanned Over-run Period as referred to in paragraph 2.12(a)(ii) (A) any amounts under Schedule 8).
- (c) Network Rail shall include in the statement provided by it in respect of each Period under paragraph 13.1(a) details of the compensation agreed or determined under this paragraph 7 and paragraph 10 to be payable in respect of any Type 3 Restriction of Use taken in that Period and that compensation shall be due and payable by the relevant party to the other in accordance with paragraph 13.1.

8 Sustained Planned Disruption payments

8.1 Payment arrangements

- (a) Following an agreement or determination that a Sustained Planned Disruption has occurred during an SPD Period, Network Rail and the Train Operator shall (if they have not already done so) commence negotiations in respect of the RoU Liability compensation to be paid by Network Rail to the Train Operator in respect of the Restrictions of Use during the relevant SPD Period and, subject to paragraph 10, shall continue such negotiations in good faith until they are concluded.
- (b) Once the compensation referred to in paragraph 8.1(a) has been agreed or determined the compensation to be paid by Network Rail to the Train Operator in respect of the Restrictions of Use during the relevant SPD Period shall be the full amount of the RoU Liability actually incurred by the Train Operator less any amounts received by the Train Operator from Network Rail in respect of such Restrictions of Use (including in respect of the period of any Unplanned Over-run Period as referred to in paragraph 2.12(a)(ii)(A) any amounts under Schedule 8).
- (c) Following any agreement or determination of an amount to be paid by Network Rail to the Train Operator in respect of a Sustained Planned Disruption that amount shall (subject to the terms of any compensation arrangements agreed in writing between the parties) be due and payable by Network Rail to the Train Operator in accordance with paragraph 13.1.
- (d) Where a Sustained Planned Disruption applies due to a circumstance which it is agreed or determined affects a part only of the Train Operator's services (including whether by reference to geographic location or Service Group), then in agreeing or

determining the RoU Liability in respect of that SPD the RoU Liability in respect of the part of the Train Operator's services not affected by that circumstance shall (unless otherwise proven) be presumed to be equal to the payments made under paragraphs 3 and 4 of this Schedule 4 in respect of those other services.

9 Notification Factors

9.1 Early notification

The Notification Factor in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column C of Annex A to this Part 3 if and to the extent that:

- (a) the Network Rail Restriction of Use is reflected in the First Working Timetable; or
- (b)
 - (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before the end of the Drafting Period in the Applicable Rules of the Route for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the First Working Timetable; and
 - (ii) subject to paragraph 9.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (iii) where paragraph 9.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition [D4.8.3], the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

9.2 Notification by Revision Notification Date

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column D of Annex A to this Part 3 if and to the extent that paragraph 9.1 does not apply, and:

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by the Revision Notification Date; and
- (b)
 - (i) the Network Rail Restriction of Use is reflected in the Working Timetable as entered into the train service database at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (ii) where paragraph 9.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a Revised Bid in accordance with Condition D4.8.3, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

9.3 Late Notification

The NF in respect of a Network Rail Restriction of Use in respect of any Service Group shall have the value specified for that Service Group in column E of Annex A to this Part 3 if and to

the extent paragraphs 9.1 and 9.2 do not apply but the Network Rail Restriction of Use is reflected in the Applicable Timetable, and includes where paragraph 9.1(b) or paragraph 9.2 would have been applicable but for a failure by Network Rail to fulfil the terms of paragraph 9.1(b)(ii) or paragraph 9.2(b)(i) respectively, notwithstanding the Train Operator having given a Revised Bid in accordance with Condition D4.8.3.

10 Dispute resolution

If the Train Operator and Network Rail fail to reach agreement as required under paragraph 2.6(c), 2.7(c), 2.10(g), 2.11, 6, 7 or 8 within 28 days following provision of the RoU Claim Notice, either party may notify the other that the dispute resolution procedure set out in paragraph 13.3 is to apply. Such procedure shall then apply in accordance with its terms (save that references to paragraph 13.2 shall be construed as being references to this paragraph 10).

