

RAILWAYS ACT 1993

2018 PERIODIC REVIEW

REVIEW NOTICE: CHARTER OPERATOR TRACK ACCESS AGREEMENTS

TO:

- (1) the persons whose names are set out in Annex 1 to this Review Notice (the “**Train Operators**”);
- (2) Network Rail Infrastructure Limited (“**Network Rail**”); and
- (3) the Secretary of State for Transport, the Scottish Ministers and the Treasury,

together the “**Addressees**”.

1 General

- 1.1 This review notice (the “**Review Notice**”) is given in accordance with paragraph 4 of Schedule 4A to the Railways Act 1993 (the “**Act**”).
- 1.2 The Office of Rail and Road (“**ORR**”) has undertaken a review of:
 - (a) the amounts payable by Network Rail and each of the Train Operators to each other under each of the track access agreements listed in Annex 1 to this Review Notice (the “**Track Access Agreements**”); and
 - (b) the times at which, and the manner in which, those amounts are payable,(the “**Review**”).
- 1.3 ORR’s conclusions on the Review, and its reasons for those conclusions, are:
 - (a) set out in a series of documents referenced in the document entitled “**2018 periodic review final determination: Overview of approach and decisions –**

October 2018” and published by ORR on 31 October 2018, and in particular those documents referenced in Chapter 1 of that document¹; and

(b) hereby incorporated into this Review Notice.

1.4 By publishing this Review Notice and serving it on each of the Addressees, ORR is initiating the implementation of the Review.

2 Proposed Relevant Changes

2.1 For or in connection with giving effect to ORR’s conclusions on the Review, ORR proposes to direct the parties to each of the Track Access Agreements to amend their Track Access Agreement on the terms specified in Annex 2 to this Review Notice (the “**proposed relevant changes**”).

2.2 ORR proposes that, subject to paragraph 3, the proposed relevant changes will come into operation on and from 1 April 2019.

3 Regulated Amendments

3.1 Subject to paragraph 3.2 below, if, before the proposed relevant changes come into operation in relation to any Track Access Agreement, such Track Access Agreement is amended in a manner which is:

(a) approved by ORR under section 22 of the Act; or

(b) directed by ORR under section 22A or section 22C of the Act,

(each a “**regulated amendment**”), then:

(i) the proposed relevant changes shall come into operation in relation to that Track Access Agreement subject to the regulated amendments; and

(ii) if there is any conflict between the proposed relevant changes and the regulated amendments, the regulated amendments shall take precedence.

¹ This further includes all documents referenced and/or linked to in the document entitled “2018 periodic review final determination: Supplementary document: Overview of charges and incentives decisions – October 2018”.

4 Objections

4.1 Subject to paragraph 4.2, any person specified in paragraph 4(4)(a) or (b) of Schedule 4A to the Act may make objections with respect to:

- (a) any of the proposed relevant changes; or
- (b) the date on which it is proposed that any such proposed relevant changes shall come into operation.

4.2 Any objection made under paragraph 4.1 must be:

- (a) made in writing;
- (b) received by ORR on or before 7 February 2019; and
- (c) addressed to ORR as follows:

Carl Hetherington
Office of Rail and Road
One Kemble Street
London
WC2B 4AN

5 Definitions and Interpretation

5.1 In this Review Notice, unless the context otherwise requires:

- (a) references to “this Review Notice” include the Annexes to this Review Notice;
- (b) references to the singular include the plural and *vice versa*;
- (c) words and phrases defined in:
 - (i) the Act;
 - (ii) the Network Code (formerly known as the Railtrack Track Access Conditions 1995 (as amended)); or

"Initial Planned Service Incident Cap Notice" has the meaning ascribed to it in paragraph 9.1.1;

"Interim Statement" means a written summary showing, in respect of Network Rail performance, the information required under paragraph 3.5 and, in respect of Train Operator performance, the information required under paragraph 4.5;

"Joint Cancellation Sum" means, in the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, the amount specified in Appendix 8A as the Joint Cancellation Sum for that Planned Service Cancellation (as adjusted in accordance with paragraph 7), expressed in pounds sterling and rounded to zero decimal places;

"Minutes Delay" means the number of minutes of delay in respect of a Trigger of a Recording Point calculated in accordance with paragraph 5;

"Network Rail Annual Cap" means the Network Rail Annual Cap specified in Appendix 8A and in respect of the first and last Financial Year means the Network Rail Annual Cap specified in Appendix 8A multiplied by the Adjustment Fraction, as adjusted in accordance with paragraphs 7 and 8.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

"Network Rail Benchmark" or "NRB" means the Network Rail Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period, as specified in Appendix 8A;

