

Factual points arising from GC's Additional Submission

This document is provided on behalf of Network Rail Infrastructure Limited (**NR**) in relation to Access Dispute Adjudication 57 (the **Dispute**) between Grand Central Railway Company Limited (**GC**) as Claimant, and NR as Defendant.

1 Introduction

- 1.1 This document is designed only to respond briefly as required to factual matters raised in GC's Additional Submissions (**Reply**). The Reply was served on 9 November 2023, so NR's Defence was not able to deal with these matters. This document is being provided in advance of the Hearing, on 20 November 2023, to both GC and the Hearing Chair.

2 Periodic Review 2008

- 2.1 NR notes that GC has referred to and commented on three drafts of clauses G2.1.1(a)(iii) and G2.2 which were proposed to the industry between February and July 2008 during Periodic Review 2008 (**PR08**), at paragraphs 2.1.2 to 2.1.13 of the Reply. In these paragraphs GC selectively uses various parts of the drafts of Part G produced during the course of PR08.
- 2.2 NR does not agree that the development of drafting should be taken into account when interpreting Part G. Legal submissions on this point will be made at the Hearing on 23 November 2023.
- 2.3 Furthermore, it is incorrect to insinuate that the different drafts during PR08 leading up to the final version of Part G were intended to do anything other than exclude possessions-related compensation from Part G, when it can be demonstrated that throughout PR08 ORR retained an unswerving commitment to this objective. This culminated in ORR's confirmation in paragraph 26.6 of its October 2008 Final Determination that "*as a consequence [of other PR08 changes to Schedule 4], Part G compensation for possessions will be withdrawn*". See paragraphs 4.4 to 4.5, and 5.7.1 to 5.7.7 of NR's Defence.
- 2.4 The timeline in Appendix 15 attached shows that ORR made this position clear long before the legal drafting process commenced and that this position remained consistent right up until the review concluded in 2008.

3 Access Charge Supplement (ACS)

- 3.1 In paragraphs 2.1.15 to 2.1.17 of the Reply, GC has commented on the ACS, to which NR responds as follows.
- 3.2 It is factually correct, as GC has said in paragraph 2.1.15, that until Periodic Review 2023 (**PR23**) an ACS has not previously been calculated for GC. However, it is incorrect to say, as GC has done in paragraph 2.1.17, that the "*move for PR23 to provide a specific open access methodology and quote suggested recognition that GC and other Open Access operators have not previously had this option available*".
- 3.3 In fact, it has been open to GC, as with the other open access operators, to request such a calculation and to pay the ACS, since at least PR08. The Hearing Chair is referred to paragraph 5.7.6 of NR's Defence and the quotation from the ORR's Final Determination from PR08. The ORR has consistently said this, for example:

- (a) in PR13, paragraph 523 of the Final Determination, *"Open access operators can opt to pay the ACS if they wish to receive full Schedule 4 compensation"*; and
 - (b) on 30 October 2018, in the ORR Final Decision on aspects of NR's Schedule 4 ACS calculation methodology, *"Open access operators can pay an ACS if they choose to but currently none do. As a result, they are only eligible for compensation for very disruptive possessions"*.
- 3.4 In paragraph 4 of its Reply, GC appears to confuse the basis on which the ACS is calculated, with what it entitles an open access operator to receive, once paid. The position as to what an ACS entitles a train operator to receive is set out very clearly in the fact sheet issued by the ORR on 30 September 2021, as referred to in paragraph 4.5 of NR's Defence, and Appendix 3 of NR's Defence.
- 3.5 This was repeated and confirmed by the ORR as recently as 31 October 2023, in PR23, from which GC provides an extract in Appendix C to the Reply. NR in turn refers to Paragraph 2.8 from that document, which says: *"Open access operators will retain the choice to fully opt in (and pay an ACS) or continue to receive limited Schedule 4 compensation (only for the most disruptive possessions and sustained planned disruption, while paying no ACS)."*
- 3.6 GC appears to suggest that because an ACS is calculated on the basis of maintenance and renewals activity, the ACS only entitles operators to payment for losses associated with Restrictions of Use (**RoU**) in connection with those activities. This is wrong for two reasons:
- (a) Payment of Schedule 4 compensation is not dependent on the reason why an RoU is being put in place. The definition of an RoU under Schedule 4 of the Track Access Contract makes no reference to why the use of the relevant Route is being restricted.
 - (b) Network Changes can also include maintenance and renewal activities if they impact on the Network. The definition of Network Change in Part G includes *"any change in or to any part of the Network"*. This therefore can cover maintenance and renewal activity as well as enhancements.
- 3.7 In paragraph 4.5 of the Reply GC objects to the calculation of an ACS on the basis that it "discriminates against" GC. The calculation of an ACS is not the subject of this Dispute, which concerns whether GC is entitled to compensation for Type 1 and 2 RoUs under Part G when it has not paid an ACS. The ORR endorses the methodology which is to be used to calculate the ACS, in consultation with the rest of the rail industry. NR is then commissioned by the ORR to apply this methodology to carry out the calculations. In PR23, part of which GC has provided as Appendix C to its Reply, the ORR confirmed in a table on page 13 that the ORR had decided *"Not to review the methodology for calculating the [ACS] for open access operators"* (in ORR's PR23 Final Determination: Policy position - Schedules 4 and 8 incentives regimes dated 31 October 2023). This is the position which NR must follow as regards calculation of the ACS.