11 Schedule 8 application

If and to the extent that a Network Rail Restriction of Use is not reflected in the Applicable Timetable for the Restriction of Use Day, the amount of compensation (if any) shall be calculated in accordance with Schedule 8 (to the exclusion of any compensation under this Schedule 4 except as provided in paragraphs 2.12, 7 or 8..

12 Restriction of Use Day and Corresponding Day

12.1 Information provision

In respect of any Restriction of Use Day for which there is either notional revenue loss or notional costs to be calculated in a Period under paragraphs 3 and 4, Network Rail shall accurately record such information as it uses and as may properly and reasonably be required to make the calculations required under paragraphs 3 and 4 (including the determination of NF and the relevant version of the Working Timetable referred to in paragraph 9.1(b)(ii) or paragraph 9.2(b)(i). Network Rail shall maintain that information until the calculations required under paragraphs 3 and 4 in respect of that Period are finally agreed or determined and provide such information to the Train Operator at its reasonable request.

12.2 Corresponding Day

- (a) If, for the purpose of identifying a Corresponding Day, no day is found under paragraph (a), (b) or (c) of the definition "Corresponding Day" and the parties have failed to reach agreement on the Corresponding Day by the date falling eight Weeks before the relevant Passenger Change Date then either party may require that the identification of the Corresponding Day be resolved by the relevant ADRR Panel.
- (b) The relevant ADRR Panel's remit shall be that it shall:
 - (i) reach a decision which is fair and reasonable; and
 - (ii) identify the day in either any version of the Working Timetable or any Draft Timetable notified to the Train Operator on or before the end of the Drafting Period in either case which has been produced in accordance with the Network Code as at the Restriction of Use Day and which most closely reflects the Services which would have been scheduled on the first day (as that term is used in the definition of Corresponding Day [save that in respect

of any Restriction of Use lasting more than two Timetable Periods, the first day may occur in any year preceding the Timetable Period]) but for Restrictions of Use reflected in the First Working Timetable for the first day; or

- (iii) where a Corresponding Day cannot be identified in accordance with paragraph 12.2(b)(ii) above, determine a notional Corresponding Day. The relevant ADRR Panel may have regard, where appropriate, to any pattern of services which may reasonably be expected to be operated during the relevant period when the Restriction of Use is being taken in the event of the permanent absence of any Corresponding Day.
- (c) If either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that Condition C6.3 of those rules shall not apply).

13 Payment procedures

13.1 *Network Rail Restrictions of Use*

- (a) Within 14 days after the end of each Period, Network Rail shall provide to the Train Operator a statement (the “Day 42 Statement”) showing:
 - (i) all Network Rail Restrictions of Use taken during that Period;
 - (ii) any notional revenue losses and notional costs calculated in accordance with paragraphs 3 and/or 4 in respect of the Network Rail Restrictions of Use identified; and
 - (iii) following any agreement or determination in the Period referred to in paragraph 13.1(a) of any RoU Liability in respect of a Type 3 Restriction of Use or a Sustained Planned Disruption (as applicable), any payment to be made by Network Rail to the Train Operator,

in sufficient detail to enable the Train Operator to make an informed assessment thereof.

13.2 *Disputes*

Within 10 days of receipt of a statement from Network Rail under paragraph 13.1, 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.

13.3 *Dispute resolution*

The procedure for resolving disputes notified under paragraph 13.2 shall be as follows:

- (a) within seven days of service of any notice under paragraph 13.2, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (b) if, within seven days of that meeting (the “first meeting”), the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within seven days) prepare a written summary of the

disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;

- (c) within 28 days of the first meeting, the senior officers shall meet with a view to resolving all disputes;
- (d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the relevant ADRR Panel; and
- (e) if either party is dissatisfied with the decision of the relevant ADRR Panel or the ruling of the Chairman (as the case may be), such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules (except that paragraph C6.3 of those rules shall not apply).