"Network Rail Cancellation Sum" means, in the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, the amount specified in Appendix 8A as the Network Rail Cancellation Sum for that Planned Service Cancellation (as adjusted in accordance with paragraph 7), expressed in pounds sterling and rounded to zero decimal places;

"Network Rail Payment Rate" means, in respect of a Planned Service, the rate, expressed as pounds per NR Performance Minute, specified in Appendix 8A as the Network Rail Payment Rate for that Planned Service (as adjusted in accordance with paragraph 7), expressed in pounds sterling and rounded to two decimal places;

"NR Performance Minute" has the meaning set out in paragraph 3.1;

"Performance Sum" means an amount for which Network Rail or the Train Operator is liable under paragraphs 3 or 4 following a Period in relation to Minutes Delay in that Period and the preceding Periods, as adjusted in accordance with paragraph 8;

"Period" means each consecutive period of 28 days during the term of this contract commencing at 00:00 hours on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;

"Planned" means entered into the Applicable Timetable;

"Planned Incident" means an incident described as such in paragraph 6.6;

"Planned Service" means a passenger carrying Service (excluding any Ancillary Movement) of the Train Operator under this contract which is entered in the Applicable Timetable;

"Planned Service Cancellation" means the Cancellation or Termination of a Planned Service;

"Planned Service Incident Cap" means, in respect of a Planned Service (and its associated Ancillary Movements) operated by or on behalf of the Train Operator, the Planned Service Incident Cap selected by the Train Operator in accordance with paragraph 9.1;

"Planned Service Incident Cap Notice" has the meaning ascribed to it in paragraph 9.1.2;

"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 into the Applicable Timetable to allow a train to regain time lost earlier in its journey as a result of a Restriction of Use;

"Relevant Year" has the meaning ascribed to it in Schedule 7;

"Restriction of Use" means any restriction of use of all or any part of the Network for the purposes of, or in connection with, inspection, maintenance, renewal or repair of the Network or any other works carried out in relation to the Network or any other railway asset or any other works in relation to it;

"Service Characteristics" means, in relation to any Service, the characteristics of that Service specified in any Train Operator Variation Request;

"Service Incident" means an incident which arises from, is caused by or results from a Planned Service or any of its associated Ancillary Movements;

"Termination" means, in respect of any Service, the operation of such train in such a way that it:

- (a) fails to reach its Planned final destination station; or
- (b) commences at a point other than its Planned station start point and does not call at its Planned station start point

and which is not a Cancellation;

"Third Party Train Cancellation" means the Cancellation or Termination of any train excluding any Ancillary Movements and excluding any Planned Service;

"Third Party User" means the operator (including the Train Operator) of any train excluding any Ancillary Movements and excluding any Planned Service;

"Third Party User Cancellation Minutes" means, in respect of a Third Party Train Cancellation, the number of minutes specified in Appendix 8A as the Third Party User Cancellation Minutes;

"TO Performance Minute" has the meaning set out in paragraph 4.1;

"Train Mile" has the meaning ascribed to it in Schedule 7;

"Train Operator Annual Cap" means the Train Operator Annual Cap specified in Appendix 8A and in respect of the first and last Financial Year means the Train Operator Annual Cap specified in Appendix 8A multiplied by the Adjustment Fraction, as adjusted in accordance with paragraphs 7 and 8.2 of this Schedule 8, expressed in pounds sterling and rounded to zero decimal places;

"Train Operator Benchmark" or **"TOB"** means the Train Operator Benchmark in Minutes Delay per 100 Train Operator Miles in relation to each Period, as specified in Appendix 8A;

"Train Operator Payment Rate" means, in relation to delay caused to a Third Party User, the rate, expressed as pounds per TO Performance Minute, specified in Appendix 8A (as adjusted in accordance with paragraph 7), expressed in pounds sterling and rounded to two decimal places;

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

"Week" means a period of 7 days beginning on Sunday and ending on the immediately following Saturday (both days inclusive), save that where that period of 7 days would otherwise fall within two Periods ("Period A" and "Period B") for the purposes of this Schedule each of the following shall constitute a Week:

- (a) Sunday to the last day of Period A (both days inclusive); and
- (b) the first day of Period B to the immediately following Saturday (both days inclusive);

"Zero Exposure" has the meaning ascribed to it in paragraph 9.1.1.

- 1.2 For the purposes of Schedule 8 events in respect of a Service shall be treated as occurring on the day on which the Service was Planned to depart from its point of origin.

2. **General principles and performance information**

- 2.1 In respect of Cancellation, this Schedule 8 shall only apply to any Planned Service Cancellation for which Network Rail is responsible or jointly responsible with the Train Operator and which occurs after 22:00 on the day before such Planned Service is due to run.

- 2.2 Each of the Train Operator and Network Rail shall use all reasonable endeavours to keep the other of them informed of any known or anticipated delay to, or Cancellation, Termination or Diversion of, Planned Services or any Ancillary Movements associated therewith.

