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17 July 2008

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Dear consultee

Periodic Review 2008: licence review - consultation on financial conditions

Introduction

1. The 2008 periodic review (PR08) will determine Network Rail's regulated outputs, revenue requirement and access charges for control period 4, which will run from 1 April 2009 to 31 March 2014. We intend to publish our final determinations on the overall revenue requirement and outputs in October 2008, with final levels of individual access charges and associated price lists approved by us in December 2008 following calculation by Network Rail.
2. The June 2008 draft determinations document published on 5 June 2008 included our proposals on the revenue requirement and the wider regulatory framework, including the financial framework within which Network Rail will operate. This included financial issues that affect the financial conditions of Network Rail's network licence. Alongside the draft determinations, we also consulted on a package of changes we are proposing to make to strengthen Network Rail's licence and outlined the high level issues that affect the financial licence conditions.
3. The high level issues that affect the financial conditions of Network Rail's include:
 - (a) the need to take appropriate account of Network Rail's corporate/industry status and relationship with government, for example consideration of the detailed mechanics of the indebtedness part of the financial ring-fence condition and how the Government is referred to, in particular in the definition of a cross-default obligation;
 - (b) any appropriate changes required as a result of Network Rail's unsupported debt proposals, for example the restriction of the use of the financial indemnity mechanism (FIM) and removing the current limits on financial indebtedness in the licence; and

- (c) updating the financial ring-fence to reflect best practice, for example the de minimis threshold and sufficiency of resources statement could be better defined.

4. This letter continues the consultation on the financial conditions and in particular includes in detail the proposed changes to the relevant licence conditions. The revised parts of the licence are included in Annex A and the changes to Network Rail's licence, as against the version published on 5 June 2008, are included in Annex B.

5. We have reviewed the licence conditions used by other utility regulators and consider that Network Rail's current financial licence conditions are largely in line with best practice. However, we think there are some areas that could be improved or clarified. The main issues are discussed below. In addition, we have also made other changes to improve or clarify the financial conditions, for example changes to the members of Network Rail's group that some of the requirements of the financial conditions will apply. These changes can be seen in Annex B.

6. In addition, following the introduction of the Companies Act 2006 we have, where appropriate, replaced the references to Companies Act 1985 with the Companies Act 2006.

Restriction of the use of the FIM and removal of the limitations on financial indebtedness

7. The June 2008 draft determinations document said that we continue to support Network Rail's intention, as set out in its strategic business plan update in April 2008, to restrict the use of the FIM¹ from the start of CP4 and raise additional debt without the support of the government guarantee. We therefore intend to include a condition in Network Rail's licence that restricts Network Rail from using the FIM for anything other than refinancing existing FIM backed debt after 31 March 2009. This restriction would also cover the facility agreement currently in existence between Network Rail, the Secretary of State and Network Rail Holdco Limited (generally referred to as the Tranche A facility).

8. Annex A includes the new financial indebtedness licence condition. On the basis that the use of the FIM will be restricted, then from 1 April 2009 we will no longer require the limitations on financial indebtedness contained in the current licence condition 29 because raising unsupported debt will introduce a hard budget constraint on Network Rail and enable greater external scrutiny of its performance. It is therefore proposed that the present limitations on Network Rail's financial indebtedness contained in the current licence condition 29 be removed from the licence. We have also, where appropriate, amended the definition of Network Rail Infrastructure Finance to take account of Network Rail's proposals to raise additional debt without the support of the government guarantee.

¹ Network Rail's parent company is a company limited by guarantee and Network Rail benefits from a government guarantee of its debt through the FIM.

Restriction on holding investments

9. Network Rail is restricted from holding investments in certain entities. We are proposing to clarify these requirements. This includes allowing Network Rail to use a subsidiary company to raise finance for the network business as in some situations it may be more appropriate to raise finance outside of the network business. These requirements are similar to those in other regulated industries.

Credit rating

10. We are proposing to revise Network Rail's requirement to maintain a credit rating so that it no longer refers to Network Rail as an issuer of debt as Network Rail may organise its financing in such a way that, for example, a subsidiary company raises the debt.

11. It is important that the credit rating Network Rail maintains is on a stand alone basis independent of the FIM, otherwise the credit rating it receives will not solely reflect the independent financial and operational characteristics of the licence holder, but will also reflect the benefit it receives from the government guarantee.

Sufficiency of resources

12. Network Rail's licence requires it to confirm to us that it has adequate management resources, financial resources and financial facilities to fulfil its obligations. The June 2008 draft determinations document said that we intend to require Network Rail to publish forward looking financial ratios. We will require these to be published on a periodic basis, including as part of the annual sufficiency of resources statement. We will publish shortly a document that will show the financial information that we will require Network Rail to publish and these requirements will be included in the Regulatory Accounting Guidelines (RAG's). We have also revised the definition of resources to be consistent with the requirements in other similar regulated industries so it now includes personnel, fixed and moveable assets, rights, licences, consents, and facilities.

Cross-default obligation

13. Network Rail's licence includes some restrictions that are designed to ensure that where Network Rail has entered into an arrangement or agreement, its interests cannot be affected by a default by another party. Network Rail's current licence does not include the Department for Transport and Transport Scotland as bodies that can cause such a cross-default obligation. We do not think that this is appropriate, as the Department for Transport and Transport Scotland should, where possible, be treated in the same way as any other external organisation. Therefore, we are proposing that the Department for Transport and Transport Scotland should no longer be excluded from the definition of organisations that can cause a cross-default. This will mean that we may need to provide a specific consent for existing cross-default obligations that are currently in place in relation to the FIM.

14. There is also a term in Network Rail's licence that allows it, in certain circumstances, to retain cross-default obligations in existence at 1 January 2003. We consider that the inclusion of this term was on a transitional basis. Given that it is now six years since Network Rail acquired Railtrack, Network Rail should be able to identify any arrangements that have a cross-default obligation and if retaining those arrangements is still appropriate, we will consent to them.

Level of de minimis activity

15. The licence restricts Network Rail from carrying out activities outside its core network business without our consent apart from certain activities that are de minimis. The present de minimis part of the licence condition is not as clear as it could be. We are proposing to revise it so that it is clear that the maximum investment of £100m (in February 2004 prices) in non-core activities is cumulative (instead of an annual limit). We are also proposing to include a requirement related to turnover, which will ensure that activities that do not need a large investment but can nonetheless create a large risk are more appropriately covered by the restrictions.

16. We are proposing to retain the present limit on investments of £100m, and we are proposing that the turnover limit should be £100m (in February 2004 prices). This is similar to the requirements in other similar regulated industries and provides appropriate protections against the financial risks associated with activities outside the core business. We are also considering the treatment of land disposals in the licence and whether they can be included as an activity that can be treated as de minimis but at the moment we have not proposed any changes to Network Rail's network licence.

Payment condition

17. Network Rail can, with certain restrictions, enter into transactions with other group companies. The financial ring-fence in other regulated industries contains a restriction on how these transactions are financed as transactions between group companies are less transparent and can potentially include terms that transfer undue risk to the network business. Therefore, to protect the network business, other similar regulators have restricted how intra-group transactions can be entered into. We are therefore proposing to introduce a similar payment condition into Network Rail's licence in order to protect the network business.

Treatment of Network Rail Infrastructure Finance (NRIF)

18. Network Rail's licence contains a restriction on the activities that NRIF can engage in so that Network Rail is protected from undue risk. We are proposing, in order further to protect Network Rail from undue risk, that these restrictions are extended so that the restriction on the investments that NRIF can make also applies to NRIF

Definition of business

19. The current licence is not as clear as it could be in defining what activities Network Rail can carry on without placing itself in breach of its licence. As currently drafted, the permitted scope of Network Rail's activities is set by reference to concepts such as "Network Business", "Permitted Business" "Permitted Non-Network Business" and "permitted purpose". "Permitted Non-Network Business" covers activities transferred to Network Rail pursuant to the Railtrack transfer scheme. We consider that it would be clearer if the activities that Network Rail is entitled to carry on were expressed as:

- (a) network business;
- (b) de minimis business; and

- (c) business for which we have granted a specific consent for Network Rail to carry out the activity.

20. On this basis, we are proposing to remove the definitions of “Permitted Business”, “Permitted Non-Network Business”, “Railtrack Transfer Scheme” and “permitted purpose” from the licence. We consider that the inclusion of activities transferred under the Railtrack transfer scheme in the definition of “Permitted Non-Network Business” was done on a transitional basis on the creation of Network Rail. Given the length of time since then we think Network Rail should be able to identify which activities fall under this category and if carrying them out is still appropriate, we will consent to them.

Benefit sharing mechanism

21. The proposed benefit sharing arrangements discussed in the June 2008 draft determinations document contemplate payments to be made by Network Rail, which could be argued to be outside the limits of the indebtedness that Network Rail’s licence allows it to incur. At present, we do not think that we need to change the licence. Where appropriate, in accordance with our policy on this issue, we could consent to these payments if necessary.

Regulatory accounts

22. Network Rail’s licence requires it to maintain such accounting records as are necessary to enable Network Rail to properly prepare the regulatory financial statements. Being able to properly prepare regulatory financial statements is not just about the maintenance of accounting records. Therefore, it is appropriate for this requirement to be widened so that:

- (a) Network Rail has to maintain such accounting records, other records and reporting arrangements as are necessary to enable the licence holder to properly prepare the regulatory financial statements; and
- (b) Network Rail shall maintain all systems of control and other governance arrangements that ensure the information collected and reported to ORR is in all material respects accurate, complete and is fairly presented and that all control and other governance arrangements are kept under regular review by the directors of the licence holder so that they remain effective for this purpose.

23. These requirements are similar to those in other similar regulated industries and should ensure that the information provided by Network Rail will be of an appropriate quality.

24. The licence allows us to issue RAG’s from time to time. Our working arrangement with Network Rail is to issue the RAG’s before the end of the financial year to which they relate. In the future, we will endeavour to issue the RAG’s before the start of the financial year to which they relate.

25. We have also amended the definition of what can be included in the RAG’s so that it is clear that we can require other information to be provided and/or published in order to monitor the licence holder’s financial performance and financial position or assist in the determination of the licence holder’s access charges.

Financial information

26. The current licence condition requires Network Rail to publish information required by the listing rules of the Financial Services Authority. We are interested in your views on whether this requirement is appropriate.

Summary of proposed changes

27. Annex A includes:

- (a) Interpretation section of the licence. The proposed changes to this section reflect the introduction of the Companies Act 2006 and the changes to the definition of Network Rail's business as discussed above.
- (b) Licence condition 3 – Financial Indebtedness. We are proposing to remove the requirements of the present financial indebtedness condition and introduce a new licence condition that restricts the FIM and Tranche A as discussed above.
- (c) Licence condition 4 – Financial ring-fence. The proposed changes to this condition are referred to above.
- (d) Licence condition 5 – Interests in rolling stock and train operators. The proposed changes to this condition reflect the introduction of the Companies Act 2006.
- (e) Licence condition 11 – Regulatory accounts. The proposed changes to this condition are referred to above.

28. We welcome comments on any issue raised in this letter. We will take them into account in taking forward our final conclusions on the Periodic Review 2008 and in implementing the outcome of the review of Network Rail's network licence. If you would like to discuss any of the issues in this letter, please contact Carl Hetherington (Head of Regulatory Finance) on 0207 282 2110.

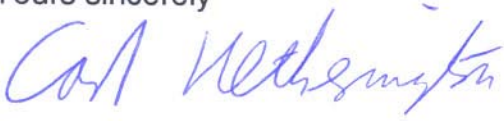
29. Please can you send your views on the issues we have raised in electronic format (or if not possible, in hard-copy format) by **Thursday 4 September 2008** to:

Linda Smith
Office of Rail Regulation
1, Kemble Street
London WC2B 4AN
Tel: 020 7282 2066
Email: Linda.Smith@orr.gsi.gov.uk

30. It would be helpful if your response is sent in electronic format. In addition, you should indicate clearly if you wish all or part of your response to remain confidential to the Office of Rail Regulation (ORR). Otherwise, we will make it available in our library, publish it on our website and we may quote from it. Where you make a response in confidence, you should attach a summary, excluding the confidential information, which can be treated as above. We may also publish the names of respondents in future documents or on our website, unless a respondent indicates that they wish their name to be withheld.