13.4 *Payments in the event of a dispute*

Where any amount under paragraph 13.1 is in dispute:

- (a) the undisputed amount shall be paid in accordance with paragraph 13.1;
- (b) the disputed amount shall be paid within 28 days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and
- (c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date on which such amount would but for such dispute have been due to be paid until the date of payment.

14 **Indexation**

14.1 The formula applicable to this paragraph 14 is:

$$R_t = R_{t-1} \left(1 + \frac{RPI_{t-1}}{100} \right)$$

where:

R_t is the relevant rate in the Relevant Year t ;

R_{t-1} is the relevant rate in the Relevant Year $t-1$; and

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Prices Index published or determined with respect to November in the Relevant Year $t-1$ and the index published or determined with respect to November in the Relevant Year $t-2$,

14.2 Each of the EBMPR and TMPR (respectively defined in paragraph 4.2) shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 so that in relation to the Relevant Year commencing on [1 April 2009], R_t shall have the value specified in:

- (a) paragraph 4.2 in respect of the EBMPR; and
- (b) in Annex C to this Part 3 of Schedule 4 in respect of TMPR,

and in the next following Relevant R_{t-1} shall respectively have the same value.

- 14.3 Each of the SPD Cost Threshold No.1 and SPD Cost Threshold No.2 shall be adjusted in respect of Periods in Relevant Year t in accordance with the formula set out in paragraph 14.1 but so that in relation to the Relevant Year commencing on [1 April 2009], R_t shall have the relevant value specified in paragraph 1.1 of this Schedule 4 and in the next following Relevant Year R_{t-1} shall respectively have the same value.

Annex A to Part 3 of Schedule 4 – Notification discount factors

Name of Service Group A	Service Group B	NFMRE		
		C to FWT	D FWT to ITWTT	E from ITWTT
Kings Cross - Hull	PF01	0.45	0.65	0.85
Metro	PG01	0.55	0.7	0.85
Kings X- Sunderland	EC01	0.45	0.65	0.85
Marylebone - Wrexham	EI01	0.45	0.65	0.85
Eurostar	GA01	0.45	0.65	0.85
Paddington – Heathrow Airport	EE02	0.55	0.7	0.85

Annex B to Part 3 of Schedule 4 – Lookup Table for EBM Weights

[This Annex will be agreed bilaterally between Network Rail and the relevant train operator]

Annex C to Part 3 of Schedule 4 – Payment Rate per train mile

[This annex contains information which is confidential as between Network Rail and the relevant train operator.]

PART 4: NOT USED

PART 5: ACCESS CHARGE SUPPLEMENT FOR RESTRICTIONS OF USE

- 1** The Train Operator shall pay or procure the payment to Network Rail of an Access Charge Supplement for Restrictions of Use (ACSRU) in respect of each Period equal to 1/13 of the amount specified below (as indexed in accordance with paragraph 2) in respect of the Relevant Year commencing 1 April in which the first day of the relevant Period falls:

Year	£
2009-2010	[]
2010-2011	[]
2011-2012	[]
2012-2013	[]
2013-2014	[]

Each such payment shall be made within 35 days after the end of the relevant Period.

- 2** Each such amount specified in paragraph 1 shall be adjusted in respect of payments made relating to Periods in the Relevant Year t in accordance with the following formula:

$$ACSRU_{pt} = ACSRU_t \cdot \frac{(RPI_{t-1})}{RPI[2008]}$$

where:

$ACSRU_{pt}$ is the actual amount payable in the Relevant Year t ;

$ACSRU_t$ is the relevant amount specified in paragraph 1 of this Part 5 for the Relevant Year t (before indexation);

RPI_{t-1} means the Retail Prices Index published or determined with respect to November in the Relevant Year $t-1$; and

$RPI[2008]$ means the Retail Prices Index published or determined with respect to November 2008,

but so that in relation to the Relevant Year commencing on 1 April 2009, $ACSRU_t$ shall have the relevant value specified in the relevant column of the table in paragraph 1.