- 2.3 Each of Network Rail and the Train Operator shall take reasonable steps to avoid and mitigate the effects of:

- (a) any incidents upon the Planned Services; and
- (b) any Service Incident affecting other trains.

- 2.4 Network Rail shall use recordings made using the Performance Monitoring System for the purposes of this Schedule 8 including the times at which the Services and other trains Trigger Recording Points. Where appropriate Network Rail may require the Train Operator, in respect of Services only, 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 provisions of the Performance Data Accuracy Code referred to in Part B of the Network Code and the provisions of that Code shall apply to this contract. Accordingly, the provisions of this Schedule 8 concerning the recording of train performance information or which refer to information regarding train performance (including references to the time at which a train Triggers a Recording Point), and the rights and remedies of the Train Operator in respect of the same, shall be subject to and interpreted in accordance with the provisions of that Code.

- 2.5 In respect of each Trigger of a Recording Point Network Rail shall use its reasonable endeavours to record separately, as unexplained delay, those minutes of delay of three minutes or more included in Minutes Delay for which it is unable to identify the incident(s) which caused that delay. The Train Operator shall co-operate with Network Rail on request by providing all such information as it has in its possession regarding the identification of the incident(s) which caused that delay.

- 2.6 All unexplained delay recorded in accordance with paragraph 2.5 shall, notwithstanding the provisions of paragraph 6.3(b) be allocated between the parties as follows:

- (a) any Minutes Delay or Cancellation Minutes in respect of Service Incidents arising either off the Network or at stations at which the Train Operator's Services are Planned to call shall be included in the TO Performance Minutes; and
- (b) any Minutes Delay to a Service or Planned Service Cancellation arising on the Network and which are not allocated to the Train Operator under this Schedule (including paragraph 2.6(a)) shall be included in the NR Performance Minutes.

2.7

- (a) Network Rail shall provide to the Train Operator through the Performance Monitoring System as soon as reasonably practicable, and in any event no later than the following Working Day, the information recorded or provided to it under paragraphs 2.4 or 2.5.
- (b) the Train Operator shall be deemed to have agreed the information recorded by Network Rail and Network Rail shall be deemed to have agreed the information recorded by the Train Operator except, in either case, to the extent that it has, within 2 clear Working Days of the information being provided, notified the other that it disputes the information. Any such notification shall specify the reasons for the dispute, so as to assist resolution of the dispute. The parties shall endeavour to resolve each such dispute within 2 Working Days of its notification.

2.8 Within 5 Working Days of a Trigger occurring, Network Rail shall be entitled to re-allocate responsibility to the Train Operator for each minute of delay included in Minutes Delay where further information becomes available to Network Rail which would otherwise result in responsibility for the relevant incident being allocated to the Train Operator in accordance with paragraph 6.4. Paragraph 2.7(b) shall apply to the allocation of responsibility under this paragraph 2.8.

2.9 Network Rail shall have no liability to the Train Operator under the terms of this Schedule in respect of Minutes Delay to a Planned Service or a Planned Service Cancellation to the extent that it is caused, in either case, by that Planned Service being presented to Network Rail on the Network after the time Planned for such presentation. In such circumstances, Network Rail shall use its reasonable endeavours to facilitate the movement of the Planned Service as expeditiously as possible subject to

- (a) any access rights which it may have granted to third parties; and
- (b) any Restrictions of Use of the Network in the Applicable Engineering Access Statement or the Applicable Timetable Planning Rules.

3. Network Rail performance

3.1 The performance minutes allocated to Network Rail in respect of any Planned Service (the "**NR Performance Minutes**") shall be equal to the sum of:

- (a) the number of Minutes Delay caused to that Planned Service by one or more Service Incidents for which Network Rail is allocated responsibility under paragraphs 2.6(b) and 6.3; and/or
- (b) 50% of the number of Minutes Delay caused to that Planned Service by one or more Service Incidents for which Network Rail is allocated joint responsibility with the Train Operator under paragraph 6.5.

3.2

3.2.1 The NR Performance Minutes shall be converted into a per 100 Train Operator Miles figure (the "**Adjusted NR Performance Minutes**") using the formula below:

$$\text{Adjusted NR Performance Minutes} = \frac{\text{NR Performance Minutes}}{100 \text{ Train Operator Miles}}$$

3.2.2 The Adjusted NR Performance Minutes calculated in accordance with paragraph 3.2.1 shall then be compared with the NRB and:

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

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

where:

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

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

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

where CPCM has the meaning ascribed to it in paragraph 3.2.2(a); and

- (c) if the Adjusted NR Performance Minutes figure is equal to NRB, neither party shall be liable to the other for a Performance Sum under this paragraph 3.2.

