

Responses to consultation on improvements to the drafting of Schedules 4, 7 and 8 of the passenger and freight model track access contracts

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DfT response

DfT has a nil response to this consultation. Our view is that it is primarily for the industry to identify any drafting issues with these Schedules.

Denise Rose

Rail Strategy - DfT

Freightliner response

Cancellations

The current contract wording is confusing in referencing cancellations. The wording cross refers between Schedule 4 and 8 and back again:

Suggest that all references to cancellations and variations that are the result of planned disruptions - both over 84 days-notice and under 84 days-notice are dealt with in Schedule 4 and cancellations that are result of unplanned disruption are dealt with in Schedule 8. It would help greatly if the amounts and conditions that apply to each category could be tabulated in an appendix to each of Schedule 4 and 8.

In Schedule 4

- the definition of “Late Notice Cancellation Sum” - cross refers to Schedule 8.
- the definition of “Late Notice Cancellation” - cross refers to Schedule 8 (which then cross refers to Schedule 4 para 5.6.1)
- 5.6.1 last para cross refers to para 8.1(d) of Schedule 8 (which then refers back to paras 4 and 5 of Schedule 4)

In Schedule 8:

- the definition of “Late Notice Cancellation” - cross refers to para 5.6.1 of Schedule 4
- the definition of “enhanced Planned Disruption Sum” - cross refers to Schedule 4
- 8.1 (d) refers to planned disruption (and therefore should sit in Schedule 4)
- Para 8.2.3 - is just confusing as a consequence of all the above cross referral!

Schedule 4

Enhanced Planned Disruption Sum and Normal Planned Disruption Sum - these sums would be better tabulated in a table in an appendix.

Definition of a cancellation

There is no clear definition of how a Cancellation caused by planned disruption is counted. Network Rail has changed the basis on which they count a train as cancelled on several occasions:

The- Network Rail used to apply a rule that a train could qualify as a cancellation if had run in the last 28 days. Network Rail then started to use a definition that was that the train could qualify as a cancellation if it had run on that day of the week within the last 28 days. It now applies the following: *“a reasonable and proportionate test will be applied to verify whether a base service ‘would have otherwise operated - Is there a pattern to the way the service has previously operated? (e.g. Mon/Wed/Fri only or Thur/Fri only) Does it only ever operate once/twice/three times a week/period?”* These changes have been imposed on freight operators with no discussion or agreement.

A clear definition is required, so that freight operators can clearly understand what the rules are when they agree to proposed engineering work. In all cases the engineering work is preventing the opportunity to run the train on that day, even if the train does not run every day the customer may want it on a particular day due to stock levels. It is also noted in this context that the liquidated sum does not actually compensate for the lost revenue (less marginal costs) by a very large margin (compensation paid is £893, whilst lost revenue is £6-12K)

Clarification of when “Restriction of Use” can be used for unplanned disruption

When there is a major unplanned disruption that last over a week Network Rail have a unilateral policy of declaring these incidents as a 'Restriction of Use' very quickly post-incident (i.e. using the process that is intended for planned engineering work (even if at short notice) when there is an unplanned disruption on the network) without the laid down consultation process. This approach has not been agreed or discussed with freight operators.

This prevents claims under Schedule 8 (which should cover unplanned disruption) and forces a Category 3 claim under Schedule 4 (which should cover planned disruption) at a later date. The definition of "Prolonged Disruption" and paragraph 7 of Schedule 8 of the freight model access agreement, headed Prolonged Disruption, suggests that this is the mechanism for dealing with these types of incidents

Given that the Network Code/Planning Rules stipulates that 'Restrictions of Use' are consulted by Network Rail, we do not think that they should be used for performance incidents which are clearly not subject to consultation, and are in effect forced onto operators with no choice. We note the ADA31 case between Grand Central and Network Rail, which is very relevant here¹.

Payments under Schedule 8 are more cost reflective than under Category 1 or 2 of Schedule 4 - and so this liquidated regime would be the preferred method for compensating for these larger incidents, rather than resorting to complex claims, apart from in very exceptional circumstances.

We therefore suggest that changes should be made to the current Schedule 4 and 8, which clarify that Schedule 8 should be used for unplanned disruption and not Schedule 4. This would support claims for major incidents to be handled via paragraph 7 of Schedule 8, as intended.

Category 1 and 2 Disruptions

Para 3.4.2 lays out timescales in which freight operators must lodge claims, but there is no timescale stated in which Network Rail must respond. We suggest that Network Rail should have 10 working days to respond and all subsequent exchanges must be responded to within 10 working days by either party.

Category 3 Disruptions

3.3.3 (a) - suggest this is amended to Network Rail payment 28 days from receipt of invoice (as Network Rail will not make these payments until an invoice has been sent by the freight operator)

Round Trip

Suggest that Paras 3.5 and 7.3 are clarified to say Network Rail shall not be liable to the Train operator for more than one Planned Disruption Sum in respect of any Round Trip unless the train is loaded in both directions.

This reflects the practice between the parties.

¹ ADA31, Access Disputes Committee, <http://www.accessdisputesrail.org/New%20ADC%20Web/Access%20Dispute%20Adjudications/ADA31%20Documents/Statement%20of%20Claim.pdf> , 2017



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By email

Dear Chris,

Consultation on improvements to the drafting of Schedules 4, 7 and 8 of the passenger and freight model track access contracts

Network Rail welcomes the opportunity to respond to ORR's consultation on improvements to the drafting of Schedules 4, 7 and 8 of the passenger and freight model track access contracts.