***Annex 4 – Schedule 4 of freight track
access contracts***

SCHEDULE 4: VARIATIONS TO SERVICES

[Note: as a result of the changes to this Schedule 4, the following consequential changes have been made to Schedule 5:

- the following definition of “Revised Base Service” has been inserted in paragraph 1.1 of Schedule 5:

““Revised Base Service” has the meaning ascribed to it in Schedule 4;”

- paragraph 4.1 of Schedule 5 which lists Services under the contract has been expanded to include the following reference:

“(e) any Revised Base Service;”]

[Note: as there is a link between Schedules 8 and 4, and Schedule 8 is still being consulted on, as a result of that consultation further consequential amendments may need to be made to this Schedule 4.]

PART 1 - GENERAL PROVISIONS

1 Definitions

1.1 Definitions

In this Schedule 4 unless the context otherwise requires:

“**Actual Costs**” means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

- (a) any benefit arising from a Category 3 Disruption including any decrease in Variable Costs as a consequence of a Category 3 Disruption; and
- (b) any Enhanced Planned Disruption Sum due to the Train Operator in connection with the relevant Service affected by a Category 3 Disruption;

“**Actual Costs Claim Notice**” has the meaning specified in paragraph 3.4.3;

“**Applicable Service**” means a Revised Base Service, a Diverted Service or any Service which suffers a Cancellation;

“Base Service” means:

- (a) a Planned Service which is not able to operate as Planned; or
- (b) a Train Slot in respect of a Level One Right or a Level Two Right which is not able to be entered in the Working Timetable in accordance with those rights;

in either case because of the non-availability of any part of the Network as a result of a Network Rail Early Notice Possession;

“Category 1 Disruption” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (b) the Planned arrival time at Destination of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (c) the end to end journey of the Revised Base Service exceeds that of the Base Service by more than 10 miles; or
- (d) the imposition of more demanding length or weight restrictions for the Revised Base Service compared to the Base Service,

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 2 Disruption or a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

“Category 2 Disruption” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service;
- (b) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;
- (c) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;

- (d) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5;

provided that:

- (i) the relevant variation arises as a direct result of a Network Rail Early Notice Possession; and
- (ii) a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

“Category 3 Disruption” means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service and the access from the Origin or to the Destination of the Base Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route);
- (b) (i) there is no Revised Base Service due to the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
(ii) the Revised Base Service does not have an applicable gauge cleared route between the Origin and the Destination where:
 - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
 - (B) the Revised Base Service operates in whole, or in part, at the relevant location within this 60 hour period;
- (c) all or part of the goods planned to be carried by the Base Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination;
- (d) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;
- (e) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Base Service as shown in Schedule 5; or
- (f) the parties agree that there is a requirement for a specified number of the Train Operator’s train crew to acquire knowledge of any

diversionary route which may form part of the Revised Base Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Base Service,

provided that the relevant variation arises as a direct result of a Network Rail Early Notice Possession;

“Category 3 Disruption Trigger” means where the Train Operator incurs Actual Costs as a consequence of any Category 3 Disruption arising from a single Network Rail Early Notice Possession;

“Criteria” means the criteria set out in paragraph 3.32 of the document entitled “Final Conclusions - Compensation for Possessions” and published by ORR on 18 August 2008;

“Disruption Claim Notice” has the meaning specified in paragraph 3.4.2;

“Disruptive Event” has the meaning ascribed to it in Part H of the Network Code;

“Early Notice Possession” means any Restriction of Use of all or part of the Network notified in all material respects to a Train Operator in accordance with sections 4, 5 or 7 of the Rules of the Route prior to the Possession Notice Date;

“Electricity for Traction” has the meaning ascribed to it in Schedule 5;

“Enhanced Planned Disruption Sum” means £959¹;

“Freight Capacity Charge” has the meaning ascribed to it in Schedule 7;

“Late Notice Actual Costs” means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

¹ This figure is based on 2006/7 prices and will be revised to 2009/10 prices in line with the Final Determination.

