

**John Thomas**  
**Director of Competition and Regulatory Economics**  
Telephone 020 7282 2025  
Fax 020 7282 2041  
E-mail john.thomas@orr.gsi.gov.uk



18 July 2008

Please see attached list

Dear Consultees

**Periodic review 2008 (PR08) consultation on draft Schedules 7 and 8 of track access contracts**

**Introduction**

1. In our PR08 draft determinations, we said that we would consult on legal drafting on Schedules 4, 7 and 8 of both passenger and freight train operators' track access contracts, consistent with these draft determinations.
2. The purpose of this letter and accompanying annexes is to provide you with an opportunity to comment on the proposed changes to Schedules 7 and 8 for both freight and franchised passenger train operators and also for other passenger operators where and to the extent that their track access contracts are subject to the PR08 as notified at the time of the PR08 initiation notice served in February 2007<sup>1</sup>.
3. We have separately consulted on PR08 changes to Schedule 4<sup>2</sup>. We also intend to make changes in PR08 to the station long term charges but this will simply be a change of

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<sup>1</sup> Periodic review 2008: review initiation notice, Office of Rail Regulation, February 2007 ([http://www.rail-reg.gov.uk/upload/pdf/PR08\\_note-of-proposal.pdf](http://www.rail-reg.gov.uk/upload/pdf/PR08_note-of-proposal.pdf)). See also periodic review 2008, Advice to Ministers and framework for setting access charges, Office of Rail Regulation, February 2007 ([http://www.rail-reg.gov.uk/upload/pdf/PR08\\_note-of-proposal.pdf](http://www.rail-reg.gov.uk/upload/pdf/PR08_note-of-proposal.pdf)).

<sup>2</sup> Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for passenger operators and Part G of the network code for all operators, Office of Rail Regulation, April 2008. This document can be accessed at: [http://www.rail-reg.gov.uk/upload/pdf/pr08-poss\\_comp\\_pass\\_090408.pdf](http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_pass_090408.pdf) and Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for freight operators, franchise passenger operators access charge supplements and part G of the network code, Office of rail regulation, July 2008. This document can be accessed at: [http://www.rail-reg.gov.uk/upload/pdf/pr08-poss\\_comp\\_pass\\_090408.pdf](http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_pass_090408.pdf)

value and we have issued a proposed list of station long term charges consistent with the draft determinations in the accompanying price list document<sup>3</sup>.

4. This consultation on the Schedules marks the start of a process to make sure that the changes that we will make to these Schedules to implement the final determinations of PR08, properly reflect the policy intentions and take into account the views of interested persons.

5. The following annexes are attached:

- Annex 1 - draft Schedule 7 (passenger);
- Annex 2 - draft Schedule 7 (freight);
- Annex 3 - draft Schedule 8 (passenger), paragraph 17; and
- Annex 4 - draft Schedule 8 (freight).

6. In each case the proposed changes have been made to the latest version of the relevant model contract and the annexes show the proposed changes to the latest version. This means that the annexes do not take account of specific differences from the template that may exist in particular track access contracts. It would be useful if your response to this initial consultation highlighted areas where the changes made in this form would require adaptation because of differences in your track access contract.

7. The proposed changes to the passenger Schedules have been made to the current version of the template franchised passenger operator contract. We recognise that bespoke changes will need to be made for example in the ScotRail contract to reflect the role of Scottish Ministers and in non-franchised passenger operator contracts to remove any provisions which only apply to franchised passenger operators such as the Network Rail rebate provision. We do not think that this should prevent those affected operators from commenting on the drafting that applies to them. We would be happy to meet with them separately to discuss any specific issues.

8. We have included comments in the annexes where we thought it would be helpful to explain the approach that we have taken to making a particular change.

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<sup>3</sup> Periodic review 2008: draft determinations, price lists, Office of Rail Regulation, June 2008. This can be accessed on our website at [http://www.rail-reg.gov.uk/upload/pdf/pr08-dft\\_determin-price\\_list.pdf](http://www.rail-reg.gov.uk/upload/pdf/pr08-dft_determin-price_list.pdf).

## **Schedule 7**

9. Schedule 7 sets out the basis for the track access charges payable by train operators to Network Rail. It also includes related provisions such as the circumstances when we can consider undertaking an access charges review.

10. The Schedule 7 changes give effect to the policy set out in our draft determinations which is particularly set out in chapters 19, 21 and 22 (and chapter 14 for the contractual re-opener provisions). In particular the proposed changes include changes to:

- the access charges review re-opener provisions (Part 7 in passenger contracts and paragraph 3 in freight contracts) to give effect to paragraphs 14.38 to 14.45 of our draft determinations;
- the traction electricity charge arrangements;
- provide for the new freight only line charge;
- provide for any rewards to be shared between Network Rail and the train operator through the efficiency benefit sharing mechanism which has been included in both freight and passenger contracts;
- remove arrangements particularly in the passenger contract (for example paragraphs 2.2 to 2.6 of Part 2) relevant in the last control period but no longer relevant for the next;
- remove the change of law provisions from the passenger contract to give effect to paragraphs 22.13 to 22.15 of our draft determinations;
- make improvements to provisions such as the procedural arrangements underpinning a Network Rail rebate in passenger contracts.

## **Schedule 8**

11. As we set out in our draft determinations for both the freight and passenger Schedule 8s, an industry group made up of train operators, Network Rail, Government and ORR representatives has led the work to develop changes and in particular for freight has recommended some fundamental changes that have required substantial drafting changes from the current Schedule 8s. For freight our principal proposed changes to give effect to our draft determinations are as follows:

- changes to the cancellation arrangements,

- the introduction of benchmarks normalised for the size and growth of the train operators' services;
- a single standard 'freight' Network Rail/TOC benchmark and Network Rail/TOC payment rate; and
- a new arrangement where the train operator benchmark can be adjusted to take account of material amounts of growth of other operators' services in paragraph 10.

12. The legal changes to the passenger Schedule 8 are limited to changes to make the dispute process relating to changes to the regime more effective. Other policy changes will be reflected in different values in the regime but do not require changes to the legal drafting in Schedule 8 to give effect to our draft determinations.

### **Consultation responses**

13. We would welcome views on any of the drafting included in the annex. We have flagged in the annexes some particular areas where we are seeking your views.

14. We are keen to meet with consultees or their representatives to discuss any comments they have on the proposed changes during the consultation period to inform consultation responses. We have asked ATOC to convene a meeting to discuss the proposed changes to the passenger contract. We are in the process of convening a meeting of the freight working group on Schedule 8 in August. We propose that this meeting should be used as an opportunity to discuss the proposed changes to Schedule 8 and, as the attendees of this working group include all affected operators, Network Rail and Government, Schedule 7. We would also be willing to arrange bilateral meetings to discuss the proposed changes during the consultation period.

15. Please can you send your views on the issues we have raised in electronic format (or if not possible, in hard-copy format) by September 5 2008 to:

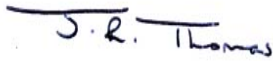
Iain Morgan  
Senior Economist  
Competition and Regulatory Economics  
Office of Rail Regulation  
1 Kemble Street  
London WC2B 4AN  
Tel: 020 7282 2060  
Email: [iain.morgan@orr.gsi.gov.uk](mailto:iain.morgan@orr.gsi.gov.uk)

16. We are also happy to discuss any of the issues raised in this letter. In the first instance please contact Iain Morgan on 0207 282 2060.

17. If you send a written response, you should indicate clearly if you wish all or part of your response to remain confidential to ORR. Otherwise we would expect to make it available in our library and on our website and potentially to quote from it. Where your response is made in confidence please can you provide a statement summarising it, excluding the confidential information, that can be treated as a non-confidential response. We may also publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

10. Copies of this letter can be found in the ORR library and on the ORR website ([www.rail-reg.gov.uk](http://www.rail-reg.gov.uk)).

Yours faithfully

A handwritten signature in black ink that reads "J.R. Thomas". The signature is written in a cursive style with a horizontal line above the first few letters.

**John Thomas**

## **List of consultees**

Association of Train Operating Companies

Department for Transport

Freight operating companies

HM Treasury

Network Rail

National Assembly of Wales

Passenger Focus

Passenger Transport Executives

Rail Freight Group members

Rail Industry Association

ROSCOs

Train operating companies

Transport for London

Transport Scotland

## ANNEX 1

### 17 July 2008 ORR Draft for Consultation of Passenger Schedule 7

#### SCHEDULE 7: TRACK CHARGES

[Note: amendments will be required for the form of Schedule 7 to apply in relation to Scotland.]

#### PART 1: INTERPRETATION

##### 1 Definitions

In Parts 1-8 inclusive, unless the context otherwise requires:

~~“2003 Final Conclusions Determinations”~~ means the document entitled ~~“Access charges review 2003: final conclusions”~~ “Periodic Review 2008: Final Determinations” and published by ORR on ~~12 December 2003~~ 30 October 2008;

~~“Additional Grant Proportion”~~ has the meaning ascribed to it in paragraph 2.4 of Part 2 of this Schedule 7;

~~“2003 access charges review”~~ means the access charges review on which ORR’s conclusions are set out in the 2003 Final Conclusions;

~~“Additional Grant Revenue access charges review”~~ means amounts payable to Network Rail by way of grant under section 211 of the Transport Act 2000 which exceed, in aggregate, the amount of grants payable in the control period under the Existing ~~Deed of Grant~~ has the meaning ascribed to it by Schedule 4A to the Act;

“Additional Permitted Charges” means the charges specified in paragraph 2 of Part 5;

“Adjusted Interest Cover Ratio” means the value of AICR derived from the formula set out in paragraph 2.2 of Part 7;

“Aggregate Fixed Charges” means, in any Relevant Year  $t$ , the sum of the values of  $F_t$  under paragraph 1 of Part 2 ~~of Schedule 7~~ and the corresponding provisions of each other relevant access agreement;

“Basic Value” has the meaning ascribed to it in paragraph 1.1(a) of Part 3A ~~of this Schedule 7~~;

“Capacity Charge” means a variable charge, calculated in accordance

with paragraph 6 of Part 2;

<b><del>“Change of Law”</del></b>	<del>means (as the context may require) Legislative Change and/or the Direction of a Competent Authority, in either case other than one the financial consequences of which are determined pursuant to Condition F4 or G5;</del>
<b><del>“Competent Authority”</del></b>	<del>means any local, national or supra-national agency, authority, department, inspectorate, minister, ministry, official, court, tribunal or public or statutory person (whether autonomous or not and including the Secretary of State), whether of the United Kingdom or of the European Union, which has, in respect of this contract, jurisdiction over either or both of the parties to, or the subject matter of, this contract, provided that “Competent Authority” shall not include:</del>
	<del>(a) ORR, except to the extent that it shall specify by notice to the parties at any time and from time to time, and subject to such conditions (if any) as it shall so specify; or</del>
	<del>(b) subject to sub paragraph (a) above, any court, tribunal or arbitral body exercising its powers in any reference made to it pursuant to or arising out of any access contract or any act or omission or fact, matter or thing associated with any such contract or the relationship created or evidenced by it;</del>
<b><del>“control period</del><u>Deed of Grant</u>”</b>	<del>means the period of five Relevant Years commencing on 1 April 2004 and ending on 31 March 2009</del> <u>Deed of Grant made on [ ] between the [Secretary of State][Scottish Ministers][delete as appropriate; it is assumed that only the ScotRail TAC will include the reference to Scottish Ministers][, Network Rail Limited] and others;</u>
<b>“Default Train Consist Data”</b>	means the data listed in Appendix 7C as amended from time to time in accordance with paragraph 10.4 of Part 2;
<b><del>“Direction</del><u>Efficiency Benefit Share</u>”</b>	<del>means any direction, requirement, instruction or rule binding on either or both of the parties, and includes any modification, extension or</del>



~~replacement of any such direction, requirement, instruction or rule for the time being in force but shall not include the exercise of a discretion under any contract or other obligation binding on the party in question or the enforcement of any such contract or obligation~~the amount determined in accordance with paragraph 3.2 of Part 2;

~~“Existing Deed of Grant~~Electrification Asset Usage Charge”

~~means the Deed of Grant made on 27 June 2002 between the Strategic Rail Authority, Network Rail Limited and others, as amended or replaced and in force on 12 December 2003~~an annual charge for electrification asset usage, calculated in accordance with paragraph 8 of Part 2;

“excluded change”

means, in relation to paragraph 2.1(b) of Part 7, a change to the arrangements established between Network Rail and any other person in respect of the payment of any amount under section 6 of the Railways Act 2005;

**“Fixed Track Charge”**

means a fixed annual charge, calculated in accordance with paragraph 2 of Part 2;

**“Fixed Track Charge Indexation”**

has the meaning ascribed to it in paragraph 2.1 of Part 2 ~~of this Schedule 7;~~

~~“Franchised Passenger Services”~~

~~means railway passenger services which the Secretary of State shall have designated as eligible for provision under franchise agreements pursuant to section 23 of the Act and Ancillary Movements in relation~~[Note: The definition of “Franchised Passenger Services” (previously used in the definitions of “Gross Tonne Mile”, “Train Mile”, “Vehicle Mile” and paragraphs 5.2 and 5.3 of Part 2) has been deleted as it is not required in this draft, principally because the electricity volume and cost reconciliation in paragraphs 5.2 and 5.3 of Part 2 is no longer limited to such services; franchised operators.]

**“Geographic Area g”**

~~means the relevant geographic section of the Network (as defined in Appendix 7B),~~ for the purposes of performing the calculations set out in paragraphs 4 and 5 of Part 2, the relevant geographic section of the Network as set out in the

[Traction Electricity Price List](#);

<b>“Grant Amount”</b>	has the meaning ascribed to it in paragraph 1.2 of Part 3A <del>of this Schedule 7</del> ;
<b>“Grant Compensation Amount”</b>	has the meaning ascribed to it in paragraph 3.2 of Part 3A <del>of this Schedule 7</del> ;
<b>“Grant Dilution”</b>	has the meaning ascribed to it in paragraph 2.1 of Part 3A <del>of this Schedule 7</del> ;
<b>“Grant Dilution Date”</b>	has the meaning ascribed to it in paragraph 2.2 of Part 3A <del>of this Schedule 7</del> ;
<b>“Gross Tonne Mile”</b>	in relation to a train, means a mile travelled on the Network <del>in providing Franchised Passenger Services</del> , by each tonne of the aggregate weight of the train in question;

<b><del>“Index of Industrial Electricity Costs”</del></b>	<del>means the index of prices of fuels purchased by manufacturing industry in Great Britain—electricity purchased by moderately large users published quarterly by the Department for Business, Enterprise and Regulatory Reform or:</del>
	<del>(a) — if the index for any quarter in any year shall not have been published on or before the last day of the fourth month after such quarter, such index for such period or periods as ORR may, after consultation with the Secretary of State, Network Rail and the Train Operator, determine to be appropriate in the circumstances; or</del>
	<del>(b) — if there is a material change in the basis of the index, such other index as ORR may, after consultation with the Secretary of State, Network Rail and the Train Operator, determine to be appropriate in the circumstances;</del>
<b><del>“Legal Requirement”</del></b>	<del>means (for the purpose of the definition of Legislative Change), in relation to any person, any of the following:</del>
	<del>(a) — any primary or secondary legislation to the extent that it applies to that person;</del>

~~(b) any regulation made by the Council or the Commission of the European Union to the extent that it applies to that person or a decision taken by the said Commission which is binding on that person to the extent that it is so binding; and/or~~

~~(c) any interpretation of law, or finding, contained in any judgment given by a court or tribunal of competent jurisdiction in respect of which the period for making an appeal has expired which requires any Legal Requirement falling within paragraph (a) or (b) above to have effect in a way which is different to that in which it previously had effect;~~

**“Legislative Change~~kWh~~”**

~~means the application to any person of any Legal Requirement which did not previously so apply or the change of any Legal Requirement applying to that person (including any such Legal Requirement ceasing to apply, being withdrawn or not being renewed) other than in relation to taxation~~kilowatt hours~~;~~

**“List of Capacity Charge Rates”**

~~means the ~~list of capacity charge rates~~document entitled “List of Capacity Charge Rates” published by ORR on ~~23 December 2003~~[ ] 2008 [Date to be inserted. It is assumed that these notices will be published prior to the review notice after the ORR audit.];~~

**“Material Amount”**

~~means an amount which Network Rail may incur in, or save by reason of, complying with a Change of Law such as is referred to in Part 3 which is likely to result in increased (or decreased) Track Charges under this contract of an amount equivalent to or exceeding 0.1 *per cent* of the Fixed Track Charge in the Relevant Year t in which Network Rail first becomes liable to make any payment or perform any other obligation in so complying;~~

**“Network Rail Rebate”**

~~has the meaning ascribed to it in paragraph 7.1 of Part 2~~of this Schedule 7;

**“Payment Date”**

~~has the meaning ascribed to it in paragraph 1.1(b) of Part 3A~~of this Schedule 7;

<b>“Period”</b>	has the meaning ascribed to it in Schedule 8;
<del>“RAB”</del>	<del>means the Regulatory Asset Base, as defined in Condition 22 of Network Rail’s network licence;</del>
<del>“RAB Increase Equivalent”</del>	<del>has the meaning ascribed to it in paragraph 2.2 of Part 2 of this Schedule 7;</del>
<b>“Rebatable Amount”</b>	has the meaning ascribed to it in paragraph 7.2 of Part 2 <del>of this Schedule 7</del> ;
<u>“Regulatory Accounting Guidelines”</u>	<u>means any guidelines issued by ORR from time to time in accordance with Condition 22.8 of the network licence; [Note: References to Conditions of the network licence may need updating to reflect the current review of the network licence.]</u>
<b>“relevant access agreement”</b>	<p>means an access agreement under which a person who is:</p> <ul style="list-style-type: none"> <li>(a) a franchise operator;</li> <li>(b) a concession operator within the meaning of the Merseyrail Electrics Network Order 2003;</li> <li>(c) a person in the same or substantially the same position as the concession operator under the Merseyrail Electrics Network Order 2003 in relation to any other network; or <u>[Note: Changes to the Network Code which are currently being progressed will be reflected in this paragraph once finished.]</u></li> <li>(d) the Secretary of State or a person providing services for the carriage of passengers by railway on behalf of the Secretary of State under section 30 of the Act,</li> </ul> <p>obtains permission from Network Rail to use the Network;</p>
<del>“Relevant Amount”</del>	<del>has the meaning ascribed to it by paragraph 2 of Part 3;</del>
<b>“Relevant Year”</b>	means a year commencing at 0000 hours on 1 April and ending at 2359 hours on the following 31 March; “Relevant Year t” means the Relevant Year for the purposes of which any calculation falls to be

made; “Relevant Year t-1” means the Relevant Year preceding Relevant Year t; and similar expressions shall be construed accordingly;

**“Retail Prices Index”**

means the general index of retail prices published by National Statistics each month in respect of all items or:

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

~~“Revised Deed of Grant”~~

~~has the meaning ascribed to it in paragraph 2.5.4(a) of Part 2 of this Schedule 7;~~

**“Schedule of Fixed Charges”**

means the document entitled “Fixed Track Charges scheduleSchedule” published by ORR on ~~23 December 2003~~[ ] 2008 [Date to be inserted. It is assumed that these notices will be published prior to the review notice after the ORR audit.];

“tariff band”

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

**“Track Usage Price List”**

means the ~~track usage price list~~document entitled “Track Usage Price List” published by ORR on ~~23 December 2003~~[ ] 2008 [Date to be inserted. It is assumed that these notices will be published prior to the review notice after the ORR audit.];

**“Traction Electricity Charge”**

means a variable charge for traction current

calculated in accordance with paragraph 4 of Part 2;

**“Traction Electricity Price List”**

means the ~~traction electricity price list~~ document entitled “Traction “Electricity Price List” published by ORR ~~in Appendix Q to the document dated 26 October 2000 setting out the final conclusions to the periodic review of access charges (with the modelled consumption rates being specified separately in the letter addressed to train operators dated 27 October 2000); on [ ] 2008; [Date to be inserted. It is assumed that these notices will be published prior to the review notice after the ORR audit.]~~

**“train category”**

means train type i used on the relevant route in question;

**“Train Consist Data”**

means the information relating to the number(s) and type(s) of railway vehicle comprised in a train movement;

**“Train Mile”**

in relation to a train, means a mile travelled by that train on the Network ~~in providing Franchised Passenger Services;~~

**“Variable Charge”**

means the Variable Track Usage Charges and, where the context admits, Traction Electricity Charges;

**“Variable Track Usage Charge”**

means a variable charge, calculated in accordance with paragraph 3 of Part 2; and

**“Vehicle Mile”**

in relation to a railway vehicle, means a mile travelled by that vehicle on the Network ~~in providing Franchised Passenger Services.~~

**2 Interpretation**

~~In this Schedule 7:~~

- ~~(a) unless the context otherwise requires, references in Parts of this Schedule to paragraphs are reference to paragraphs in the Parts in which they appear;~~
- ~~(b) unless otherwise stated, all provisions have effect from 1 April 2001; and~~

~~(c) all references in this Schedule 7 to a notice given by ORR on 10 March 2004 shall be construed as though references in Annex 2 to that notice to “Debt Issuance Programme (as defined in the Revised Deed of Grant attached at Annex 3 to this notice)” were references to “Debt Issuance Programme (as defined in the Revised Deed of Grant as amended and restated by the Supplemental Deed dated 28 September 2004 between the SRA, Network Rail Limited, Network Rail Holdco Limited and Network Rail, as that definition is construed in accordance with clause 1.2 of the Revised Deed of Grant as amended and restated by that Supplemental Deed)”.~~

The provisions of clause 1.2(e) of this contract shall not apply to any references to the Deed of Grant in this Schedule 7.