We consider the clarity, consistency and simplicity of the contractual drafting in the model contracts to be very important and we are pleased to offer our suggestions regarding a number of areas where we believe this could be improved. We have set our suggestions out in the appendix to this letter. These suggestions are not exhaustive and we will continue to develop further proposals which we would like to discuss at an appropriate time.

In preparing our response we have included the matters from our recent consultation with the industry on changes to contractual wording¹ which in some cases have been further refined on the basis of comments received. These are listed as issues 1-5 in the appendix to this letter. The remainder are issues raised solely in response to the Consultation on improvements to the drafting of Schedules 4, 7 and 8 of the passenger and freight model track access contracts.

¹ <https://cdn.networkrail.co.uk/wp-content/uploads/2017/11/Consultation-on-proposed-changes-to-the-wording-of-track-access-contracts-CP6.pdf>

The table below provides a summary of the suggestions contained in this consultation response and their benefits.

Item	Proposal	Benefit
1	Rounding of values	To remove uncertainty in the drafting
2	Replacement of references to train service database	To reflect current commercial practice
3	Amending invoicing timescales	To reflect desired commercial practice
4	Reducing the use of paper invoices	To reflect desired commercial practice
5	Updating references to freight performance statements	To reflect current commercial practice
6	Cancelled possessions	To remove uncertainty in the drafting
7	Easements of Restrictions of Use	To remove uncertainty in the drafting
8	Ability to reopen Schedule 8	To remove uncertainty in the drafting
9	Amplify the need to amend passenger Schedule 8 Appendix 3	To reflect current commercial practice
10	Clarification of the meaning of dispute in the definition of RoU Trigger Date	To remove uncertainty in the drafting
11	Clarification of Claim Notice validity	To remove uncertainty in the drafting
12	Definition of "Restriction of Use"	To remove ambiguity in the contract
13	Definition of "Passenger Timetable"	To remove ambiguity in the contract
14	Estimated Bus Mile Payments	To remove uncertainty in the drafting
15	Track charges where freight services do not reach destination	To reflect establish policy intent
16	Inconsistent wording regarding the causation of loss	To simplify drafting whilst retaining the established policy intent

No part of this response is confidential and we are content for it to be published in full. We would also welcome any further opportunities to engage with you on the development of these documents and any other documents which will support our working arrangements with you.

Please do not hesitate to raise any queries or concerns.

Yours sincerely

Peter Craig

Peter Craig
Regulatory Reform Manager

Appendix

1. Rounding of values - Paragraph 2.7.2 of Schedule 7 of the passenger model contract and paragraph 2.7.3 of the freight model contract

Current position

- 1.1. Certain formulae in the model freight and passenger contracts require the insertion of Retail Price Index (RPI) values in their calculation. RPI is a measure of the price of goods and services in the UK and is published by the Office of National Statistics. No difficulty arises in the application of this as RPI values are published to one decimal place. Nevertheless, a problem may arise when such RPI values are multiplied by other factors in formulae in the contract as it can produce figures to an infinite number of decimal places, the rounding treatment of which is only partly prescribed in the contract.
- 1.2. More specifically, in both the freight and passenger model contracts, in Schedule 7 the 'Initial Indexation Factor' is a defined term. It prescribes a formula, the inputs to which are RPI values. When the formula is applied it produces an output figure to an infinite number of decimal places bringing a question as to how it should be treated in terms of rounding.
- 1.3. At present, as a pragmatic solution, Network Rail uses the same rounding rule as prescribed in paragraph 2.7.2 of the contract and rounds the value to three decimal places.
- 1.4. The same issue manifests itself in paragraph 2.7.3 of the model freight contract regarding the 'Phased in charges indexation adjustment' where again no rounding rule is prescribed.

Proposed approach for CP6

- 1.5. To remove uncertainty, it is proposed that this rounding rule should be prescribed as part of the 'Initial Indexation Factor' definition. Proposed drafting is suggested in respect of the definition of the 'Initial Indexation Factor' in respect of both the model passenger and model freight contracts.
- 1.6. It is proposed that this rounding rule needs to be prescribed in paragraph 2.7.3 of the model freight contract regarding the 'Phased in charges indexation adjustment'.
- 1.7. Proposed drafting in respect of both changes is shown in relation to the model contract.

Proposed changes to the freight and passenger model contracts regarding the ‘Initial Indexation Factor’

Existing drafting is shown in black with the changes proposed shown in red.

“Initial Indexation Factor” is derived from the following formula:

$$\text{IIF} = \left(1 + \frac{(\text{RPI}_{2013} - \text{RPI}_{2012})}{\text{RPI}_{2012}} \right)^2$$

where:

IIF means the Initial Indexation Factor;

RPI₂₀₁₂ means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2012; and

RPI₂₀₁₃ means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013;

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

Proposed changes to the freight model contract regarding the ‘Phased in charges indexation adjustment’

Existing drafting is shown in black with the changes proposed shown in red.