(a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and

(b) any Late Notice Cancellation Sum or Service Variation Sum (as the case may be) due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

“Late Notice Actual Costs Claim Notice” has the meaning specified in paragraph 9.3;

“Late Notice Actual Costs Claim Trigger” means:

(a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or

(b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

“Late Notice Cancellation” has the meaning ascribed to it in Schedule 8;

“Late Notice Cancellation Sum” has the meaning ascribed to it in Schedule 8;

“Level One Right” has the meaning ascribed to it in Schedule 5;

“Level Two Right” has the meaning ascribed to it in Schedule 5;

“Modification Notice” means a notice given by ORR to the parties which sets out:

(a) the modifications to be made to the Specified Provisions and to any other provisions of this contract which require modification as a result of the modifications to the Specified Provisions to the extent that, in ORR’s opinion, it is necessary or appropriate for such modifications to be made having regard to the Criteria; and

(b) the date or dates from which the modifications referred to in paragraph (a) are to have effect;

“Network Rail Early Notice Possession” means any Early Notice Possession other than an Operator Early Notice Possession;

“Normal Planned Disruption Sum” means £360²;

“Operator Early Notice Possession” means any Early Notice Possession to the extent:

- (a) required as a result of any damage to the Network or Environmental Damage which in each case:
 - (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and
 - (ii) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network by the Train Operator; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
- (c) required in connection with a Network Change proposed by the Train Operator under Condition G3 of the Network Code.

“Original Service” means a Planned Service which:

- (a) is affected by a Disruptive Event as described in paragraph 4.1; or
- (b) is not able to operate because of the non-availability of any part of the Network as described in paragraph 5.1;

“Planned Disruption Sum” means a Normal Planned Disruption Sum or an Enhanced Planned Disruption Sum;

“Possession Notice Date” means, in respect of each Service, the day which is 84 days before the day on which the Service is Planned to depart its Origin;

² This figure is based on 2006/7 prices and will be revised to 2009/10 prices in line with the Final Determination.

“Relevant Cancellation” has the meaning specified in paragraph 9.1;

“Relevant Service Variation” has the meaning specified in paragraph 9.2;

“Revised Base Service” means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D3 or D4.8 of the Network Code;

“Round Trip” means a Service and any associated Empty Services and Ancillary Movements;

“Service Variation” has the meaning attributed to it in paragraph 7.1;

“Specified Provisions” means (a) the definitions of “Category 1 Disruption”, “Category 2 Disruption”, “Category 3 Disruption”, “Category 3 Disruption Trigger”, “Normal Planned Disruption Sum” and “Enhanced Planned Disruption Sum”, (b) paragraphs 3.1 to 3.3, (c) paragraphs 9.1, 9.2 and 9.4 and (d) the quantum of the Late Notice Cancellation Sum specified in Appendix 1 of Schedule 8;

“Variable Charge” has the meaning ascribed to it in Schedule 7; and

“Variable Costs” means the Train Operator’s costs which vary as a result of a Category 3 Disruption, a Relevant Cancellation or a Relevant Service Variation (as the case may be) arising directly from changes in train mileage including staff, maintenance, fuel or electricity costs, the Variable Charge and the Freight Capacity Charge.

1.2 *Interpretation*

References in this Schedule to a **“Service”**, except in the definition of “Round Trip”, shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

2 Payment

Subject to and in accordance with this Schedule 4 and paragraph 9 of Schedule 8, Network Rail shall, in respect of each Charging Period, pay or procure payment of:

- (a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (b) a Late Notice Cancellation Sum in respect of each Late Notice Cancellation and, where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (c) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption;
- (e) an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph 3.3.3 and in accordance with paragraph 3.3.3,

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum or one Cancellation Sum or one Late Notice Cancellation Sum in respect of an Applicable Service, whether under this Schedule 4 or under Schedule 8 or otherwise.

PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE

3 Disruption compensation

3.1 Category 1 Disruption

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for a Normal Planned Disruption Sum in respect of each Category 1 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or

- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.2 *Category 2 Disruptions*

Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3 *Category 3 Disruptions*

3.3.1 Subject to paragraphs 2, 3.4.1 and 3.5, Network Rail shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Base Service affected by a Category 3 Disruption which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) is a Level One Right or a Level Two Right which but for a Network Rail Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.

3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of an Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the

Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Actual Costs Claim Notice; or

- (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Network Rail shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Network Rail shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Network Rail Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator such Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

3.4 *Notification, Disruption Claim Notices and Actual Costs Claim Notices*

3.4.1 The Train Operator shall notify Network Rail of any Network Rail Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Network Rail Early Notice Possession.

3.4.2 The Train Operator must notify Network Rail of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a “**Disruption Claim Notice**”).

3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail:

- (a) no later than the day falling 56 days after the end of the occurrence of the Network Rail Early Notice Possession giving rise to a Category 3 Disruption; or
- (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),

whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant Network Rail Early Notice Possession (an “**Actual Costs Claim Notice**”).

3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Network Rail Early Notice Possession, provided that:

- (a) each such Actual Costs Claim Notice relates to a different period covered by the relevant Network Rail Early Notice Possession; and
- (b) no Actual Costs Claim Notice can be issued after the last day for serving notice specified under paragraph 3.4.3.

3.5 *Planned Disruption Sum on Round Trip*

Network Rail shall not be liable to the Train Operator for more than one Planned Disruption Sum in respect of any Round Trip.

3.6 *Early notice of potential Actual Cost claims*

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Network Rail Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Network Rail Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Network Rail and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Network Rail Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE

4 Services rescheduled following a Disruptive Event

4.1 *Establishing an Alternative Train Slot*

Where there is a Disruptive Event:

- (a) to the extent that there is appropriate capacity available on the relevant part of the Network; and
- (b) subject to Part H of the Network Code and the Railway Operational Code,

Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally Bid in respect of any Service which is affected by the Disruptive Event and notify the Train Operator of it.

4.2 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Spot Bid made by the Train Operator for the Alternative Train Slot which has been accepted by Network Rail); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

4.3 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 4.2(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Spot Bid.

4.4 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Spot Bid under paragraph 4.3, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with that Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the original Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

4.5 *Cancellation*

4.5.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 4.1;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3; or
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8 and paragraph 2 of Schedule 4 and paragraphs 8 and 9 of Schedule 8 shall apply.

4.5.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 4.2(a); or
- (b) accepted as a Spot Bid under paragraph 4.3,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

4.6 *Part H of the Network Code*

This paragraph 4 is subject to the rights and obligations of the parties under Part H of the Network Code and the Railway Operational Code.

5 Other variations to Planned Services

5.1 *Non-availability of a Service*

This paragraph 5 applies if, for any reason other than:

- (a) a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified in all material respects prior to the Possession Notice Date; and
- (b) the circumstances envisaged by paragraph 4,

Network Rail nominates that any part of the Network will not be available for a Planned Service to operate at the Planned time and such non-availability is:

- (i) Attributable to Network Rail (as defined in Schedule 8); and
- (ii) known about in sufficient time for an alternative Service to be Bid into the Working Timetable as a new Planned Service.

5.2 *Establishing an Alternative Train Slot*

To the extent that there is appropriate capacity available on the relevant part of the Network, and subject to Parts D and H of the Network Code and the Decision Criteria, Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally Bid and notify the Train Operator of it.

5.3 *Train Operator's response*

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 5.2, the Train Operator shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Train Operator shall be treated as a Spot Bid made by the Train Operator for the Alternative Train Slot which has been accepted by Network Rail); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

5.4 *Rejection of Alternative Train Slot*

If the Train Operator reasonably rejects under paragraph 5.3(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Spot Bid.