31. Copies of this document can be found in the ORR library and on the ORR website (www.rail-reg.gov.uk).

Yours sincerely

A handwritten signature in blue ink that reads "Carl Hetherington". The signature is written in a cursive style with a prominent initial "C".

Carl Hetherington

ANNEX A

Revised sections of Network Rail's licence

Interpretation

1. In this licence:

- “access charge” means any amount payable or proposed to be paid under an access contract or an installation access contract.
- “affiliate” in relation to the licence holder means any holding company or subsidiary of the licence holder or any subsidiary of a holding company of the licence holder, in each case within the meaning of sections 1159, 1160 and Schedule 6 of the Companies Act 2006.
- “control” shall be construed in accordance with sub-sections (2) and (4) to (6) of section 416 of the Income and Corporation Taxes Act 1988 with the following modifications namely:
- (i) for the words "the greater part" wherever they occur in sub-section (2) there shall be substituted the words "30 per cent or more"; and
 - (ii) in sub-section (6), for the word "may" there shall be substituted the word "shall", the words from "and such attributions" onwards shall be omitted and in the other provisions of that sub-section any reference to an associate of a person shall be construed as including only a relative of his (as defined by section 417(4) of that Act), a partner of his and a trustee of a settlement (as defined by section 681(4) of that Act) of which he is a beneficiary.
- “funder” means any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) and each Passenger Transport Executive or other person who provides money by way of grant or loan with the primary purpose of securing the provision of services relating to railways.
- “licence holder's network” means the network of which the licence holder is the operator pursuant to this licence.
- “licensed activities” means things authorised to be done by the licence holder in its capacity as operator of a network or trains pursuant to this licence.
- “LTUC” means the London Transport Users' Committee and any successor to LTUC which performs the same functions.

“network”	includes, where the licence holder has any estate or interest in, or right over a station or light maintenance depot, such station or light maintenance depot.
“Network Business”	<p>means</p> <ul style="list-style-type: none"> (i) the business of providing and operating the licence holder's network, including the maintenance, renewal, replacement, improvement, enhancement and development of the network; and (ii) any ancillary service related to the business and activities in paragraph (i); <p>and, without limitation, includes:</p> <ul style="list-style-type: none"> (a) the purpose of financing the business in paragraph (i) and the services in paragraph (ii); and (b) any payment or transaction lawfully made or undertaken by the licence holder for a purpose within conditions 4.14(b)(i) to (vii).
“ORR”	means the Office of Rail Regulation.
“related undertaking”	in relation to the licence holder means any undertaking in which the licence holder has a participating interest (and for this purpose "undertaking" has the meaning given by section 1161 of the Companies Act 2006, and "participating interest" is to be construed in accordance with paragraph 8 of Schedule 8 to The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008.
“RPC”	means the Rail Passengers' Council and any successor or delegated body which performs the functions of the RPC.
“TfL”	means Transport for London.

Conditions

3 Financial indebtedness

3.1. The licence holder shall not, and shall procure that any subsidiary of the licence holder, Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance shall not, incur financial indebtedness which is supported by, or otherwise incurred in reliance on, either:

- (a) any state financial indemnity; or
- (b) the facility agreement,

except as provided for in condition 3.2.

3.2 Notwithstanding condition 3.1, the licence holder, any subsidiary of the licence holder, Network Rail Infrastructure Finance, and any subsidiary of Network Rail Infrastructure Finance, shall be entitled to incur financial indebtedness supported by, or otherwise incurred in reliance on, any state financial indemnity or the facility agreement in any of the following circumstances:

- (a) where it is incurred pursuant to a contract assumed before or on 31 March 2009; or
- (b) where it is a refinancing of financial indebtedness incurred before or on 31 March 2009.

3.3 For the purpose of condition 3.2, refinancing shall mean any transaction by which the terms of any contract for financial indebtedness are amended or replaced (whether or not on the same terms as the existing contract) by a new contract (whether by novation or otherwise), excluding any transaction which increases the aggregate amount of the financial indebtedness of the licence holder, any subsidiary of the licence holder, Network Rail Infrastructure Finance, and any subsidiary of Network Rail Infrastructure Finance.

3.4 In this condition:

“facility agreement” means the agreement described as the OpCo Facility dated on or about 3 October 2002 made originally between Railtrack plc, the Strategic Rail Authority and Network Rail Holdco Limited and now, by virtue of a transfer scheme, existing between the licence holder, the Secretary of State and Network Rail Holdco Limited

“financial indebtedness”

means any financial indebtedness of the relevant entity, including but not limited to:

- (a) moneys borrowed;
- (b) any acceptance credit;
- (c) any bond, note, debenture, loan stock or other similar instrument;
- (d) any redeemable preference share;
- (e) any finance or capital lease;
- (f) receivables sold or discounted;
- (g) the acquisition cost of any asset to the extent payable after is acquisition or possession by the party liable where the deferred payment is arranged primarily as a method of raising finance or financing the acquisition of that asset;
- (h) any derivative transaction protecting against or benefiting from fluctuations in any rate or price;
- (i) any other transaction (including any forward sale or purchase agreement) which has the commercial effect of a borrowing;
- (j) any counter-indemnity obligation in respect of any guarantee, indemnity bond, letter of credit or any other instrument issued by a bank or financial institution;
- (k) any accrued but unpaid interest, fees, costs and expenses incurred under or as part of the raising of financial indebtedness; and
- (l) any guarantee, indemnity or similar assurance against financial loss of any person in respect of any item referred to in paragraphs (a) to (k) above.

and for the purposes of this condition 3:

- (a) financial indebtedness:

- (i) is calculated by reference to the principal amount outstanding of any such financial indebtedness (and no mark to market value will be used to calculate its amount);
 - (ii) excludes any financial indebtedness between the licence holder or any of the licence holder's subsidiaries and Network Rail Infrastructure Finance or any of Network Rail Infrastructure Finance's subsidiaries;
 - (iii) excludes any financial indebtedness between the licence holder and any of its subsidiaries;
 - (iv) excludes any financial indebtedness between any of the licence holder's subsidiaries;
 - (v) excludes any financial indebtedness between Network Rail Infrastructure Finance and any of its subsidiaries;
 - (vi) excludes any financial indebtedness between any of Network Rail Infrastructure Finance's subsidiaries; and
 - (vii) excludes any derivative transaction other than as set out in paragraph (h) above;
- (b) where financial indebtedness denominated in a foreign currency is hedged by a derivative of the type set out in paragraph (h) above, the principal amount outstanding shall be calculated by reference to the sterling amount payable under the relevant derivative; and
- (c) total financial indebtedness shall be calculated net of any cash or cash equivalents held by the licence holder and Network Rail Infrastructure Finance or their subsidiaries.

“Network Rail Infrastructure Finance”

means Network Rail Infrastructure Finance plc.

“state financial indemnity”

means:

- (a) the guarantee provided by the Secretary of State in 2004, which is available until 2052, having the

effect that any debt holders would be indemnified against any shortfall in debt service payments by the licence holder, by any subsidiary of the licence holder, by Network Rail Infrastructure Finance or by any subsidiary of Network Rail Infrastructure Finance whatever the cause; and

- (b) any other financial indemnity, guarantee or other form of financial support which has been or will be offered or made available by the Secretary of State or by any other funder and which has similar effect to that described in paragraph (a).

4 Financial ring-fence

Restriction of activities

4.1 The licence holder shall not, and shall procure that its subsidiary undertakings shall not, conduct any business or carry on any activity other than:

- (a) the Network Business;
- (b) business or activities which the licence holder and any subsidiary of the licence holder are entitled to conduct or carry on under the *de minimis* provisions under conditions 4.6 to 4.9; and
- (c) any other business or activity of the licence holder for which ORR has given its written consent under this condition 4.

4.2 The licence holder shall, unless ORR otherwise consents:

- (a) procure from Network Rail Infrastructure Finance an undertaking or undertakings in favour of the licence holder which shall provide that Network Rail Infrastructure Finance will not conduct any business or carry on any activity other than for the purpose of financing:
 - (i) the Network Business;
 - (ii) business or activities which the licence holder and any subsidiary of the licence holder are entitled to conduct or carry on under the *de minimis* provisions under conditions 4.6 to 4.9; or
 - (iii) any other business or activity of the licence holder for which ORR has given written consent under this condition 4,

and shall ensure that all such undertakings, or undertakings with like effect, remain in force for so long as the licence holder remains the holder of this licence; or

- (b) otherwise procure that Network Rail Infrastructure Finance does not conduct any business or carry on any activity other than for the purpose of financing those matters referred to in conditions 4.2(a)(i), (ii) and (iii).

- 4.3 The licence holder shall not, and shall procure that its subsidiary undertakings and Network Rail Infrastructure Finance and its subsidiary undertakings shall not, acquire or retain, without the prior written consent of ORR, shares or other investments of any kind in any related undertaking after the relevant date except:
- (a) shares or other investments in a body corporate which is a subsidiary of the licence holder and has been incorporated by it solely for the purpose of raising finance for the Network business;
 - (b) shares or other investments in a body corporate which conducts business only for the purposes of the Network Business; and
 - (c) investments acquired in the usual and ordinary course of the licence holder's treasury management operations, subject to the licence holder maintaining in force, in relation to those operations, a system of internal controls which complies with best corporate governance practice as required (or, in the absence of any such requirement, recommended) from time to time for a company whose ordinary shares are for the time being admitted to the Official List of the UK Listing Authority (or a successor body).
- 4.4 For the purposes of this condition 4, any reference to an obligation on the licence holder or Network Rail Infrastructure Finance to procure an undertaking is to be read as requiring either:
- (a) a legally enforceable undertaking; or
 - (b) a legally enforceable undertaking forming part of a contract to which the licence holder or, where applicable, Network Rail Infrastructure Finance is a party.
- 4.5 ORR, in deciding whether to give its consent under this condition 4, may have regard, among other matters, to the risks imported to the Network Business by the activity in question and the benefits accruing, or likely to accrue, to the Network Business out of that activity.

De minimis

4.6 Where ORR has not given its consent under conditions 4.1 to 4.3, the licence holder and any subsidiary of the licence holder shall, notwithstanding conditions 4.1 and 4.3, be entitled to conduct any business and to carry on any activity which is not for the purposes of the Network Business (“relevant other business”) as long as such relevant other business is *de minimis* business, is not and does not involve the disposal of land, and does not infringe any condition of any consent given by ORR under this licence.

4.7 The relevant other business will be “*de minimis* business” if both:

(a) the aggregate turnover of all the relevant other business carried on by the licence holder and the equity share of the aggregate turnover of all the relevant other business carried on by all the licence holder’s affiliates or related undertakings does not in any period of twelve months commencing on 1 April of any year exceed the indexed turnover limit for that period of twelve months;

and

(b) the aggregate amount of all investments (determined in accordance with condition 4.8) made by the licence holder in relevant other business, carried on by the licence holder and all affiliates or related undertakings does not at any time exceed the indexed investment limit.

4.8 For the purpose of condition 4.7:

(a) the “indexed turnover limit” in respect of any period of twelve months means the sum of £100 million plus the amount that is produced when £100 million is multiplied by the percentage change (whether expressed as a positive or negative figure) between the RPI as published or determined in respect of February in that financial year and as published or determined in respect of February 2004;

(b) the “indexed investment limit” means the sum of £100 million plus the amount that is produced when £100 million is multiplied by the percentage change (whether expressed as a positive or negative figure) between the RPI as published or determined in respect of the point in time relevant for the purpose of condition 4.7(b) and as published or determined in respect of February 2004;

- (c) “equity share” means, in relation to any shareholding, the nominal value of the equity shares held by the licence holder in an affiliate or related undertaking expressed as a percentage of the nominal value of the entire issued equity share capital of that affiliate or related undertaking;
- (d) “investment” means any form of financial support or assistance given by or on behalf of the licence holder for the relevant other business of the licence holder or an affiliate or related undertaking whether on a temporary or permanent basis and includes any commitment to provide any such support or assistance in the future. At any point in time, the amount of the investment is the sum of:
- (i) the value at which such investment was included in the audited historical cost balance sheet of the licence holder at its latest accounting reference date to have occurred before the date on which this condition takes effect in this licence (or, where the investment was not so included, zero);
 - (ii) the aggregate gross amount of all expenditure (whether of a capital or revenue nature) howsoever incurred by the licence holder in respect of such investment in all completed accounting reference periods since such accounting reference date;
 - (iii) all commitments and liabilities (whether actual or contingent) of the licence holder relating to such investments outstanding at the end of the most recently completed accounting reference period,
- less the sum of the total gross amount of all income (whether of a capital or revenue nature and however received by the licence holder) in respect of such investment in all completed accounting reference periods since the accounting reference date referred to in condition 4.7(a).