2.7.3 The Phased in Charges Indexation Adjustment shall be derived:

- (a) in respect of the Relevant Year commencing on 1 April 2014, from the following formula:

$$\text{PCIA}_{2014} = \text{Initial Indexation Factor}$$

where:

PCIA₂₀₁₄ means the Phased in Charges Indexation Adjustment in respect of the Relevant Year commencing on 1 April 2014; and

- (b) in respect of any Relevant Year t commencing on or after 1 April 2015, from the following formula:

$$\text{PCIA}_t = \left(1 + \frac{(\text{RPI}_{t-1} - \text{RPI}_{2013})}{\text{RPI}_{2013}} \right) \bullet \text{Initial Indexation Factor}$$

where:

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

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

RPI₂₀₁₃ means the average value of the monthly RPI figures for the 12 months up to and including the month of December 2013.

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

2. Proposed replacement of references to the train service database - Paragraphs 9.1(b)(ii) and 9.2(b)(i) of Schedule 4 of the passenger model contract

Current position

- 2.1. The model passenger track access contract makes reference to the train service database (TSDB) and the uploading of data to it with respect to the rights and obligations of the parties to the contract. Such data might include details of Restrictions of Use and Service Variations, the detail of which may be vital in decision making or any dispute that may arise concerning that decision making process. TSDB is, however, no longer in use and the system now in use involves data from multiple Common Interface Files (CIF) being automatically uploaded to the Performance Monitoring System by a third party supplier.
- 2.2. The model passenger track access contract retains obsolete references to TSDB. In the case of the need to establish whether data has been uploaded to industry systems, the references in the contract to TSDB have no legal meaning.

Proposed approach for CP6

- 2.3. The proposed changes to the model contracts would provide for references to TSDB being replaced by reference to replacement systems that are now in use.
- 2.4. While the existing wording refers to Network Rail entering data into a system, the process now in use does not involve Network Rail carrying out a data entry process and it is not possible to merely replace reference to TSDB with a reference to a replacement system. Instead, the proposed drafting refers to the observation of data that is reflected in the Performance Monitoring System. The Performance Monitoring System already exists as a defined term in the contract. The Performance Monitoring System is visible to all industry parties and provides an objective and auditable measure of the data provided. The proposed change is shown below.

Proposed changes to the passenger model contract

Existing drafting is shown in black with the changes proposed shown in red.

9. Notification Factors

9.1 Early notification

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

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

- (b)
 - (i) details of the Network Rail Restriction of Use are notified to the Train Operator on or before D-26 for the Timetable Period in respect of the Restriction of Use Day but, at the request of the Train Operator (as accepted by Network Rail), are not reflected in the New Working Timetable; and
 - (ii) subject to paragraph 9.1(b)(iii), the Network Rail Restriction of Use is reflected in the Working Timetable as **reflected in the Performance Monitoring System entered into train service database** at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (iii) where paragraph 9.1(b)(ii) does not apply because the Train Operator has failed to give Network Rail a revised Access Proposal in accordance with Condition D3.4.9 of the Network Code, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

9.2 Notification by TW-22

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

- (a) details of the Network Rail Restriction of Use are notified to the Train Operator by TW -22; and
- (b)
 - (i) the Network Rail Restriction of Use is reflected in the Working Timetable as **reflected in the Performance Monitoring System entered into the train service database** at 22:00 hours on the day which is 12 Weeks before the Restriction of Use Day; or
 - (ii) where paragraph 9.2(b)(i) does not apply because the Train Operator has failed to give Network Rail a revised Access Proposal in accordance with Condition D3.4.9 of the Network Code, the Network Rail Restriction of Use is reflected in the Applicable Timetable in respect of the Restriction of Use Day.

3. Amending invoicing timescales to allow data from passenger operators correcting default consists to be more easily reflected in invoices issued – Paragraphs 10.3(e) and 10.3(c) of Schedule 7 of the passenger model contract and paragraphs 11.3(e) and 11.3(c) of the charter passenger model contract

Amending invoicing timescales to allow data from passenger operators correcting default consists to be more easily reflected in invoices issued

Current Position

- 3.1. The model passenger contract provides for a situation in which the consist of a train is not known. In such circumstances a default consist is applied, the

default consist being a parameter that has previously been negotiated between the parties and that is specified in the relevant track access contract. The opportunity exists in such circumstances for the operator to supply actual train consist data to Network Rail so that the correct charge maybe applied and it is considered in the interests of both parties that this should be achieved wherever possible.

- 3.2. With regard to the timescales for notifying this consist data to Network Rail, paragraph 10.3(e) of the contract states that Network Rail should issue financial adjustments within seven days of the receipt of objections to default consist data being applied. As Network Rail has on occasions received more than 1,000 journeys to correct from one weekly report and the number of such corrections fluctuates greatly by week, it is not always possible to achieve this.

Proposed approach for CP6

- 3.3. The proposed changes to the model contract would provide for Network Rail being required to issue financial adjustments within 14 days rather than seven days of the receipt of objections to default consist data being applied. It is believed that this is a realistic and achievable timescale which will bring benefits to both parties through greater accuracy in billing.

Amending the format of actual train consist data supplied to Network Rail where default consists have been applied

Current Position

- 3.4. Where default consists have been applied by Network Rail, operators have the opportunity to supply actual train consist data so that they may be accurately billed. The format in which such data should be supplied to Network Rail is not prescribed.
- 3.5. The difficulty in dealing with default consist data is compounded by the wide variety of formats in which different operators supply such data to Network Rail. This results in Network Rail spending a considerable amount of time re-formatting data into a standardised format so that it may be processed. To overcome this, the submission of data in a standardised format is sought.