5.5 *Measure of performance*

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Spot Bid under paragraph 5.4, then:

- (a) Network Rail shall permit the Train Operator to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

5.6 *Cancellation*

5.6.1 *Where:*

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 5.2;
- (b) the Train Operator rejects the Alternative Train Slot nominated by Network Rail under paragraph 5.3(b) and does

not propose a different Alternative Train Slot under paragraph 5.4; or

- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 5.4 and this is not accepted by Network Rail,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8, paragraph 2 of Schedule 4 shall apply and Network Rail shall be liable for the Late Notice Cancellation Sum in respect of that Cancellation in accordance with paragraphs 8.2.3 and 9 of Schedule 8.

5.6.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 5.3(a); or
- (b) accepted as a Spot Bid under paragraph 5.4,

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE

6 Restrictions of Use before Possession Notice Date

Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Network Rail nominates that any part of the Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Rules of the Route which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Network Rail shall have no liability to the Train Operator under Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

PART 5 – SERVICE VARIATION

7 **Service Variation**

7.1 *Service Variation*

For the purposes of this Schedule 4, “**Service Variation**” means a variation to any Service which:

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Network Rail (as defined in Schedule 8); and
- (b) has one or more of the following effects:
 - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;
 - (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;
 - (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
 - (iv) the use of at least one additional locomotive for the Diverted Service over the number for the Original Service or use of a diesel locomotive for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for that Original Service as shown in Schedule 5;
 - (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours;
 - (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours; and
 - (vii) while the Train Operator has Bid for the original Train Slot in accordance with Part D of the Network Code, the nomination

and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Spot Bid because an act or omission of Network Rail resulted in the original Bid not being Planned in accordance with Part D.

7.2 Network Rail liability

Subject to paragraphs 7.3 and 7.4, Network Rail shall be liable in any Charging Period for a Service Variation Sum in respect of each Service Variation relating to a Service Planned to depart its Origin in that Charging Period.

7.3 Service Variation Sum on Round Trip

Network Rail shall not be liable to the Train Operator for more than one Service Variation Sum in respect of any Round Trip.

7.4 Service Variation / Cancellation

Network Rail shall not be liable to the Train Operator for a Service Variation Sum if, following the Service Variation, the Train Operator is entitled to a Late Notice Cancellation Sum in respect of the Diverted Service.

PART 6 – MODIFICATION PROVISION

8. Modifications to Specified Provisions

8.1 If at any time after 1 April 2010:

- (a) and before 1 October 2010, Network Rail determines that the Criteria for making modifications to the Specified Provisions have been met, it shall notify ORR (copied to the Train Operator) promptly in accordance with paragraph 8.3; or

- (b) and before 1 August 2010, the Train Operator considers that the Criteria for making modifications to the Specified Provisions may have been met, it shall notify Network Rail (with a copy to ORR) and Network Rail shall determine whether the Criteria have been met and whether it should make a reference to ORR pursuant to paragraph 8.1(a).
- 8.2 Without prejudice to paragraph 8.1(a), Network Rail shall at any time after 1 April 2010 but before 1 October 2010 provide a notice to ORR and the Train Operator in accordance with paragraph 8.3 setting out its determination as to whether or not the Criteria for making modifications to the Specified Provisions have been met and where it determines that the Criteria have been met it shall notify ORR under paragraph 8.1(a) at the same time.
- 8.3 Any notice issued by Network Rail under paragraph 8.1(a) and/or 8.2 shall set out its reasons, supported by evidence either:
 - (a) explaining why it has determined that the Criteria have been met; or
 - (b) explaining why it has determined that the Criteria have not been met.
- 8.4 If ORR disagrees with Network Rail's determination notified to ORR pursuant to paragraph 8.2, ORR shall be entitled to proceed, following such consultation as it considers appropriate with Network Rail and the Train Operator, as if Network Rail had determined that the Criteria have been met and made a notification to ORR pursuant to paragraph 8.1(a).
- 8.5 ORR shall not be entitled to proceed to determine to what extent modifications by means of a Modification Notice shall be made unless it has first consulted the parties and such other persons, if any, as it considers appropriate (including any other operator whose access agreement in relation to track includes a similar provision to this paragraph 8) and taken into account their representations to determine whether it is appropriate to proceed.