4.9 ORR may in writing designate any business or activity as not being a *de minimis* business for the purpose of the limitations in conditions 4.6 to 4.8. Such designation may be subject to conditions.

Prohibition on cross-default, indebtedness and intra-group transactions

- 4.10 The licence holder shall not, and shall procure an undertaking or undertakings that its subsidiary undertakings and Network Rail Infrastructure Finance and its subsidiary undertakings shall not, without the prior written consent of ORR:
- (a) enter into an agreement or arrangement incorporating a cross-default obligation; or
 - (b) continue or permit to remain in effect any agreement, commitment or arrangement incorporating a cross-default obligation subsisting on the relevant date.
- 4.11 Condition 4.10 shall not prevent the licence holder from giving any guarantee permitted by and in compliance with the requirements of condition 4.12(a).
- 4.12 Save with the prior written consent of ORR, the licence holder shall not, and shall procure an undertaking or undertakings that its subsidiary undertakings and Network Rail Infrastructure Finance and its subsidiary undertakings shall not:
- (a) create or continue or permit to remain in effect any mortgage, charge, pledge, lien or other form of security or encumbrance whatsoever, undertake any indebtedness to any other person or guarantee any liability or obligation of another person other than on an arm's length basis, on normal commercial terms, for the purpose of the network business and (where relevant) in accordance with condition 7; or
 - (b) transfer, lease, license or lend any sum or sums, asset, right or benefit to any affiliate or related undertaking of the licence holder otherwise than by way of:
 - (i) a dividend or other distribution out of distributable reserves, subject to conditions 4.30 to 4.33;
 - (ii) repayment of capital;
 - (iii) payment properly due for any goods, services or assets provided on an arm's length basis and on normal commercial terms;

- (iv) a transfer, lease, licence or loan of any sum or sums, asset, right or benefit on an arm's length basis and on normal commercial terms and made in compliance with the payment condition referred to in 4.13;
- (v) repayment of any loan or payment of any interest on a loan not prohibited by condition 4.12(a);
- (vi) payments for the surrender of group corporation tax relief or for the surrender of advance corporation tax calculated on a basis not exceeding the value of the benefit received; or
- (vii) an acquisition of shares or other investments in conformity with the restriction on the acquisition of shares or other investments set out in condition 4.3 of this licence, made on an arm's length basis and in accordance with normal commercial terms,

and provided always that (where relevant) such transfer, lease, licence or loan is made in accordance with condition 7.

4.13 The payment condition referred to in paragraph 4.12 is that the consideration due in respect of the transaction in question is paid in full when the transaction is entered into unless either:

- (a) the counter-party to the transaction has and maintains until payment is made in full an investment grade issuer credit rating; or
- (b) the obligations of the counter-party to the transaction are fully and unconditionally guaranteed throughout the period during which any part of the consideration remains outstanding by a guarantor which has and maintains an investment grade issuer credit rating.

Sufficiency of resources

4.14 The licence holder shall at all times act in a manner calculated to secure that it has available to itself such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities, on such terms and with all such rights, as shall ensure that it is at all times able to:

- (a) properly and efficiently carry on the Network Business; and
- (b) comply in all respects with its obligations under the Act and this licence.

Credit rating

- 4.15 The licence holder shall use all reasonable endeavours to ensure that the licence holder maintains at all times on a stand alone basis an investment grade issuer credit rating.
- 4.16 For the purpose of condition 4.15 “investment grade issuer credit rating” means an issuer credit rating recognised as investment grade by Standard and Poor’s Rating Group (or any of its subsidiaries), by Moody’s Investors Service Inc. (or any of its subsidiaries) or by Fitch Ratings Limited (or any of its subsidiaries) or by any other reputable credit rating agency which, in ORR’s opinion, notified in writing to the licence holder, has comparable standing in the United Kingdom and the United States of America.

Undertakings from ultimate holding company and from Network Rail Infrastructure Finance

Undertaking not to put the licence holder in breach of its licence

- 4.17 The licence holder shall, unless ORR otherwise consents, procure from each company and any other person which is at any time an ultimate holding company of the licence holder an undertaking in favour of the licence holder.
- 4.18 The undertaking referred to in condition 4.17 shall provide that any such ultimate holding company will refrain from any action, and will procure that any person (including without limitation a corporate body) that is a subsidiary of, or is controlled by, the ultimate holding company (other than the licence holder and any subsidiary of the licence holder) will refrain from any action, which would then be likely to cause the licence holder to breach any of its obligations under the Act or this licence.
- 4.19 The undertaking referred to in condition 4.17 shall be in a form specified by ORR.
- 4.20 The undertaking referred to in condition 4.17 shall be obtained within seven days of the company or other person in question becoming an ultimate holding

company of the licence holder and shall remain in force for so long as the licence holder remains the holder of this licence and the ultimate holding company remains the ultimate holding company of the licence holder.

Undertaking to provide information

- 4.21 The licence holder shall, unless ORR otherwise consents, procure from each company or any other person which is at any time an ultimate holding company of the licence holder an undertaking in favour of the licence holder.
- 4.22 The undertaking referred to in condition 4.21 shall require any such ultimate holding company to give to the licence holder, and to procure that any person (including without limitation, a corporate body) that is a subsidiary of, or is controlled by, the ultimate holding company (other than the licence holder and its subsidiaries) will give to the licence holder, all such information as may be necessary to enable the licence holder to meet its obligations under the Act and under this licence to provide documents and provide information to ORR and such additional information as ORR may require about the activities of that ultimate holding company and its subsidiaries and the financing of them.
- 4.23 The undertaking referred to in condition 4.21 shall be in a form specified by ORR.
- 4.24 The undertaking referred to in condition 4.21 shall be obtained within seven days of the company or other person in question becoming an ultimate holding company of the licence holder and shall remain in force for so long as the licence holder remains the holder of this licence and the ultimate holding company remains the ultimate holding company of the licence holder.
- 4.25 The licence holder shall, unless ORR otherwise consents, procure from Network Rail Infrastructure Finance an undertaking in favour of the licence holder. The undertaking shall require Network Rail Infrastructure Finance to give to the licence holder all such information in its possession as may be necessary to enable the licence holder to meet its obligations under the Act and under this licence to provide documents and provide information to ORR and such additional information as ORR may require about the activities of any ultimate holding company of the licence holder, its subsidiaries and the financing of them and Network Rail Infrastructure Finance.

4.26 The undertaking referred to in condition 4.25 shall be in a form approved by ORR.

4.27 The licence holder shall:

- (a) deliver to ORR evidence (including a copy of all such undertakings) that the licence holder has complied with the obligation to procure any undertaking pursuant to this condition 4;
- (b) inform ORR immediately in writing if the directors of the licence holder become aware that any undertaking procured pursuant to this condition 4 has ceased to be legally enforceable or that its terms have been breached; and
- (c) comply with any direction from ORR to enforce any of the undertakings procured pursuant to this condition 4.

4.28 The licence holder shall not, save with ORR's prior written consent, enter (directly or indirectly) into any agreement or arrangement with any ultimate holding company of the licence holder or any subsidiary of such ultimate holding company (other than a subsidiary of the licence holder) at a time when (a) an undertaking required pursuant to conditions 4.17 to 4.26 is not in place; (b) there is an unremedied breach of such undertaking; or (c) the licence holder is in breach of the terms of condition 4.27.

4.29 The licence holder shall not, save with ORR's prior written consent, enter (directly or indirectly) into any agreement or arrangement with Network Rail Infrastructure Finance or any subsidiary of Network Rail Infrastructure Finance at a time when (a) an undertaking required pursuant to condition 4.2 or 4.25 is not in place; (b) there is an unremedied breach of such undertaking; or (c) the licence holder is in breach of the terms of condition 4.27.

Payment of dividends

4.30 The directors of the licence holder shall not, without ORR's consent, declare or recommend a dividend and the licence holder shall not make any other form of distribution, within the meaning of sections 829, 830, 849 or 850 of the Companies Act 2006, or redeem or repurchase any share capital of the licence holder unless prior to the declaration, recommendation or making of

the distribution, redemption or repurchase (as the case may be) the licence holder shall have issued to ORR a certificate complying with the following requirements in conditions 4.31 and 4.32.

4.31 The certificate shall be in the following form:

“After making enquiries, the directors of the licence holder are satisfied:

- (i) that the licence holder is in compliance in all material respects with all obligations imposed on it by condition 4 and condition 11 of its network licence;
- (ii) that the payment of a dividend or making of a distribution, redemption or repurchase of [] on [] will not, either alone or when taken together with other circumstances reasonably foreseeable at the date of this certificate, cause the licence holder to be in breach to a material extent of any of these obligations in the future; and
- (iii) that such payment of dividend or making of distribution, redemption or repurchase will not impair the ability of the licence holder to finance the Network Business.”

4.32 The certificate shall be signed by a director of the licence holder and approved by a resolution of the board of directors of the licence holder passed not more than 14 days before the date on which the declaration, recommendation or payment will be made.

4.33 Where the certificate required by condition 4.30 has been issued in respect of the declaration or recommendation of a dividend, the licence holder shall be under no obligation to issue a further certificate prior to payment of that dividend provided such payment is made within six months of the issuing of that certificate.

4.34 In this condition:

“cross-default obligation”	<p>means a term of any agreement or arrangement whereby the liability of the licence holder or of Network Rail Infrastructure Finance to:</p> <ul style="list-style-type: none"> (a) pay or repay any debt or other sum; or (b) do anything pursuant to a term of any agreement or arrangement to which that person is a party <p>arises or is increased or accelerated or is capable of arising, increasing or of being accelerated by reason of a default (howsoever such default may be described or defined) by any person other than the licence holder or Network Rail Infrastructure Finance unless:</p> <ul style="list-style-type: none"> (i) that liability can arise only as a result of a default by a subsidiary of the licence holder or Network Rail Infrastructure Finance; and (ii) that the licence holder or Network Rail Infrastructure Finance holds a majority of the voting rights in that subsidiary and has the right to appoint or remove a majority of its board of directors; and (iii) that subsidiary only carries on Network Business or business or activity referred to in condition 4.2(a)(ii) and (iii) or for the purpose of financing the matters referred to in subparagraphs (a)(i) to (iii) of condition 4.2;
“indebtedness”	<p>means all liabilities now or hereafter due, owing or incurred, whether actual or contingent, whether solely or jointly with any other person and whether as principal or surety, together with any interest accruing on them and all costs, charges, penalties and expenses incurred in connection with them;</p>
“information”	<p>shall include, in any form or medium, any documents, accounts, estimates, returns, forecasts, reports and data of any kind (whether or not prepared specifically at the request of ORR) of any description specified by ORR;</p>

“Network Rail Infrastructure Finance”	<p>means:</p> <ul style="list-style-type: none"> (i) Network Rail Infrastructure Finance plc; and (ii) (unless ORR otherwise consents) any other person which carries out the same, or substantially the same, functions as Network Rail Infrastructure Finance plc in relation to the financing of the licence holder;
“relevant date”	means 1 January 2003;
“RPI”	<p>means the general index of retail prices published by the Office for National Statistics each month in respect of all items or:</p> <ul style="list-style-type: none"> (i) if the index for any month shall not have been published on or before the last day of the third month after such month, such index for such month or months as ORR may, after consultation with the licence holder, determine to be appropriate in the circumstances; or (ii) if there is a material change in the basis of such index, such other index as ORR, after consultation with the licence holder, determines to be appropriate in the circumstances;
“stand alone basis”	means in relation to the licence holder only, on an individual basis, independently of, and without reference to the financial condition or circumstances of, any subsidiary of the licence holder or other member of its group (including without limitation, a body corporate) or any other person;
“subsidiary”	shall bear the same meaning as that attributed to it in section 1159 of the Companies Act 2006;
“subsidiary undertaking”	shall bear the same meaning as that attributed to it in section 1162 of the Companies Act 2006; and

“ultimate holding company”

means each of:

- (i) a holding company of the licence holder which is not itself a subsidiary of another company;
- (ii) where a holding company of the licence holder which is not a subsidiary of another company has entered into an agreement relating to the exercise of voting rights in or the appointment or removal of directors of the licence holder or any company of which the licence holder is a subsidiary, every party to that agreement; and
- (iii) where the exercise of voting rights in or the appointment or removal of directors of a holding company of the licence holder which is not a subsidiary of another company is controlled by an agreement, every party to that agreement.