Proposed approach for CP6

- 3.6. It is proposed to insert a template table in the passenger model contract at the end of paragraph 10.3(c) that will show the format in which train consist data is to be supplied to Network Rail.

Proposed changes to the passenger model contract

Existing drafting is shown in black with the changes proposed shown in red.

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; or
 - (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~~
 - (iv) (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 **or credit note**, 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 **or credit note** 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 **or credit note** shall be final and

binding on the parties. Data shall be supplied to Network Rail in the format;

Train ID	Start date & time	Train Slot origin	Train slot destination	Train Consist (actual): Specified Equipment used

- (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 such Train Consist Data within 14 days following receipt of a notice of objection, either party may refer the matter for resolution in accordance with the ADRR.
- (e) Within ~~seven~~ 14 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 21 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 4A of this Part 2 or under paragraph 18 of the Traction Electricity Rules 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 90 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(e), 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.

4. Opportunities to reduce the use of paper invoices – Paragraphs 16.1.2 of the passenger and freight model contracts

Current position

4.1. Model contracts currently provide for invoices to be transmitted to customers by a variety of means with the default position requiring the issuing of paper invoices. Whilst we are aware that some operators may consider the issuance of paper invoices useful, we have identified that considerable efficiencies could be made if the industry were to universally adopt the transmission of invoices through an electronic medium, rather than by a variety of more costly means of transmission. Additionally, we believe that electronic billing offers a number of advantages over paper billing in terms of security, environmental impact and timeliness. Ultimately model contracts might be amended to reflect the use of an electronic medium thereby crystallising such benefits across the industry through making the use of such a medium the default position.

Proposed approach for CP6

4.2. CP6 offers the opportunity to develop an opt-in mechanism within the contract that would allow operators to elect to adopt invoicing by electronic means if they wished to do so. Such a mechanism would operate on a similar basis to the opt-in provisions that are available to operators in relation to on-train metering (OTM). This approach would entail adding suitable drafting to the model contracts to provide for operators that might elect to adopt it. Use of such a mechanism would have the advantage that it would not require bespoke terms to be agreed with each operator adopting electronic invoicing, avoiding the need for negotiation and approval in each case. It would also ensure that all operators entering into such arrangements do so on the same basis.

5. Updating of references to freight performance statements – Paragraph 9.2 of Schedule 8 of the freight model contract

Current position

5.1. Appendix 3 to Schedule 8 of the model freight contract sets out the process and requirements for the production and agreement of performance statements. It sets out the rights and obligations of the parties to the process and would be expected to be relied upon in the case of any dispute that might arise as to whether those rights and obligations had been met.

5.2. The timing and content of the statements we currently produce are not consistent with the provisions of Appendix 3, and in some cases those requirements are unclear (e.g. 1(b)(iii) is redundant given 1(b)(ii)). We do not believe that operators would want us to change the current procedures to match

the contractual specification as to operate the process in this manner is considered to be impracticable by those involved in its daily operation. Instead we propose to change the specification in Appendix 3 to reflect the process actually followed.

Proposed approach for CP6

5.3. The structure of specification has been simplified to separate out the information that is supplied daily, weekly and per period. A significant proportion of the information is provided daily, one week in arrears, rather than weekly as provided for in the current Appendix 3. The content of the information provided in the interim statements has been clarified and the further processes carried out after the end of each Week and after the end of each Charging Period have been set out with relevant detail of what they require. The proposed drafting below reflects very helpful input that was provided by DB Cargo in relation to the refinement of drafting that we proposed in our original consultation.

Proposed changes to the freight model contract, Schedule 8

Existing drafting is shown in black with the changes proposed shown in red.

SCHEDULE 8, paragraph 9.2

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), Service Variation Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums shall be set off against each other, and~~ Network Rail shall:
- (a) issue an invoice or credit note as appropriate in respect of the balance, if any, ~~shown on the period final statement provided in accordance with paragraph 11 of Appendix 3, within 28 days after the provision of such period final statement~~Charging Period;
 - (b) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 12 of Appendix 3, within 28 days after the provision of such period final statement; and
 - (c) issue a credit note in respect of the aggregate of all Normal Planned Disruption Sums and Enhanced Planned Disruption Sums for which Network Rail is liable in accordance with Schedule 4, if any, within 28 days after agreement of such liability.
- 9.2.2 In the event that (i) any of the period final statements referred to in subparagraphs 9.2.1(a) and 9.2.1(b) have not been provided within 28 days after the end of the Charging Period to which they relates or (ii)

agreement referred to in sub-paragraph 9.2.1(c) has not been reached within those same 28 days, in both cases Network Rail may agree with the Train Operator that an interim payment be made. If such agreement is reached then the invoice or credit note (as appropriate) issued shall detail which of the relevant sums are thus settled and which remain outstanding; and any subsequent invoice or credit note (as appropriate) issued in respect of the same Charging Period under sub-paragraphs 9.2.1(a), 9.2.1(b) or 9.2.1(c) shall take account of the interim payments as well as remaining subject to paragraph 9.1.