3.3 In the event of a Planned Service Cancellation for which Network Rail is allocated responsibility under paragraphs 2.6(b) and/or 6.3, Network Rail shall, in respect of that Planned Service be liable to pay to the Train Operator (in substitution for and to the exclusion of any liability under paragraph 3.4) the Network Rail Cancellation Sum. In the event of a Planned Service Cancellation for which Network Rail is allocated joint responsibility under paragraph 6.5, then in respect of that Planned Service Network Rail shall be liable to pay to the Train Operator (in substitution for and to the exclusion of any liability under paragraph 3.4) the Joint Cancellation Sum.

3.4 If a Planned Service is the subject of a Diversion or Failure to Stop due to a Service Incident for which Network Rail is allocated responsibility under paragraph 6.3 and, as a result, the Train Operator incurs, in relation to such Planned Service, additional costs which but for the Diversion or Failure to Stop it would not have incurred, Network Rail shall, in addition to any liability under paragraph 3.2, pay the Train Operator the Charter Service Variation Sum in respect of the Planned Service provided that the Train Operator shall have notified to and supplied Network Rail with evidence (to its reasonable satisfaction) of such costs on or before the end of the Period following the Period in which such Service Incident occurred.

3.5 Within 5 Working Days after the end of each Week, Network Rail shall provide the Train Operator with an Interim Statement showing in respect of each Planned Service which was Planned to depart from its point of origin during that Week and for which Network Rail is liable to make payment under this paragraph 3 either:

- (a) the Performance Sum calculated in accordance with paragraph 3.2; or
- (b) whether it is a Planned Service Cancellation for which Network Rail is liable to the Train Operator under paragraph 3.3.

Any unresolved dispute under paragraph 2.7 in relation to a Planned Service the subject of an Interim Statement shall be indicated as such on the Interim Statement. Within 2 Working Days of receipt of the Interim Statement the Train Operator shall sign and return a copy thereof to Network Rail and indicate on the copy any aspects of the Interim Statement which it disputes, giving reasons for any dispute. Save to the extent that any disputes are so notified or if the Train Operator fails to sign and return to Network Rail a copy of the Interim Statement, the Train Operator shall be deemed to have agreed the contents of the Interim Statement.

4. Train Operator performance

4.1 The performance minutes allocated to the Train Operator in respect of any Third Party User (the "TO Performance Minutes") shall be calculated as follows:

$$TO \text{ Performance Minutes} = (A + B) + (C + D)$$

where:

A = the total number of Minutes Delay in respect of all Triggers by each train operated by that Third Party User caused by one or more Service Incidents for which the Train Operator is allocated responsibility under paragraphs 2.6(a) and 6.4; and

B = 50% of the total number of Minutes Delay in respect of all Triggers by each train operated by that Third Party User caused by one or more Service Incidents for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5;

C = the Third Party User Cancellation Minutes in respect of each Third Party Train Cancellation due to a Service Incident for which the Train Operator is allocated sole responsibility under paragraphs 2.6(a) and 6.4, provided that there shall be disregarded any Minutes Delay caused as a result of such Service Incident occurring after the time at which the train of the Third Party User arrives at the point on or off the Network where it subsequently becomes a Third Party Train Cancellation; and

D = 50% of the Third Party User Cancellation Minutes in respect of each Third Party Train Cancellation due to a Service Incident for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5 provided that there shall be disregarded any Minutes Delay caused as a result of such Service Incident occurring after the time at which the train of the Third Party User arrives at the point on or off the Network where it subsequently becomes a Third Party Train Cancellation.

4.2 For the avoidance of doubt, in the event of a Planned Service Cancellation for which the Train Operator is allocated sole responsibility under paragraph 6.4, then in respect of that Cancellation the Train Operator shall only be liable to pay Network Rail the applicable charge under paragraph 5.1 of Part 2 of Schedule 7 and in the event of a Planned Service Cancellation for which the Train Operator is allocated joint responsibility with Network Rail under paragraph 6.5, then in respect of that Planned Service the Train Operator shall be liable to pay Network Rail 50% of the applicable charge under Schedule 7.

4.3

4.3.1 For the purposes of this paragraph 4.3, the TO Performance Minutes arising in respect of a Planned Service (and its associated Ancillary Movements) shall be capped as follows:

(a) where the Train Operator has elected to have no exposure above the Planned Service Incident Cap in accordance with paragraph 9, any such minutes in excess of the Planned Service Incident Cap shall be disregarded; or

(b) where the Train Operator has elected to have 30% exposure above the Planned Service Incident Cap in accordance with paragraph 9, 70% of any such minutes in excess of the Planned Service Incident Cap shall be disregarded.