5 Interests in rolling stock and train operators

5.1 Subject to condition 5.2, the licence holder shall not, except in so far as ORR may otherwise consent, be directly or indirectly interested in the ownership or operation of any railway vehicle in Great Britain.

5.2 Condition 5.1 shall not apply in respect of any railway vehicle:

- (a) used for any such purpose as is mentioned in sub-paragraph 1(b) or (c) of the scope of this licence; or
- (b) forming part of the Royal Train.

5.3 The licence holder shall, without limitation to the generality of condition 5.1, be regarded as directly interested in the ownership or operation of railway vehicles where the licence holder:

- (a) has any legal or beneficial interest in any railway vehicle (in whole or in part); or
- (b) has the right to manage the affairs of another person who has any such interest in, or operates, any railway vehicle.

5.4 The licence holder shall, without prejudice to the generality of condition 5.1, be regarded as indirectly interested in the ownership or operation of any railway vehicle which is operated by any of its affiliates or in which the licence holder or any of its affiliates has any legal or beneficial interest (in whole or in part).

5.5 In this condition:

“holding company” has the meaning given in section 1159 of the Companies Act 2006;

“a substantial minority” means a holding of, or an interest in, 10 per cent or more of the securities or of any class of securities in a body corporate, other than a subsidiary.

5.6 For the purposes of determining whether a person has a substantial minority holding in a body corporate:

- (a) it is immaterial whether that holding is direct or through a nominee or trustee;

- (b) such holdings of the subsidiaries of a body corporate shall be treated as its own; and
- (c) where a body corporate is as a consequence of this condition to be treated as having more than one such holding in another body corporate, the holdings shall be aggregated and treated as a single holding.

11 Regulatory accounts

Purpose

11.1 The purpose of this condition 11 is to procure the provision of annual information on the financial performance and financial position of the licence holder, Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance which:

- (a) is relevant to ORR and other persons for the assessment and determination of the licence holder's access charges; and
- (b) allows the financial performance and financial position of the licence holder to be monitored against the Determination Assumptions.

General duty

11.2 To achieve the purpose in condition 11.1, the licence holder shall prepare regulatory financial statements in relation to itself and, unless ORR otherwise consents, to Network Rail Infrastructure Finance in accordance with the following paragraphs of this condition 11 and any Regulatory Accounting Guidelines from time to time issued by ORR.

11.3 The licence holder shall, and shall procure that any affiliate or related undertaking of the licence holder and Network Rail Infrastructure Finance shall, maintain such accounting records, other records and reporting arrangements as are necessary to enable the licence holder to properly prepare the regulatory financial statements required by condition 11.2. The licence holder shall maintain all systems of control and other governance arrangements that ensure the information collected and reported to ORR is in all material respects accurate, complete and is fairly presented and that all control and other governance arrangements are kept under regular review by the directors of the licence holder so that they remain effective for this purpose.

Specific obligations

11.4 The financial statements referred to in condition 11.2:

- (a) shall be prepared in respect of the financial year ended 31 March 2002 and (save as otherwise provided in this condition 11 or the Regulatory Accounting Guidelines) on a consistent basis in respect of each financial year;
- (b) shall be prepared such that, so far as is reasonably practicable, the definition of items in primary statements; the valuation of assets and liabilities; the treatment of income and expenditure as capital or revenue; adjustments in respect of the provision, utilisation, depreciation and amortisation of assets and liabilities; and any other relevant accounting policies shall be consistent with:
 - (i) ORR's valuation of the Regulatory Asset Base for the purpose of determining access charges for the access review periods specified in the Regulatory Accounting Guidelines; and
 - (ii) the Determination Assumptions for the access review periods specified in the Regulatory Accounting Guidelines;(and so that where the presentation of an item in the primary statements departs from the basis for the Regulatory Asset Base or the Determination Assumptions, a reconciliation shall be included by way of a note),
- (c) shall include, as a primary statement, a statement of regulatory financial performance comparing income and expenditure, for the access review periods specified in the Regulatory Accounting Guidelines period with the Determination Assumptions;
- (d) shall include all details reasonably necessary to reconcile items included in the primary statements with any corresponding items in annual statutory accounts for the access review periods specified in the Regulatory Accounting Guidelines; and
- (e) shall include narrative explaining the material variances from the previous year and from the Determination Assumptions.

Sufficiency of resources

11.5 The licence holder shall make a statement, which shall be approved by a resolution of the board of directors of the licence holder and signed by a director of the licence holder pursuant to that resolution, certifying the adequacy (or otherwise) of the management and financial resources, personnel, fixed and moveable assets, rights, licences, consents and facilities of the licence holder for the period of 18 months commencing on the date of the statement.

11.6 The statement made under condition 11.5 shall be in one of the following forms:

either:

(a) “After making enquiries, and subject to the outcome of any access charges review which is due to be concluded within the 18 month period referred to in this statement, the directors of the licence holder have a reasonable expectation that the licence holder will have available to it, after taking into account in particular, but without limitation:

- (i) any dividend or other distribution, loan repayments or other sums due which might reasonably be expected to be declared or paid by the licence holder;
- (ii) any mortgage, charge, pledge, lien or other form of security or other encumbrance; and
- (iii) any indebtedness or guarantee,

sufficient management resources and financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act and under its network licence for the period of 18 months referred to in this statement.”

or:

(b) "After making enquiries, and subject to the outcome of any access charges review which is due to be concluded within the 18 month period referred to in this statement, the directors of the licence holder have a reasonable expectation, subject to the factors set out below, that the licence holder will have available to it, after taking into account in particular, but without limitation:

- (i) any dividend or other distribution, loan repayments or other sums due which might reasonably be expected to be declared or paid by the licence holder;
- (ii) any mortgage, charge, pledge, lien, or other form of security or other encumbrance; and
- (iii) any indebtedness or guarantee,

sufficient management resources and financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act and under its network licence for the period of 18 months referred to in this statement. However, they would like to draw attention to the following factors which may cast doubt on the ability of the licence holder to do this."

or:

(c) "In the opinion of the directors of the licence holder, the licence holder will not have available to it sufficient management resources and financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act and under its network licence for the period of 18 months referred to in this statement."

11.7 The licence holder shall submit to ORR details of the main factors which the directors of the licence holder have taken into account in making the statement under condition 11.5 and the information specified in the Regulatory Accounting Guidelines. In the case of a statement of the kind contemplated by condition 11.6(b) the licence holder shall also submit with the statement a

description of the factors which may cast doubt on the ability of the licence holder to carry on the activities authorised by this licence.

11.8 The licence holder shall -

- (a) notify ORR in writing immediately if its directors become aware of any circumstance that causes them no longer to have the reasonable expectation expressed in the most recent statement made under condition 11.5 in the forms set out in condition 11.6; and
- (b) subject to complying, as if it were a company whose ordinary shares are for the time being admitted to the Official List of the UK Listing Authority, with the listing rules of the Financial Services Authority acting in its capacity as a competent authority for the purposes of Part VI of the Financial Services and Markets Act 2000, publish its notification to ORR in such form and manner as ORR may direct. This notification will include the information specified in the Regulatory Accounting Guidelines in relation to the operation of the re-opener provisions.

Regulatory Accounting Guidelines

11.9 ORR may from time to time issue Regulatory Accounting Guidelines, which may:

- (a) further specify the accounting policies, format and content of the financial statements and the matters to be shown or reported in them;
- (b) provide for appropriate segmental analysis and/or further breakdown of any items contained in the financial statements;
- (c) provide for specification or description of any transactions or arrangements between the licence holder and any affiliate or related undertaking (including, without limitation, so as to enable ORR to monitor compliance with the conditions of this licence);
- (d) further include provision requiring the licence holder to prepare and publish information in respect of proposed enhancements which the licence holder shall log up as enhancement expenditure, and annually, information on those enhancements actually made; and

- (e) require other information to be provided and/or published in order to monitor the licence holder's financial performance and financial position or assist in the determination of the licence holder's access charges.

Auditors

11.10 The licence holder shall procure a report by the Auditors addressed to ORR:

- (a) stating whether, in their opinion, the regulatory financial statements (other than those referred to in condition 11.10(c)) and information on proposed enhancements have been prepared in accordance with this condition, including Regulatory Accounting Guidelines;
- (b) stating whether, in their opinion, the regulatory financial statements present fairly the financial performance and financial position of the licence holder and (to the extent that they relate to Network Rail Infrastructure Finance) of Network Rail Infrastructure Finance in accordance with this condition and any Regulatory Accounting Guidelines; and
- (c) stating whether the information on enhancement expenditure produced in accordance with condition 11.9(d) has been prepared in accordance with the Regulatory Accounting Guidelines and is consistent with such expenditure presented in the primary financial statements.

11.11 Each statement made under condition 11.5 shall be accompanied by a report prepared by the Auditors and addressed to ORR, stating whether the Auditors are aware of any inconsistencies between that statement and any supporting statements and either the financial statements referred to in condition 11.2 or any information which the Auditors obtained in the course of their audit work for the licence holder and, if so, the report of the auditors should state what the inconsistencies are.

11.12 The licence holder shall enter into a contract of appointment with the Auditors which shall include a term that the Auditors will provide such further explanation or clarification of their reports and such further financial information in respect of the matters which are the subject of their reports as ORR may reasonably require for the exercise of its functions, including, in

relation to monitoring, compliance by the licence holder with the conditions of this licence.

Publication and provision of information

11.13 The licence holder shall deliver to ORR a copy of the financial statements together with any information provided for in the Regulatory Accounting Guidelines, the Auditors' report referred to in condition 11.10 and the statement referred to in condition 11.5 as soon as reasonably practicable and in any event not later than 1 July following the end of the financial year to which they relate (or a later date approved by ORR). The financial statements, information, the Auditors' report referred to in condition 11.10 and the statement referred to in condition 11.5, subject to any modifications approved by ORR, (including the deletion of any information the publication of which ORR is satisfied would or might seriously and prejudicially affect the interests of the licence holder or any other person), shall be published within one calendar month of delivery to ORR and then made available to any member of the public on request.

11.14 With a view to enabling the licence holder to comply with its obligations under condition 11.2, the licence holder shall, unless ORR otherwise consents, procure from Network Rail Infrastructure Finance a legally enforceable undertaking or undertakings in favour of the licence holder which shall require Network Rail Infrastructure Finance to prepare and give to the licence holder financial statements in relation to Network Rail Infrastructure Finance and its subsidiaries in such a form and covering such periods as may be specified in any Regulatory Accounting Guidelines from time to time issued by ORR.

11.15 The licence holder shall:

- (a) deliver to ORR evidence (including a copy of all such undertakings) that the licence holder has complied with the obligation to procure any undertaking pursuant to condition 11.14;
- (b) inform ORR immediately in writing if the directors of the licence holder become aware that any undertaking procured pursuant to condition 11.14 has ceased to be legally enforceable or that its terms have been breached; and

- (c) comply with any direction from ORR to enforce any of the undertakings procured pursuant to condition 11.14.