~~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, Normal Planned Disruption Sums, Enhanced Planned Disruption 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 53 of Appendix 3 and which is still in dispute.~~

APPENDIX 3: PERFORMANCE STATEMENTS

Interim statements provided by Network Rail

1. ~~As soon as reasonably practicable after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), and using~~ Using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week (or, in the case of paragraph 1(e), each Charging Period), 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;~~ each day. Such interim statements shall be issued on the eighth day after the end of each particular day (or, if the eighth day is not a Working Day, on the next Working Day thereafter) indicating:
 - ~~(a) (ii) are~~ which incidents are Attributable to the Train Operator, and in respect of such incidents the Minutes Delay to Third Party Trains;
 - ~~(b)~~ which incidents are Attributable to Network Rail, and in respect of such incidents the Minutes Delay to Services;
 - ~~(c)~~ which incidents are Attributable to both the Train Operator and Network Rail, and in respect of such incidents (i) that portion of Minutes Delay to Third Party Trains which is allocated to the Train Operator and (ii) that portion of Minutes Delay to Services which is allocated to Network Rail; and
 - ~~(d)~~ which incidents in categories (a) to (c) above remain, at the time of production of the interim statement, under further investigation following a referral by the Train Operator under Condition B2.3.2 of the Network Code.

- ~~(iii) are wholly or partly MDTO (as calculated in accordance with paragraph 4.2.1 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;~~
- ~~(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; and~~
 - ~~(iii) are wholly or partly MDNR (as calculated in accordance with paragraph 6.2.1 of this Schedule 8);~~
- 2. As soon as reasonably practicable after the end of each Week, and using all reasonable endeavours to provide such interim statement within two Working Days after the end of each Week, Network Rail shall provide to the Train Operator ~~(e)~~ an interim statement listing all Disruption Sums arising during that Week for which it believes the Train Operator is liable under paragraph 5 of this Schedule 8;
~~(d) an interim statement listing all incidents which are Attributable to both the Train Operator and Network Rail; and~~
- 3. As soon as reasonably practicable after the end of each Charging Period, and using all reasonable endeavours to provide such interim statement within six Working Days after the end of each Charging Period, Network Rail shall provide to the Train Operator ~~(e)~~ an interim statement listing:
 - (a) ~~(i)~~ the total Contract Miles; and
 - (b) ~~(ii)~~ the total number of Services,in each case operated by the Train Operator during that Charging Period.

Interim statements provided by the Train Operator

- 42. 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, and 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

- 53.** Within two Working Days of receipt of any interim statement under paragraph 1, ~~or 2, 3 or 4~~ of this Appendix the recipient shall notify the provider of the interim statement of any reason why it disputes the interim statement by endorsing the interim statement and returning it to the provider of such statement.
- 64.** Within the next five Working Days after notification of any dispute under paragraph **53**, nominated representatives of the parties shall meet and attempt to resolve that dispute.
- 75.** If any matter is still in dispute ten Working Days after the meeting held under paragraph **64** above, either party may refer such matter for resolution under paragraph 9.3.1 of this Schedule 8.

Deemed agreement

- 86.** Except to the extent that it has, within two Working Days of receipt, notified the provider of an interim statement under paragraph **53** 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;~~
 - ~~(b) Attributable to Network Rail; or~~
 - ~~(c) Attributable to both the Train Operator and 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.~~

Period final statements

- 9.** After the resolution of any investigations listed in an interim statement in accordance with paragraph 1(d), and of any disputes notified under paragraph 5, Network Rail shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
- (a) the total Cancellations and the aggregate of the Cancellation Sums payable under this Schedule 8;

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

Statement of adjustment

- 119.** If Condition B3.3 of the Network Code (Adjustment to prior results) applies in respect of all or part of a Charging Period, Network Rail shall promptly issue to the Train Operator a statement showing the necessary adjustments (if any) to any Performance Sums, Cancellation Sums, Late Notice Cancellation Sums, Normal Planned Disruption Sums, Enhanced Planned Disruption Sums, Disruption Sums and Prolonged Disruption Sums already paid in respect of the Charging Period.
- 1240.** Any statement issued by Network Rail under paragraph 119 shall be accompanied by an adjusting invoice or credit note.

6. Cancelled possessions – Paragraph 2.9 of Schedule 4 of the passenger model contract

Current position

- 6.1. Paragraph 2.9 of Schedule 4 of the Track Access Contract sets out provisions for changes to Restrictions of Use However, the Track Access Contract does not specify the length of advance notice that a Train Operator would reasonably require to re-instate its train services in the event of a Restriction of Use, typically a possession, being cancelled.

Proposed approach for CP6

- 6.2. We consider that the contract could benefit from more clarity on this point. This might include the inclusion of a defined cut-off point prior to the start of a Restriction of Use following which a Train Operator might reasonably not be expected to re-instate its train services.

7. Easements to Restrictions of Use - Paragraph 2.9 of Schedule 4 of the passenger model contract

Current position

- 7.1. The Track Access Contract does not specify the Schedule 4 compensation payable in the case of an easement of a possession. For example, if Network Rail makes a possession less disruptive, dependent on when Network Rail notifies the Train Operator of this, Network Rail could lose its early notification discount despite the possession being less disruptive than previously anticipated. Furthermore, if the Train Operator requests the easement to the possession, as the Track Access Contract does not provide provision for this, Network Rail could again lose its early notification discount. This creates perverse incentives, whereby Network Rail could pay more Schedule 4 compensation to a Train Operator for a less disruptive possession.