4.3.2 The TO Performance Minutes shall be converted into a per 100 Train Operator Miles figure (the "**Adjusted TO Performance Minutes**") using the formula below:

$$\text{Adjusted TO Performance Minutes} = \frac{\text{TO Performance Minutes}}{100 \text{ Train Operator Miles}}$$

4.3.3 The Adjusted TO Performance Minutes calculated in accordance with paragraph 4.3.2 shall then be compared with the TOB and:

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

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

where:

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

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

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

where CPCM has the meaning ascribed to it in paragraph 4.3.3(a); and

- (c) if the Adjusted TO Performance Minutes figure is equal to TOB, neither party shall be liable to the other for a Performance Sum under this paragraph 4.3.

4.4 If:

- (a) any service operated by a Third Party User is the subject of a Diversion or Failure to Stop but does not become a Third Party Train Cancellation for which Third Party User Cancellation Minutes are allocated to the Train Operator under paragraph 4.1; or
- (b) Network Rail has to postpone a Restriction of Use or has to keep open any part of the Network beyond the time at which such part of the Network is generally open to passenger carrying movements

due to a Service Incident for which the Train Operator is allocated responsibility under paragraph 6.4 and, as a result, Network Rail incurs additional costs which, but for the Service Incident it would not have incurred, the Train Operator shall, in addition to any liability under paragraph 4.2, pay Network Rail the Charter Service Variation Sum in respect of the Planned Service provided that Network Rail shall have notified to and supplied the Train Operator with evidence (to its reasonable satisfaction) of such costs on or before the end of the Period following the Period in which such Service Incident occurred.

4.5 Within 5 Working Days after the end of each Week, Network Rail shall provide the Train Operator with an Interim Statement listing all Service Incidents during that Week for which the Train Operator is allocated responsibility under paragraph 6.4 or joint responsibility with Network Rail under paragraph 6.5 and showing, for each such Service Incident, the TO Performance Minutes. Any unresolved dispute under paragraph 2.7 in relation to any such Service Incident shall be indicated as such on the Interim Statement. Within 2 Working Days of receipt of the Interim Statement the Train Operator shall sign and return a copy thereof to Network Rail and indicate on the copy any aspects of the Interim Statement which it disputes, giving reasons for any dispute. Save to the extent that any disputes are so notified or if the Train Operator fails to sign and return to Network Rail a copy of the Interim Statement, the Train Operator shall be deemed to have agreed the contents of the Interim Statement.

5. Calculation of minutes delay

5.1 Subject to paragraph 5.2 the Minutes Delay for a Planned Service in respect of a 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 so Triggers the Recording Point is later than the time at which that train is Planned so to Trigger the Recording Point; and
- (b) in respect of each other recorded Trigger by a train, the lesser of:
- (i) the number of minutes in respect of the Trigger calculated as in paragraph 5.1(a) above; 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 such Triggers; and

B is any Recovery Time between such Triggers.

5.2 The Minutes Delay calculated in accordance with paragraph 5.1 shall be allocated to the incident(s) causing those Minutes Delay as described in paragraph 6. Any minutes of delay which are included in any Minutes Delay and which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall for the purposes of this Schedule 8 be deemed to be zero.

6. Allocation of responsibility

6.1 For the purposes of this Schedule 8 responsibility for each minute of delay included in Minutes Delay, each Third Party Train Cancellation, each Diversion, each Failure to Stop and each Planned Service Cancellation shall be allocated according to the responsibility for the incident which caused such Minutes Delay, Third Party Train Cancellation, Diversion, Failure to Stop or Planned Service Cancellation as established in accordance with the following provisions of this paragraph 6.

6.2 In assessing the causes of any Minutes Delay, Third Party Train Cancellation, Diversion, Failure to Stop or Planned Service Cancellation there shall be taken into account all incidents contributing thereto including:

- (a) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents contributing thereto;
- (b) where a train is affected by the cancellation of or delay to an Ancillary Movement, the incident(s) giving rise to that cancellation or delay; and
- (c) where a Restriction of Use overruns, due to the start of such Restriction of Use being delayed by a late running train (including a Planned Service or an Ancillary Movement associated therewith), the incident(s) giving rise to that late running.

6.3 Subject to paragraph 6.5, Network Rail shall be allocated responsibility for an incident other than a Planned Incident if that incident is:

- (a) caused by breach by Network Rail of any of its obligations under this contract or any of its obligations in its safety authorisation which are relevant to the operation of the Services;
- (b) caused by failures of or delays to Services arising on the Network which are not allocated to the Train Operator under this contract; or
- (c) caused by acts or omissions of Network Rail's staff or Network Rail's contractors in breach of this contract.