11.16 In this condition:

“Auditors”	means the person appointed by the licence holder for the purpose of reporting on the regulatory financial statements referred to in this condition 11;
“Determination Assumptions”	means any assumptions (including their definitions and bases of measurement) from time to time notified to the licence holder by ORR as assumptions that have been used for determining access charges;
“Network Rail Infrastructure Finance”	Has the meaning given to it by condition 4.34
“Regulatory Accounting Guidelines ”	means any guidelines issued by ORR from time to time in accordance with condition 11.9; and
“Regulatory Asset Base”	means the asset values as from time to time notified to the licence holder by ORR as being asset values that have been or are to be used for determining access charges.

ANNEX B

**Revised section of Network Rail's licence compared to our proposals on
Network Rail's licence published on 5 June 2008**

Interpretation

1. In this licence:

- “access charge” means any amount payable or proposed to be paid under an access contract or an installation access contract.
- “affiliate” in relation to the licence holder means any holding company or subsidiary of the licence holder or any subsidiary of a holding company of the licence holder, in each case within the meaning of sections ~~736, 736A~~1159, 1160 and ~~736B~~Schedule 6 of the Companies Act ~~1985~~2006.
- “control” shall be construed in accordance with sub-sections (2) and (4) to (6) of section 416 of the Income and Corporation Taxes Act 1988 with the following modifications namely:
- (i) for the words "the greater part" wherever they occur in sub-section (2) there shall be substituted the words "30 per cent or more"; and
 - (ii) in sub-section (6), for the word "may" there shall be substituted the word "shall", the words from "and such attributions" onwards shall be omitted and in the other provisions of that sub-section any reference to an associate of a person shall be construed as including only a relative of his (as defined by section 417(4) of that Act), a partner of his and a trustee of a settlement (as defined by section 681(4) of that Act) of which he is a beneficiary.
- “funder” means any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) and each Passenger Transport Executive or other person who provides money by way of grant or loan with the primary purpose of securing the provision of services relating to railways.
- “licence holder's network” means the network of which the licence holder is the operator pursuant to this licence.
- “licensed activities” means things authorised to be done by the licence holder in its capacity as operator of a network or trains pursuant to this licence.
- “LTUC” means the London Transport Users' Committee and any

	successor to LTUC which performs the same functions.
“network”	includes, where the licence holder has any estate or interest in, or right over a station or light maintenance depot, such station or light maintenance depot.
“Network Business”	means <ul style="list-style-type: none"> (i) the business of providing and operating the licence holder's network, including the maintenance, renewal, replacement, improvement, enhancement and development of the network; and (ii) any ancillary service related to the business and activities in paragraph (i); and, without limitation, includes: <ul style="list-style-type: none"> (a) the purpose of financing the business in paragraph (i) and the services in paragraph (ii); and (b) any payment or transaction lawfully made or undertaken by the licence holder for a purpose within conditions 4.14(b)(i) to (vii).
“ORR”	means the Office of Rail Regulation.
“Permitted Business”	means the Network Business and the Permitted Non-Network Business.
“Permitted Non-Network Business”	means any business, other than the Network Business and the exploitation of land (which includes the disposal of land within the meaning of condition 7), of the type transferred to the licence holder pursuant to the Railtrack Transfer Scheme.
“Railtrack Transfer Scheme”	means the transfer scheme in respect of which the licence holder is the transferee made by the Board under section 85 of the Act and as varied pursuant to section 97 of, and Schedule 8 to, the Act.
“related undertaking”	in relation to the licence holder means any undertaking in which the licence holder has a participating interest (and for this purpose "undertaking" has the meaning given by section 259 1161 of the Companies Act 1985 2006 , and "participating interest" is to be construed in accordance with section 260 of that Act paragraph 8 of Schedule 8 to The Small Companies and Groups (Accounts and Directors' Report) Regulations 2008).
“RPC”	means the Rail Passengers' Council and any successor or delegated body which performs the functions of the RPC.

“TfL” means Transport for London.

~~2. Any reference in this licence to a numbered paragraph is a reference to the paragraph bearing that number in the condition in which the reference occurs.~~

~~3. In interpreting this licence, headings shall be disregarded.~~

~~4. Where in this licence the licence holder is required to comply with any obligation within a specified time limit, that obligation shall be deemed to continue after that time limit if the licence holder fails to comply with that obligation within that time limit.~~

~~5. Where this licence provides for anything to be done by any person within a particular period of time or on or by a particular day or date, ORR may vary that period, day or date by giving notice to the licence holder and such other persons as appear to it likely to be affected by the variation.~~

~~6. Where in this licence there is a provision for ORR to give its consent, ORR may give such consent subject to conditions.~~

~~7. The provisions of section 149 of the Act shall apply for the purposes of the service of any document pursuant to this licence.~~

~~8. The Interpretation Act 1978 shall apply to this licence as if it were an Act.~~

~~9. Terms and expressions defined in the Railways Act 1993, the Transport Act 2000 and the Railways Act 2005 shall, unless the contrary intention appears, have the same meanings in this licence.~~

~~2.7~~

Part B ~~Restrictions on activities~~

Conditions

3 Financial indebtedness

3.1. ~~3.1— Except with the written consent of ORR, the licence holder shall ensure that as at the end of the financial year to which the financial statements prepared under condition 11 relate: The licence holder shall not, and shall procure that any subsidiary of the licence holder, Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance shall not, incur financial indebtedness which is supported by, or otherwise incurred in reliance on, either:~~

~~(a) — the total amount of financial indebtedness of Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance shall not exceed 90 per cent of the Regulatory Asset Base of the licence holder applicable at that time; and~~

~~(b) — the total amount of financial indebtedness of the licence holder, any subsidiaries of the licence holder, Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance shall not exceed 100 per cent of the Regulatory Asset Base of the licence holder applicable at that time.~~

~~3.2— Without prejudice to condition 3.1:~~

~~(a) — the licence holder shall use reasonable endeavours to ensure that the total amount of financial indebtedness of Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance shall not at any time exceed 85 per cent of the Regulatory Asset Base of the licence holder applicable at that time;~~

~~(b) — if the total amount of financial indebtedness of Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance exceeds 85 per cent of the Regulatory Asset Base of the licence holder applicable at that time, the licence holder shall, within such time periods as ORR may notify as being appropriate in the circumstances:~~

~~(i) — provide to ORR details of the steps it intends to take to reduce the amount to 85 per cent or below;~~

~~(ii) — take those steps; and~~

~~(iii) — provide to ORR evidence that it has taken those steps.~~

~~3.3 The licence holder shall provide, from time to time as requested by ORR and in any event every year in the regulatory financial statements it prepares pursuant to condition 11, confirmation that, in respect of the financial year to which the statements relate, it has complied, and, in respect of the following financial year, it is likely to comply, with condition 3.1 and (where applicable) with condition 3.2(b) and, if so requested by ORR, evidence in support of that confirmation.~~

~~(a) any state financial indemnity; or~~

~~(b) the facility agreement.~~

~~except as provided for in condition 3.2.~~

3.2 Notwithstanding condition 3.1, the licence holder, any subsidiary of the licence holder, Network Rail Infrastructure Finance, and any subsidiary of Network Rail Infrastructure Finance, shall be entitled to incur financial indebtedness supported by, or otherwise incurred in reliance on, any state financial indemnity or the facility agreement in any of the following circumstances:

(a) where it is incurred pursuant to a contract assumed before or on 31 March 2009; or

(b) where it is a refinancing of financial indebtedness incurred before or on 31 March 2009.

3.3 For the purpose of condition 3.2, refinancing shall mean any transaction by which the terms of any contract for financial indebtedness are amended or replaced (whether or not on the same terms as the existing contract) by a new contract (whether by novation or otherwise), excluding any transaction which increases the aggregate amount of the financial indebtedness of the licence holder, any subsidiary of the licence holder, Network Rail Infrastructure Finance, and any subsidiary of Network Rail Infrastructure Finance.

3.4 In this condition:

“facility agreement” means the agreement described as the OpCo Facility dated on or about 3 October 2002 made originally between Railtrack plc, the Strategic Rail Authority and Network Rail Holdco Limited and now, by virtue of a transfer scheme, existing between the licence holder, the Secretary of State and Network Rail Holdco Limited

“financial indebtedness” means any financial indebtedness of ~~a financial nature of the relevant entity, for or in respect of~~ including but

not limited to:

- (a) moneys borrowed;
- (b) any acceptance credit;
- (c) any bond, note, debenture, loan stock or other similar instrument;
- (d) any redeemable preference share;
- (e) any finance or capital lease;

(f) receivables sold or discounted;

(g) the acquisition cost of any asset to the extent payable after is acquisition or possession by the party liable where the deferred payment is arranged primarily as a method of raising finance or financing the acquisition of that asset;

~~(f)~~ (h) any foreign currency derivative transaction protecting against or benefiting from fluctuations in foreign exchange rates; any rate or price;

~~(g)~~ (i) any other transaction (including any forward sale or purchase agreement) which has the commercial effect of a borrowing;

~~(h)~~ (j) any counter-indemnity obligation in respect of any guarantee, indemnity, bond, letter of credit or any other instrument issued by a bank or of financial institution; and

~~(i)~~

(k) any accrued but unpaid interest, fees, costs and expenses incurred under or as part of the raising of financial indebtedness; and

(l) any guarantee, indemnity or similar assurance against financial loss of any person in respect of any item referred to in paragraphs (a) to ~~(k)~~ above;

and for the purposes of this condition 3:

- (a) financial indebtedness:
- (i) is calculated by reference to the principal amount outstanding of any such financial indebtedness (and no mark to market value will be used to calculate its amount);
 - (ii) excludes any financial indebtedness between the licence holder or any of the licence holder's subsidiaries and Network Rail Infrastructure Finance or any of Network Rail Infrastructure Finance's subsidiaries;
 - (iii) excludes any financial indebtedness between the licence holder and any of its subsidiaries;
 - (iv) excludes any financial indebtedness between any of the licence holder's subsidiaries;
 - (v) excludes any financial indebtedness between Network Rail Infrastructure Finance and any of its subsidiaries;
 - (vi) excludes any financial indebtedness between any of Network Rail Infrastructure Finance's subsidiaries; and
 - (vii) excludes any derivative transaction other than as set out in paragraph (fh) above;
- (b) where financial indebtedness denominated in a foreign currency is hedged by a derivative of the type set out in paragraph (fh) above, the principal amount outstanding shall be calculated by reference to the sterling amount payable under the relevant derivative; and
- (c) total financial indebtedness shall be calculated net of any cash or cash equivalents held by the licence holder and Network Rail Infrastructure Finance or their subsidiaries.

"Network Rail Infrastructure Finance"

~~has the meaning given to it by condition 4.34.~~ means Network Rail Infrastructure Finance plc.

~~"Regulatory Asset Base"~~ state financial

~~has the meaning given to it by condition 11.~~ means:

indemnity”

(a) the guarantee provided by the Secretary of State in 2004, which is available until 2052, having the effect that any debt holders would be indemnified against any shortfall in debt service payments by the licence holder, by any subsidiary of the licence holder, by Network Rail Infrastructure Finance or by any subsidiary of Network Rail Infrastructure Finance whatever the cause; and

(b) any other financial indemnity, guarantee or other form of financial support which has been or will be offered or made available by the Secretary of State or by any other funder and which has similar effect to that described in paragraph (a).

4—Ring-fencing

4 Financial ring-fence

Restriction of activities ~~and financial ring-fence~~

4.1 ~~4.1—Subject to conditions 4.5 to 4.13, except with the written consent of ORR, the~~The licence holder shall not, and shall procure that its subsidiary undertakings shall not, conduct any business or carry on any activity other than ~~the Permitted Business~~;

(a) the Network Business;

(b) business or activities which the licence holder and any subsidiary of the licence holder are entitled to conduct or carry on under the *de minimis* provisions under conditions 4.6 to 4.9; and

(c) any other business or activity of the licence holder for which ORR has given its written consent under this condition 4.