## PART 2: TRACK CHARGES

### 1 Principal formula

During each Relevant Year (and, in respect of  $F_t$  ~~and  $L_t$~~ , prorated for each day of any period of this contract comprising less than a full Relevant Year), Network Rail shall levy and the Train Operator shall pay Track Charges in accordance with the following formula:

$$T_t = F_t + V_t + E_t + K_t + EV_t - BS_t - W_t$$

where:

$T_t$  means Track Charges in Relevant Year t;

$F_t$  means an amount in respect of the Fixed Track Charge in Relevant Year t, which shall be:

(a) in respect of the Relevant Year commencing on 1 April ~~2004, 2009~~, the total of the amounts set out in the row relating to the Train Operator and the column relating to that year in the Schedule of Fixed Charges; and

(b) in respect of any other Relevant Year t, the total of the amounts set out in the row relating to the Train Operator and the column relating to that year in the Schedule of Fixed Charges, multiplied by the Fixed Track Charge Indexation for that year calculated in accordance with paragraph 2.1;  ~~$RIE_t$  means an amount in respect of the RAB Increase Equivalent in Relevant Year t, calculated in accordance with the provisions of paragraph 2.2;~~

~~$AGP_t$  means an amount in respect of the Additional Grant Proportion in Relevant Year t, calculated in accordance with the provisions of paragraph 2.4;~~

$V_t$  means an amount in respect of the Variable Track Usage Charge in Relevant Year t which is derived from the formula in paragraph 3;

$E_t$  means an amount in respect of the Traction Electricity Charge in Relevant Year t which is derived from the formula in paragraph 4;

$K_t$  means an amount in respect of the Capacity Charge in Relevant Year t which is derived from the formula in paragraph 6;

~~$L_t$~~   $EV_t$  means an amount ~~(whether of a positive or in respect of the Electrification Asset Usage Charge, calculated in accordance with the formula in paragraph 8;~~

$BS_t$  means an amount (which shall not be a negative value) ~~allowed to be charged by Network Rail to the Train Operator~~ in respect of the ~~financial consequences to Network Rail~~ Efficiency Benefit Share in



Relevant Year t ~~following a Change of Law~~which is determined in accordance with ~~the provisions of Part 3~~paragraph 3.2; and

$W_t$  means an amount (which shall not be a negative value) in respect of the Network Rail Rebate in Relevant Year t, calculated in accordance with the provisions of paragraph 7.1.

## 2 ~~Fixed Track Charge Indexation, RAB Increase Equivalent and Additional Grant Proportion~~2.1 Fixed Track Charge Indexation

The Fixed Track Charge Indexation in Relevant Year t shall be derived from the following formula:

$$FTCI_t = 1 + \left( \frac{RPI_{t-1} - RPI_{2008}}{RPI_{2008}} \right)$$

where:

$FTCI_t$  means the Fixed Track Charge Indexation in Relevant Year t;

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

$RPI_{2003}$ ~~2008~~ means the Retail Prices Index published or determined with respect to November ~~2003~~.

### ~~2.2 RAB Increase Equivalent~~

~~For the purposes of paragraph 1, an amount in respect of the RAB Increase Equivalent in Relevant Year t ( $RIE_t$ ) is an amount derived from the following formula:~~

where: 
$$RIE_t = RI_t - \frac{F_t}{AF_t} - FTCI_t$$

~~$RI_t$  has the meaning ascribed to it in paragraph 2.3.1;~~

~~$F_t$  has the meaning ascribed to it in paragraph 1;~~

~~$AF_t$  means the Aggregate Fixed Charge in Relevant Year t; and~~

~~$FTCI_t$  is the Fixed Track Charge Indexation in Relevant Year t, calculated in accordance with paragraph 2.1, but so that  $RIE_t$  shall be zero in respect of the Relevant Years commencing on 1 April 2006, 1 April 2007 and 1 April 2008.~~

### ~~2.3 $RI_t$~~

#### ~~2.3.1 Value of $RI_t$~~

~~Subject to paragraph 2.3.2,  $RI_t$  shall be the amount which ORR specifies as RI in respect of Relevant Year t in a notice given on 10 March 2004.~~

### ~~2.3.2 Notice~~

~~A notice under paragraph 2.3.1 shall have no effect unless:~~

- ~~(a) ORR is satisfied that all the conditions specified in paragraph 2.3.3 have been satisfied; and~~
- ~~(b) it satisfies the requirements of paragraph 2.3.4.~~

### ~~2.3.3 Conditions precedent to giving of notice~~

~~The conditions referred to in paragraph 2.3.2(a) are:~~

- ~~(a) ORR has received from Network Rail, by 29 February 2004, a written proposal, satisfactory to ORR, which states:~~
  - ~~(i) the amount which Network Rail considers should be added to the RAB;~~
  - ~~(ii) proposed values for RI in respect of the Relevant Years commencing on 1 April 2004 and 1 April 2005, being the amounts by which Track Charges should be reduced in such Relevant Years to take account of such increase in the RAB; and~~
  - ~~(iii) the reasoning by which Network Rail arrived at such amounts, including:
    - ~~(A) information about the terms of any actual or proposed loan agreement, credit facility, securitisation or other financing arrangement entered, or to be entered into, by Network Rail after 12 December 2003; and~~
    - ~~(B) such other information, calculations, projections or estimates as may have been requested by ORR; and~~~~
- ~~(b) ORR has taken into account:~~
  - ~~(i) Network Rail's proposal under paragraph 2.3.3(a);~~
  - ~~(ii) the matters in respect of which duties are imposed on it under section 4 of the Act;~~
  - ~~(iii) the tests specified in paragraph 15.21 of the 2003 Final Conclusions; and~~
  - ~~(iv) the terms of any document submitted under paragraph 2.5.3(a) and, if such a document is submitted, the matters specified in paragraph 2.5.3(b).~~

### ~~2.3.4 Mandatory elements of notice~~

~~A notice given under paragraph 2.3.1 must state:~~

- ~~(a) values for RI in respect of the Relevant Years commencing on 1 April 2004 and 1 April 2005 which are the same as the values proposed by Network Rail under paragraph 2.3.3(a)(ii); and~~

~~(b) that ORR has determined that the amount which Network Rail proposed should be added to the RAB under paragraph 2.3.3(a)(i) shall be added to the RAB.~~

#### ~~2.4 Additional Grant Proportion~~

~~For the purposes of paragraph 1, an amount in respect of the Additional Grant Proportion in Relevant Year t ( $AGP_t$ ) is an amount derived from the following formula:~~

$$\frac{AGP_t = AG_t \cdot \frac{F_t}{AF_t} \cdot FTCl_t}{}$$

~~where:~~

~~$AG_t$  means the amount (if any) specified by ORR as AG in respect of Relevant Year t in a notice given under paragraph 2.5.1;~~

~~$F_t$  has the meaning ascribed to it in paragraph 1;~~

~~$AF_t$  means the Aggregate Fixed Charge in Relevant Year t; and~~

~~$FTCl_t$  is the Fixed Track Charge Indexation in Relevant Year t, calculated in accordance with paragraph 2.1,~~

~~but so that in every Relevant Year t,  $RIE_t + AGP_t$  shall be greater than or equal to zero.~~

#### ~~2.5 $AG_t$~~

##### ~~2.5.1 Value of $AG_t$~~

~~Subject to paragraph 2.5.2,  $AG_t$  shall be the amount which ORR specifies as AG in respect of Relevant Year t in a notice given on 10 March 2004.~~

##### ~~2.5.2 Notice~~

~~A notice under paragraph 2.5.1 shall have no effect unless:~~

~~(a) ORR is satisfied that all the conditions specified in paragraph 2.5.3 have been satisfied; and~~

~~(b) it satisfies the requirements of paragraph 2.5.4.~~

##### ~~2.5.3 Conditions precedent to giving of notice~~

~~The conditions referred to in paragraph 2.5.2(a) are:~~

~~(a) by 29 February 2004, ORR has received from Network Rail a document, whose contents have been agreed with the Strategic Rail Authority, which, if executed, would amend or replace the Existing Deed of Grant; and~~

~~(b) ORR is satisfied:~~

- ~~(i) that if the document received by it under paragraph 2.5.3(a) were to be executed:
    - ~~(A) Network Rail would receive Additional Grant Revenue; and~~
    - ~~(B) no payment of any amount of grant payable under the Existing Deed of Grant as amended or replaced by such document would be:
      - ~~(aa) subject to the performance by Network Rail or any other person of any obligation;~~
      - ~~(bb) subject to the exercise by the Secretary of State or any other person of any discretion; or~~
      - ~~(cc) contingent upon the happening of any event or circumstance, or any act or omission of any person; and~~~~~~
  - ~~(ii) that it would be appropriate, having regard to:
    - ~~(A) the Additional Grant Revenue;~~
    - ~~(B) the matters in respect of which duties are imposed on it under section 4 of the Act; and~~
    - ~~(C) the terms of any proposal made by Network Rail under paragraph 2.3.3(a) and, if such a proposal is made, the matters specified in paragraph 2.3.3(b);~~~~
- to give a notice under paragraph 2.5.1.

#### ~~2.5.4 Notice: mandatory elements~~

~~A notice given under paragraph 2.5.1 must:~~

- ~~(a) have attached to it a copy of the whole of the Existing Deed of Grant as it would be amended or replaced by the document received from Network Rail under paragraph 2.5.3(a) (the “**Revised Deed of Grant**”); and~~
  - ~~(b) state a value of AG in respect of each Relevant Year in the control period, which:
    - ~~(i) may be positive or negative; and~~
    - ~~(ii) shall correspond to the difference between:
      - ~~(A) the amount of grants payable under the Revised Deed of Grant; and~~
      - ~~(B) the amount of grants payable under the Existing Deed of Grant,~~~~~~
- ~~in such Relevant Year.~~

~~2.6—Notices, submissions and payment arrangements under paragraph 2~~

~~2.6.1—Notices and submissions under paragraphs 2.3 and 2.5: timing~~

~~Where paragraph 2.3 or 2.5 provides for ORR to:~~

- ~~(a) give a notice; or~~
- ~~(b) receive a submission or document from Network Rail,  
on or by a specified date, ORR may specify, by a notice given under this  
paragraph 2.6.1, such later date for:~~
  - ~~(i) the giving of such notice; or~~
  - ~~(ii) the receipt of such submission or document,  
as it considers appropriate.~~

~~2.6.2—Notices under paragraph 2.6.1: timing~~

~~A notice referred to in paragraph 2.6.1 may be given at any time and from  
time to time.~~

~~2.6.3—Notices under paragraph 2: service and publication~~

~~Any notice contemplated or provided for under this paragraph 2 shall be:~~

- ~~(a) given to Network Rail and the Train Operator; and~~
- ~~(b) published in such manner as ORR considers appropriate.~~

~~2.6.4—Invoicing and payment adjustments: post 1 April 2004 specification of R<sub>t</sub>  
or A<sub>G</sub><sub>t</sub>~~

~~Where a notice given under paragraph 2.3 or 2.5 is given on or after 1  
April 2004:~~

- ~~(a) the terms of invoicing and payment established by the parties to this  
contract shall be adjusted so as to give effect to the notice on and  
from 1 April 2004;~~
- ~~(b) such adjustments may include the repayment by one party to the  
other of an amount overpaid or the giving of credit for any such  
overpayment; and~~
- ~~(c) if the parties have not made the relevant adjustments by agreement  
within 30 days of the giving of the notice in question, ORR shall,  
upon the application of either party, be entitled to determine what  
adjustments are to be made and the adjustments so determined shall  
have effect.~~

**3 Variable track charge and efficiency benefit share**

**3.1 Variable track charge**

For the purposes of paragraph 1, the term  $V_t$  means an amount in respect of the Variable Track Usage Charge in Relevant Year  $t$  which is derived from the following formula:

$$V_t = \sum V_{it} \cdot UV_{it}$$

where:

$V_{it}$  means an amount in respect of the Variable Track Usage Charge per Vehicle Mile for a category of vehicle  $i$  for Relevant Year  $t$  which is derived from the following formula:

$$V_{it} = V_{it-1} \left[ 1 + \frac{RPI_{t-1} - 0}{100} \right]$$

where:

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

but so that in relation to the Relevant Year commencing on 1 April ~~2004~~, 2009,  $V_{it}$  shall have, in respect of each Vehicle Mile, the value set out in the Track Usage Price List; and in relation to the next following Relevant Year  $V_{it-1}$  shall have the same value;

$UV_{it}$  means the actual volume of usage (in Vehicle Miles) in Relevant Year  $t$  of vehicle type  $i$  (referred to in the Track Usage Price List) operated by or on behalf of the Train Operator; and

$\Sigma$  means the summation across all relevant categories of vehicle types (i).

### [3.2 Efficiency Benefit Share](#)

[The Efficiency Benefit Share is an amount \(which shall not be a negative value\) representing a return of Track Charges which shall be identified in the ORR's annual assessment of Network Rail as the "Efficiency Benefit Share", if any, to be rebated to the Train Operator, such amount to be determined in accordance with \[Annex/Table \[ \] of\] the 2008 Final Determinations<sup>1</sup>.](#)

## **4 Traction Electricity Charge**

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<sup>1</sup> [This Schedule refers to a number of terms being defined in the 2008 Final Determinations. The 2008 Final Determinations will have to be checked to ensure consistency.](#)

4.1 For the purposes of paragraph 1, the term  $E_t$  means an amount in respect of the Traction Electricity Charge in Relevant Year  $t$  which is derived from the following formula:

$$E_t = \sum C_i \cdot EF_{gjt} \cdot UE_{igt}$$

where:

$\Sigma$  means the summation across all relevant train categories  $i$ , tariff bands  $j$  and/or Geographic Areas  $g$ , as appropriate, of:

$C_i$  means the calibrated modelled consumption rate (in kWh per Train Mile in relation to electric multiple units and kWh per Gross Tonne Mile in relation to locomotive-hauled units) for train category  $i$ , shown in the Traction Electricity Price List;

~~$E_{gjt}$~~   $EF_{gjt}$  means an amount for traction current (in pence per kWh) consumed by railway vehicles operated by or on behalf of the Train Operator in Geographic Area  $g$ , in tariff band  $j$ , ~~in Relevant Year  $t$ , derived from the following formula:~~ (i) as set out in the Traction Electricity Price List or (ii) as otherwise agreed or determined pursuant to paragraph 4.2;

~~where:~~

~~$I_{t-1}$  means the percentage change (whether of a positive or negative value) between the Index of Industrial Electricity Costs published or determined with respect to the quarter ending on 30 June in Relevant Year  $t-1$  and the index published or determined with respect to the quarter ending on 30 June in year  $t-2$ ,~~

~~but so that in relation to the Relevant Year commencing on 1 April 2001,  $E_{gjt}$  shall have, in respect of each kWh, the value set out in the Traction Electricity Price List; and in relation to the next following Relevant Year  $E_{gjt-1}$  shall have the same value;~~

~~$EV_t$  means an amount for electrification asset usage (in pence per kWh) which is derived from the following formula:~~

~~where:~~

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

~~but so that in relation to the Relevant Year commencing on 1 April 2001,  $EV_t$  shall have, in respect of each kWh, the value set out in the Traction Electricity Price List; and in relation to the next following Relevant Year  $EV_{t+1}$  shall have the same value;~~

~~$UE_{igt}$~~   $UE_{igt}$  means the actual volume of usage (in electrified ~~Train~~Vehicle Miles in relation to electric multiple units or Gross Tonne Miles in relation to locomotive hauled units) of trains operated by or on behalf of the Train Operator in train category i, in Geographic Area g, in tariff band j and in Relevant Year t, pursuant to this contract;

~~$\Sigma$  means the summation across all relevant train categories (i), tariff bands (j) and/or Geographic Areas (g), as appropriate;~~

~~“kWh” means kilowatt hours;~~

~~“tariff band” means the tariff zone and time band in which the train in question is operated;~~

~~“train category” means train type i used on the relevant route in question; and~~

~~“tariff zone”, “time band”, “train type” and “relevant route” have the meanings ascribed to them in the Traction Electricity Price List.~~

## ~~5~~ **Modelled and actual rates of consumption**

4.2 Network Rail shall at least three months prior to the start of each Relevant Year commencing on or after 1 April 2009 consult with the Train Operator regarding its strategy for the procurement of traction electricity in respect of that Relevant Year. If Network Rail receives agreement from the Train Operator, Network Rail will procure electricity in accordance with what has been agreed. In the event that agreement is not forthcoming from the Train Operator, Network Rail will, acting reasonably, determine the procurement strategy for electricity for traction.

4.3 Network Rail shall provide to the Train Operator within 30 days of the end of each calendar month in each Relevant Year, the total actual cost of traction electricity against the budgeted amounts. Network Rail shall also provide to the Train Operator a provisional six month volume reconciliation before 30 October of each Relevant Year and the provisional nine month volume reconciliation before 30 January of each Relevant Year.

4.4 (a) If the Train Operator wishes to propose the introduction of on-train metering to measure traction electricity consumption for the purposes of invoicing Network Rail for traction electricity, it shall notify Network Rail of any required changes to the contract in connection with that proposal.



- (b) Any notice under sub-paragraph 4.4(a) shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.
- (c) Promptly following any response served by Network Rail under sub-paragraph 4.4(b), the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and if so the amendments.
- (d) If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the parties shall notify ORR. If ORR elects to determine the matter, the parties shall furnish ORR with such information and evidence as ORR shall require to determine the matter and shall abide by any determination issued by ORR. If ORR does not so elect, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
- (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
  - (ii) each of the parties shall abide by the rules and procedures established by the expert; and
  - (iii) the parties shall direct the expert to have regard to any relevant criteria and/or policy statement most recently issued by the Office of Rail Regulation.
- (e) Any amendment to the contract in connection with the proposal referred to in sub-paragraph 4.4(a) shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph 4.4 (other than a determination by ORR pursuant to sub-paragraph 4.4(d)), the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.
- (f) Any amendment to the contract in connection with the proposal referred to in sub-paragraph 4.4(a) shall apply with effect from, subject to paragraph 4.4(e), the date proposed by the Train Operator (unless otherwise agreed by the parties or determined by the ORR or the expert in relation to the proposal).