Proposed approach for CP6

- 7.2. We consider that the contract could benefit from more clarity on this point. This might include the definition of certain circumstances in which due to a possession becoming less disruptive or an easement being requested by a Train Operator, Network Rail would not lose its early notification discount.

8. Ability to Reopen Schedule 8 - Paragraph 17.1 of Schedule 8 of the passenger model contract

Current position

- 8.1. We consider that the current drafting of Paragraph 17 to Schedule 8 requires clarification, specifically around the process of the recalibration and when this paragraph can be used (i.e. what, precisely, can this paragraph be used for during CP6).

Proposed approach for CP6

- 8.2. We believe it would be beneficial for ORR to also include some text in its Final Determination and the track access contract setting out the extent to which the provisions within this paragraph can be used for CP6. We are particularly concerned about setting performance trajectories for the entire Control Period for train operators affected by Crossrail and Thameslink, due to the significant

amount of uncertainty associated with performance forecasting for these projects.

9. Amplify the need when amending Schedule 8 Appendix 3 to make consequential changes to Appendix 1- Paragraph 17.5 of Schedule 8 of the passenger model contract

Current position

9.1. Appendix 3 contains the Sustained Poor Performance (“SPP”) thresholds. These are levels of performance over time which when sufficiently poor are deemed to be a point at which the passenger operator should be able to apply for additional compensation over and above the standard Schedule 8 compensation payable. Paragraphs 18 and 19 of Schedule 8 set out the mechanism for this.

Proposed approach for CP6

9.2. In reopening Schedule 8 Appendix 1, we suggest that the need to modify Appendix 3 accordingly for any consequential changes could be amplified within the contract. This might be achieved, for example, by both strengthening the wording of this paragraph and moving it to immediately follow paragraph 7.1.

10. Clarification of the meaning of dispute in the definition of RoU Trigger Date (b) in Schedule 4-Schedule 4 of the passenger model contract – definitions

Current position

10.1. The term RoU Trigger Date is defined in the contract as follows;

“RoU Trigger Date” means, in respect of any Period, the later to occur of the following:

- the date on which Network Rail issues a Day 42 Statement; and
- in the event of any dispute in respect of Network Rail’s Day 42 Statement, the date on which such dispute is agreed or determined;

Proposed approach for CP6

10.2. We would welcome clarification of the meaning of the definition of RoU Trigger Date (b) in Schedule 4. It would be helpful if the contract could make it clear whether is it only a dispute of the Schedule 4 Day 42 Statement (it is assumed so but could be explicit) or whether it is a dispute of the particular possession

which is the subject of the RoU being reopened or any possession within the Day 42 Statement relating to that period.

11. Clarification of Claim Notice validity for RoUs spanning multiple periods - Paragraph 2.8(a) of Schedule 4 of the passenger model contract

Current position

11.1. Paragraph 2.8 (a) of Schedule 4 states that the person making a request pursuant to Clause 2.6(b) or Clause 2.7(b) must notify the other that a Restriction of Use is a Type 2 Restriction of Use or a Type 3 Restriction of Use and that the circumstances in paragraph 2.6(b) or 2.7(b) (as applicable) apply within 56 days of the RoU Trigger Date relating to the Period in which that Restriction of Use commences.

Proposed approach for CP6

11.2. Where an RoU spans across more than one period, clarification would be appreciated as to whether the new period's Day 42 Statement triggers the need for a new Claim Notice or whether the Notice continues to be valid from the commencement of the RoU.

12. Definition of "Restriction of Use" – Schedule 4 definitions in the passenger model contract

Current position

12.1. The definition of 'Restriction of Use' in the passenger model contract (on p38) has a closing bracket missing. The meaning of the definition in the absence of the bracket is not clear.

Proposed approach for CP6

12.2. We believe that the closing bracket should be included in the contract after the words "on or before D-26", in conjunction with some other necessary changes to provide for its intended effect.

12.3. Specifically, we note that inclusion of the bracket could bring a suggestion that Network Rail might be held liable for compensation for any difference between the Applicable Timetable and the New Working Timetable relevant to that day; and also any difference between the New Working Timetable relevant to that day and a Corresponding Day Timetable, i.e. the New Working Timetable relevant to another similar day. We believe that this is not the intent of the contract.

- 12.4. Central to this is the meaning applied to “restriction of use” (which appears in the definition of the defined term as an undefined term), noting that the definition of Restriction of Use (on page 38) begins “means, in respect of any day, any restriction of use of all or any part of the Routes...”.
- 12.5. Whilst Network Rail might interpret “restriction of use” to mean possession, line closure or other degraded mode of operation, it could be argued that it means anything which causes their desired train time to vary, subject to few limits:
- The restriction has to result in a difference between the Applicable Timetable and the New Working Timetable relevant to that day, or between the New Working Timetable relevant to that day and a Corresponding Day Timetable, i.e. the New Working Timetable relevant to another similar day;
 - Such differences which are the result of requests by the operator itself are of course excluded.
- 12.6. In this latter interpretation, in addition to changes associated with possessions, changes associated with timetable revisions initiated by Network Rail or by another party would be subject to compensation. The Access Charge Supplement is not calibrated to include these, and we do not believe it is the intention of the Schedule 4 regime to compensate for these.
- 12.7. Consequently, we propose a change to the definition of Restriction of Use to remove the present ambiguity caused by use of the term “restriction of use”. One way to do this would be as follows, which would also change the bracketed clause:
- “Restriction of Use” means, in respect of any day, any ~~restriction of use~~ difference from the normal capability of all or any part of the Routes (~~other than one caused by a Recovery Allowance which was contained where the normal capability of the Routes is expressed~~ in the Applicable Timetable Planning Rules relevant to that day notified to each Timetable Participant on or before D-26) which results in:
- (a) A difference between the Applicable Timetable on that day as compared with the New Working Timetable in respect of that day; and/or
 - (b) A difference between the New Working Timetable on that day as compared with the Corresponding Day Timetable in respect of the Corresponding Day;
- 12.8. This appears to be an issue that may be affecting both Schedules 4 and 8 in respect of differing opinions held by Network Rail and operators as to what the datum point is and how variance arising from it is compensated. Initial thinking is that in Schedule 8 the “public timetable” requires better definition. In Schedule