6.4 Subject to paragraph 6.5, the Train Operator shall be allocated responsibility for an incident other than a Planned Incident if that incident is:

- (a) caused by breach by the Train Operator of any of its obligations under this contract or any of its obligations in its safety certificate which are relevant to the operation of the Services;

- (b) caused by circumstances within the control of the Train Operator (whether or not the Train Operator is at fault) in its capacity as an operator of trains under this contract; or
- (c) caused (whether or not the Train Operator is at fault) by any defect in or other failure by the Specified Equipment to comply with the Service Characteristics of a Service whether or not such Specified Equipment is owned by the Train Operator; or
- (d) caused by acts, or omissions of the Train Operator's staff, customers, contractors (including any associates or associate sub-contractors of the Train Operator) in connection with this contract, or passengers using the Services; or
- (e) caused by circumstances arising:
 - (i) off the Network and which are not caused by Network Rail in breach of its obligations under this contract; or
 - (ii) in connection with the operation of any station, light maintenance depot or other facility to which the Train Operator has been granted access for the purpose of the operation of the relevant Service; or
 - (iii) under a connection agreement to which Network Rail is a party in relation to a light maintenance depot or other facility referred to under (ii) above.

6.5 Network Rail and the Train Operator shall be allocated joint responsibility for:

- (a) any incident caused by or in connection with any incident arising at or in a station which is not within the reasonable control of either party; or
- (b) any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 6.3 or 6.4.

6.6 An incident in connection with a Restriction of Use shall be treated as a Planned Incident to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Applicable Timetable.

7. **Payment terms and supplementary provisions**

7.1.1 The aggregate of any and all sums for which each party is liable under this Schedule in relation to Planned Services which were Planned to depart from their point of origin during a Period shall be set off against each other and the balance, if any, shall be invoiced by Network Rail to the Train Operator or, as the case may be, shall be the subject of a credit note issued by Network Rail to the Train Operator within 14 days after the end of the Period and shall be payable within 28 days after the end of the Period.

7.1.2 In respect of any Financial Year, the aggregate liability of Network Rail to make balance payments to the Train Operator under paragraph 7.1.1 shall not exceed the Network Rail Annual Cap.

7.1.3 In respect of any Financial Year, the aggregate liability of the Train Operator to make balance payments to Network Rail under paragraph 7.1.1 shall not exceed the Train Operator Annual Cap.

7.1.4 Where any amount which is the subject of this Schedule is in dispute:

- (a) the undisputed amount shall be accounted for in accordance with paragraph 7.1.1 (and shall be subject to set off accordingly);

- (b) the disputed balance ("disputed balance") shall be accounted for in the calculations made under paragraph 7.1.1 for the Period in which the dispute is resolved or otherwise determined (and shall be subject to set off accordingly); and
- (c) the disputed balance shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the date on which the disputed balance would but for such dispute have been due to be so accounted for until the date of such account.

7.2 **Indexation of Indexed Figures**

7.2.1 For each Relevant Year commencing on and from 1 April 2019, the Indexed Figures shall be adjusted in accordance with paragraph 7.2.2.

7.2.2

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

For the purposes of this paragraph 7.2.2(b), the Adjustment Factor in respect of Relevant Year t shall be calculated in accordance with the following formula:

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

where:

CPI_{t-1} means the CPI published or determined with respect to the month of November in Relevant Year t-1; and

CPI_{t-2} means the CPI published or determined with respect to the month of November in Relevant Year t-2.

- (c) If this contract takes effect after 1 April 2019, the Indexed Figures shall be adjusted in accordance with paragraphs 7.2.2(a) and (b) as if this contract had been in effect on and from 1 April 2019.

Performance Monitoring System

7.3 Each Service shall be allocated an eight character code in the Performance Monitoring System (being a different code to that which applies to services of the Train Operator operated under any other access agreement) to allow for monitoring of each Planned Service and its associated Ancillary Movements.

8. **Reviews of Network Rail Annual Cap and Train Operator Annual Cap**

8.1 *Not used*

8.2 **Adjustments to the Network Rail Annual Cap and Train Operator Annual Cap**

8.2.1 The Network Rail Annual Cap and the Train Operator Annual Cap that shall apply from 1 April in each Financial Year in relation to each Period in that Financial Year shall be the Network Rail Annual Cap and the Train Operator Annual Cap, in each case as specified in Appendix 8A and as adjusted in accordance with paragraph 7.2 and this paragraph 8.2, provided that no adjustment shall be made to the Network Rail Annual Cap or the Train Operator Annual Cap pursuant to the following subparagraphs of this paragraph 8.2 prior to 1 April 2020; and

thereafter an adjustment shall only be made if the total number of Train Miles operated by the Train Operator during Financial Year t or the Baseline Annual Train Mileage is 1,000,000 or greater.