8.6 If at any time following receipt of a notice pursuant to paragraphs 8.1 or 8.2 ORR gives notice to either or both of the parties that it requires from either or both of them any information to inform its determination as to what modifications should be made to the Specified Provisions and any other provisions of this contract which require modification as a result of the modifications to the Specified Provisions:

(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 any information requested by ORR in accordance with paragraph 8.6(a) and has not provided ORR with an explanation which is satisfactory to ORR for its failure to do so, taking into account, to the extent applicable, any revised timescales within which that party has agreed with ORR that it 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 that matter without the information in question and the party in default shall have no grounds for complaint on the basis that ORR's decision did not take into account the information requested but not supplied.

8.7 This contract shall have effect with the modifications specified in a Modification Notice from the date specified by ORR in that notice. A Modification Notice shall not have retrospective effect.

8.8 No Modification Notice shall have effect unless:

(a) ORR has first consulted the parties and such other persons, if any, as it considers appropriate in relation to the terms of the proposed Modification Notice;

(b) in the consultations referred to in paragraph 8.8(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 the contents and terms of the proposed Modification Notice;

- (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 proposed Modification Notice;
- (d) ORR has notified the consultees as to its conclusions in relation to the proposed Modification Notice (including by providing to each consultee a copy of the text of the proposed Modification Notice) and its reasons for those conclusions; and
- (e) ORR has served a modification notice, in substantially similar terms to the Modification Notice (save to the extent ORR has set out during its consultation process its reasons for adopting a different approach) on any operator whose access agreement in relation to track includes a similar provision to this paragraph 8 on or about the same date.

PART 7 – LATE NOTICE ACTUAL COSTS CLAIMS

9. *Late Notice Actual Costs Claims*

9.1 Late Notice Actual Costs Claim arising from Relevant Cancellation

If, pursuant to paragraph 5.6.1, Network Rail is liable for a Late Notice Cancellation Sum in respect of a Cancellation (a “**Relevant Cancellation**”), and:

- (a) either:

- (i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or
 - (ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
 - (iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Cancellation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

9.2 Late Notice Actual Costs Claim arising from Relevant Service Variation

If, pursuant to paragraph 7, Network Rail is liable for a Service Variation Sum in respect of a Service Variation (other than a Service Variation which arises from a variation to a Service which the Train Operator has accepted under paragraph 4) (a “**Relevant Service Variation**”), and:

- (a) either:
 - (i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:
 - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and

- (B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or
 - (ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or
 - (iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Network Rail has agreed to provide Electricity for Traction for the Original as shown in Schedule 5; or
 - (iv) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

9.3 Late Notice Actual Costs Claim Notice

In respect of a claim for Late Notice Actual Costs arising under paragraphs 9.1 or 9.2 above, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Network Rail no later than the day falling 56 days after the occurrence of the Relevant Cancellation or Relevant Service Variation (as the case may be), and such claim must include details of the estimate of the Late Notice Actual Costs which are attributable to the Relevant Cancellation or Relevant Service Variation (as the case may be) (a "**Late Notice Actual Costs Claim Notice**").

9.4 Late Notice Actual Costs Claim Process

Within 56 days (or such other period as the parties may agree) of receipt by Network Rail of a Late Notice Actual Costs Claim Notice, Network Rail shall notify the Train Operator that either:

(a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall also pay such Late Notice Actual Costs to the Train Operator within 56 days of receipt by Network Rail of the relevant Late Notice Actual Costs Claim Notice; or

(b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Network Rail shall:

(i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

(ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or

(c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Network Rail shall:

(i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are

concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and

- (ii) pay to the Train Operator such Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).