4.2 The licence holder shall, unless ORR otherwise consents:

(a) procure from Network Rail Infrastructure Finance ~~a—legally enforceable~~an undertaking or undertakings in favour of the licence holder which shall provide that Network Rail Infrastructure Finance will not conduct any business or carry on any activity other than for the purpose of financing:

(i) the ~~Permitted~~Network Business;

(ii) business or activities which the licence holder and any subsidiary of the licence holder are entitled to conduct or carry on under ~~condition 4.10~~the *de minimis* provisions under conditions 4.6 to 4.9; or

(iii) any other business or activity of the licence holder for which ORR has given written consent under this condition ~~4~~4.

and shall ensure that all such undertakings, or undertakings with like effect, remain in force for so long as the licence holder remains the holder of this licence; or

- (b) otherwise procure that Network Rail Infrastructure Finance does not conduct any business or carry on any activity other than for the purpose of financing those matters referred to in conditions 4.2(a)(i), (ii) and (iii).

~~4.3 The undertaking of~~ The licence holder shall not, and shall procure that its subsidiary undertakings ~~referred to in condition 4.2 may be part of a contract to which the licence holder and Network Rail Infrastructure Finance are parties.~~ 4.4 The licence holder shall not and its subsidiary undertakings shall not, acquire or retain, without the prior written consent of ORR, shares or other investments of any kind in any related undertaking after the relevant date except:

- (a) shares or other investments in ~~anya~~ body corporate which is a subsidiary of the licence holder, ~~such shares having been acquired or retained only for a permitted~~ and has been incorporated by it solely for the purpose of raising finance for the Network business;
- (b) shares or other investments in a body corporate which conducts business only for ~~a permitted purpose~~ the purposes of the Network Business; and
- (c) investments acquired in the usual and ordinary course of the licence holder's treasury management operations, subject to the licence holder maintaining in force, in relation to those operations, a system of internal controls which complies with best corporate governance practice as required (or, in the absence of any such requirement, recommended) from time to time for a company whose ordinary shares are for the time being admitted to the Official List of the UK Listing Authority (or a successor body).

~~4.5 Nothing in this condition 4 shall prevent:~~

- ~~(a) any affiliate in which the licence holder does not hold shares or any other investment from conducting any business or carrying on any activity;~~

- ~~(b) — the licence holder from holding shares as, or performing the supervisory or management functions of, an investor in respect of any body corporate in which it holds an interest consistently with the provisions of the licence;~~
- ~~(c) — the licence holder from performing the supervisory or management functions of a holding company in respect of any subsidiary in which it holds an interest consistently with provisions of the licence;~~
- ~~(d) — the licence holder from carrying on any business or conducting any activity to which ORR has given its consent in writing.~~

4.4 For the purposes of this condition 4, any reference to an obligation on the licence holder or Network Rail Infrastructure Finance to procure an undertaking is to be read as requiring either:

- (a) a legally enforceable undertaking; or
- (b) a legally enforceable undertaking forming part of a contract to which the licence holder or, where applicable, Network Rail Infrastructure Finance is a party.

4.5 ORR, in deciding whether to give its consent under this condition 4, may have regard, among other matters, to the risks imported to the Network Business by the activity in question and the benefits accruing, or likely to accrue, to the Network Business out of that activity.

De minimis

4.6 Where ORR has not given its consent under conditions 4.1 to ~~4.4, or 4.5(d), 4.3,~~ the licence holder and any subsidiary of the licence holder shall, notwithstanding conditions ~~4.1, 4.4~~4.1 and ~~4.5, 4.3,~~ be entitled to conduct any business and to carry on any activity which is not for ~~a permitted purpose (in this condition 4.6~~ the purposes of the Network Business (“relevant other business”) as long as such relevant other business is *de minimis* business, is not and does not involve the disposal of land, and does not infringe any condition of any consent given by ORR under this licence.

4.7 The relevant other business will be “*de minimis* business” if both:

(a) the aggregate turnover of all the relevant other business carried on by the licence holder and the equity share of the aggregate turnover of all the relevant other business carried on by all the licence holder's affiliates or related undertakings does not in any period of twelve months commencing on 1 April of any year exceed the indexed turnover limit for that period of twelve months;

and

(b) the aggregate amount of all investments (determined in accordance with condition 4.8) made by the licence holder ~~or any of its subsidiaries in all the~~in relevant other business, carried on by the licence holder and all affiliates or related undertakings does not at any time exceed, ~~in the year commencing on 3 October 2002 or in any financial year ended 31 March,~~ the indexed ~~amount for that financial year~~investment limit.

4.8 For the purpose of condition 4.7:

~~(a) "investment" means any form of expenditure or commitment to spend (whether of a capital or revenue nature) or liability (whether present, future, actual or contingent, each contingent liability being valued at the best estimate of the value of the liability that may result multiplied by the best estimate of the probability that it will result), including any liability pursuant to any guarantee or indemnity; and~~

~~(b)~~

(a) the "indexed ~~amount~~turnover limit" in respect of any ~~financial year~~period of twelve months means the sum of £100 million plus the amount that is produced when £100 million is multiplied by the percentage change (whether expressed as a positive or negative figure) between the RPI as published or determined in respect of February in that financial year and as published or determined in respect of February ~~2004.~~2004;

(b) the "indexed investment limit" means the sum of £100 million plus the amount that is produced when £100 million is multiplied by the percentage change (whether expressed as a positive or negative figure) between the RPI as published or determined in respect of the

point in time relevant for the purpose of condition 4.7(b) and as published or determined in respect of February 2004:

(c) “equity share” means, in relation to any shareholding, the nominal value of the equity shares held by the licence holder in an affiliate or related undertaking expressed as a percentage of the nominal value of the entire issued equity share capital of that affiliate or related undertaking;

(d) “investment” means any form of financial support or assistance given by or on behalf of the licence holder for the relevant other business of the licence holder or an affiliate or related undertaking whether on a temporary or permanent basis and includes any commitment to provide any such support or assistance in the future. At any point in time, the amount of the investment is the sum of:

(i) the value at which such investment was included in the audited historical cost balance sheet of the licence holder at its latest accounting reference date to have occurred before the date on which this condition takes effect in this licence (or, where the investment was not so included, zero);

(ii) the aggregate gross amount of all expenditure (whether of a capital or revenue nature) howsoever incurred by the licence holder in respect of such investment in all completed accounting reference periods since such accounting reference date;

(iii) all commitments and liabilities (whether actual or contingent) of the licence holder relating to such investments outstanding at the end of the most recently completed accounting reference period,

less the sum of the total gross amount of all income (whether of a capital or revenue nature and however received by the licence holder) in respect of such investment in all completed accounting reference periods since the accounting reference date referred to in condition 4.7(a).

- 4.9 ORR may in writing designate any business or activity as not being a *de minimis* business for the purpose of the limitations in conditions 4.6 to 4.8. Such designation may be subject to conditions.

Prohibition on cross-default, ~~encumbrances~~indebtedness and intra-group transactions

- 4.10 ~~From the relevant date, the~~The licence holder shall not ~~without the~~, and shall procure an undertaking or undertakings that its subsidiary undertakings and Network Rail Infrastructure Finance and its subsidiary undertakings shall not, without the prior written consent of ORR:
- (a) enter into an agreement or arrangement incorporating a cross-default obligation; or
 - (b) continue or permit to remain in effect any agreement, commitment or arrangement incorporating a cross-default obligation subsisting on the relevant date ~~save that any cross-default obligation in existence at that date may remain in effect for so long as and provided that the cross-default obligation is solely referable to an arrangement or agreement entered into prior to the relevant date and the terms on which that loan or those facilities have been made available or of that agreement or arrangement as subsisting on that date are not materially varied to the detriment of the licence holder or otherwise made more onerous or, where there is such material variation of those terms, such change is outside the licence holder's effective control.~~
- 4.11 Condition 4.10 shall not prevent the licence holder from giving any guarantee permitted by and in compliance with the requirements of condition ~~4.14~~4.12(a).
- 4.12 ~~The~~Save with the prior written consent of ORR, the licence holder shall not, and shall procure ~~from~~an undertaking or undertakings that its subsidiary undertakings and Network Rail Infrastructure Finance ~~a legally enforceable undertaking or undertakings in favour of the licence holder which shall provide that Network Rail Infrastructure Finance shall not, without written consent of ORR, do any of the matters referred to in condition 4.10(a) and (b).~~and its subsidiary undertakings shall not:
- ~~4.13—The undertaking or undertakings referred to in condition 4.12 may be part of a contract to which the licence holder and Network Rail Infrastructure Finance are parties.~~
- ~~4.14—Save with the written consent of ORR, the licence holder shall not after the relevant date:~~

- (a) create or continue or permit to remain in effect any mortgage, charge, pledge, lien or other form of security or encumbrance whatsoever, undertake any indebtedness to any other person or guarantee any liability or obligation of another person other than on an arm's length basis, on normal commercial terms, for ~~a permitted~~the purpose of the network business and (where relevant) in accordance with condition 7; or
- (b) transfer, lease, license or lend any sum or sums, asset, right or benefit to any affiliate or related undertaking of the licence holder otherwise than by way of:
- (i) a dividend or other distribution out of distributable reserves, subject to conditions ~~4.29~~4.30 to ~~4.32~~4.33;
 - (ii) repayment of capital;
 - (iii) payment properly due for any goods, services or assets provided on an arm's length basis and on normal commercial terms;
 - (iv) a transfer, lease, licence or loan of any sum or sums, asset, right or benefit on an arm's length basis and on normal commercial terms and made in compliance with the payment condition referred to in 4.13;
 - (v) repayment of any loan or payment of any interest on a loan not prohibited by condition ~~4.14~~4.12(a);
 - (vi) ~~(vi)~~—payments for the surrender of group corporation tax relief or for the surrender of advance corporation tax calculated on a basis not exceeding the value of the benefit received; or
 - (vii) ~~(vii)~~—an acquisition of shares or other investments in conformity with the restriction on the acquisition of shares or other investments set out in condition 4.3 of this licence, made on an arm's length basis and in accordance with normal commercial terms,

and provided always that (where relevant) such transfer, lease, licence or loan is made in accordance with condition 7.

4.13 The payment condition referred to in paragraph 4.12 is that the consideration due in respect of the transaction in question is paid in full when the transaction is entered into unless either:

(a) the counter-party to the transaction has and maintains until payment is made in full an investment grade issuer credit rating; or

(b) the obligations of the counter-party to the transaction are fully and unconditionally guaranteed throughout the period during which any part of the consideration remains outstanding by a guarantor which has and maintains an investment grade issuer credit rating.

Sufficiency of resources

~~4.15~~4.14 The licence holder shall at all times act in a manner calculated to secure that it has ~~sufficient~~available to itself such resources, including (without limitation) management resources, financial resources and financial facilities to enable it to carry on the Permittedand financial resources, personnel, fixed and moveable assets, rights, licences, consents, and facilities, on such terms and with all such rights, as shall ensure that it is at all times able to:

(a) properly and efficiently carry on the Network Business; and ~~to~~

(b) comply in all respects with its obligations under the Act and this licence.

Credit rating

~~4.16~~4.15 The licence holder shall use all reasonable endeavours to ensure that the licence holder ~~as issuer of any corporate debt~~ maintains at all times ~~an issuer credit rating which is~~on a stand alone basis an investment grade issuer credit rating.

~~4.17~~4.16 For the purpose of condition ~~4.16~~4.15 “investment grade issuer credit rating” means ~~a~~an issuer credit rating recognised as investment grade by Standard and Poor’s Rating Group (or any of its subsidiaries), by Moody’s Investors Service Inc. (or any of its subsidiaries) or by Fitch Ratings Limited (or any of its subsidiaries) or by any other reputable credit rating agency

which, in ORR's opinion, notified in writing to the licence holder, has comparable standing in the United Kingdom and the United States of America.

Undertakings from ultimate holding company and from Network Rail Infrastructure Finance

Undertaking not to put the licence holder in breach of its licence

~~4.18~~4.17 The licence holder shall, unless ORR otherwise consents, procure from each company and any other person which is at any time an ultimate holding company of the licence holder ~~a legally enforceable~~an undertaking in favour of the licence holder.