## 5. Volume and Cost Reconciliation<sup>2</sup>

5.1 Within 90 days after the end of Relevant Year t, Network Rail shall calculate ~~at two~~ supplementary ~~amount S<sub>t</sub>~~, amounts S1<sub>t</sub> and S2<sub>t</sub> which shall be payable by or to the Train Operator, ~~which in accordance with this paragraph 5.~~

5.2 S1<sub>t</sub> is derived from the following formula:

$$S1_t = \sum E_{gt} \cdot \frac{(A_{gt} - M_{gt})}{M_{gt}}$$

where:

$\sum$  means the summation across all relevant train categories i, tariff bands j and Geographic Areas g, as appropriate, of:

E<sub>gt</sub> is part of the Traction Electricity Charge payable by the Train Operator for each applicable Geographic Area g in Relevant Year t, determined in accordance with the following formula:

~~M<sub>gt</sub> means the total modelled electricity consumption for Franchised Passenger Services in Geographic Area g in Relevant Year t which is derived from the following formula:~~

$$E_{gt} = \sum C_i \cdot EF_{gjt} \cdot UE_{igt}$$

where:

C<sub>i</sub> means the calibrated modelled consumption rate (in kWh per Train Mile in relation to electric multiple units and kWh per Gross Tonne Mile in relation to locomotive-hauled units) for train category i, shown in the Traction Electricity Price List;

EF<sub>gjt</sub> means an amount for traction current (in pence per kWh) determined in accordance with paragraph 4 of this Part 2; and

~~UE<sub>igt</sub>~~ UE<sub>igt</sub> means the actual volume of usage (in electrified ~~Train Vehicle~~ Miles in relation to electric multiple units or Gross Tonne Miles in relation to locomotive hauled units) if any of trains operated in Relevant Year t by or on behalf of all train operators in Geographic Area g of trains of train category i, in Geographic Area g and in tariff band j, each as referred to in

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<sup>2</sup> ORR and Network Rail are considering whether modifications to this paragraph 5 are required in relation to the application of the regenerative braking discount.

the Traction Electricity Price List ~~in Relevant Year t, pursuant to the provision of Franchised Passenger Services;~~ and

~~E<sub>gjt</sub> means an amount for traction current (in pence per kWh) determined in accordance with paragraph 4;~~

~~Σ~~

~~M<sub>gt</sub> means the summation across all relevant train categories (i) and all tariff bands (j); and~~ total modelled electricity consumption in Geographic Area g and in Relevant Year t which is derived from the following formula:

$$M_{gt} = \sum C_i \cdot UE_{igt}$$

~~A<sub>gt</sub> means the total actual electricity consumption (in kWh) if any, in Geographic Area g for Franchised Passenger Services in the in Relevant Year t by or on behalf of all train operators, assessed by Network Rail (as nearly as reasonably practicable accurately as possible) as being the appropriate proportion of the electricity consumption billed to Network Rail by its electricity suppliers in that area for traction electricity consumed in accordance with the terms for the purchase of traction electricity entered into by Network Rail.~~

[Notes:

1. This definition of A<sub>gt</sub> is deliberately different from the equivalent definition in Schedule 7 (Freight) given that the regime in paragraph 4.2 only applies to Schedule 7 (Passenger). ORR would welcome views from industry parties.

2. Given Network Rail's current ability to measure consumption in each region, is this assessment / apportionment necessary?

5.3 S<sub>2t</sub> is derived from the following formula:

$$S_{2t} = (EP_t + S1_t) * (CS_t - CW_t) / CS_t$$

where:

S1<sub>t</sub> means the supplementary amount in respect of the Train Operator for Relevant Year t calculated in accordance with paragraph 5.2;

EP<sub>t</sub> means the summation of E<sub>gjt</sub> for the Train Operator as referred to in paragraph 5.2 across all geographic areas for Relevant Year t;

CS<sub>t</sub> means the total actual cost to Network Rail for traction electricity for each train operator whose access contract incorporates a provision in relation to S<sub>t</sub> in substantially similar terms to this paragraph 5

[Note: The definition of “Franchised Passenger Services” has been deleted for the reasons given in the drafting note following the deletion of that definition in Part 1 above] in Relevant Year t; and

CW<sub>t</sub> means the total modelled cost for traction electricity for each train operator whose access contract incorporates a provision in relation to S<sub>t</sub> in substantially similar terms to this paragraph 5 in the Relevant Year t as notified to the Train Operator by Network Rail which is derived from the following formula:

$$CW_t = \sum (E_t + S1_t)$$

5.25.4 Network Rail shall, within 90 days after the end of Relevant Year t, provide to the Train Operator:

- (a) ~~(a)~~ — a statement of the ~~amount S<sub>t</sub>~~ amounts S1<sub>t</sub> and S2<sub>t</sub> (whether of a positive or negative amount);
- (b) ~~(b)~~ — such background workings as may reasonably be required for a proper understanding of the calculation; and
- (c) ~~(c)~~ — a certificate of the auditors ~~for the time being~~ of Network Rail confirming the accuracy of the calculation.

5.35.5 Within 30 days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in paragraph 5.2,5.4, the ~~amount S<sub>t</sub>~~ amounts S1<sub>t</sub> and S2<sub>t</sub> shall be invoiced for payment as provided under this contract. If the ~~amount S<sub>t</sub>~~ aggregate of the amounts S1<sub>t</sub> and S2<sub>t</sub> ~~is~~ positive, the invoice shall be issued by Network Rail and payable by the Train Operator. If the ~~amount S<sub>t</sub>~~ aggregate of the amounts S1<sub>t</sub> and S2<sub>t</sub> ~~is~~ negative, ~~the invoice shall be issued by Network Rail will issue a credit note to~~ the Train Operator ~~and payable by Network Rail.~~

## 6 Capacity Charge

For the purposes of paragraph 1, the term K<sub>t</sub> means an amount in respect of the Capacity Charge in Relevant Year t which shall be derived from the following formula:

$$K_t = \left[ \sum (Pg_{twd} * Tg_t) + (Pg_{tw} * Tg_t) \right]$$

where:

$\sum$  means the sum across all Service Groups;

~~Pg~~Pg<sub>tw</sub> means the Weekday rate per Service Group g in respect of Relevant Year t shown in Column [ ] of the List of Capacity Charge Rates and indexed in accordance with the following formula:

$$Pg_{tw} = Pg_{tw-1} \left[ 1 + \frac{RPI_{t-1}}{100} \right]$$

where:

RPI<sub>t-1</sub> means the percentage change (whether of a positive or negative value) between the Retail Prices Index published or determined with respect to November in Relevant Year t-1 and the index published or determined with respect to November in Relevant Year t-2,

but so that in relation to the Relevant Year t commencing on 1 April ~~2004, CG<sub>t</sub>2009, Pg<sub>tw</sub>~~ shall have the value for the Weekday rate per Service Group g shown for the Train Operator in Column [ ] of the List of Capacity Charge Rates; and in relation to the next following Relevant Year, ~~Pg, Pg<sub>tw-1</sub>~~ shall have the same value;

~~Tg<sub>t</sub> means the actual train miles run by Services in Service Group g in the Relevant Year t;~~

~~CG<sub>t</sub> means an amount (in lieu of an adjustment to the Fixed Track Charge) derived from Pg<sub>tw</sub> means the weekend rate per Service Group g in respect of Relevant Year t shown in Column [ ] of the List of Capacity Charge Rates and indexed in accordance with~~ the following formula:

$$Pg_{tw} = Pg_{tw-1} \left[ 1 + \frac{RPI_{t-1}}{100} \right]$$

where:

RPI<sub>t-1</sub> means the percentage change (whether of a positive or negative value) between the Retail Prices Index published or determined with respect to November in Relevant Year t-1 and the index published or determined with respect to November in Relevant Year t-2,

but so that in relation to the Relevant Year t commencing on 1 April ~~2004, CG<sub>t</sub>2009, Pg<sub>tw</sub>~~ shall have the value for the weekend rate per Service Group g shown for the Train Operator in Column [ ] of the List of Capacity Charge Rates; and in relation to the next following Relevant Year, ~~CG<sub>t</sub>, Pg<sub>tw-1</sub>~~ shall have the same value;

~~Tg<sub>t</sub> means the actual train miles run by Services in Service Group g in the Relevant Year t; and~~

“**Service** means a collection of Services specified in column A of Appendix

**Group”** 1 of Schedule 8, and any Ancillary Movements relating to such Services.

## 7 Network Rail Rebate

7.1 For the purpose of paragraph 1, the Network Rail Rebate in respect of any Relevant Year  $t$  ( $W_t$ ) is an amount (which shall not be a negative value) by way of a return of Track Charges; paid in Relevant Year  $t-1$ , derived from the following formula:

$$W_t = \frac{RA_t \cdot F_t}{AF_t}$$

where:

$RA_t$  means the Rebatable Amount declared by Network Rail in relation to Relevant Year  $t-1$  under paragraph 7.2;

$F_t$  has the meaning ascribed to it in paragraph 1 as if references to “Relevant Year  $t$ ” in the definition of “ $F_t$ ” in paragraph 1 were references to “Relevant Year  $t-1$ ”; and

$AF_t$  means the Aggregate Fixed Charge in Relevant Year  $t-1$ .

7.2 The Rebatable Amount shall be the amount, if any:

- (a) which represents such proportion of Network Rail’s total income for Relevant Year  $t-1$  as it reasonably considers that it does not require in order to discharge its obligations under its network licence and any contracts to which it is a party;
- (b) which Network Rail, in its discretion, considers it appropriate, having regard to the matters specified in paragraph 7.3, to rebate as an amount representing a return of Track Charges payable by persons who provide services for the carriage of passengers by railway under the relevant access agreements to which they are parties; and
- (c) which Network Rail notifies as such to ORR before the end of each Relevant Year ~~in the control period  $t-1$~~ .

7.3 In considering the amount of the Rebatable Amount in any Relevant Year, Network Rail shall have regard to:

- (a) its obligations under its network licence and any contracts to which it is a party;
- (b) the extent to which its efficiency and economy in discharging the obligations referred to in paragraph 7.3(a) matches or exceeds any assumption which ORR made in the ~~2003~~2008 Final ~~Conclusions~~Determinations;
- (c) its current and foreseeable future financial position; and
- (d) the need for long term investment in the Network.

7.4 No amount of Track Charges shall be rebated under this paragraph 7 unless ORR, having regard to the matters:

- (a) to which Network Rail is to have regard under paragraph 7.3; and
- (b) in respect of which duties are imposed on it under section 4 of the Act,

has consented to such rebate.

**8 ~~Not Used~~ Electrification Asset Usage Charge**

For the purposes of paragraph 1, the term  $EV_t$  means an amount for electrification asset usage (in pence per kWh) which is derived from the following formula:

$$EV_t = EV_{t-1} \cdot \left[ 1 + \frac{RPI_{t-1} - 0}{100} \right]$$

where:

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

but so that in relation to the Relevant Year commencing on 1 April 2009,  $EV_t$  shall have, in respect of each kWh, the value set out in the Track Usage Price List; and in relation to the next following Relevant Year  $EV_{t-1}$  shall have the same value.

**9 Changes to the List of Capacity Charge Rates, Traction Electricity Price List and Track Usage Price List<sup>3</sup>**

9.1 No supplement to the Traction Electricity Price List or Track Usage Price List, and no change to the List of Capacity Charge Rates, shall have effect unless the supplement or change has been:

- (a) determined in accordance with the procedure set out in this paragraph 9; or
- (b) agreed between the parties,

and ORR shall have given its consent to the supplement or change.

9.2 Either of the Train Operator and Network Rail shall be entitled to propose that:

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<sup>3</sup> ORR is considering whether further changes are required to this paragraph to reflect changes in the price lists, and would welcome views from rail industry participants.

- (a) the Traction Electricity Price List shall be supplemented so as to include prices and/or modelled consumption rates and/or appropriate discounts in respect of regenerative braking for any additional train category or relevant route by tariff band (any such being a “relevant category”);
  - (b) the Track Usage Price List shall be amended so as to include a vehicle category which is not included in the list; or
  - (c) the List of Capacity Charge Rates shall be amended so as to take account of changes in the pattern and number of Services.
- 9.3 Any proposition of the kind referred to in paragraph 9.2 shall be made by notice to the other party and shall be accompanied by a specification in reasonable detail of the change proposed and the reasons for it. The parties shall thereafter negotiate in good faith the necessary supplements or changes to the list in question.
- 9.4 If the parties shall have failed to agree such supplements or changes within 45 days of the date of the notice given under paragraph 9.3, either party shall be entitled to refer the matter to an arbitrator for determination pursuant to Part C of the Access Dispute Resolution Rules. Unless the parties shall otherwise agree, paragraph ~~C6~~ [1.24 to 1.30 inclusive](#) of those rules shall not apply to the arbitration.
- 9.5 The remit of the arbitrator shall be to determine:
- (a) whether any such new relevant category or vehicle category (as the case may be) should be added to the list in question or whether changes in the pattern and/or number of Services warrant a change to the list in question; and, if so,
  - (b) which new categories should be added and what prices and/or modelled consumption rates and/or appropriate discounts should be included in relation to each such category or what change to the List of Capacity Charge Rates should be made.
- 9.6 In determining the matter referred to him under paragraph 9.4, the arbitrator shall be required by the parties to reach a decision which is fair and reasonable to them, having regard to:
- (a) the matters ~~as respects~~ [in respect of](#) which duties are imposed on ORR by section 4 of the Act; and
  - (b) the criteria which ORR shall have most recently published (and identified as such) in relation to charging for permission to use track.
- 9.7 The parties shall procure that the decision of the arbitrator shall be delivered to ORR within 7 days after the date of the decision.
- 9.8 No decision of an arbitrator appointed under paragraph 9.4 shall have effect without the consent of ORR.
- 9.9 If ORR gives its consent to:



- (a) the decision of an arbitrator appointed under paragraph 9.4; or
- (b) a supplement of the Traction Electricity Price List or the Track Usage Price List, or a change to the List of Capacity Charge Rates, agreed between the parties,

the supplement or change in question shall have effect from such date as ORR shall determine by notice to the parties.

## 10 Payment of access charges

### 10.1 Payment of access charges

- (a) The Train Operator shall pay or procure the payment to Network Rail of:

- (i) the Variable Track Usage Charge;
- (ii) the Traction Electricity Charge;
- (iii) the Capacity Charge;

~~(iv) not used;~~

(iv) the Electrification Asset Usage Charge; and

(v) the Additional Permitted Charges; ~~and,~~

~~(vi) any amounts due in respect of Lt, as that term is defined in paragraph 1 of Part 2,~~

attributable to any Period as invoiced by Network Rail on or after expiry of each such Period within 21 days of the invoice date or 28 days after the end of the Period, whichever is later.

- (b) The Train Operator shall pay or procure the payment to Network Rail of that part of the Fixed Track Charge attributable to any Period as invoiced by Network Rail on or after the expiry of each such Period within 7 days of the invoice date or 7 days after the end of the Period, whichever is later.

~~(c) When invoicing the Train Operator in respect of the Fixed Track Charge attributable to any Period, Network Rail shall deduct from the total amount payable under any such invoice that part of any amount in respect of RIE<sub>t</sub> and AGP<sub>t</sub> (each as defined in, and applied in the formula in, paragraph 1 of Part 2) attributable to such Period.~~

(c) Not used.

- (d) Any invoice issued by Network Rail or the Train Operator under paragraph ~~5.35.5~~ 5.5 of Part 2 (relating to modelled and actual rates of electricity consumption) shall be payable by the party to whom it is addressed within 21 days of the relevant invoice date.

~~(e) Network Rail shall pay or procure the payment to the Train Operator of any amounts due in respect of L<sub>t</sub> (as defined in paragraph 1 of Part~~

~~2) attributable to any Period as invoiced by the Train Operator on or after the expiry of each such Period within 21 days of the invoice date or 28 days after the end of the Period, whichever is later.~~

## 10.2 *Train Consist Data*

Network Rail shall calculate the Variable Charges payable by the Train Operator in respect of each Period using the Train Consist Data supplied by the Train Operator and, to the extent such Train Consist Data is not available to Network Rail, the Default Train Consist Data.

## 10.3 *Invoices and right to object to invoices*

- (a) Network Rail will notify the Train Operator on a weekly basis of the train movements for which Default Train Consist Data has been used to establish the Variable Charges payable by the Train Operator. At either party's request, the parties shall consult with a view to substituting Train Consist Data for Default Train Consist Data but such consultation shall not delay the issue by Network Rail of the invoice for the Variable Charges in respect of the Period concerned.
- (b) For each Period, Network Rail shall be entitled to invoice the Train Operator for Variable Charges in respect of any and all train movements operated by the Train Operator during that Period based on either:
  - (i) Train Consist Data provided by the Train Operator in respect of any train movement at or prior to the time that such train movement is completed;
  - (ii) Train Consist Data agreed by the parties under paragraph 10.3(a) in respect of any train movement; or
  - (iii) Train Consist Data provided by the Train Operator in respect of any train movement (other than any train movement where the Specified Equipment used in operating the relevant movement is loco hauled) by the end of the day on which such train movement has been completed,or (to the extent that (i) or (ii) or (iii) above do not apply) Default Train Consist Data. Each such invoice will be payable in accordance with the provisions of paragraph 10.1.
- (c) Either party shall be entitled, at any time prior to the later of 2359 hours on the fourteenth day following the expiration of the relevant Period and seven days following receipt by the Train Operator of the relevant invoice, to notify the other that it objects to any Train Consist Data (including, where applicable, the use of Default Train Consist Data) on which the whole or any part of the Variable Charges included in the relevant invoice are based and any such notice shall specify in reasonable detail what that party believes to be the Train

Consist Data for the relevant train movement(s) (“notice of objection”). In the absence of any notice of objection being served within such time the Train Consist Data used in the relevant invoice shall be final and binding on the parties.

- (d) The parties shall seek to agree the Train Consist Data specified in any notice of objection and any consequential financial adjustment required to the relevant invoice. If the parties are unable to agree that Train Consist Data within fourteen days following receipt of a notice of objection, the Train Consist Data shall be determined at the request of either party by arbitration in accordance with Part C of the Access Dispute Resolution Rules save that:
  - (i) the parties shall use their respective endeavours to ensure a joint paper setting out their respective positions on the matter in dispute is agreed for delivery to the arbitrator no later than three working days following the expiration of a period of 14 days following receipt of a notice of objection;
  - (ii) the parties shall each request that the arbitrator’s decision in writing (following any discussions or meetings between or with the parties that the arbitrator considers necessary) is delivered to the parties no later than fifty-six days after the expiration of the relevant Period and that the arbitrator establish such rules and procedures for the conduct of the arbitration as he sees fit having regard to such timescale; and
  - (iii) each of the parties shall accept and abide by the rules and procedures established by the arbitrator under paragraph 10.3(d)(ii).
- (e) Within seven days of any Train Consist Data being agreed or determined in accordance with paragraph 10.3(d), Network Rail shall, if any consequential or financial adjustment of the relevant invoice is required, issue a further invoice to, or (as the case may be) a credit note in favour of, the Train Operator in the amount of the relevant adjustment. The invoice or credit note shall be payable at the same time as the invoice for Variable Charges for the relevant Period or, if issued later than twenty-one days after the end of the relevant Period, within seven days after the date of its issue.
- (f) The actual volume of usage used to calculate any supplementary amount payable under paragraph 5 of Part 2 shall be established on the basis of the Train Consist Data and the Default Train Consist Data applied in calculating the Variable Charges for each of the Periods in Relevant Year t as adjusted in accordance with paragraph 10.3(d) on or before ninety days after the end of Relevant Year t.
- (g) Where, as a result of any invoice or credit note issued pursuant to paragraph 10.3, any sum of money which has been paid shall

become repayable or any sum of money which has been unpaid shall become payable the party to whom such sum shall be paid shall be paid or allowed interest at the Default Interest Rate on such sum from the date when it (if repayable) was paid or the date when such sum (if payable) ought to have been paid until the date of payment or repayment.