8.2.2 Within 28 days after the last day of Financial Year t, Network Rail shall notify the Train Operator in writing of:

- (a) the total number of Train Miles operated by the Train Operator during Financial Year t (the "**Annual Train Mileage**");
- (b) Network Rail's determination as to whether or not the Annual Train Mileage for Financial Year t exceeds or is less than the Baseline Annual Train Mileage (as determined in accordance with paragraph 8.2.3 below (the "**Baseline Annual Train Mileage**") by, in each case, an amount equal to or greater than 2.5% of the Baseline Annual Train Mileage (the "**Annual Train Mileage Variation**"); and
- (c) if Network Rail determines that there has been an Annual Train Mileage Variation, Network Rail's proposal for an adjusted Network Rail Annual Cap and/or Train Operator Annual Cap, in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR.

8.2.3

- (a) The Baseline Annual Train Mileage that shall apply from 1 April in each Financial Year shall be the Baseline Annual Train Mileage specified in Appendix 8A, unless it is adjusted in accordance with paragraph 8.2.3(b).
- (b) If, in accordance with paragraph 8.2.2(b), Network Rail determines that there has been an Annual Train Mileage Variation, then the Baseline Annual Train Mileage for the Financial Year immediately following Financial Year t ("**Financial Year t+1**") and each subsequent Financial Year until any further adjustment is made to the Baseline Annual Train Mileage pursuant to this paragraph 8.2.3(b) shall be the Annual Train Mileage for the Financial Year t in which the Annual Train Mileage Variation has occurred.

8.2.4 Promptly (and in any event, within 28 days) following receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, the parties shall endeavour to agree whether the Network Rail Annual Cap and/or the Train Operator Annual Cap should be adjusted in accordance with this paragraph 8.2 and, if so, the adjustment (in each case having regard to any relevant criteria and/or policy statement most recently issued by ORR), provided that any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2 shall be subject to the prior approval of ORR.

8.2.5 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, the Train Operator and Network Rail reach agreement as to any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap, the parties shall notify ORR and shall provide ORR with such information and evidence as ORR shall require to determine whether or not to approve the proposed adjustment. The parties agree to abide by any determination issued by ORR.

8.2.6 If, within 56 days of receipt by the Train Operator of the information and notice from Network Rail required to be provided pursuant to paragraph 8.2.2, either:

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

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

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

8.2.8 Promptly following any adjustment to the Network Rail Annual Cap and/or the Train Operator Annual Cap pursuant to this paragraph 8.2, and in order to give effect to that adjustment, Network Rail shall issue to the Train Operator a statement showing the necessary adjustments to:

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

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

8.2.9 Any statement issued by Network Rail pursuant to paragraph 8.2.8 shall be accompanied by an adjusting invoice or credit note in accordance with paragraph 7.1.1.

9. **Selection by the Train Operator of the Planned Service Incident Cap and Exposure Level**

9.1 ***Selection by the Train Operator of the Planned Service Incident Cap and Exposure Level***

9.1.1 Subject to paragraph 9.1.3, on or before the date on which this paragraph 9.1 takes effect, the Train Operator shall notify Network Rail in writing of the level of Planned Service Incident Cap and the level of exposure above the Planned Service Incident Cap ("**Exposure Level**") it wishes to apply being either no exposure above the Planned Service Incident Cap, as described in paragraph 4.3.1(a) ("**Zero Exposure**"), or 30% exposure above the Planned Service Incident Cap, as described in paragraph 4.3.1(b) ("**30% Exposure**") (such notification being the "**Initial Planned Service Incident Cap Notice**"). The Planned Service Incident Cap Access Charge Supplement Rate applicable to the Train Operator under this contract shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the level of Planned Service Incident Cap selected by the Train Operator in the Initial Planned Service Incident Cap Notice until it is replaced by a different level of Planned Service Incident Cap and Exposure Level selected by the Train Operator in a Planned Service Incident Cap Notice issued pursuant to paragraph 9.1.2.

9.1.2 Subject to paragraph 9.1.3, the Train Operator may change the level of Planned Service Incident Cap and Exposure Level previously selected by it (either in the Initial Planned Service Incident Cap Notice or any subsequent Planned Service Incident Cap Notice issued pursuant to this paragraph 9.1.2) with effect from 1 April in any Financial Year by notifying Network Rail in writing of the level of Planned Service Incident Cap and Exposure Level it wishes to apply for that Financial Year (the "**Planned Service Incident Cap Notice**"). Any such Planned Service Incident Cap Notice must be served by the Train Operator on Network Rail by no later than 6 weeks prior to 1 April in the Financial Year from which the Train Operator wishes the new level of Planned Service Incident Cap and Exposure Level to apply, and the Planned Service Incident Cap Access Charge Supplement Rate applicable for that and each subsequent Financial Year shall be the rate set out in that part of column B (if the Train Operator selects Zero Exposure) or column C (if the Train Operator selects 30% Exposure) adjacent to the Planned Service Incident Cap selected by the Train Operator in the Planned Service Incident Cap Notice until it is replaced by a different level of Planned Service Incident Cap selected by the Train Operator pursuant to this paragraph 9.1.2.