4.18 The undertaking referred to in condition 4.17 shall provide that ~~the person giving that undertaking ("the Covenantor")~~any such ultimate holding company will refrain from any action, and will procure that ~~every~~any person (including without limitation a corporate body) that is a subsidiary of ~~the Covenantor, or is controlled by, the ultimate holding company~~ (other than the licence holder and ~~its subsidiaries~~any subsidiary of the licence holder) will refrain from any action, which would then be likely to cause the licence holder to breach any of its obligations under the Act or this licence.

4.19 The undertaking referred to in condition 4.17 shall be in a form specified by ORR.

4.20 The undertaking referred to in condition 4.17 shall be obtained within seven days of the company or other person in question becoming an ultimate holding company of the licence holder and shall remain in force for so long as the licence holder remains the holder of ~~the~~this licence and ~~the Covenantor remains~~ the ultimate holding company ~~of the licence holder.~~remains the ultimate holding company of the licence holder.

Undertaking to provide information

4.21 The licence holder shall, unless ORR otherwise consents, procure from each company or any other person which is at any time an ultimate holding company of the licence holder ~~a legally enforceable~~an undertaking in favour of the licence holder. ~~The undertaking shall require the person giving that undertaking ("the Covenantor")~~

4.22 The undertaking referred to in condition 4.21 shall require any such ultimate holding company to give to the licence holder, and to procure that ~~each subsidiary from time to time of the Covenantor~~any person (including without limitation, a corporate body) that is a subsidiary of, or is controlled by, the ultimate holding company (other than the licence holder and its subsidiaries) will give to the licence holder, all such information as may be necessary to enable the licence holder to meet its obligations under the Act and under this licence to provide documents and provide information to ORR and such additional information as ORR may require about the activities of ~~the Covenantor~~that ultimate holding company and its subsidiaries and the financing of them.

~~4.22 The undertaking referred to in condition 4.21 shall be in a form specified by ORR.~~

4.23 The undertaking referred to in condition 4.21 shall be in a form specified by ORR.

4.24 The undertaking referred to in condition 4.21 shall be obtained within seven days of the company or other person in question becoming an ultimate holding company of the licence holder and shall remain in force for so long as the licence holder remains the holder of this licence and the ~~Covenantor~~ultimate holding company remains the ultimate holding company of the licence holder.

~~4.24~~ 4.25 The licence holder shall, unless ORR otherwise consents, procure from Network Rail Infrastructure Finance ~~a legally enforceable~~an undertaking in favour of the licence holder. The undertaking shall require Network Rail Infrastructure Finance to give to the licence holder all such information in its possession as may be necessary to enable the licence holder to meet its obligations under the Act and under this licence to provide documents and provide information to ORR and such additional information as ORR may require about the activities of any ultimate holding company of the licence holder, its subsidiaries and the financing of them and Network Rail Infrastructure Finance.

~~4.25~~ 4.26 The undertaking referred to in condition ~~4.24~~4.25 shall be in a form approved by ORR.~~The undertaking may be part of a contract to which the licence holder and Network Rail Infrastructure Finance are parties.~~

~~4.26~~4.27 The licence holder shall:

- (a) deliver to ORR evidence (including a copy of all such undertakings) that the licence holder has complied with the obligation to procure any undertaking pursuant to ~~conditions 4.18, 4.21 or 4.24~~this condition 4;
- (b) inform ORR immediately in writing if the directors of the licence holder become aware that any undertaking procured pursuant to ~~conditions 4.2, 4.18, 4.21 or 4.24~~this condition 4 has ceased to be legally enforceable or that its terms have been breached; and
- (c) comply with any direction from ORR to enforce any of the undertakings procured pursuant to ~~conditions 4.2, 4.18, 4.21 or 4.24~~this condition 4.

~~4.27~~4.28 The licence holder shall not, save with ORR's prior written consent, enter (directly or indirectly) into any agreement or arrangement with any ultimate holding company of the licence holder or any subsidiary of such ultimate holding company (other than a subsidiary of the licence holder) at a time when (a) an undertaking required pursuant to conditions ~~4.18 or 4.21~~4.17 to 4.26 is not in place ~~or~~; (b) there is an unremedied breach of such undertaking; or (c) the licence holder is in breach of the terms of condition 4.27.

~~4.28~~4.29 The licence holder shall not, save with ORR's prior written consent, enter (directly or indirectly) into any agreement or arrangement with Network Rail Infrastructure Finance or any subsidiary of Network Rail Infrastructure Finance at a time when (a) an undertaking required pursuant to condition ~~4.24~~4.2 or 4.25 is not in place ~~or~~; (b) there is an unremedied breach of such undertaking; or (c) the licence holder is in breach of the terms of condition 4.27.

Payment of dividends

~~4.29~~4.30 The directors of the licence holder shall not, without ORR's consent, declare or recommend a dividend and the licence holder shall not make any other form of distribution, within the meaning of ~~section 263~~sections 829, 830, 849 or 850 of the Companies Act ~~1985, 2006, or redeem or repurchase any share capital of the licence holder~~ unless prior to the declaration, recommendation or making of the distribution, redemption or repurchase (as

the case may be) the licence holder shall have issued to ORR a certificate complying with the following requirements in conditions ~~4.30~~4.31 and ~~4.31~~4.32.

~~4.30~~4.31 The certificate shall be in the following form:

“After making enquiries, the directors of the licence holder are satisfied:

- (i) that the licence holder is in compliance in all material respects with all obligations imposed on it by condition 4 and condition 11 of its network licence;
- (ii) that the payment of a dividend or making of a distribution, redemption or repurchase of [] on [] will not, either alone or when taken together with other circumstances reasonably foreseeable at the date of this certificate, cause the licence holder to be in breach to a material extent of any of these obligations in the future; and
- (iii) that such payment of dividend or making of distribution, redemption or repurchase will not impair the ability of the licence holder to finance the ~~Permitted~~Network Business.”

~~4.31—4.32~~ The certificate shall be signed by a director of the licence holder and approved by a resolution of the board of directors of the licence holder passed not more than 14 days before the date on which the declaration, recommendation or payment will be made.

~~4.32~~4.33 Where the certificate required by condition 4.30 has been issued in respect of the declaration or recommendation of a dividend, the licence holder shall be under no obligation to issue a further certificate prior to payment of that dividend provided such payment is made within six months of the issuing of that certificate. ~~4.33—ORR in deciding whether to give its consent under conditions 4.1 to 4.4 may have regard, among other matters, to the risks imported to the Network Business by the activity in question and the benefits accruing, or likely to accrue, to the Network Business out of that activity.~~

4.34 In this condition:

~~“corporate debt” means any unsecured and unsubordinated borrowing c~~

	money having an initial maturity of five years or more;
“cross-default obligation”	<p>means a term of any agreement or arrangement whereby the liability of the licence holder or of Network Rail Infrastructure Finance to:</p> <p>(a) pay or repay any debt or other sum; or</p> <p>(b) do anything pursuant to a term of any agreement or arrangement to which that person is a party</p> <p>arises or is increased or accelerated or is capable of arising, increasing or of being accelerated by reason of a default (howsoever such default may be described or defined) by any person other than an excluded party, unless that liability<u>the licence holder or Network Rail Infrastructure Finance unless:</u></p> <p>(i) <u>that liability</u> can arise only as a result of a default by a subsidiary of an excluded party<u>the licence holder or Network Rail Infrastructure Finance</u>; and</p> <p>(ii) that excluded party<u>the licence holder or Network Rail Infrastructure Finance</u> holds a majority of the voting rights in that subsidiary and has the right to appoint or remove a majority of its board of directors; and</p> <p>(iii) that subsidiary <u>only</u> carries on <u>Network Business or</u> business only for a permitted purpose or for the matters<u>or activity</u> referred to in condition 4.2(a)(ii) and (iii) or for the purpose of financing the matters referred to in subparagraphs (a)(i) to (iii) of condition 4.2;</p>
“excluded party”	means the licence holder, Network Rail Infrastructure Finance, the Strategic Rail Authority and any successor to the Strategic Rail Authority which provides credit support to the licence holder or to Network Rail Infrastructure Finance;
“indebtedness”	means all liabilities now or hereafter due, owing or incurred, whether actual or contingent, whether solely or jointly with any other person and whether as principal or surety, together with any interest accruing on them and all costs, charges, penalties and expenses incurred in connection with them;
“information”	shall include <u>in any form or medium</u> , any documents,

<p>“Network Rail Infrastructure Finance”</p>	<p>accounts, estimates, returns, forecasts or, reports <u>and data of any kind</u> (whether or not prepared specifically at the request of ORR) of any description specified by ORR;</p> <p>means:</p> <ul style="list-style-type: none"> (i) Network Rail Infrastructure Finance plc; and (ii) (unless ORR otherwise consents) any other person which carries out the same, or substantially the same, functions as Network Rail Infrastructure Finance plc in relation to the financing of the licence holder;
<p>“permitted purpose”</p>	<p>means the purposes of the Permitted Business;</p>
<p>“relevant date”</p>	<p>means 1 January 2003;</p>
<p>“RPI”</p>	<p>means the general index of retail prices published by the Office for National Statistics each month in respect of all items or:</p> <ul style="list-style-type: none"> (i) if the index for any month shall not have been published on or before the last day of the third month after such month, such index for such month or months as ORR may, after consultation with the licence holder, determine to be appropriate in the circumstances; or (ii) if there is a material change in the basis of such index, such other index as ORR, after consultation with the licence holder, determines to be appropriate in the circumstances;
<p>“<u>stand alone basis</u>”</p>	<p><u>means in relation to the licence holder only, on an individual basis, independently of, and without reference to the financial condition or circumstances of, any subsidiary of the licence holder or other member of its group (including without limitation, a body corporate) or any other person;</u></p>
<p>“subsidiary”</p>	<p>shall bear the same meaning as that attributed to it in section 736<u>1159</u> of the Companies Act 1985<u>2006</u>;</p>
<p>“subsidiary undertaking”</p>	<p>shall bear the same meaning as that attributed to it in section 258<u>1162</u> of the Companies Act 1985<u>2006</u>; and</p>
<p>“ultimate holding company”</p>	<p>means each of:</p> <ul style="list-style-type: none"> (i) a holding company of the licence holder which is not itself a subsidiary of another company;

- (ii) where a holding company of the licence holder which is not a subsidiary of another company has entered into an agreement relating to the exercise of voting rights in or the appointment or removal of directors of the licence holder or any company of which the licence holder is a subsidiary, every party to that agreement; and
- (iii) where the exercise of voting rights in or the appointment or removal of directors of a holding company of the licence holder which is not a subsidiary of another company is controlled by an agreement, every party to that agreement.

5 Interests in rolling stock and train operators

5.1 Subject to condition 5.2, the licence holder shall not, except in so far as ORR may otherwise consent, be directly or indirectly interested in the ownership or operation of any railway vehicle in Great Britain.

5.2 Condition 5.1 shall not apply in respect of any railway vehicle:

- (a) used for any such purpose as is mentioned in sub-paragraph 1(b) or (c) of the scope of this licence; or
- (b) forming part of the Royal Train.

5.3 The licence holder shall, without limitation to the generality of condition 5.1, be regarded as directly interested in the ownership or operation of railway vehicles where the licence holder:

- (a) has any legal or beneficial interest in any railway vehicle (in whole or in part); or
- (b) has the right to manage the affairs of another person who has any such interest in, or operates, any railway vehicle.

5.4 The licence holder shall, without prejudice to the generality of condition 5.1, be regarded as indirectly interested in the ownership or operation of any railway vehicle which is operated by any of its affiliates or in which the licence holder or any of its affiliates has any legal or beneficial interest (in whole or in part).

5.5 In this condition:

“holding company” has the meaning given in section ~~736~~[1159](#) of the Companies Act ~~1985~~[2006](#);

“a substantial minority” means a holding of, or an interest in, 10 per cent or more of the securities or of any class of securities in a body corporate, other than a subsidiary.