#### *10.4 Unrepresentative Train Consist Data*

- (a) If at any time during this contract either party considers the Default Train Consist Data specified in Appendix 7C is not representative of the Train Operator's Services and in particular, but without limitation, the type(s) of railway vehicles then in use and the regular number of carriages forming part of those railway vehicles in the operation of its Services, either party shall be entitled on written notice to the other to request that the Default Train Consist Data be amended. Any such request shall specify in reasonable detail the grounds for the request and the proposed amendments to the Default Train Consist Data.
- (b) The parties shall endeavour to reach agreement on any amendments to the Default Train Consist Data within twenty-one days of the date of the request referred to in paragraph 10.4(a) and if the parties are unable to agree such amendments within such time period, the matter shall be referred to expert determination in accordance with Part D of the Access Dispute Resolution Rules.
- (c) Upon the earlier of agreement between the parties or expert determination, the parties shall notify ORR of the proposed amendments to the Default Train Consist Data and, subject to ORR not objecting to the proposed amendments within fourteen days (the "14 day period") of receipt of the notification by ORR, such amendments shall take effect from the first day of the next Period following the earlier of ORR confirming its consent to the proposed amendments and the expiry of the 14 day period. If ORR objects to the proposed amendments within the 14 day period, the parties shall endeavour to reach agreement with ORR on the appropriate amendments, if any, to the Default Train Consist Data which shall then take effect on the first day of the Period next following that in which agreement is reached.

#### *10.5 Disputed amounts repayment and interest rate*

- (a) Where a party wishes to contest any invoice issued to it under this Schedule 7 (including any invoice in respect of Track Charges) it shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute but shall pay the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice.

- (b) Where a party has given notice under paragraph 10.5 (a) that it disputes part of any invoiced amount:
  - (i) payment of such sum shall be without prejudice to the determination of whether such sum is properly due or not; and
  - (ii) if it is subsequently determined that the disputed sum, or part of it, was not properly due the payee shall repay the disputed sum, or relevant part, to the payer together with interest (to accrue daily and be compounded monthly) at the Default Interest Rate from the date of payment until the actual date of repayment.

### **PART 3: ~~CHANGE OF LAW~~**

#### **NOT USED1-~~General~~**

~~The following paragraphs of this Part 3 shall apply for the purpose of determining the value (if any) of the term  $L_t$  in Part 2.~~

#### **~~2—Relevant Amounts~~**

##### ~~2.1—Inclusion in formula~~

~~If a Change of Law occurs after the date upon which this contract shall have been entered into,  $L_t$  in any Relevant Year  $t$  shall be the Relevant Amount.~~

##### ~~2.2—Meaning of Relevant Amount~~

~~The Relevant Amount is such reasonable amount as Network Rail, behaving with due efficiency and economy (and in accordance with Clause 4), may incur in (or save by reason of) complying, during Relevant Year  $t$ , with requirements resulting directly and necessarily from the Change of Law and which it is reasonable be borne by the Train Operator and not by Network Rail. The question whether it is reasonable that any such amount should be so borne shall be determined in accordance with any relevant criteria published by ORR.~~

#### **~~3—Notification of Change of Law involving Material Amounts~~**

~~3.1—As soon as reasonably practicable after becoming aware of any Change of Law which will or may reasonably be expected to involve the expenditure or saving by Network Rail of a Material Amount, Network Rail shall:~~

- ~~(a) notify the Train Operator and ORR of the change in question and of its assessment of the Relevant Amount;~~
- ~~(b) provide to the Train Operator such information as the Train Operator shall reasonably require, in a form and amount of detail which is sufficient to enable the Train Operator to make a proper assessment of the effect of the Change of Law and of the assessment referred to in paragraph 3.1(a); and~~
- ~~(c) provide to ORR all information required in that respect by ORR.~~

~~3.2 Without prejudice to paragraph 5 and subject to paragraph 6, where an obligation to notify ORR arises under this paragraph 3:~~

~~(a) no agreement or determination of the kind referred to in paragraph 4 shall have effect until 28 days after ORR shall have been notified of the agreement or determination in question; and~~

~~(b) if ORR shall have exercised its right to call in the determination under paragraph 5, no such agreement or determination shall have effect.~~

#### ~~4 Value of Relevant Amount~~

~~The amount referred to in paragraph 2 for inclusion in the term  $L_t$  shall (save in the circumstances referred to in the remaining paragraphs of this Part 3) be such amount as may be agreed between Network Rail and the Train Operator or as may be determined in accordance with any procedure for the arbitration or settlement of disputes provided for in this contract.~~

#### ~~5 Office of Rail Regulation's right to call in determination of Relevant Amount~~

~~5.1 Notwithstanding paragraphs 3 and 4, if ORR shall have given notice to the parties that:~~

~~(a) in its discretion it considers that it is appropriate, by reason of the significance of any Change of Law (and whether or not such Change of Law may give rise to changes of a Material Amount), that it should call in the determination of the value (if any) of the term  $L_t$  insofar as the value of that term is or may be affected by the Change of Law in question, and determine it itself; and~~

~~(b) it has determined that it will so determine it itself,  
the determination in question shall be made by ORR.~~

~~5.2 If ORR shall have given a notice under paragraph 5.1, the parties shall provide to it any information it may require relating to the Change of Law and its financial consequences.~~

~~5.3 Upon service by ORR of a notice of the kind referred to in paragraph 5.1, the parties shall discontinue any proceedings of the kind referred to in paragraph 4 which might otherwise result in a determination of the value of the term  $L_t$ . ORR's determination may make provision as to the proportions in which the parties shall bear the costs of the proceedings in question.~~

#### ~~6 Limitation on the determination of the Relevant Amount by the Office of Rail Regulation~~

~~6.1 No determination by ORR of the kind referred to in paragraph 5 shall, with respect to Relevant Year  $t$  in which it is made (or any previous year), operate so as to substitute the value determined by ORR for any value agreed by the parties or determined under paragraph 4:~~

- (a) ~~before the date upon which the parties shall have been notified of the decision of ORR to call in the determination; and~~
- (b) ~~in the case of a Change of Law involving a Material Amount, after expiry of the notice period provided for in paragraph 3.2.~~
- 6.2 ~~ORR's determination shall have effect in substitution for any value determined by the parties with effect for Relevant Year t+1 and following years.~~

## ~~7 Procedure in a called in determination~~

~~The provisions of Part E of the Access Dispute Resolution Rules shall apply *mutatis mutandis* to the procedure for any determination by ORR under Part 3.~~

## PART 3A: GRANT DILUTION

### 1 Grant Amounts

#### 1.1 Basic Values and Payment Dates

For the purposes of this Part 3A:

- (a) the Basic Values are the amounts by way of grant under section 2116 of the ~~Transport~~Railways Act ~~2000~~2005 specified in the ~~Revised Deed of Grant as amended and restated by the Supplemental Deed dated 28 September 2004 between the SRA, Network Rail Limited, Network Rail Holdco Limited and Network Rail as to be paid by the Strategic Rail Authority (now to be paid by the Secretary of State) to be paid by the [Secretary of State][Scottish Ministers][delete as appropriate]~~ to Network Rail; and
- (b) the Payment Dates are 1 April and 1 October in each of the years ~~2004, 2005, 2006, 2007~~2009, 2010, 2011, 2012 and ~~2008, 2013~~, or such other dates for the payment of such grants as may be stipulated in the ~~Revised Deed of Grant as amended and restated by the Supplemental Deed dated 28 September 2004 between the SRA, Network Rail Limited, Network Rail Holdco Limited and Network Rail~~Deed of Grant.

#### 1.2 Indexation

For the purposes of this Part 3A, the Grant Amount for each Payment Date is the Basic Value specified in the ~~Revised Deed of Grant as amended and restated by the Supplemental Deed dated 28 September 2004 between the SRA, Network Rail Limited, Network Rail Holdco Limited and Network Rail~~Deed of Grant as to be paid on that date, adjusted in accordance with any applicable indexation provisions of the ~~Revised Deed of Grant as amended and restated by the Supplemental Deed dated 28 September 2004 between the SRA, Network Rail Limited, Network Rail Holdco Limited and Network Rail~~Deed of Grant.

### ~~1.3 No Revised Deed of Grant~~

~~If there is no Revised Deed of Grant, paragraphs 1.1 and 1.2 shall be construed as if each reference in them to “the Revised Deed of Grant” were a reference to “the Existing Deed of Grant”.~~

## **2 Grant Dilution**

### *2.1 Meaning of Grant Dilution*

For the purposes of this Part 3A, there shall be a “**Grant Dilution**” in respect of a Payment Date if:

- (a) the ~~[Secretary of State—fails]~~[Scottish Ministers]~~[delete as appropriate] fail[s]~~, for any reason, to pay the whole or any part of the Grant Amount on or before that Payment Date; or
- (b) the payment of the whole or any part of the Grant Amount in respect of that Payment Date is:
  - (i) subject to the performance by Network Rail or any other person of any obligation;
  - (ii) subject to the exercise by the ~~[Secretary of State]~~[Scottish Ministers]~~[delete as appropriate]~~ or any other person of any discretion; or
  - (iii) contingent upon the happening of any event or circumstance, or any act or omission of any person.

### *2.2 Meaning of Grant Dilution Date*

In respect of any Grant Dilution:

- (a) if the Grant Dilution is of the kind referred to in paragraph 2.1(a), the Grant Dilution Date shall be the Payment Date in respect of which the ~~[Secretary of State]~~[Scottish Ministers]~~[delete as appropriate]~~ fails to pay the whole or any part of the Grant Amount due on that date; and
- (b) if the Grant Dilution is of the kind referred to in paragraph 2.1(b), each Payment Date which falls during any period during which the payment of the whole or any part of a Grant Amount is:
  - (i) subject to any of the matters specified in paragraph 2.1(b)(i) or (ii); or
  - (ii) contingent upon any of the matters specified in paragraph 2.1(b)(iii),

shall be a Grant Dilution Date.

## **3. Grant Compensation Amount**

### *3.1 Payment obligation*



If a Grant Dilution occurs:

- (a) Network Rail shall notify the Train Operator and ORR that a Grant Dilution has occurred, and the circumstances in which it has occurred; and
- (b) the Train Operator shall:
  - (i) send a copy of the notification it has received from Network Rail under paragraph 3.1(a) to any Passenger Transport Executive within whose area it provides services for the carriages of passengers by railway;
  - (ii) if the Grant Dilution is of the kind described in paragraph 2.1(a), pay Network Rail a Grant Compensation Amount calculated in accordance with paragraph 3.2 three months after the Grant Dilution Date; and
  - (iii) if the Grant Dilution is of the kind described in paragraph 2.1(b), pay Network Rail a Grant Compensation Amount calculated in accordance with paragraph 3.2 three months after each Grant Dilution Date.

### 3.2 Calculation

Any Grant Compensation Amount payable under paragraph 3.1 is an amount calculated in accordance with the following formula: [\[Note: ORR will provide the number to be inserted in the square brackets in the formula below\]:](#)

$$GC = (GA_p - P) \cdot \left(1.0575^{0.25 \cdot \left[ \quad \right]}\right) \cdot F_t \cdot$$

where:

GC means the Grant Compensation Amount;

GA<sub>p</sub> means the Grant Amount for the Payment Date which is the same date as the Grant Dilution Date;

P means:

- (a) if the Grant Dilution is of the kind described in paragraph 2.1(a), the amount of any whole or part payment of the Grant Amount which Network Rail certifies to the Train Operator, within 7 days after the Grant Dilution Date, that it has received from the [\[Secretary of State\]\[Scottish Ministers\]\[delete as appropriate\]](#); and
- (b) if the Grant Dilution is of the kind described in paragraph 2.1(b), zero;

F<sub>t</sub> has the meaning ascribed to it in paragraph 1 of Part 2 ~~of this Schedule 7~~; and

AF<sub>t</sub> means the Aggregate Fixed Charge in Relevant Year t.

#### **PART 4: NOT USED**

#### **PART 5: ADDITIONAL PERMITTED CHARGES**

##### **1 Obligation to pay**

Network Rail may make and the Train Operator shall be required to pay under this contract, in addition to Track Charges, only such Additional Permitted Charges as are enumerated in paragraph 2.

##### **2 Definition**

Additional Permitted Charges shall comprise the following:

- (a) such amounts payable to Network Rail as are specified in, or calculated in accordance with, Schedule 4;
- (b) such amounts payable to Network Rail as are specified in, or calculated in accordance with, Schedule 8; and
- (c) such amounts payable to Network Rail pursuant to any provision of the Network Code.

#### **PART 6: SUPPLEMENTAL PROVISIONS**

Each invoice issued by Network Rail to the Train Operator shall contain or be accompanied by separate itemisation of the following charges and other information in respect of the period covered by the invoice:

- (a) the daily amount of the Fixed Track Charge and the number of days covered by the invoice;
- (b) the rate of Variable Track Usage Charge and the relevant number of Vehicle Miles comprised in ~~units~~ vehicles for each service (i) so charged;
- (c) the rate of Traction Electricity Charge and the number of ~~Train~~Vehicle Miles comprised in vehicles for each service or Gross Tonne Miles comprised in units for each service, (i) so charged;
- (d) ~~not used~~ the amount of the Electrification Asset Usage Charge and the number of days covered by the invoice;
- (e) not used;
- (f) not used;
- (g) ~~(g) — the amount of any sum payable or receivable in respect of the term L<sub>t</sub> (Change of Law), showing separately amounts in respect of each Change of Law if more than one~~ Efficiency Benefit Payment Share;
- (h) not used;

- (i) the amount of any sum  $S_t$  payable as provided in paragraph 5 of Part 2;
- (j) the amount of any sum  $K_t$  payable as provided in paragraph 6 of Part 2; and
- (k) in respect of any Additional Permitted Charge, separately the amount payable in respect of each head of charge for Additional Permitted Charges.

## **PART 7: FUTURE ACCESS CHARGES REVIEWS**

### **1 General**

ORR may carry out one or more access charges reviews of all or part of this contract as follows:

- (a) an access charges review such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation on and from 1 April ~~2009~~2014 or such later date as may be specified in that review; and
- (b) as provided in paragraph 2 (and only as provided in paragraph 2), an access charges review such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation before 1 April ~~2009~~2014.

### **2 Access charges reviews capable of coming into operation before 1 April ~~2009~~2014**

#### ~~2.1—Review of specific activities~~

~~ORR may carry out an access charges review of any relevant part or parts of this contract at any time if it is satisfied that it is necessary or expedient to do so in order to take account (and only to take account) of:~~

- ~~(a)—Network Rail's expenditure on signalling and any associated works;~~
- ~~(b)—expenditure on compensation payable for Restrictions of Use under Schedule 4 to this contract or under the corresponding provisions in other passenger track access contracts; or~~
- ~~(c)—increases in cumulative expenditure by Network Rail on renewal and enhancement of the West Coast Main Line (comprising both project and regional renewal costs) over the amounts specified in the line labelled "Total WCML expenditure" in Table 7.6 of the 2003 Final Conclusions, which:
 
  - ~~(i)—have the effect that such expenditure in the control period will be higher by 15 per cent or more than the amounts so specified; or~~
  - ~~(ii)—are, in ORR's opinion, likely to have that effect.~~~~

## ~~2.2 Contractual arrangements on West Coast Main Line~~

~~ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time if it considers it necessary or expedient to do so in order to take account (and only to take account) of the obligation of Network Rail to pay any amount:~~

- ~~(a) to or for the benefit of West Coast Trains Limited in connection with the failure of Network Rail to perform any obligation owed to West Coast Trains Limited, including as a result of any liability of West Coast Trains Limited or any of its affiliates to any other person; and~~
- ~~(b) in connection with the discharge of any of its obligations to West Coast Trains Limited in respect of the renewal or enhancement of the West Coast Main Line or the acceptance into service of any rolling stock used or to be used on the West Coast Main Line.~~
- ### ~~2.3 Exceptional circumstances~~

ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where [paragraph 2.3 of this Part 7 applies and](#):

- (a) ~~the cumulative expenditure of Network Rail on:~~ [Network Rail's projections at that time \(each such projection being prepared in accordance with the Regulatory Accounting Guidelines\) as to its Net Expenditure in relation to that part of the Network which is situated in Scotland \(the "Scottish Network"\) for the immediately following period of 36 consecutive months \(each a "Review Period"\) show a projected level of such Net Expenditure which is higher by 15 per cent or more than the assumed expenditure for that period, where:](#)
- (i) ["Net Expenditure" shall be derived from the following formula:](#)
- $$\text{Net Expenditure} = 1 - 2 - 3 - 4$$
- [where:](#)
- [1 means Network Rail's total income in respect of the Scottish Network in the relevant Review Period;](#)
- [2 means Network Rail's total expenditure in respect of the Scottish Network in the relevant Review Period on operation, maintenance and renewal of the Network; and enhancement;](#)
- [3 means \[the proportion of the\] Net Interest payable in respect of the Scottish Network in the relevant Review Period; and](#)
- [4 means \[the proportion of the\] corporation tax payable in respect of the Scottish Network in respect of the relevant Review Period;](#)
- (ii) ~~those enhancements of the Network on which expenditure has been allowed in the 2003 Final Conclusions, as specified in the~~

~~lines labelled “WCRM enhancements” and “Other enhancements” in Annex D to the 2003 Final Conclusions,~~

For the purposes of the formula specified in paragraph 2.1(a)(i), each of the expressions “Network Rail’s ~~has been, in any period beginning on 1 April 2004 and ending on a relevant date, higher or lower by 15 per cent or more than~~total income”, “Network Rail’s total expenditure”, “corporation tax” and “Net Interest” shall have the meanings ascribed to them in [Annex/Table [ ] of] the 2008 Final Determinations; and

(iii) “assumed ~~expenditure for that period; or~~expenditure” means the amount of Net Expenditure assumed by ORR to be incurred in respect of the Scottish Network in each Financial Year (or part thereof) falling within the relevant Review Period and identified as “assumed expenditure” in respect of the Scottish Network in [Annex/Table [ ] of] the 2008 Final Determinations; where part only of a Financial Year falls within the relevant Review Period, the Net Expenditure relating to that part Financial Year shall be attributed to that Review Period on a pro rata basis reflecting the proportion of that Financial Year falling within that Review Period; or

**[Note: This paragraph 2.1(a) will only be included in the ScotRail contract.]**

(b) it considers that: ~~(i)~~—there has been a material change, other than an excluded change, in the circumstances of Network Rail or in relevant financial markets or any part of such markets; ~~and~~

## 2.2 Adjusted Interest Cover Ratio

2.2.1 ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where paragraph 2.3 of this Part 7 applies and, in any Review Period, the value of the Adjusted Interest Cover Ratio (AICR) derived from the following formula is less than or equal to 1.35:

$$AICR = \frac{1 - 2 - 3 - 4}{5}$$

where:

1 means Network Rail’s projected total income in that Review Period;

2 means Network Rail’s projected total expenditure (excluding Network Rail’s renewals and enhancements projected expenditure) in that Review Period;

3 means the total amount of corporation tax forecast to be paid by Network Rail in that Review Period;

4 means the figure for the regulatory amortisation assumption made by ORR in relation to that Review Period as specified in [Annex/Table [ ] of] the 2008 Final Determinations; and

5 means the Net Interest forecast to be paid by Network Rail on its Net Debt in that Review Period.

2.2.2 For the purposes of the ratio specified in paragraph 2.2.1, each of the expressions “Network Rail’s projected total income”, “Network Rail’s projected total expenditure”, “Network Rail’s renewals and enhancements projected expenditure”, “corporation tax”, “regulatory amortisation assumption”, “Net Interest” and “Net Debt” shall have the meanings ascribed to them in [Annex/Table [ ] of] the 2008 Final Determinations.

2.2.3 For the purposes of the ratio specified in paragraph 2.2.1, where part only of a Financial Year falls within the relevant Review Period, each of the component elements of the formula specified in paragraph 2.2.1 relating to that part Financial Year shall be attributed to that Review Period on a pro rata basis reflecting the proportion of that Financial Year falling within that Review Period.

### 2.3 *Compelling reasons for access charges review*

~~(ii) — in consequence~~ ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where, in consequence of the occurrence of the circumstances specified in paragraph 2.1 and/or paragraph 2.2, ORR considers that there are compelling reasons to initiate an access charges review, having due regard to its duties under section 4 of the Act, including in particular the duty to act in a manner which it considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which ORR has functions under or by virtue of Part I of the Act.