4 the point on which clarification is sought is whether flexing a train in the Applicable Timetable (the actual timetable applicable on that day) constitutes a Network Rail Restriction of Use.

13. Definition of “Passenger Timetable” – model passenger contract Schedule 8 paras 1.1, 2 and 3.

Current position

13.1. Delay is calculated against working times in the Applicable Timetable; lateness is calculated against public times in the Applicable Timetable. The contract is less than clear about this; the Schedule 4 definition of “Passenger Timetable” (page 154) is “the timetable referred to within the Performance Monitoring System as the passenger timetable and which reflects the Applicable Timetable”. The Performance Monitoring System is defined in Network Code Condition B1 as a system which must record train times against the Working Timetable. The Working Timetable is defined in Network Code Part A “as set out in Condition D2.1 and 2.1.6”, which could be taken to mean the New Working Timetable, not the Applicable Timetable. Nowhere does it mention public times or working times.

Proposed approach for CP6

13.2. We recognise that the current consultation is not about changing the Network Code, and we might make a proposal to address these Network Code elements in due course, but for the moment we suggest changes to the Schedule 8 definitions to improve clarity as set out below.

Para 1.1 Definitions:

“Passenger Timetable” means ~~the timetable referred to within the Performance Monitoring System as the passenger timetable and which reflects the Applicable Timetable~~ those elements of the Applicable Timetable which are intended to be advertised to the public;

“Applicable Timetable” means, in respect of any day, that part of the Working Timetable in respect of that day which is drawn up in accordance with Condition D2.1.1 of the Network code as at 22:00 hours on the day prior to that day.

13.3. For the avoidance of doubt, our view is that wherever there is a difference in the Applicable Timetable between the time at which a train movement at a location is planned and the time at which that train movement at that location is intended to be advertised to the public, any reference in this Schedule 8 to a time at which a train is scheduled in the Applicable Timetable shall be taken to refer to

the former and any reference to a time at which a Train is scheduled in the Passenger Timetable shall be taken to refer to the latter. It might be considered desirable to add a note clarifying this in the contract.

14. Estimated Bus Mile (EBM) Payments - Paragraph 4.2 of Schedule 4 of the passenger model contract

Current position

14.1. The passenger model contract sets out the calculations which are used to make payments in relation to cost compensation for rail replacement services and references Annex B. However the contract does not define the geographical limits to which Annex B should be used and simply references train services and this has caused issues with interpretation. While Network Rail uses the pairings which fall within the Restriction of Use footprint as the applicable locations as a basis for calculations, it has been perceived by some that the services affected should be compensated even if they are outside the area of the restriction so an operator who extended bus journeys beyond the affected area might argue that they should receive compensation for the entire journey. For example, a Restriction of use might exist between Bletchley and Milton Keynes Central but buses might operate between Bletchley and Northampton.

Proposed approach for CP6

14.2. Whilst the table in Schedule 4 “Description of Possession Response” could be seen to set out which bus movements were in scope and which were not, the term “Description of Possession Response” is not defined in the contract. If it were defined as, for example, “means the section of route for which EBM may be claimed” it might help to clarify matters (though this may not be the only solution).

15. Track charges where freight services do not reach destination -Paragraph 2.1.2 of Schedule 7 of the freight model contract

Current position

15.1. There is a specific reference is paragraph 2.1.2 of Schedule 7 which states “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” which appears inappropriate, particularly given that the operator is already compensated under Schedule 8 in such a scenario.

Proposed approach for CP6

15.2. We propose that the words “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” are removed from the freight model contract.

16. Inconsistent wording regarding the causation of loss – Model contracts generally

Current position

16.1. The contract uses different wording in different places for what may be claimed in the event of loss. Sometimes it refers to losses “as a result of”, or sometimes “as a consequence of.” It is not clear whether these different words are intended to mean something different from each other or whether the contract has simply been drafted with a different form of words unintentionally with no difference in meaning intended.

Proposed approach for CP6

16.2. Unless there is specific reason to perpetuate different wording in different places for what may be claimed in the event of loss we propose that the words used should be standardised. If there is a reason for the different wording it might usefully be explained in ORR guidance to contract users.

Annex 1: What improvements would you like made to the drafting of Schedules 4, 7 and 8 of the model track access contracts?

This pro-forma is available to those who wish to use it to respond to our consultation. However, as noted above, you may respond in any format you find convenient. In either case, please be sure to include the below details.