5.6 For the purposes of determining whether a person has a substantial minority holding in a body corporate:

- (a) it is immaterial whether that holding is direct or through a nominee or trustee;

- (b) such holdings of the subsidiaries of a body corporate shall be treated as its own; and
- (c) where a body corporate is as a consequence of this condition to be treated as having more than one such holding in another body corporate, the holdings shall be aggregated and treated as a single holding.

11 Regulatory accounts

Purpose

11.1 The purpose of this condition 11 is to procure the provision of annual information on the financial performance and financial position of the licence holder, Network Rail Infrastructure Finance and any subsidiaries of Network Rail Infrastructure Finance which:

- (a) is relevant to ORR and other persons for the assessment and determination of the licence holder's access charges; and
- (b) allows the financial performance and financial position of the licence holder to be monitored against the Determination Assumptions.

General duty

11.2 To achieve the purpose in condition 11.1, the licence holder shall prepare regulatory financial statements in relation to itself and, unless ORR otherwise consents, to Network Rail Infrastructure Finance ~~(and shall for such purpose maintain accounting records)~~ in accordance with the following paragraphs of this condition 11 and any Regulatory Accounting Guidelines from time to time issued by ORR.

11.3 The licence holder shall, and shall procure that any affiliate or related undertaking of the licence holder and Network Rail Infrastructure Finance shall, maintain such accounting records, other records and reporting arrangements as are necessary to enable the licence holder to properly prepare the regulatory financial statements required by condition 11.2. The licence holder shall maintain all systems of control and other governance arrangements that ensure the information collected and reported to ORR is in all material respects accurate, complete and is fairly presented and that all control and other governance arrangements are kept under regular review by the directors of the licence holder so that they remain effective for this purpose.

Specific obligations

~~11.3~~11.4 The financial statements referred to in condition 11.2:

- (a) shall be prepared in respect of the financial year ended 31 March 2002 and (save as otherwise provided in this condition 11 or the Regulatory Accounting Guidelines) on a consistent basis in respect of each financial year;
- (b) shall be prepared such that, so far as is reasonably practicable, the definition of items in primary statements; the valuation of assets and liabilities; the treatment of income and expenditure as capital or revenue; adjustments in respect of the provision, utilisation, depreciation and amortisation of assets and liabilities; and any other relevant accounting policies shall be consistent with:
- (i) ORR's valuation of the Regulatory Asset Base for the purpose of determining access charges for the access review periods specified in the Regulatory Accounting Guidelines; and
- (ii) the Determination Assumptions for the ~~corresponding period~~; access review periods specified in the Regulatory Accounting Guidelines;
- (and so that where the presentation of an item in the primary statements departs from the basis for the Regulatory Asset Base or the Determination Assumptions, a reconciliation shall be included by way of a note);
- (c) shall include, as a primary statement, a statement of regulatory financial performance comparing income, ~~and~~ expenditure, ~~profits and losses~~ for the access review periods specified in the Regulatory Accounting Guidelines period with the Determination Assumptions;
- (d) shall include all details reasonably necessary to reconcile items included in the primary statements with any corresponding items in annual statutory accounts for the ~~same period~~; access review periods specified in the Regulatory Accounting Guidelines; and
- (e) shall include narrative explaining the material variances from the previous year and from the Determination Assumptions; ~~and (f) shall include confirmation that, in respect of the financial year to which the statements relate, it has complied, and in respect of the following financial year, it is likely to comply, with condition 3.1 and (where~~

applicable) with condition 3.2(b), and, if so requested by ORR, evidence in support of that confirmation.

Sufficiency of resources

~~11.4~~ 11.5 The licence holder shall make a statement, which shall be approved by a resolution of the board of directors of the licence holder and signed by a director of the licence holder pursuant to that resolution, certifying the adequacy (or otherwise) of the management ~~resources~~ and financial resources, personnel, fixed and moveable assets, rights, licences, consents and facilities of the licence holder for the period of 18 months commencing on the date of the statement.

~~11.5~~ 11.6 The statement made under condition ~~11.4~~ 11.5 shall be in one of the following ~~terms~~ forms:

either:

- (a) “After making enquiries, and subject to the outcome of any access charges review which is due to be concluded within the 18 month period referred to in this statement, the directors of the licence holder have a reasonable expectation that the licence holder will have available to it, after taking into account in particular, but without limitation:
- (i) any dividend or other distribution, loan repayments or other sums due which might reasonably be expected to be declared or paid by the licence holder;
 - (ii) any mortgage, charge, pledge, lien or other form of security or other encumbrance; and
 - (iii) any indebtedness or guarantee,

sufficient management resources and financial resources ~~and financial~~, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act

and under its network licence for the period of 18 months referred to in this statement.”

or:

(b) “After making enquiries, and subject to the outcome of any access charges review which is due to be concluded within the 18 month period referred to in this statement, the directors of the licence holder have a reasonable expectation, subject to the factors set out below, that the licence holder will have available to it, after taking into account in particular, but without limitation:

- (i) any dividend or other distribution, loan repayments or other sums due which might reasonably be expected to be declared or paid by the licence holder;
- (ii) any mortgage, charge, pledge, lien, or other form of security or other encumbrance; and
- (iii) any indebtedness or guarantee,

sufficient management resources and financial resources ~~and financial~~, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act and under its network licence for the period of 18 months referred to in this statement. However, they would like to draw attention to the following factors which may cast doubt on the ability of the licence holder to do this.”

or:

(c) “In the opinion of the directors of the licence holder, the licence holder will not have available to it sufficient management resources and financial resources ~~and financial~~, personnel, fixed and moveable assets, rights, licences, consents, and facilities to enable the licence holder to carry on the activities authorised by its network licence in accordance with its obligations under the Act and under its network licence for the period of 18 months referred to in this statement.”

~~11.6~~11.7 The licence holder shall submit to ORR details of the main factors which the directors of the licence holder have taken into account in making the statement under condition ~~11.4~~11.5 and the information specified in the Regulatory Accounting Guidelines. In the case of a statement of the kind contemplated by condition ~~11.5~~11.6(b) the licence holder shall also submit with the statement a description of the factors which may cast doubt on the ability of the licence holder to carry on the activities authorised by this licence ~~as specified within it~~.

~~11.7~~11.8 The licence holder shall -

- (a) ~~(a)~~ — notify ORR in writing immediately if its directors become aware of any circumstance that causes them no longer to have the reasonable expectation expressed in the most recent statement made under condition ~~11.4~~11.5 in the ~~terms~~forms set out in condition ~~11.5(a) or (b)~~; 11.6; and
- (b) ~~(b)~~ — subject to complying, as if it were a company whose ordinary shares are for the time being admitted to the Official List of the UK Listing Authority, with the listing rules of the Financial Services Authority acting in its capacity as a competent authority for the purposes of Part VI of the Financial Services and Markets Act 2000, publish its notification to ORR in such form and manner as ORR may direct. This notification will include the information specified in the Regulatory Accounting Guidelines in relation to the operation of the re-opener provisions.

Regulatory Accounting Guidelines

~~11.8~~11.9 ORR may from time to time issue Regulatory Accounting Guidelines, which may:

- (a) further specify the accounting policies, format and content of the financial statements and the matters to be shown or reported in them;
- (b) provide for appropriate segmental analysis and/or further breakdown of any items contained in the ~~primary~~financial statements;

- (c) provide for specification or description of any transactions or arrangements between the licence holder and any affiliate or related undertaking (including, without limitation, so as to enable ORR to monitor compliance with the conditions of this licence); ~~and~~
- ~~(d)~~ ~~(d)~~—further include provision requiring the licence holder to prepare and publish information in respect of proposed enhancements which the licence holder shall log up as enhancement expenditure, and annually, information on those enhancements actually made; ~~and~~
- (e) require other information to be provided and/or published in order to monitor the licence holder's financial performance and financial position or assist in the determination of the licence holder's access charges.

Auditors

~~41.9~~11.10 The licence holder shall procure a report by the Auditors addressed to ORR:

- (a) stating whether, in their opinion, the regulatory financial statements (other than those referred to in condition ~~41.9~~11.10(c)) and information on proposed enhancements have been prepared in accordance with this condition, including Regulatory Accounting Guidelines;
- (b) stating whether, in their opinion, the regulatory financial statements present fairly the financial performance and financial position of the licence holder and (to the extent that they relate to Network Rail Infrastructure Finance) of Network Rail Infrastructure Finance in accordance with this condition and any Regulatory Accounting Guidelines; and
- (c) stating whether the information on enhancement expenditure produced in accordance with condition ~~41.8~~11.9(d) has been prepared in accordance with the Regulatory Accounting Guidelines and is consistent with such expenditure presented in the primary financial statements.

~~41.40~~11.11 Each statement made under condition ~~41.4~~11.5 shall be accompanied by a report prepared by the Auditors and addressed to ORR, stating whether

the Auditors are aware of any inconsistencies between that statement and any supporting statements and either the financial statements referred to in condition 11.2 or any information which the Auditors obtained in the course of their audit work for the licence holder and, if so, ~~what they~~the report of the auditors should state what the inconsistencies are.

~~11.11~~11.12 The licence holder shall enter into a contract of appointment with the Auditors which shall include a term that the Auditors will provide such further explanation or clarification of their reports and such further financial information in respect of the matters which are the subject of their reports as ORR may reasonably require for the exercise of its functions, including, in relation to monitoring, compliance by the licence holder with the conditions of this licence.

Publication and provision of information

11.13 ~~11.12~~ The licence holder shall deliver to ORR a copy of the financial statements together with any information provided for in the Regulatory Accounting Guidelines, the Auditors' report referred to in condition ~~11.9~~11.10 and the statement referred to in condition ~~11.4~~11.5 as soon as reasonably practicable and in any event not later than 1 July following the end of the financial year to which they relate (or a later date approved by ORR). The financial statements, information, the Auditors' report referred to in condition ~~11.9~~11.10 and the statement referred to in condition ~~11.4~~11.5, subject to any modifications approved by ORR, (including the deletion of any information the publication of which ORR is satisfied would or might seriously and prejudicially affect the interests of the licence holder or any other person), shall be published within one calendar month of delivery to ORR and then made available to any member of the public on request.

~~11.13~~11.14 With a view to enabling the licence holder to comply with its obligations under condition 11.2, the licence holder shall, unless ORR otherwise consents, procure from Network Rail Infrastructure Finance a legally enforceable undertaking or undertakings in favour of the licence holder which shall require Network Rail Infrastructure Finance to prepare and give to the licence holder financial statements in relation to Network Rail Infrastructure Finance and its subsidiaries in such a form and covering such periods as may be specified in any Regulatory Accounting Guidelines from time to time issued by ORR.

~~11.14~~11.15 The licence holder shall:

- (a) deliver to ORR evidence (including a copy of all such undertakings) that the licence holder has complied with the obligation to procure any undertaking pursuant to condition ~~11.13~~11.14;
- (b) inform ORR immediately in writing if the directors of the licence holder become aware that any undertaking procured pursuant to condition ~~11.13~~11.14 has ceased to be legally enforceable or that its terms have been breached; and
- (c) comply with any direction from ORR to enforce any of the undertakings procured pursuant to condition ~~11.13~~11.14.

~~11.15~~11.16 In this condition:

“Auditors”	means the person appointed by the licence holder for the purpose of reporting on the regulatory financial statements referred to in this condition 11;
“Determination Assumptions”	means any assumptions (including their definitions and bases of measurement) from time to time notified to the licence holder by ORR as assumptions that have been used for determining access charges;
“Network Rail Infrastructure Finance”	has <u>Has</u> the meaning given to it by condition 4.34
“Regulatory Accounting Guidelines ”	means any guidelines issued by ORR from time to time in accordance with condition 11.8 <u>11.9</u> ; and
“Regulatory Asset Base”	means the asset values as from time to time notified to the licence holder by ORR as being asset values that have been or are to be used for determining access charges.

Document comparison done by DeltaView on 17 July 2008 12:56:03

Input:	
Document 1	PowerDocs://ORR/319471/1
Document 2	PowerDocs://ORR/319022/9
Rendering set	Standard

Legend:	
Insertion	
Deletion	
Moved from	
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Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
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Moved to	10
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Format changed	0
Total changes	535