### ~~2.4 — *Review of the elements of charges*~~

~~ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time if it considers that it is necessary or expedient to do so:~~

~~(a) — in respect of the Traction Electricity Charge, in order to allow Train Operators to purchase electricity from competing suppliers or to facilitate on-train metering;~~

~~(b) — in order to establish appropriate incentives for improvements to track and vehicle quality or to the efficiency of the track/vehicle interface;~~

~~(c) in order to establish appropriate incentives for the efficient use of the Network; or~~

~~(d) in order to reflect a material change or proposed material change in the policy or practice of Network Rail concerning Restrictions of Use.~~

### **3 Definitions**[Interpretation](#)

3.1 In this Part 7, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

~~3.2 In this Part 7:~~

~~“access charges review” has the meaning ascribed to it by Schedule 4A to the Act;~~

~~“assumed expenditure” means, in relation to any period beginning on 1 April 2004 and ending on a relevant date, the cumulative expenditure of Network Rail on operation, maintenance, renewal and enhancement of the Network which is specified in the line labelled “Total Expenditure” in Annex D to the 2003 Final Conclusions;~~

~~“excluded change”, in relation to paragraph 2.3(b)(i), means a change to the arrangements established between Network Rail and any other person in respect of the payment of any amount under section 211 of the Transport Act 2000;~~

~~“expenditure”, in relation to paragraph 2.3(a) and to the definition of “assumed expenditure” in this Part 7, includes:~~

~~(a) compensation payable by Network Rail for Restrictions of Use under Schedule 4 to this contract and under the corresponding provisions in all other relevant access agreements; and~~

~~(b) payments by Network Rail under Schedule 8 to this contract and under the corresponding provisions in all other relevant access agreements;~~

~~“relevant date” means any of: 31 March 2006, 31 March 2007, 31 March 2008 or 31 March 2009; and~~

~~“West Coast Main Line” means the following route sections of the Network:~~

<b>Route Section</b>	<b>From</b>	<b>To</b>	<b>Lines</b>
4	Euston	Rugby Trent Valley Junction	All platforms and running lines from Euston to Camden. All running lines and loops from Camden to Hanslope Junction to Rugby Trent Valley Junction (direct). Goods and associated running lines from West London Junction and

Route Section	From	To	Lines
			Harlesden Junction to Brent Junction.
2	Rugby Trent Valley Junction	Weaver Junction	All running lines and loops from Rugby Trent Valley Junction via Nuneaton, Tamworth, Lichfield, Stafford, Madeley and Crewe to Weaver Junction. Independent Lines at Crewe.
3	Weaver Junction	Gretna Junction	All running lines and loops from Weaver Junction, via Acton Grange Junction, Warrington Bank Quay, Winwick Junction (direct), Wigan North Western, Preston, Lancaster, Oxenholme and Carlisle to Gretna Junction. Helsby lines from Acton Grange Junction to Warrington Bank Quay via Arpley and Windsor Bridge to Euxton via Bolton.
4	Gretna Junction	Glasgow Central	All running lines and loops from Gretna Junction, via Lockerbie, Carstairs, Law Junction, Shieldmuir (direct), Motherwell, Uddingston (direct), Newton, Rutherglen West Junction and Eglinton Street Junction to Glasgow Central.
5	Hanslope Junction	Rugby	All running lines and loops via Northampton.
6	Rugby Trent Valley Junction	Trent Valley No1 Junction	All running lines and loops from Rugby via Coventry, Birmingham International, Grand Junction, Birmingham New Street, Soho North and South Junctions, Dudley Port, Wolverhampton and Penkridge to Stafford.
7	Crewe	Manchester Piccadilly	All running lines and loops from Crewe via Wilmslow and Stockport to Manchester Piccadilly.
8	Wilmslow	Slade Lane Junction	All running lines via Styal (excluding Manchester Airport branch and South spur).
9	Weaver Junction	Liverpool Lime Street	All running lines and loops from Weaver Junction via Runcorn, Allerton and Edge Hill to Liverpool Lime Street.
10	Stechford	Bushbury Junction	All running lines and loops from Stechford via Aston, Bescot, Portobello Junction to Bushbury Junction (direct).
11	Norton Bridge	Stone	All running lines.
12	Colwich Junction	Cheadle Hulme	All running lines and loops from Colwich via Meaford Crossing, Stoke on Trent and Macclesfield to Cheadle Hulme.
13	Carstairs South Junction	Haymarket East Junction	All running lines and loops from Carstairs South Junction and Carstairs Station Junction via Auchengray and Slateford to Haymarket East



Route Section	From	To	Lines
	and Carstairs Station Junction		Junction (exclusive).
14	Coventry North Junction	Nuneaton South Junction	All running lines and loops via Bedworth.
15	Preston	Blackpool North	All running lines and loops.
16	Crewe	Kidsgrove	All running lines and loops via Alsager.
17	Liverpool Lime Street	Manchester Piccadilly	All running lines via Earlestown or via Warrington Central and Heaton Norris Junction to Salford crescent via Ashton Moss.

**PART 8: NOT USED**

## APPENDIX 7A

Not Used

## APPENDIX 7B

**Not used.** [Note: *The Geographic Areas for calculation of the Traction Electricity wash-up*

*will be identified in the Traction Electricity Price List.* For the purposes of performing the calculation set out in paragraph 5 of Part 2, the applicable Geographic Areas and tariff zones will be as set out in the table below. Unless otherwise specified, all electrified connecting lines, sidings, passing loops, links to depots or yards are contained within these zones.

<b>Traction electricity Geographic Area / Tariff Zone</b>	<b>Description</b>
Merseyside	Comprises the Merseyside third rail electrified system between Liverpool, Southport, Ormskirk, Kirkby, Hunts Cross, Ellesmere Port, Chester, New Brighton and West Kirby
Thameslink North	Comprises the overhead line electrified routes from London St Pancras, Farringdon and Moorgate (Midland) to Bedford
London Tilbury & Southend	Comprises the overhead line electrified London Tilbury and Southend routes from Fenchurch Street to Shoeburyness via Laindon, Rainham and Chafford Hundred; the route from Barking to Forest Gate Junction; and the route between Gas Factory Junction and Bow Junction
Great Eastern	Comprises the electrified Great Eastern Main Line routes from Liverpool Street to Bow Junction, Upminster, Southend Victoria, Southminster, Braintree, Sudbury, Clacton, Walton on Naze, Harwich Town and Norwich; the West Anglia route from Liverpool Street to Hackney Downs station; the Lea Valley Line between Stratford and Coppermill Junction, and the overhead line electrified section of the North London Line route between Stratford and Camden East Junction
West Anglia	Comprises the electrified West Anglia routes from Hackney Downs station to Chingford, Enfield Town, Hertford East, Stanstead Airport, Cambridge and Kings Lynn and the electrified route between Cambridge Junction (on the East Coast Main Line near Hitchin) and Cambridge

<b>Traction electricity Geographic Area / Tariff Zone</b>	<b>Description</b>
East Coast and North East	Comprises the electrified East Coast Main Line (and all electrified connecting routes in the North East) from Kings Cross to the neutral section at Chathill (between Alnmouth and Belford), Leeds, Bradford and Skipton; the electrified route between Moorgate and Finsbury Park; the electrified route between Canonbury West Junction and Finsbury Park; and the Kings Cross Incline between Camden Road East Junction and Freight Terminal Junction.
Scotland	Comprises all electrified routes in Scotland; the West Coast Main Line to the north of the neutral section at Upperby (between Penrith and Carlisle); and the East Coast Main Line to the north of the neutral section at Chathill
West Coast Main Line and North London Lines	Comprises the West Coast Main Line routes from Euston to the neutral section at Upperby (between Penrith and Carlisle), Liverpool, Manchester, Manchester Airport and Birmingham; all electrified routes around Birmingham and Manchester; the third rail electrified lines from Euston to Watford Junction; the West London Line to the North Pole junction; the North London Line between South Acton and North Woolwich (excluding the overhead line supply between Camden East Junction and Stratford); and the route between the Primrose Hill tunnels and Camden Road
Southern	Comprises all third rail electrified routes south from Farringdon, Cannon Street, Charing Cross, London Bridge, Waterloo and Victoria, covering the international route as far as the Network Rail/Eurotunnel boundary; the West London Line to the south of North Pole junction; and the North London Line between Richmond and Acton Central
Paddington – Heathrow	Comprises the electrified route from Paddington to Heathrow Airport

## APPENDIX 7C

### Default Train Consist Data

Document comparison done by DeltaView on 17 July 2008 16:51:46

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Document 2	interwovenSite://LONDMS/BD/8060175/6
Rendering set	NR Standard

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

Statistics:	
	Count
Insertions	488
Deletions	508
Moved from	14
Moved to	14
Style change	0
Format changed	0
Total changes	1024

## ANNEX 2

### 17 JULY 2008 ORR DRAFT FOR CONSULTATION OF FREIGHT SCHEDULE 7

#### SCHEDULE 7: TRACK CHARGES

##### 1. Definitions

In this Schedule 7 unless the context otherwise requires:

“2008 Final Determinations” means the document entitled “Periodic Review 2008: Final Determinations” published by ORR on 30 October 2008;

“access charges review” has the meaning attributed to it in paragraph 1(1) of Schedule 4A to the Act;

“Adjusted Interest Cover Ratio” means the value of AICR derived from the formula set out in paragraph 3.2.2 (a);

“Adjustment Factor” means the factor calculated in accordance with paragraph 2.7.2;

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

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

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

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

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

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

**“Efficiency Benefit Share”** means the amount determined in accordance with paragraph 2.10;

**“Electrification Asset Usage Charge”** means the ~~charge calculated in accordance with paragraph 2.5;~~**“Electrification Asset Usage Rate”** means the ~~electrification asset usage rate or rates as published by ORR and as may from time to time be updated and republished by ORR;~~ charge set out in the Track Usage Price List, as adjusted in accordance with paragraph 2.7.2;

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

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

**“ESI Wagon”** means an electricity supply industry coal freight wagon;

**“excluded change”** means, in relation to paragraph 3.2.1, a change to the arrangements established between Network Rail and any other person in respect of the payment of any amount under section 6 of the Railways Act 2005;

**“Freight Capacity Charge”** means the charge calculated in accordance with paragraph 2.3;

~~**“Freight Capacity Charge Price List”** means the freight capacity charge price list (whether or not published as a separate price list) in respect of which each price is calculated by multiplying by 0.9 the corresponding price in the capacity~~



~~charge price list for passenger services published by ORR on 29 June 2001 (as amended in accordance with paragraph 2.10);~~

“**Freight Capacity Rate**” means the ~~tariff~~£[●] for each Service ~~set out in the Freight Capacity Charge Price List~~, as adjusted in accordance with paragraph 2.7.2; [Note: figure to be confirmed following completion by Network Rail of its consultation.]

“**Freight Only Line Charge**” means the amount payable in respect of each ESI Wagon and each SNF Wagon, in each case specified in paragraph 2.5, multiplied by KGTM and payable pursuant to paragraph 2.2.1 and adjusted in accordance with paragraph 2.7.2;

“**Freight Services**” means the services for the carriage of goods by railway on the Network;

“**Geographic Area g**” means, for the purposes of performing the calculations set out in paragraph 2.4, the relevant geographic section of the Network as set out in the Traction Electricity Price List;

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

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

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

“**IIEC Adjustment Factor**” means the factor calculated in accordance with paragraph 2.7.4;

“**Indexed Figures**” means the Variable Rate, the Traction Electricity Rate, the Electrification Asset Usage ~~Rate~~Charge, the Freight Capacity Rate, the Incident Cap Access Charge Supplement Rate, the Train Operator Payment Rate, the Network Rail Payment Rate, the Service Variation Sum, the Train Operator Cap, the Disruption Sum, the Network Rail Cap ~~and~~, the Cancellation Sum, the Late Notice Cancellation Sum, the Prolonged Disruption Amount and the Freight Only Line Charge;

~~“**Index of Industrial Electricity Costs**” or “**IIEC**” has the meaning ascribed to it in paragraph 2.7.5;~~

“**KGTM**” means 1000 Gross Tonne Miles;

“**kWh**” means kilowatt hours;

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

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

“**Locomotive Miles**” means, in relation to a locomotive, the Contract Miles travelled by that locomotive;

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

~~[Note: The definition of “**Modelled Consumption Rate**” means, for each Service, such amount as Network Rail shall specify for the purpose of each Financial Year as reflecting, so far as reasonably practicable, the actual consumption of traction electricity by the Train Operator in that Financial Year in kWh per Gross Tonne Mile subject to:~~ ***has been deleted as it will now be included in the Traction Electricity Price List.***

~~(a) — the agreement of the Train Operator that the calculations upon which such amount is based are accurate, such agreement not to be unreasonably withheld or delayed; and~~

~~(b) — the consent of ORR;~~

“**New Registered Equipment**” means a type of railway vehicle or vehicle commodity combination not incorporated in the Track Usage Price List;

“**ORR’s Qualifying Modification Criteria**” means the criteria issued by ORR as described in paragraph 2.9.1;

“**Qualifying Modification**” means a modification to the Operating Constraints in excess of their level as at 1 April ~~2001~~, 2009, which:

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

“**Qualifying Modification Benefit Charge**” means, in relation to any Qualifying Modification, a charge which shall:

- (a) take account of:
  - (i) the use made or to be made of the Qualifying Modification, where such modification increased the capacity of the Network; or
  - (ii) in any other case, the benefit which is likely to be derived from the Qualifying Modification by the Train Operator compared to the benefit derived from such modification by the Contributing Train Operator; ~~;~~ and

(b) ~~apply~~reflect any relevant guidance in relation to the funding of modifications to the Operating Constraints published in ORR’s Qualifying Modification Criteria;

“**QM Threshold**” means a level of costs in relation to a modification to the Operating Constraints determined in accordance with ORR’s Qualifying Modification Criteria;

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

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

“**RPI**” has the meaning ascribed to it in paragraph 2.7.2;

~~“**Track Usage Price List**” means ORR’s track usage price list as published on 28 October 2002, and as may from time to time be updated and republished by ORR;~~

“**SNF Wagons**” means spent nuclear fuel wagons;

“**S<sub>t</sub>**” has the meaning ascribed to it in paragraph 2.4.2;

“**tariff band**” means the tariff zone and time band in which the train in question is operated;

“**Track Usage Price List**” means the document entitled “Track Usage Price List” published by ORR on [•] 2008 *[Date to be inserted. It is assumed that these notices will be published prior to the review notice after the ORR audit.]*;

“**Traction Electricity Charge**” means the charge calculated in accordance with paragraph 2.4;

“**Traction Electricity Price List**” means the document entitled “Traction Electricity Price List” published by ORR on [•] 2008 *[Date to be inserted. It is assumed*

that these notices will be published prior to the review notice after the ORR audit.].

“**Traction Electricity Rate**” means, for each Service, ~~such~~the amount ~~as Network Rail shall specify for the purpose of each Financial Year as reflecting, so far as reasonably practicable, the actual cost to Network Rail of providing traction electricity to the Train Operator subject to:~~

specified in the Traction Electricity Price List, (a) — the agreement of the Train Operator that the calculations upon which such amount is based are accurate, such agreement not to be unreasonably withheld or delayed; and

~~(b) — the consent of ORR,~~ as adjusted in accordance with paragraph 2.7.4;

“train category” means train type i used on the relevant route in question;

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

“**Variable Charge**” means the charge calculated in accordance with the formula set out in paragraph ~~2.2.1~~2.2.1, summed across all Services; and

“**Variable Rate**” means, in respect of each locomotive type, empty wagon type, loaded wagon type and coaching stock type (to be determined by Commodity) used in respect of each Service, the rate per KGTM set out in the Track Usage Price List or determined in accordance with paragraph 2.2, as adjusted from time to time in accordance with paragraph 2.7.2.

## 2. Track Charges

### 2.1 *Obligation on Train Operator to pay*

2.1.1 In respect of each Charging Period, the Train Operator shall pay or procure payment of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incremental Costs, the Incident Cap Access Charge Supplement ~~and~~, the Qualifying Modification

Benefit Charge and any amount of S<sub>i</sub> payable by the Train Operator, in each case in accordance with this Schedule-7. The charges will be rounded to the nearest penny. Where a calculation ends up exactly half way between whole numbers it will be adjusted upward.

2.1.2 No Track Charges shall be payable by the Train Operator in respect of a Train Slot when the train has not reached its Planned Destination for a reason which is Attributable to Network Rail.

2.1.3 Network Rail shall issue to the Train Operator an invoice as soon as practicable, or as otherwise agreed, following the expiry of each Charging Period in respect of the Variable Charge, the Freight Capacity Charge, the Traction Electricity Charge, the Electrification Asset Usage Charge, the Incident Cap Access Charge Supplement and any Incremental Costs or Qualifying Modification Benefit Charges which are payable in respect of that Charging Period. Such invoice will reflect any Efficiency Benefit Share or amount of S<sub>i</sub> payable by Network Rail. [Note: ORR would welcome industry parties' views as to whether the invoicing provisions of this Schedule 7 (Freight) should be brought into line with those of Schedule 7 (Passenger).]

## 2.2 Variable Charges

2.2.1 The Variable Charge in respect of each Service in each Charging Period shall be calculated in accordance with the following formula:

$$\text{Variable Charge} = 1 + 2 + 3 + 4 + \underline{5}$$

where:

- 1 means, in respect of each locomotive, the Variable Rate for the relevant locomotive type multiplied by the KGTM for that locomotive type relating to the relevant Service;

- 2 means, in respect of each empty wagon, the Variable Rate for the relevant empty wagon type multiplied by the KGTM for that empty wagon type relating to the relevant Service;
- 3 means, in respect of each loaded wagon, the Variable Rate for the relevant loaded wagon type multiplied by the KGTM for that loaded wagon type relating to the relevant Service; ~~and~~
- 4 means, in respect of each unit of coaching stock, the Variable Rate for the relevant coaching stock type multiplied by the KGTM for that coaching stock type relating to the relevant Service; and
- 5 means, in respect of each ESI Wagon and each SNF Wagon, the Freight Only Line Charge for that ESI Wagon or SNF Wagon (as the case may be) multiplied by the KGTM for that ESI Wagon or SNF Wagon (as the case may be) relating to the relevant Service.

2.2.2 Upon receipt of a notice given by the Train Operator to Network Rail of the introduction of New Registered Equipment to the Network for which no Variable Rate has been determined by ORR, Network Rail shall:

- (a) propose the Variable Rate in respect of that New Registered Equipment; and
- (b) notify the Train Operator and ORR of the proposed Variable Rate for that New Registered Equipment within 14 days of receipt of the notice given by the Train Operator.

2.2.3 The relevant Variable Rate as so determined by ORR shall be deemed to have been incorporated into the Track Usage Price List:

- (a) where ORR has determined the Variable Rate for the New Registered Equipment (taking account of Network Rail's proposal under paragraph

2.2.2) and has notified the parties of the Variable Rate to apply to the New Registered Equipment; or

(b) where:

(i) Network Rail has failed to notify the Train Operator and ORR of the proposed Variable Rate for the New Registered Equipment under paragraph 2.2.2; and

(ii) ORR has determined the Variable Rate in consultation with the Train Operator, Network Rail and all other [train](#) operators, and notified the parties of the Variable Rate to apply to the New Registered Equipment.

2.2.4 If ORR has not published or determined the Variable Rate:

(a) in respect of any type of Specified Equipment by the date of signature of this contract; or

(b) in respect of New Registered Equipment in accordance with paragraph 2.2.3,

then the Variable Rate in respect of that type of Specified Equipment or New Registered Equipment shall be deemed to be ~~£3.51 for locomotives or wagons conveying electricity supply industry coal and iron ore and £2.68 for locomotives or wagons conveying all other traffic and for coaching stock~~ [\[£1.65 per KGTM<sup>1</sup>\]](#).

2.2.5 If:

(a) the Variable Rate in respect of any Specified Equipment or New Registered Equipment has not been published or determined by ORR by the date of signature of this contract or under paragraph 2.2.3 respectively; and

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<sup>1</sup> [Note: This number still reflects 2006/7 prices.](#)



(b) ORR later determines a new Variable Rate for any Specified Equipment or New Registered Equipment,

then promptly after ORR has determined the Variable Rate under paragraph (b) above, Network Rail shall:

(i) retrospectively apply that Variable Rate~~;~~<sub>;</sub>

(A) \_\_\_\_\_ in respect of the relevant Specified Equipment, from the date of signature of this contract~~;~~<sub>;</sub> and~~;~~<sub>;</sub>

(B) \_\_\_\_\_ in respect of the relevant New Registered Equipment, from the date of introduction of that New Registered Equipment,

in each case so as to recalculate the amount of the Variable Charge that would have been payable in respect of the period from the date of signature of this contract or the date of introduction of the relevant New Registered Equipment to the date on which the above Variable Rate is determined by ORR; and

(ii) issue an adjusting invoice or credit note.