Full name	Phil Dawson
Job title	Regulation & Track Access Manager
Organisation	Stagecoach Rail & Virgin Rail Group
Email*	
Telephone number*	

*This information will not be published on our website.

Specific paragraph reference (including which of the model TACs you are referring to)	Description of issue	Further comments
[for reference purposes]	[please include a specific reference to the drafting]	[if you have a specific solution/change in drafting in mind please include it here]

Specific paragraph reference (including which of the model TACs you are referring to)	Description of issue	Further comments
Schedule 4, definition of “RoU Direct Costs”	<p>Network Rail tends to interpret some of the terms inconsistently when rejecting train operators’ claims for costs. Specifically, it will reject a claim for management time when an in-house team has been used to plan for disruption as costs have not been “incrementally incurred”. An in-house team is nearly always cheaper and more efficient than bringing in 3rd party or consultancy resource. Thus TOCs are penalised for reducing industry costs. The costs must be “reasonable” but the word “incremental” does not form part of the definition.</p>	<p>We suggest the following drafting amendments (in blue) to the RoU definition:</p> <p>RoU Direct Costs” means the aggregate amount of:</p> <ul style="list-style-type: none"> (a) bus and taxi hire costs; (b) publicity costs; (c) train planning and diagramming costs <i>(including management and staff time)</i>; <i>(d) revenue management staff time in replanning all yield management activity on behalf of customers due to the timetable changes</i> <i>(e) operational and driver management costs (including management and staff time)</i>; <i>(f) the costs of reimbursing customers (including ticket refunds and out of pocket expenses); and</i> <i>(g) all other costs directly related to the organisation and management of the Train Operators response to a Type 2 Restriction of Use (including management</i>

Specific paragraph reference (including which of the model TACs you are referring to)	Description of issue	Further comments
		<p><i>and staff time</i>), reasonably incurred by the Train Operator as a result of a Type 2 Restriction of Use, adjusted by:</p> <p>(i) adding any increase in RoU Variable Costs; and</p> <p>(ii) deducting any decrease in RoU Variable Costs.</p> <p><i>For clarity, costs do not need to be incremental but must be reasonably incurred.”</i></p>
Schedule 4, 2.9	<p>There have been instances recently where Network Rail have refused to pay the higher Notification Factor (NF) for possessions which have changed after the NF deadlines. Their justification for not paying the higher NFs was that the changes reduced either the time duration or the geographical extent of the possessions, thereby reducing the effect on our services.</p> <p>However, irrespective of the nature of the change, when a possession is amended at late notice, services need to be re-planned resulting in confusion, loss of confidence, and a potential loss of bookings from our customers.</p>	<p>New paragraph required in Schedule 4 - Section 2.9 (suggest paragraph 2.9e).</p> <p><u>“Any change to a Restriction of Use after TW-26 and TW-22 including easements and reinstatement of previously affected trains, will attract the Notification Factor relevant at the date of the change”.</u></p>

Specific paragraph reference (including which of the model TACs you are referring to)	Description of issue	Further comments
	<p>Disruption caused by late changes to possessions can have just as big an impact as when new possessions are notified late. The Notification Factor payable needs to reflect this.</p> <p>The drafting of the TAC needs clarifying.</p>	
Schedule 4	<p>Very late cancellation of major RoUs and Major operational disruption.</p> <p>Under the current possessions regime Network Rail can cancel any RoUs at short notice (even 24 hours before) and only compensate operators for the Direct Costs.</p> <p>Similarly, the threatened national rail strike in 2015 (Network Rail operations teams) uncovered a 'fundamental gap' in the possessions compensation regime: for InterCity type operators there is revenue loss from the point at which a strike is announced given the twelve week booking horizons (even if the strike is later cancelled). More and more customers book their travel in advance and are the predominant way customers on InterCity TOCs in particular book. In the current regime, if a RoU for strike action is called by Network Rail but subsequently cancelled, Train Operators can</p>	<p>We believed that TOCs should be compensated for 'all Relevant Losses' in a Network Rail strike scenario and the mechanism for compensation should be simple rather than complex, perhaps by using a 'liquidated sums' approach for revenue loss. For example, Schedule 4 is payable if the possession is cancelled from T-2 to cover revenue losses, and out of pocket expenses can be covered as per the RoU Direct Costs compensation mechanism.</p>

Specific paragraph reference (including which of the model TACs you are referring to)	Description of issue	Further comments
	<p>only claim for costs committed or spent and not for revenue loss – which understates the total loss to a train operator for such an event.</p> <p>Therefore, there needs to be a mechanism in Schedule 4 to compensate train operators for ‘all relevant losses’ as a result of either a cancelled RoU at very short notice or delayed NR strike action to reflect changes in customer behaviour. Specific to strike action, this needs to start from the point at which the strike is called.</p>	
Schedule 7	Remove all references to REBS. It is a failed and overly complex mechanism whereby an inefficient monopoly supplier charges its customers for its gross inefficiency. Route MD’s ignore it as NR HQ cover any costs and receive any payments from TOCs.	
Schedule 8, Clause 18.2	Amend the wording of Clause 18.2 Indemnity to reflect John Larkinson’s letter to the industry on 14 November 2014 i.e. it is to cover all relevant Losses for failing to achieve benchmark performance rather than for “perfect performance”. As it stands, this letter has no contractual effect but clarified drafting in the TAC would.	