9.1.3 For the avoidance of doubt, if the Train Operator selected a Planned Service Incident Cap prior to Financial Year 2019/20, and did not issue a subsequent Planned Service Incident Cap Notice in respect of Financial Year 2019/20 selecting 30% Exposure, the Train Operator shall be

deemed, for the purposes of paragraphs 9.1.1 and 9.1.2, to have selected Zero Exposure for Financial Year 2019/20.

9.2 **Level of Planned Service Incident Cap, Exposure Level and Planned Service Incident Cap Access Charge Supplement Rate**

For the purposes of paragraph 9.1, the Train Operator shall select one of the following Planned Service Incident Caps and, in respect of the relevant Planned Service Incident Cap, the Exposure Level as set out in either Column B or C:

A	B	C
Planned Service Incident Cap	Planned Service Incident Cap Access Charge Supplement Rate (£ per Train Mile operated in a Period) expressed in pounds sterling and rounded to two decimal places – Zero Exposure above the Planned Service Incident Cap	Planned Service Incident Cap Access Charge Supplement Rate (£ per Train Mile operated in a Period) expressed in pounds sterling and rounded to two decimal places – 30% Exposure above the Planned Service Incident Cap
93 minutes	1.58	1.11
147 minutes	1.29	0.91
500 minutes	0.51	0.36
1,000 minutes	0.16	0.11
5,000 minutes	0.00	0.00
No Planned Service Incident Cap	None	None

10. **ETCS Amendments**

10.1

- (a) Either party may by notice to the other propose that amendments are made to this Schedule 8 (and to any other provisions of this contract as a result of those amendments) as a consequence of the introduction of ETCS on any part of the Network that is used by the Train Operator ("**ETCS Amendments**").
- (b) ORR may make ETCS Amendments, subject to complying with paragraph 10.3.

10.2

- (a) A party that wishes to make ETCS Amendments shall serve a notice on the other party that:
 - (i) specifies as far as possible the proposed ETCS Amendments and the date from which they are to have effect; and
 - (ii) is accompanied by information and evidence in reasonable detail supporting the proposed ETCS Amendments and setting out the reasons for making them.

- (b) The party receiving a notice under paragraph 10.2(a) shall respond in writing, in reasonable detail and with reasons for its response, within 30 Working Days of service of such notice.
- (c) Promptly, (and in any event within 20 Working Days) following service of a response pursuant to paragraph 10.2(b), the parties shall use reasonable endeavours to agree the wording of the proposed ETCS Amendments and the date on which they are to have effect.
- (d) If:
 - (i) the parties agree to make ETCS Amendments pursuant to paragraph 10.2(c); or
 - (ii) the parties fail to reach agreement within 50 Working Days of service of a notice under paragraph 10.2(a), or prior to that date the parties agree that it is unlikely that agreement will be reached within that period,they shall notify ORR.

10.3

- (a) If ORR:
 - (i) receives a notification under paragraph 10.2(d); or
 - (ii) proposes to make ETCS Amendments itself,then in deciding whether to approve, determine or make (as the case may be) the ETCS Amendments it shall:
 - (A) give the parties and such other persons, if any, as it considers appropriate, the opportunity to make representations in relation to the proposed ETCS Amendments; and
 - (B) take into account any representations received before making its decision, such decision to specify the date on which the ETCS Amendments shall have effect.
- (b) ORR may require either party to provide such information as it may reasonably require to make a decision pursuant to paragraph 10.3(a), and such information shall be provided in accordance with any timescales and to the standard required by ORR.

Appendix 8A

Charter Service Variation Sum: £662

Joint Cancellation Sum: £1,007

Network Rail Cancellation Sum: £2,013

Network Rail Payment Rate: £21.25 per NR Performance Minute

Network Rail Annual Cap: £691,524

Network Rail Benchmark (NRB): the NRB in relation to a Period shall be 7.02 Minutes Delay per 100 Train Operator Miles

Train Operator Payment Rate: £53.31 per TO Performance Minute

Train Operator Annual Cap: £691,524

Train Operator Benchmark (TOB): the TOB in relation to each Period shall be 7.11 Minutes Delay per 100 Train Operator Miles

Third Party User Cancellation Minutes: 35 minutes

Baseline Annual Train Mileage: shall be the total number of Train Miles operated by the Train Operator during the Financial Year commencing on 1 April 2018 and ending on 31 March 2019, which Network Rail shall notify to the Train Operator.