*[Note: ORR is awaiting Network Rail's proposal with respect to a coal spillage rebate mechanism which the ORR will consider and discuss with interested industry parties before reflecting such a mechanism in this contract.]*

### 2.3 Freight Capacity Charge

The Freight Capacity Charge shall be calculated in accordance with the following formula or such other method that the parties may agree with the object of calculating a Freight Capacity Charge that is not materially different from that calculated in accordance with the following formula:

$$\text{Freight Capacity Charge} = \sum(\text{FCR}_{\text{mf}} \times \text{CM}_{\text{mf}}) + (\text{FCR}_{\text{w}} \times \text{CM}_{\text{w}})$$

where:

~~FCR~~FCR<sub>mf</sub> means the Freight Capacity Rate in respect of Services operated during the period from Monday to Friday (both inclusive);

~~CM~~

CM<sub>mf</sub> means Contract Miles; ~~and~~ in respect of Services operated during the period from Monday to Friday (both inclusive);

FCR<sub>w</sub> means the Freight Capacity Rate in respect of Services operated on Saturday and/or Sunday, where:

$$\text{FCR}_w = \text{FCR}_{mf} \times [\bullet];$$

[Note: figure to be confirmed following completion by Network Rail of its consultation.]

CM<sub>w</sub> means Contract Miles in respect of Services operated on Saturday and/or Sunday; and

$\Sigma$  means the summation across all Services.

## 2.4 Traction Electricity Charge

2.4.1 If the Train Operator procures the supply of electricity from or through Network Rail (whether as its agent or otherwise) for the purpose of running trains under this contract, the Traction Electricity Charge shall be calculated in accordance with the following formula:

$$\text{Traction Electricity Charge} = \Sigma(\text{TER} \times \text{KGTM})$$

where:

TER means the Traction Electricity Rate; and

$\Sigma$  means the summation across all Services using electric traction.

## 2.5 — ~~Electrification Asset Usage Charge~~

~~If the Train Operator uses traction electricity for the purpose of running trains under this contract, the Electrification Asset Usage Charge shall be calculated in accordance with 2.4.2~~ Within 90 days after the end of each Financial Year (“**Relevant Year t**”), Network Rail shall calculate a supplementary amount (“**S<sub>t</sub>**”), payable by or to the Train Operator, which is derived from the following formula:

~~Electrification Asset Usage Charge =  $\sum(MCR \times KGTM \times EAUR)$~~

$$S_t = \sum E_{gt} \cdot \frac{(A_{gt} - M_{gt})}{M_{gt}}$$

where:

~~MCR means the Modelled Consumption Rate;~~

~~EAUR means the Electrification Asset Usage Rate; and~~

E<sub>gt</sub> is part of the Traction Electricity Charge payable by the Train Operator for each applicable Geographic Area g in Relevant Year t, determined in accordance with the following formula:

$$E_{gt} = \sum C_i \cdot E_{git} \cdot UE_{ijgt}$$

M<sub>gt</sub> means the total modelled electricity consumption in Geographic Area g in Relevant Year t which is derived from the following formula:

$$M_{gt} = \sum C_i \cdot UE_{ijgt}$$

where:

C<sub>i</sub> means the calibrated modelled consumption rate (in kWh per Train Mile in relation to electric multiple units and kWh per Gross Tonne Mile in relation to locomotive-hauled units) for train category i, shown in the Traction Electricity Price List;

UE<sub>ijgt</sub> means the actual volume of usage (in kWh per Train Mile in relation to electric multiple units and kWh per Gross Tonne Mile in relation to locomotive-hauled units), if any, of trains operated by or on behalf of all train operators in Geographic Area g of trains of train category i, in tariff band j, referred to in the Traction Electricity Price List in Relevant Year t; and

E<sub>git</sub> means an amount for traction current determined in accordance with paragraph 2.4.1;

~~$\sum$~~  means the summation across all ~~Services using electric traction~~ relevant train categories i, all tariff bands j and all Geographic Areas g; and

A<sub>gt</sub> means the total actual electricity consumption (in kWh), if any, of trains operated by or on behalf of all train operators in Geographic Area g in the Relevant Year t [assessed by Network Rail (as accurately as possible) as being the appropriate proportion of the electricity consumption billed to Network Rail by its electricity suppliers in that area]. [*Note: given Network Rail's current ability to measure consumption in each region, is this assessment/apportionment necessary?*]

2.4.3 Network Rail shall, within 90 days after the end of Relevant Year t, provide to the Train Operator:

- (a) a statement of the amount S<sub>t</sub> (whether of a positive or negative amount);
- (b) such background workings as may reasonably be required for a proper understanding of the calculation; and
- (c) a certificate of the auditors of Network Rail confirming the accuracy of the calculation.

2.4.4 Within 30 days after the date upon which Network Rail shall have provided to the Train Operator the information referred to in paragraph 2.4.3, the amount  $S_t$  shall be invoiced for payment as provided under this contract. If the amount  $S_t$  is positive, the invoice shall be issued by Network Rail and payable by the Train Operator. If the amount  $S_t$  is negative, the invoice shall be issued by the Train Operator and payable by Network Rail.

2.4.5 If the Train Operator wishes to propose the introduction of on-train metering to measure traction electricity consumption for the purposes of invoicing Network Rail for traction electricity, it shall notify Network Rail of any required changes to the contract in connection with that proposal.

2.4.6 Any notice under paragraph 2.4.5 shall be accompanied by information and evidence in reasonable detail supporting the changes proposed and setting out the reasons for those changes, and Network Rail shall respond in writing within 56 days of service of any such notice.

2.4.7 Promptly following any response served by Network Rail under paragraph 2.4.6, the parties shall endeavour to agree whether the contract should be amended in connection with that proposal and if so the amendments.

2.4.8 If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the parties shall notify ORR. If ORR elects to determine the matter, the parties shall furnish ORR with such information and evidence as ORR shall require to determine the matter and shall abide by any determination issued by ORR. If ORR does not so elect, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:

- (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and

procedures for the conduct of the determination as he sees fit having regard to that timescale;

(ii) each of the parties shall abide by the rules and procedures established by the expert; and

(iii) the parties shall direct the expert to have regard to any relevant criteria and/or policy statement most recently issued by the Office of Rail Regulation.

2.4.9 Any amendment to the contract in connection with the proposal referred to in paragraph 2.4.5 shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph 2.4 (other than a determination by ORR pursuant to paragraph 2.4.8), the parties shall ensure that ORR is furnished with such amendment and such information and evidence as it shall require to determine whether or not to approve the amendment.

2.4.10 Any amendment to the contract in connection with the proposal referred to in paragraph 2.4.5 shall apply with effect from, subject to paragraph 2.4.9, the date proposed by the Train Operator (unless otherwise agreed by the parties or determined by the ORR or the expert in relation to the proposal).

### 2.5 Freight Only Line Charge

In respect of each ESI Wagon and each SNF Wagon, the Freight Only Line Charge for the purposes of paragraph 2.2.1 shall be as follows:

<u>Wagon Type</u>	<u>2009-2010</u>	<u>2010-2011</u>	<u>2011-2012</u>	<u>2012-2013</u>	<u>2013-2014</u>
<u>ESI Wagon charge in £ per KGTM</u>	<u>[•]</u>	<u>[•]</u>	<u>[•]</u>	<u>[•]</u>	<u>[•]</u>

<u>SNF Wagon charge</u> <u>in £ per KGTM</u>	[.]	[.]	[.]	[.]	[.]
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## 2.6 Incident Cap Access Charge Supplement

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

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

where:

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

ICACSR means the Incident Cap Access Charge Supplement Rate.

## 2.7 Price Variation

2.7.1 The Indexed Figures shall remain in force until the day preceding 1 April ~~2007~~2010.

2.7.2 On 1 April in each Financial Year, commencing 1 April ~~2007~~2010, the Indexed Figures other than the Traction Electricity Rate shall each be adjusted by multiplying them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula:

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

where:

RPI<sub>t-1</sub> means the average value of the monthly figures of the General Index of Retail Prices All Items as published in Economic

Trends issued by the Office for National Statistics (Table 18.1 reference CHAW) (“RPI”) for the 12 months up to and including the month of December immediately preceding the relevant 1 April; and

RPI<sub>t-2</sub> means the average value of the monthly figures of RPI for the 12 months up to and including the month of December which is 16 months before the relevant 1 April.

*[Note: The definition of RPI in this Schedule 7 (Freight) is different from the definition of “Retail Prices Index” in Schedule 7 (Passenger). ORR would welcome industry parties’ views as to whether the two Schedules should be conformed in this respect.]*

2.7.3 If RPI for any month of December shall not have been published on or before the following March, or there is a material change in the base composition of RPI, then the parties may agree to such other index as they deem appropriate with the object of placing both parties in the position in which they would have been had there been no change in the base composition of RPI.

2.7.4 On 1 April in each Financial Year, commencing 1 April ~~2001~~2010, the Traction Electricity Rate shall be varied by multiplying it by an IIEC Adjustment Factor calculated as follows:

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

this calculation to be rounded to three decimal places,

where:

t is the relevant Financial Year in respect of which the Adjustment Factor is being calculated;



IIEC<sub>t-1</sub> is the mean value of the Index of Industrial Electricity Costs published or determined in respect of the Financial Year <sub>t-1</sub>; and

IIEC<sub>t-2</sub> is the mean value of the Index of Industrial Electricity Costs published or determined in respect of the Financial Year which precedes the Financial Year referred to above.

2.7.5 “**Index of Industrial Electricity Costs**” or “**IIEC**” means the index of prices of fuels purchased by the manufacturing industry in Great Britain, electricity purchased by moderately large users, published quarterly by the Department of Business, Enterprise and Regulatory Reform, or:

- (a) if the IIEC for any quarter in any year shall not have been published on or before the last day of the fifth month after the end of such quarter, such index for such period or periods as ORR may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances; or
- (b) if there is a material change in the basis of the IIEC, such other index as ORR may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances.

## 2.8 *Incremental Costs*

### 2.8.1 *Where:*

- (a) the Train Operator makes a Bid;
- (b) the operation of the Service Bid for would exceed the Operating Constraints applying as at 1 April ~~2001~~2009;
- (c) the Train Operator notifies Network Rail at the time of making the Bid that it wishes Network Rail to modify the Operating Constraints applying as at 1 April ~~2001~~2009 in a manner so as to permit the operation of the Service Bid for under this contract;

- (d) Network Rail is reasonably able to effect such modifications in a timescale that meets the Train Operator's requirements; and
- (e) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed ~~£250,000~~£300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

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

- (a) it shall effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c); or
- (b) it shall not effect the modification to the Operating Constraints requested by the Train Operator under paragraph 2.8.1(c) for one of the following reasons:
  - (i) it is not reasonably able to effect such modification in a timescale that meets the Train Operator's requirements; or
  - (ii) the Incremental Costs of such modification are estimated by Network Rail to exceed ~~£250,000~~£300,000 in any Financial Year.

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

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

2.8.5 Where Network Rail notifies the Train Operator under paragraph 2.8.2(b), if the Train Operator disputes Network Rail's reasons under paragraphs 2.8.2(b)(i) or (ii), it shall be entitled to refer the matter for expert determination under Part D of the Access Dispute Resolution Rules within 20 Working Days of Network Rail's notice under paragraph 2.8.2(b).

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

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

2.8.7 Where:

- (a) the Train Operator makes a Bid; and
- (b) the operation of the Service Bid for:
  - (i) would exceed the Operating Constraints applying as at 1 April ~~2001~~2009; and
  - (ii) is permitted under the Operating Constraints applying as at the date of the Bid by reason of a Qualifying Modification,

then paragraph 2.8.8 shall apply.

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

2.8.9 Where:

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

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

2.8.10 If the parties have failed to agree the Incremental Costs in accordance with paragraph 2.8.6 within 20 Working Days of the date of the relevant Bid, either party shall be entitled to refer the determination of the Incremental Costs for expert determination in accordance with Part D of the Access Dispute Resolution Rules.

2.8.11 If the Train Operator disputes:

(a) the amount of any Qualifying Modification Benefit Charge payable by it under paragraph 2.8.8; or

(b) the amount of any rebate payable to it under paragraph 2.8.9,

within 20 Working Days of the date of its receipt from Network Rail of details of the amount of the charge or rebate respectively, it shall be entitled to refer the matter for expert determination in accordance with Part D of the Access Dispute Resolution Rules.

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

(a) notifying such freight train operator of the referral for expert determination; and

(b) giving to such freight train operator the opportunity to become a party to the proceedings in respect of such expert determination.

2.8.13 If a reference for expert determination is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties<sup>2</sup> ~~remit to the expert~~ shall ~~be that he shall~~ direct the expert to hold

the expert determination under Part D of the Access Dispute Resolution Rules and shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
  - (i) the matters in respect of which duties ~~which~~ are imposed on ORR by virtue of section 4 of the Act; and
  - (ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;
- (c) not make an award which is inconsistent with any provisions of the Network Code; and
- (d) give his reasons.

2.8.14 Network Rail undertakes to the Train Operator that, subject to the approval of ORR, in any regulated access agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with a freight train operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.

2.8.15 Where, in relation to any Qualifying Modification, the determination of any Qualifying Modification Benefit Charge, or corresponding rebate of Incremental Costs, is referred to expert determination by any person under the provisions of any regulated access agreement (other than this contract):

- (a) such determination shall be binding on Network Rail and the Train Operator; and

- (b) Network Rail and the Train Operator shall make any necessary adjustments of payments between them under this contract to give effect to such determination.

2.8.16 Network Rail shall be the legal and beneficial owner of all modifications to Operating Constraints effected by or on behalf of Network Rail under this paragraph 2.8.

## 2.9 *Office of Rail Regulation's Qualifying Modification Criteria*

2.9.1 ORR may at any time issue criteria:

- (a) specifying how the QM Threshold for any Qualifying Modification shall be determined, which may vary for different types of Qualifying Modification; and
- (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.

2.9.2 ORR's criteria under paragraph 2.9.1(a) above shall not have effect unless ORR has:

- (a) consulted the parties in relation to the issues to be dealt with in such criteria;
- (b) taken into account any representations made by the parties in response to the consultation under paragraph 2.9.2(a); and
- (c) notified the parties as to its conclusions in relation to the issues to be dealt with in such criteria and the reasons for those conclusions.

## 2.10 ~~Changes to the Freight Capacity Charge Price List~~Efficiency Benefit Share

~~2.10.1~~ If The Efficiency Benefit Share is an amount (which shall not be a negative value) representing a return of Track Charges which shall be identified in the ORR's annual assessment of Network Rail ~~or the Train Operator wishes to amend the Freight Capacity Charge Price List to include~~

~~new route sections for which, as at the date of signature of this contract, there is no existing charge (“new relevant route section”), at the request of either party, the parties shall negotiate with a view to agreeing what, if any, changes (“relevant changes”) are required to the Freight Capacity Charge Price List to include any new relevant route section, as the “Efficiency Benefit Share”, if any, to be rebated to the Train Operator, such amount to be determined in accordance with [Annex/Table [ ] of] the 2008 Final Determinations<sup>2</sup>~~

~~2.10.2—Any request by either party in accordance with paragraph 2.10.1 shall be made by notice to the other party and shall be accompanied by such supporting information as the other party may reasonably require.~~

~~2.10.3—If the parties have failed to agree the relevant changes in accordance with paragraph 2.10.1 within 35 Working Days of the date of the notice under paragraph 2.10.2, either party shall be entitled to refer the determination of the relevant changes to an arbitrator pursuant to Part C of the Access Dispute Resolution Rules.~~ 2.10.4—If the parties agree the relevant changes, or the relevant changes are determined by an arbitrator pursuant to paragraph 2.10.3, they shall submit them to ORR for its approval as an amendment to the Freight Capacity Charge Price List.

### 3 Freight Charging Review

#### 3.1 ~~Access charges review~~ General

~~3.1.1—Subject to paragraph 3.2, ORR may at any time and from time to time carry out an one or more access charges review in relation to~~ reviews of all or part of this contract ~~if ORR considers that:~~ as follows:

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<sup>2</sup> This Schedule refers to a number of terms being defined in the 2008 Final Determinations. The 2008 Final Determinations will have to be checked to ensure consistency.

~~(a) it is necessary or expedient to review the Traction Electricity Charge in order to allow train operators to purchase electricity from competing suppliers, and to facilitate on-train metering; or~~

~~(b) it is necessary or expedient to review the Variable Charge, the Traction Electricity Charge or the Electrification Asset Usage Charge in order to take account of the updated infrastructure costs associated with additional information relating to track-friendly vehicles; or~~

3.1.1 an access charges review such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation on and from 1 April 2014 or such later date as may be specified in that review; and

3.1.2 as provided in paragraph 3.2 (and only as provided in paragraph 3.2), an access charges review such that amendments to this contract to give effect to the conclusions of such an access charges review come into operation before 1 April 2014.

## **3.2 Access charges reviews capable of coming into operation before 1 April 2014**

### 3.2.1 Exceptional circumstances

~~(e) —~~ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where paragraph 3.2.3 applies and it considers that there has been a material change in circumstances since ORR published its conclusions on its review of freight charging policy in October 2001 and in consequence, other than an excluded change, in the circumstances of Network Rail or in relevant financial markets or any part of such markets.

### 3.2.2 Adjusted Interest Cover Ratio

(a) ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where paragraph 3.2.3 applies and, in the immediately following period of 36 consecutive months (each a “Review



Period”), the value of the Adjusted Interest Cover Ratio (AICR) derived from the following formula is less than or equal to 1.35:

$$AICR = \frac{1 - 2 - 3 - 4}{5}$$

where:

1 means Network Rail’s projected total income in that Review Period;

2 means Network Rail’s projected total expenditure (excluding Network Rail’s renewals and enhancements projected expenditure) in that Review Period;

3 means the total amount of corporation tax forecast to be paid by Network Rail in that Review Period;

4 means the figure for the regulatory amortisation assumption made by ORR in relation to that Review Period as specified in [Annex/Table [ ] of] the 2008 Final Determinations; and

5 means the Net Interest forecast to be paid by Network Rail on its Net Debt in that Review Period.

(b) For the purposes of the formula specified in paragraph 3.2.2(a), each of the expressions “Network Rail’s projected total income”, “Network Rail’s projected total expenditure”, “Network Rail’s renewals and enhancements projected expenditure”, “corporation tax”, “regulatory amortisation assumption”, “Net Interest” and “Net Debt” shall have the meanings ascribed to them in [Annex/Table [ ] of] the 2008 Final Determinations.

(c) For the purposes of the ratio specified in paragraph 3.2.2(a), where part only of a Financial Year falls within the relevant Review Period, each of the component elements of the formula specified in paragraph 3.2.2(a) relating to that

part Financial Year shall be attributed to that Review Period on a pro rata basis reflecting the proportion of that Financial Year falling within that Review Period.

### 3.2.3 *Compelling reasons for access charges review*

ORR may carry out an access charges review in relation to any relevant part or parts of this contract at any time where, in consequence of the occurrence of the circumstances specified in paragraph 3.2.1 and/or paragraph 3.2.2, ORR considers that there are compelling reasons to initiate an access charges review—~~is appropriate,~~ having due regard to ORR's duties under section 4 of the Act; ~~or (d) it is necessary or expedient to introduce a regime to incentivise the parties to improve maintenance of track or vehicles,~~ including in particular the duty to act in a manner which it considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which ORR has functions under or by virtue of Part I of the Act.

## **3.3 Interpretation**

~~3.1.2~~ In this paragraph 3, references to ORR carrying out an access charges review shall be construed as including references to its initiating implementation of that review.

### ~~3.2~~ *Consultation*

~~ORR shall not carry out an access charges review under paragraph 3.1 unless it shall first have consulted the parties and the Secretary of State and have taken into account any representations or objections which any of them shall have made to it (and not withdrawn) within such period as it shall have specified for the purpose.~~

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### ANNEX 3

#### 17 JULY 2008 ORR DRAFT FOR CONSULTATION OF PASSENGER SCHEDULE 8 - PARAGRAPH 17 ONLY

#### **17 Amendments to Appendix 1**

##### *17.1 Circumstances in which parties agree to amend Appendix 1*

Either party may by notice to the other propose that Appendix 1 be amended in accordance with this paragraph 17.

##### *17.2 Procedure for amendments to Appendix 1*

- (a) The party who wishes to amend Appendix 1 shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:
- (i) where such change relates to a forthcoming timetable change, on or before the first day of the month 6 months before the relevant Principal Change Date or Subsidiary Change Date on which that timetable change is due to occur; and
  - (ii) in any other case, prior to the date from which it proposes such change shall have effect.
- (b) Any notice under sub-paragraph 17.2(a) shall :
- (i) specify as far as possible that party's proposed amendments to Appendix ~~4~~1; and
  - (ii) be accompanied by information and evidence in reasonable detail supporting the change proposed and setting out the reasons for it, and the party receiving that notice shall respond in writing within 56 days of service of any such notice.
- (c) Promptly following the service of any ~~such notice~~ response under sub-paragraph 17.2(b)(ii), the parties shall endeavour to agree whether Appendix 1 should be amended in accordance with this paragraph 17 and if so the amendments.
- (ed) If the parties fail to reach agreement within 90 days after service of the relevant notice, or if prior to that date both parties agree that agreement is unlikely to be reached prior to that date, the parties shall notify ORR. If ORR elects to determine the matter, the parties shall furnish ORR with such information and evidence as ORR shall require to determine the matter and shall abide by any determination issued by ORR. If ORR does not so elect, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:

- (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;
  - (ii) each of the parties shall abide by the rules and procedures established by the expert; and
  - (iii) the parties shall direct the expert to (A) have regard to any relevant criteria and/or policy statement most recently issued by the Office of Rail Regulation, including in relation to the introduction of any capped value in respect of any Service Group in Appendix 4.1, and (B) set out in its determination the reasons for that determination.
- (de) Any amendment to Appendix 1 shall take effect only when it has been approved by ORR under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph ~~17, the parties shall use all reasonable endeavours to~~17 (other than a determination by ORR pursuant to sub-paragraph 17.2(d)), the parties shall ensure that ORR is furnished with such amendment and ~~sufficient~~such information and evidence as it shall require to determine whether or not to approve the amendment.
- (ef) Any amendment to Appendix 1 shall apply with effect from:
- (i) the relevant Principal Change Date or Subsidiary Change Date (where paragraph 17.2 (a) (i) applies); or
  - (ii) subject to paragraph 17.2 (de) the date proposed by the party requesting the change in accordance with paragraph 17.2 (a) (ii) (unless otherwise agreed by the parties or determined by the ORR or the expert in relation to the change).

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## ANNEX 4

### 17 JULY 2008 ORR DRAFT FOR CONSULTATION OF FREIGHT SCHEDULE 8

#### **SCHEDULE 8: PERFORMANCE REGIME**

[Note: as a result of the changes to this Schedule 8, the following consequential changes are required:

- the definition of “Incident Cap Access Charge Supplement Rate” in clause 1 should be amended as follows:

““Incident Cap Access Charge Supplement Rate” means, in relation to any Financial Year, the rate determined in accordance with paragraph 11.1 of Schedule 8, as adjusted under paragraph 2.7.2 of Schedule 7;”

- the definition of “Indexed Figures” in Schedule 7 has been expanded to include the Late Notice Cancellation Sum and the Prolonged Disruption Amount.]

#### **1. Definitions**

In this Schedule 8 unless the context otherwise requires:

“100 Train Miles” means, in relation to a train, or a portion of a train, an aggregate of 100 miles travelled by that train, or that portion of a train, on the Network in providing Services; [Note: as the term ‘Train Mile’ is not defined in the model freight contract, this definition is based on the term “Contract Mile” to ensure consistency.]

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

“Attributable to both the Train Operator and Network Rail” means, in respect of any delay to or cancellation of a Service or to a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution

Guide, that both the Train Operator and Network Rail are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of “Attributable to the Train Operator” or “Attributable to Network Rail”);

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

- (a) any delay or cancellation or other matter, occurring on or off the Network, which is not Attributable to the Train Operator;
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator;
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree, or it is otherwise determined, is Attributable to Network Rail; or
- (d) any delay or cancellation occurring on or off the Network, caused by an Other Train Operator Train on the Network,

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

**“Attributable to the Train Operator”** means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
  - (i) any acts or omissions of the Train Operator’s staff or its agents, contractors or sub-contractors;
  - (ii) any Train Operator Omission;
  - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Network Rail shall have refused to permit the Service to



move over the Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);

- (iv) any improperly loaded railway wagons which form the whole or part of any Service;
  - (v) any Service not being promptly accepted off the Network at a Destination or Intermediate Point for reasons not caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator);
  - (vi) any failures or delays arising off the Network, other than those which are caused by Network Rail (in its capacity as operator of the Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Network Rail in its capacity as operator of the Network) (other than the Train Operator); or
  - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator;
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
- (i) any delay to or cancellation of a Service Attributable to the Train Operator;
  - (ii) any Train Operator Omission; or
  - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Network Rail, but which the parties agree or it is otherwise determined is Attributable to the Train Operator,

in all cases:

(aa) having regard to the guidance on allocation of responsibility for incidents set out in the Delay Attribution Guide; and

(bb) ignoring any delay or cancellation under paragraph (d) of the definition of “Attributable to Network Rail”;

“**Benchmarks**” means the Train Operator Benchmark ~~Per Train~~ and the Network Rail Benchmark ~~Per Train specified in Appendix 1~~;

“**Disruption Sum**” means the Disruption Sum specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

“**Financial Year t**” has the meaning ascribed to it in paragraph 10.1.3;

“**Financial Year t-1**” means the Financial Year preceding Financial Year t, and similar expressions shall be construed accordingly;

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

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

“**Late Notice Cancellation**” means any Service which, pursuant to either of (i) paragraph 4.5.1 of Schedule 4 or (ii) paragraph 5.6.1 of Schedule 4, is treated as a Cancellation for the purposes of paragraph 8.1(d);

“**Late Notice Cancellation Sum**” means the Late Notice Cancellation Sum specified in Appendix ~~1~~, as adjusted under paragraph 2.7.2 of Schedule 7;

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

“**Network Rail Benchmark**” means the Network Rail ~~Benchmark~~ Delay Minutes benchmark in relation to each Charging Period, ~~calculated in accordance with Appendix 1;~~ “**Network Rail Benchmark Per Train**” means the Network Rail Benchmark Per Train specified in Appendix 1;

“**Network Rail Cap**” means the Network Rail Cap specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7, save that, in respect of the first and last Financial Year, the Network Rail Cap shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;

“**Network Rail Charging Period Limit**” means  $1/13^{\text{th}}$  of the Network Rail Cap;

~~“**Network Rail Lower Review Level**” means, in respect of a Financial Year, the Network Rail Lower Review Level specified in Appendix 1, save that, in respect of the first and last Financial Year, the Network Rail Lower Review Level shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;~~

“**Network Rail Payment Rate**” means the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

~~“**Network Rail Upper Review Level**” means, in respect of a Financial Year, the Network Rail Upper Review Level specified in Appendix 1, save that, in respect of the first and last Financial Year, the Network Rail Upper Review Level shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;~~

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

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

“**Performance Sum**” means an amount for which the Train Operator or Network Rail is liable under one of paragraphs 4 and 6 following a Charging Period in relation to Minutes Delay in that Charging Period and the preceding Charging Periods;

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

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

**“Prolonged Disruption Amount”** means the Prolonged Disruption Amount specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

**“Prolonged Disruption Sum”** means the Prolonged Disruption Sum calculated in accordance with paragraph 7;

~~**“Rates”** means the Train Operator Payment Rate and the Network Rail Payment Rate specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;~~

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

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

**“Relevant Circumstances”** means circumstances other than actual reductions or increases in delays to trains, including a change in the way in which responsibility for delays is attributed;

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

**“Train Operator Benchmark”** means the Train Operator Benchmark in relation to each Charging Period, ~~calculated in accordance with Appendix 1;~~ ~~**“Train Operator Benchmark Per Train”** means the Train Operator Benchmark Per Train~~ specified in Appendix 1 and adjusted in accordance with paragraph 10.1;

**“Train Operator Cap”** means the Train Operator Cap specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7, save that, in respect of the first and last Financial Year, the Train Operator Cap shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;

**“Train Operator Charging Period Limit”** means 1/13th of the Train Operator Cap;

~~**“Train Operator Lower Review Level”** means, in respect of a Financial Year, the Train Operator Lower Review Level specified in Appendix 1, save that, in respect of the first and last Financial Year, the Train Operator Lower Review Level shall be that specified in Appendix 1 multiplied by the Adjustment Fraction;~~

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

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

**“Train Operator Payment Rate”** means the Train Operator Payment Rate specified in Appendix 1, as adjusted under paragraph 2.7.2 of Schedule 7;

~~**“Train Operator Upper Review Level”** means, in respect of a Financial Year, the Train Operator Upper Review Level specified in Appendix 1, save that, in respect of the first and last Financial Year, the Train Operator Upper Review Level shall be that specified in Appendix 1 multiplied by the Adjustment Fraction; and [and](#)~~

**“Trigger”** means the act of a train arriving at, passing or departing from a Recording Point.

## **2. General**

### *2.1 Performance monitoring system recordings*

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

### *2.2 Liability for Short Notice Service*

Network Rail shall, notwithstanding that it shall have accepted a Bid for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a result of Network Rail meeting its commitments in terms of train regulation as set out in Train Regulation Policies of the Railway Operational Code.

### *2.3 Mitigation of delays*

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

### *2.4 Calculation of Minutes Delay*

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

### **3. Diagnosis of delays**

#### *3.1 Attributing delays*

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

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

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

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

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

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

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

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

#### *3.5 Identifying delaying incidents*

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

### 3.6 *Performance statements*

Appendix 3 (Performance statements) shall have effect.

## 4. **Minutes Delay in respect of Train Operator performance**

### 4.1 *Prescribed delay period*

4.1.1 For the purposes of this paragraph 4, the aggregate Minutes Delay to Third Party Trains Attributable to the Train Operator arising as a result of any one incident or event shall be capped at the Incident Cap, so that any such minutes in excess of the Incident Cap shall be disregarded.

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

### 4.2 *Train Operator performance against TOB*

#### 4.2.1 In respect of each Charging Period:

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

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

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

4.2.2 the Adjusted MDTO calculated in accordance with paragraph 4.2.1 shall then be compared with the Train Operator Benchmark (“TOB”) and:



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

(TOB - the Adjusted MDTO) x Train Operator Payment Rate;

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

(the Adjusted MDTO - TOB) x Train Operator Payment Rate;

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

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

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

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

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

### *6.1 Cancellations*

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

- (a) if the Service is a Cancellation as defined in paragraph 8.1(a), there shall not be any Minutes Delay in respect of the Service Attributable to Network Rail;

- (b) if the Service is a Cancellation as defined in paragraph 8.1(b), there shall be disregarded any Minutes Delay in respect of the Service after the first ~~1~~12 hours aggregate of Minutes Delay; and
- (c) if the Service is a Cancellation as defined in paragraph 8.1(c), there shall be disregarded any Minutes Delay in respect of the Service after the time at which the Service arrives at the point on or off the Network where it subsequently becomes a Cancellation.

6.2 *Network Rail performance against NRB*

In respect of each Charging Period:

6.2.1

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

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

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

6.2.2 the Adjusted MDNR calculated in accordance with paragraph 6.2.1 shall then be compared with the Network Rail Benchmark (“NRB”) and:

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

$$(\text{NRB} - \text{the Adjusted MDNR}) \times \text{Network Rail Payment Rate};$$

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

([the Adjusted MDNR](#) - NRB) x Network Rail Payment Rate;

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

## 7. Prolonged Disruption

### 7.1 Prolonged Disruption Sum calculation

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

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

where:

[CSPDA](#) is the ~~Cancellation Sum~~ [Prolonged Disruption Amount](#);

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

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

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2

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

7.2 *Subsequent Prolonged Disruption*

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

7.3 *Network Rail liability*

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

7.3.2 Network Rail shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service, a Short Notice Service or an Ancillary Movement.

**8. Cancellation**

8.1 *Cancellation*

For the purposes of this paragraph 8, “**Cancellation**” means any Service:

- (a) which does not depart from its Origin within ~~1~~12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within ~~1~~12 hours after the time at which it is Planned to depart and arrives at its Destination more than ~~1~~12 hours after the time at which it is Planned to arrive, and in respect of which no Diverted Service has been agreed; or

- (c) which departs from its Origin within ~~[ ]~~12 hours after the time at which it is Planned to depart but does not arrive at its Destination, and in respect of which no Diverted Service has been agreed,

in each case where ~~[ ] hours or more of the first [ ]~~ at least 6 hours of the delay to the Service is Attributable to Network Rail; or

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

## 8.2 *Network Rail liability*

8.2.1 Subject to paragraphs ~~8.2.28.2.2, 8.2.3~~ and 8.3 below, and paragraphs 3.4, 4.5 and 5.6 of Schedule 4, Network Rail shall be liable in any Charging Period for the Cancellation Sum in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

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

- (a) an Empty Service, a Short Notice Service or an Ancillary Movement; or
- (b) any Service which is Planned to depart its Origin during a Week in respect of which a Prolonged Disruption Sum is payable and which is a Cancellation as a result of such Prolonged Disruption.

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

paragraph 8.2.1 above but shall instead be liable for the Late Notice Cancellation Sum in respect of that Late Notice Cancellation.

### 8.3 *Late presentation of Service*

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

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

## 9. **Payment**

### 9.1 *Aggregate net liability of Network Rail and the Train Operator for Performance Sums*

9.1.1 The aggregate net liability of Network Rail for a Performance Sum in respect of any Charging Period shall not exceed the Network Rail Charging Period Limit.

9.1.2 Subject to paragraph 9.1.3, if Network Rail would otherwise be liable for a Performance Sum which exceeds the Network Rail Charging Period Limit, then the amount by which such claim exceeds the Network Rail Charging Period Limit ~~(the “Network Rail residual amount”)~~ shall be taken into account when calculating Network Rail’s aggregate net liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.3 In respect of any Financial Year, the aggregate net liability of Network Rail under this paragraph 9.1 shall not exceed the Network Rail Cap.

9.1.4 The aggregate net liability of the Train Operator for a Performance Sum in respect of any Charging Period shall not exceed the Train Operator Charging Period Limit.

9.1.5 Subject to paragraph 9.1.6, if the Train Operator would otherwise be liable for a Performance Sum which exceeds the Train Operator Charging Period Limit, then the amount by which such claim exceeds the Train Operator Charging Period Limit ~~(the “Train Operator residual amount”)~~ shall be taken into account when calculating the Train Operator’s aggregate net liability for a Performance Sum in respect of the subsequent Charging Period or Charging Periods in that Financial Year.

9.1.6 In respect of any Financial Year, the aggregate net liability of the Train Operator under this paragraph 9.1 shall not exceed the Train Operator Cap.

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

## 9.2 *Issue of invoice or credit note*

9.2.1 In respect of each Charging Period, subject to paragraph 9.1, the liabilities of the Train Operator and of Network Rail for any Performance Sums (as such Performance Sums may be adjusted under paragraph 10.1), Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Disruption Sums and Prolonged Disruption Sums shall be set off against each other, and Network Rail shall issue an invoice or credit note as appropriate in respect of the balance, if any, within 28 days after the end of such Charging Period.

9.2.2 The invoice or credit note issued under paragraph 9.2.1 shall show:

- (a) any Performance Sums, Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Disruption Sums and Prolonged Disruption Sums for which Network Rail or the Train Operator is liable; and
- (b) any matter referred to in Appendix 3 which the Train Operator or Network Rail has disputed under paragraph 3 of Appendix 3 and which is still in dispute.

### 9.3 *Resolution of disputes*

9.3.1 Without prejudice to Clause 13, Part B of the Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.

9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

## 10. **Reviews of ~~Rates and~~ Benchmarks**

*[Note: this paragraph has been drafted so that the Train Operator Benchmark can be adjusted each year to reflect any actual growth or reduction in traffic on the network (in each case subject to a materiality threshold). We have proposed that the adjustment should apply both retrospectively (so that the Performance Sums for the previous year are recalculated to reflect actual growth for reduction in traffic) and for the year ahead (so that the adjusted benchmark will be used to calculate the Performance Sums for that year). We would welcome the industry's thoughts on this.]*

### 10.1 *Referral of data*

~~10.1.1 Network Rail may by notice to the Train Operator served within 60 days after the end of a Financial Year:(a) request a review of Adjustments to the Train Operator Benchmark Per Train if MDTO (as referred to in paragraph 4.2) in respect of that Financial Year:~~

~~(i) is less than the Train Operator Lower Review Level; or~~

~~(ii) exceeds the Train Operator Upper Review Level; and/or~~

10.1.1 In this paragraph 10:

“Actual Train Operator Mileage” means the aggregate of:

(a) the total number of Contract Miles operated by the Train Operator during the Financial Year in question;



(b) subject to paragraph 10.1.5<sup>1</sup>, the total number of Contract Miles assumed pursuant to paragraph 10.1.4 to have been operated by the Train Operator during the Financial Year in question; and

(c) the total Third Party Train Mileage during that Financial Year; and

“Third Party ~~(b) request a review of the Rates~~ Train Mileage” means the total mileage operated or, subject to paragraph 10.1.5, assumed pursuant to paragraph 10.1.4 to have been operated, by Third Party Trains on the Network during the Financial Year in question.

10.1.2 ~~10.1.2—The Train Operator may by notice to Network Rail served within 60 days after the end of a Financial Year:~~

10.1.3 Benchmark that shall apply from 1 April ~~(a)—request a review of the Network Rail Benchmark Per Train if MDNR (as referred to in paragraph 6.2) in respect of that Financial Year:~~

10.1.4 in each Financial Year ~~(i) is less than the Network Rail Lower Review Level; or~~

10.1.5 ~~(ii)—exceeds the Network Rail Upper Review Level; and/or~~

10.1.6 in relation to each Charging Period shall be the Train Operator Benchmark specified in Appendix 1 as adjusted in accordance with this paragraph 10.1. ~~(b)—request—a review of the Rates.~~

~~10.1.7 10.2—Agreement of adjustments~~

~~10.2.1 In respect of each review requested under paragraph 10.1, the parties shall each use all reasonable endeavours to agree within 30 days from receipt of the notice given under~~

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<sup>1</sup> The inclusion of an element of assumed mileage in the definition of “Actual Train Operator Mileage” reflects the fact that, under paragraph 10.1.3, Actual Train Operator Mileage will be calculated prior to the end of each Financial Year for the preceding 11 Charging Periods, requiring an assumed amount to be determined on a pro rata basis for the final Charging Period in the relevant Financial Year. However, no assumed mileage need be included in the circumstances described in the second sentence of paragraph 10.1.5.

~~paragraphs 10.1.1 or 10.1.2 appropriate adjustments to Appendix 1 for the matters in respect of which the review is requested.~~

~~10.2.2~~ ~~Any adjustments agreed under paragraph 10.2.1 shall~~ [Note: if the Train Operator Benchmark adjustment is to be made by reference to the actual mileage for the Financial Year during which the review is requested and for each subsequent Financial Year a whole Financial Year then the benchmark adjustment may not have been completed in time for the calculation of the Train Operator's performance against the Train Operator Benchmark for the first Charging Period in the Financial Year following adjustment. We therefore propose that the reference period for the Actual Train Operator Mileage should be from 1 April to 1 March with an assumed actual mileage being used for the period from 2 March to 31 March. We would welcome industry parties' views on this proposal.]

10.1.3 Within 14 days of the first day of the final Charging Period in each Financial Year ("Financial Year t"), Network Rail shall determine the Actual Train Operator Mileage operated, and, if applicable, assumed to have been operated, on the Network prior to that date during:

(a) Financial Year t (the "Actual Mileage t"); and

(b) the Financial Year immediately preceding Financial Year t (the "Actual Mileage t-1").

10.1.4 ~~10.2.3~~ ~~The adjustments agreed under paragraph 10.2.1~~ The Actual Mileage t shall be calculated as follows:

~~10.1.5 (a) only take account of:~~

~~(i) the Relevant Circumstances~~

$$\text{Actual Mileage } t = A + B$$

where:

A means the Actual Train Operator Mileage for the period from 1 April to the last day of the penultimate Charging Period (inclusive) in Financial Year t; and

~~(ii) such other circumstances as ORR may from time to time determine as being relevant and notify the parties accordingly; and~~

~~(b) preserve the basis on which the Benchmarks were established.~~

~~10.3 Expert determination~~

B is an amount equal to A  
12

10.1.6 In respect of the Financial Year t ending on 31 March 2010 only, the Actual Mileage t-1 shall be the amount specified in Appendix 1. For any other Financial Year t, the Actual Mileage t-1 shall be the Actual Train Operator Mileage operated on the Network during Financial Year t-1, disregarding any assumed mileage under paragraph 10.1.4.

10.1.7 If the Actual Mileage t exceeds the Actual Mileage t-1, the amount of such excess, expressed as a percentage of the Actual Mileage t-1, shall be the “Traffic Growth”. If the Actual Mileage t is less than the Actual Mileage t-1, the difference, expressed as a percentage of the Actual Mileage t-1, shall be the “Traffic Reduction”.

10.1.7 ~~If, in respect of any review requested under paragraph 10.1, the parties fail to reach agreement on the adjustments required under paragraph 10.2 within 30 days from receipt of the notice given under paragraphs 10.1.1 or 10.1.2, either party shall be entitled to refer the matter to expert determination in accordance with Part D of the Access Dispute Resolution Rules, save that:~~

Financial Year t, the Traffic Growth or Traffic Reduction is equal to or greater than (a) the terms of reference to the expert shall be that:

2.5% ~~(i) the determination shall be consistent with paragraphs 10.2.2 and 10.2.3;~~

~~(ii) the determination shall be delivered in writing to the parties no later than 56 days after the date of referral of the matter to the expert; and~~

~~(iii) the expert shall establish such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;~~

~~the “Materiality Threshold”). then: (b) each of the parties shall abide by the rules and procedures established by the expert; and~~

~~(c) in the absence of manifest error, and subject to paragraph 10.4, the determination of the expert shall be final and binding on the parties.~~

#### ~~10.4 Office of Rail Regulation’s consent to adjustments~~

~~10.4.1 Any adjustments agreed between the parties or determined under paragraph 10.3 shall take effect only if ORR gives its consent to them, and from such date as ORR may determine in such consent.~~

~~10.4.2 If ORR does not give its consent to the adjustments described in paragraph 10.4.1, it may issue a notice requiring the parties to make adjustments to Appendix 1, as specified in the notice, in respect of the review requested under paragraph 10.1.~~

~~10.4.3 No notice of ORR under paragraph 10.4.2 shall have effect unless ORR has:~~

~~(a) consulted the parties in relation to the issues specified in the notice;~~

~~(b) taken into account any representations made by the parties in response to the consultation under paragraph 10.4.3(a); and~~

~~(c) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.~~

#### ~~10.5 Statement of adjustments~~

~~10.5.1 Promptly following any adjustments to Appendix 1 taking effect under paragraph 10.4, and in order to give effect to those adjustments, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:~~

- ~~(a) the invoices and credit notes already issued in that Financial Year; and~~
- ~~(b) the payments already made in respect of Performance Sums relating to the Charging Periods from and including the first Charging Period in the Financial Year.~~

(a) the Train Operator Benchmark in respect of each Charging Period within Financial Year t shall be:

(i) in the case of Traffic Growth, increased; or

(ii) in the case of Traffic Reduction, decreased,

by an amount, expressed as a percentage, equal to the Traffic Growth or Traffic Reduction, as the case may be (the “Adjusted Train Operator Benchmark”);

(b) within 14 days of determining the Adjusted Train Operator Benchmark (if any) in accordance with paragraph 10.1.7(a), Network Rail shall re-calculate the Train Operator’s performance in respect of each Charging Period (other than the final Charging Period) during Financial Year t in accordance with paragraph 4.2 using the same MDTO figures that were previously applied during Financial Year t, but substituting the previous Train Operator Benchmark with the Adjusted Train Operator Benchmark;

(c) within 14 days of re-calculating the Train Operator’s performance pursuant to paragraph 10.1.7(b), Network Rail shall provide to the Train Operator:

(i) a statement of any adjustments required to either (A) the Train Operator’s liability to Network Rail for the Performance Sum or (B) Network Rail’s liability to the Train Operator for the Performance Sum, in each case pursuant to paragraph 4.1; and

(ii) such background workings as may reasonably be required for a proper understanding of the calculation; and

(d) the calculation of the Train Operator's performance pursuant to paragraph 4.1 in respect of the final Charging Period within Financial Year t falling after 1 March in Financial Year t shall be made using the Adjusted Train Operator Benchmark.

~~10.1.8~~10.5.2—~~Any statement issued by Network Rail under paragraph 10.5.1~~ Any statement issued by Network Rail under paragraph 10.1.7(c) shall be accompanied by an adjusting invoice or credit note.

~~11. Notice by the Office of Rail Regulation to modify the Incident Cap Access Charge Supplement Rate~~

~~under paragraph 9.2.~~11.1—~~Notice by Network Rail~~

~~Network Rail may give notice to ORR at any time requesting ORR to issue a modification notice to modify the Incident Cap Access Charge Supplement Rate.~~

~~11.2~~—~~Contents of notice~~

~~Any notice given by Network Rail under paragraph 11.1 shall state:~~

- ~~(a) the methodology which Network Rail proposes should be applied to the modification of the Incident Cap Access Charge Supplement Rate;~~
- ~~(b) the reasons for such methodology; and~~
- ~~(c) any other matters relevant to the proposed modification of the Incident Cap Access Charge Supplement Rate.~~

~~11.3~~—~~Modification of Appendix 1~~

~~Subject to paragraph 11.5, if ORR issues to the parties a modification notice following a request under paragraph 11.1, Appendix 1 shall be modified:~~

- ~~(a) as agreed between the parties;~~
- ~~(b) as determined in accordance with the procedure set out in paragraph 11.4; or~~

~~(c) as determined by ORR under paragraph 11.5.~~

~~11.4 Expert determination~~

~~If the parties have failed to reach agreement within 45 days of the date of ORR's notice following a request under paragraph 11.1, either party shall be entitled to refer the matter to expert determination in accordance with Part D of the Access Dispute Resolution Rules, save that:~~

~~(a) the terms of reference to the expert shall be that:~~

~~(i) the expert shall consider the contents of Network Rail's notice under paragraph 11.1 and ORR's notice following a request under paragraph 11.1 in reaching his decision;~~

~~(ii) the determination shall be delivered in writing to the parties no later than 56 days after the date of referral of the matter to the expert; and~~

~~(iii) the expert shall establish such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;~~

~~(b) each of the parties shall abide by the rules and procedures established by the expert; and~~

~~(c) in the absence of manifest error, and subject to paragraph 11.5, the determination of the expert shall be final and binding on the parties.~~

~~11.5 Office of Rail Regulation's consent to modification~~

~~11.5.1 Any modification agreed between the parties or determined under paragraph 11.4 shall take effect only if ORR gives its consent to it, and from such date as ORR may determine in such consent.~~

~~11.5.2 If ORR does not give its consent to a modification as described in paragraph 11.5.1, it may issue a notice requiring the parties to make a modification to the Incident Cap Access Charge Supplement Rate as specified in the notice.~~

~~11.5.3 No notice of ORR under paragraph 11.5.2 shall have effect unless ORR has:~~

- ~~(a) consulted the parties in relation to the issues specified in the notice;~~
- ~~(b) taken into account any representations made by the parties in response to the consultation under paragraph 11.5.3(a); and~~
- ~~(c) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.~~

## ~~12. Agreement to modify the Incident Cap Access Charge Supplement Rate~~

### ~~12.1 Proposal to modify~~

~~Either party may by notice to the other propose that the Incident Cap Access Charge Supplement Rate be modified in accordance with this paragraph 12 if:~~

- ~~(a) the modification can be justified on commercial grounds; and~~
- ~~(b) there has been an increase or decrease of more than ten per cent in the number of Train Slots used by the Train Operator over a period of three consecutive months, relative to the number of Train Slots used by the Train Operator in the three months immediately after the later of:
  - ~~(i) [insert the date on which Services may first be operated by the Train Operator under this contract]; and~~
  - ~~(ii) the date when the Incident Cap Access Charge Supplement Rate was last modified in accordance with paragraphs 11 or 12 of this Schedule.~~~~

### ~~12.2 Timing~~

~~A notice under paragraph 12.1 shall be given before 1 February in the Financial Year preceding the Financial Year in which the modification is proposed to have effect.~~



~~12.3—Expert determination~~

~~If the parties have failed to reach agreement within 45 days of the date of the notice given under paragraph 12.1, either party shall be entitled to refer the matter for expert determination in accordance with Part D of the Access Dispute Resolution Rules, save that:~~

~~(a) the terms of reference to the expert shall be that:~~

~~(i) any modification to the Incident Cap Access Charge Supplement Rate shall be consistent with the modification criteria specified in paragraph 12.4 (the “**modification criteria**”); and~~

~~(ii) the determination shall be delivered in writing to the parties no later than 56 days after the date of referral of the matter to the expert; and~~

~~(iii) the expert shall establish such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale;~~

~~(b) each of the parties shall abide by the rules and procedures established by the expert; and~~

~~(c) in the absence of manifest error, and subject to paragraph 12.5, the determination of the expert shall be final and binding on the parties.~~

~~12.4—Modification criteria~~

~~The modification criteria are:~~

~~(a) 12 months of the most recently available historic data of Minutes Delay will be used to calculate the risk of delays or cancellations resulting from incidents Attributable to the Train Operator exceeding the Incident Cap; and~~

~~(b) Network Rail's unfunded exposure in relation to the risk associated with delays or cancellations Attributable to the Train Operator exceeding the Incident Cap will be assessed. The calculation of the unfunded exposure in this paragraph 12.4(b) shall~~

~~be based on the Train Operator Payment Rate set out in Appendix 1, and the Train Operator shall be liable to pay Network Rail the Incident Cap Access Charge Supplement Rate in respect of that risk, which shall include a contingency for taking that risk.~~

~~12.5—Office of Rail Regulation’s consent to modification~~

~~12.5.1 Any modification agreed between the parties or determined under paragraph 12.3 shall take effect only if ORR gives its consent to it, and from such date as ORR may determine in such consent.~~

~~12.5.2 If ORR does not give its consent to a modification as described in paragraph 12.5.1, it may issue a notice requiring the parties to make a modification to the Incident Cap Access Charge Supplement Rate as specified in the notice.~~

~~12.5.3 No notice of ORR under paragraph 12.5.2 shall have effect unless ORR has:~~

- ~~(a) consulted the parties in relation to the issues specified in the notice;~~
- ~~(b) taken into account any representations made by the parties in response to the consultation under paragraph 12.5.3(a); and~~
- ~~(c) notified the parties as to its conclusions in relation to the issues specified in the notice and its reasons for those conclusions.~~

10.1.9 If an Adjusted Train Operator Benchmark is required pursuant to paragraph 10.1.7(a) above then the Train Operator Benchmark for the Financial Year immediately following Financial Year t each subsequent Financial Year shall be such Adjusted Train Operator Benchmark until any further adjustment is made in accordance with this paragraph 10.1.[Note: ORR has not included a specific disputes process in connection with these provisions and would welcome the industry parties’ views on this approach.]

## 11. Selection by the Train Operator of the Incident Cap

### 11.1 Selection by the Train Operator of the Incident Cap

11.1.1 By no later than 6 weeks prior to 1 April in each Financial Year, the Train Operator shall notify Network Rail in writing of the level of Incident Cap it wishes to apply for that Financial Year (the “Incident Cap Notice”). The Incident Cap Access Charge Supplement Rate applicable for that Financial Year shall be the rate set out in the column adjacent to the Incident Cap selected by the Train Operator in the Incident Cap Notice.

11.1.2 The Incident Cap Notice, once given, shall be irrevocable.

### 11.2 Level of Incident Cap and Incident Cap Access Charge Supplement Rate

For the purposes of paragraph 11.1, the Train Operator shall select one of the following Incident Caps:

<u>Incident Cap</u>	<u>Incident Cap Access Charge Supplement</u>
<u>0</u>	<u>£0</u>
<u>1,000 minutes</u>	<u>[Note: Remaining rates to be determined following Network Rail’s revised calculation taking into account the greater data available but using a 10% contingency instead of a 20% contingency. This will be available for discussion at the August 2008 meeting of the industry working group.]</u>
<u>2,000 minutes</u>	
<u>3,000 minutes</u>	
<u>4,000 minutes</u>	
<u>5,000 minutes</u>	

<a href="#"><u>6,000 minutes</u></a>	
<a href="#"><u>7,000 minutes</u></a>	
<a href="#"><u>8,000 minutes</u></a>	
<a href="#"><u>9,000 minutes</u></a>	
<a href="#"><u>10,000 minutes</u></a>	

## APPENDIX 1: PERFORMANCE

### Train Operator Performance

<del>Train Operator Benchmark Per Train</del>	<del>{•}</del>			
<del>Train Operator Lower Review Level</del>	<del>{•}</del>			
<del>Train Operator Upper Review Level</del>	<del>{•}</del>			
<del>Train Operator Payment Rate</del>	<del>{•}</del>			
<del>Train Operator Cap</del>	<del>{•}</del>			
<del>Disruption Sum</del>	<del>{•}</del>			
<del>Incident Cap Access Charge Supplement Rate</del>	<del>{•}</del>			
<del>Incident Cap</del>	<del>{•}</del>			
<u>Train Operator Payment Rate</u>		<u>£[32] per Minutes Delay to Services which are Attributable to the Train Operator.</u>		
<u>Train Operator Cap</u>		<u>£[to be proposed by the Train Operator and Network Rail and subject to ORR approval]</u>		

**Disruption Sum**

£[to be determined for each individual contract]

## Network Rail Performance

<b>Network Rail Payment Rate</b>	[•]			<u>£16.50 per Minutes Delay to Services which are Attributable to Network Rail.</u>
<b>Network Rail Cap</b>	[•]			<u>£[to be proposed by the Train Operator and Network Rail and subject to ORR approval]</u>
<b>Cancellation Sum</b>	[•]			
		<b>Network Rail Benchmark Per Train</b>	<b>Network Rail Lower Review Level</b>	<b>Network Rail Upper Review Level</b>
<b>2004/2005</b>	[•]	[•]	[•]	[•]
<b>2005/2006</b>	[•]	[•]	[•]	[•]
<b>2006/2007</b>	[•]	[•]	[•]	[•]
<b>2007/2008</b>	[•]	[•]	[•]	[•]
<b>2008/2009 <u>Pro longed Disruption Amount</u></b>	[•]	[•]		<u>£[to be determined for each individual contract]</u>

## Benchmarks

### Train Operator Benchmark

~~The Subject to adjustment in accordance with paragraph 10.1, the Train Operator Benchmark (TOB) in relation to a Charging Period shall be calculated in the following manner:~~

$$\text{each TOB} = \text{TBM} \times M,$$

~~where:~~

~~Charging Period shall be [2.63] Minutes Delay TBM — means the Train Operator Benchmark Per Train in relation to the relevant Charging Period; and~~

~~M — means the aggregate number of train movements made by the Train Operator under this contract in the relevant Charging Period.~~

~~per 100 Train Miles. The Network Rail Benchmark (NRB) in relation to a Charging Period shall be calculated in the following manner:~~

$$\text{NRB} = \text{NRBM} \times M,$$

~~where:~~

~~NRBM — means the~~

### **Network Rail Benchmark** ~~Per Train in relation to the relevant Charging Period~~

The Network Rail Benchmark (NRB) in relation to a Charging Period shall be:

(a) in relation to each Charging Period within Financial Year 2009/2010, [7.97] Minutes Delay per 100 Train Miles;

(b) in relation to each Charging Period within Financial Year 2010/2011, [●] Minutes Delay per 100 Train Miles;



(c) in relation to each Charging Period within Financial Year 2011/2012, [●] Minutes Delay per 100 Train Miles;

(d) in relation to each Charging Period within Financial Year 2012/2013, [●] Minutes Delay per 100 Train Miles; and

~~M means the aggregate number of train movements made by the Train Operator under this contract in the relevant Charging Period.~~

(e) in relation to each Charging Period within Financial Year 2013/2014 and each subsequent Financial Year, [●] Minutes Delay per 100 Train Miles.

*[Note: The figure to be inserted in each of paragraphs (b) to (e) inclusive will be based on the figure in paragraph (a), and then reduced in line with Network Rail's improvement trajectory. To be finalised following the industry group meeting in August 2008.]*

### Cancellation Sum

The Cancellation Sum shall be calculated as follows:

(a) the Cancellation Sum shall be £1,500 for each Cancellation below the Cancellation Threshold;

(b) the Cancellation Sum shall be £4,000 for each Cancellation equal to or above the Cancellation Threshold; and

(c) the “Cancellation Threshold” in any Financial Year shall be [●] Cancellations (including any Late Notice Cancellations), calculated as a percentage of the total number of Services operated by the Train Operator which are Cancellations.

*[Note: ORR is considering the level of Cancellation Threshold and how it should apply. This is to be determined after discussion at the industry group meeting in August 2008.]*

### Late Notice Cancellation Sum

The Late Notice Cancellation Sum in respect of each Late Notice Cancellation shall be £[•].  
*[Note: this amount will be determined for each individual contract.]*

**Actual Mileage t-1**

For the purposes of paragraph 10.1.5, the Actual Mileage t-1 shall be [•]. *[Note: this will be provided by ORR, following discussion at the industry group meeting in August 2008.]*

## APPENDIX 2: CALCULATION OF MINUTES DELAY

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:

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

where:

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

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

B is any Recovery Time between such Triggers.

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

## APPENDIX 3: PERFORMANCE STATEMENTS

### Interim statements provided by Network Rail

1. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, Network Rail shall provide to the Train Operator the following interim statements:
  - (a) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to the Train Operator;
    - (iii) are wholly or partly MDTO (as calculated in accordance with paragraph [4.24.2.1](#) of this Schedule 8); and
    - (iv) wholly or partly caused Minutes Delay for any Third Party Train, including the aggregate number of Minutes Delay in respect of Third Party Trains for each such incident; and
  - (b) an interim statement listing all incidents which:
    - (i) are in connection with Services which were Planned to depart from their Origin during that Week;
    - (ii) are Attributable to Network Rail;
    - (iii) are wholly or partly MDNR (as calculated in accordance with paragraph [6.26.2.1](#) of this Schedule 8); and
  - (c) an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable.

## **Interim statements provided by the Train Operator**

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

## **Dispute of interim statement**

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

### **Deemed agreement**

6. Except to the extent that it has, within ~~1~~two Working Days of receipt, notified the provider of an interim statement under paragraph 3 that it disputes the contents of such interim statement, the recipient shall be deemed to have agreed the contents of that statement.

### **Further interim statement**

7. If Network Rail's nominated representative under paragraph 4 has reasonable grounds to believe that any further incident was:

- (a) Attributable to the Train Operator; or
- (b) Attributable to Network Rail,

but was not shown as such in the information made available under paragraph 1 above, Network Rail may notify the Train Operator of such further incident within five Working Days after the last Minutes Delay, cancellation of a Third Party Train or Cancellation caused by that incident.

8. If Network Rail notifies the Train Operator of any further incident under paragraph 7, Network Rail shall issue a further interim statement for the day in question showing the information required under paragraph 1, and the foregoing provisions of this Appendix shall apply to such further interim statement.

### **Statement of adjustment**

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

10. Any statement issued by Network Rail under paragraph 9 shall be accompanied by an adjusting invoice or credit note.

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