20 November 2023

Appendix 15**Timeline demonstrating ORR's consistent position on the intended effect of the PR08 Part G changes:**

5 January 2007	ORR letter to the Network Code Industry Steering Group (ISG) remitting ISG to carry out a review of compensation regimes for possessions. https://www.orr.gov.uk/sites/default/files/om/pr08-toc_comp.pdf
<p>In its detailed remit to ISG, ORR states that various principles should be reflected in the review, starting with “<i>all compensation for possessions should be made through Schedule 4 of a Track Access Agreement (or its freight equivalent) to the exclusion of Part G</i>”.</p>	
11 October 2007	ISG's industry consultation on ORR's behalf on the emerging proposals for a revised compensation regime for possessions https://www.orr.gov.uk/sites/default/files/om/cnslt_oss_comp_regime_270907.pdf
<p>ISG confirms in para 4.7 that “<i>the proposal is for Part G to be amended to exclude compensation relating to disruptive possessions</i>”.</p>	
31 January 2008	ISG recommendation to ORR on its proposals for a revised compensation regime for possessions https://www.orr.gov.uk/sites/default/files/om/pr08-poss-recs_comp_regime_310108.pdf
<p>ISG confirms its adherence to ORR's original remit, stating in its executive summary that the proposed changes will mean that “<i>all compensation for possessions can be made through Schedule 4 of a track access agreement (or its freight equivalent) to the exclusion of Part G of the Network Code.</i>”</p>	
8 April 2008	ORR draft proposals on possession compensation https://www.orr.gov.uk/sites/default/files/om/pr08-poss_comp_pass_090408.pdf
<p>ORR confirms in paragraph 36 that “<i>the main effect of the proposed changes is to exclude Part G compensation being payable by Network Rail to train operators in respect of any costs, direct losses or costs incurred by the train operator as a consequence of any Restriction of Use in connection with the implementation of a proposed change.</i>”</p>	
18 August 2008	ORR final conclusions on possession compensation https://www.orr.gov.uk/sites/default/files/om/comp4poss_180808.pdf
<p>ORR confirms in paragraph 4.5 that “<i>the main effect of the changes being made to Part G is to exclude Part G compensation being payable by Network Rail to Train Operators in respect of any costs, direct losses or expenses incurred by Train Operators as a consequence of any Restriction of Use in connection with the implementation of a proposed Network Change.</i>”</p>	
30 October 2008	ORR Final Determination PR08 https://www.orr.gov.uk/sites/default/files/om/383.pdf
<p>ORR confirms in paragraph 26 that “<i>as a consequence [of other PR08 changes to Schedule 4], Part G compensation for possessions will be withdrawn</i>”.</p> <p>And in paragraph 26.26, that “<i>the main effect of the changes being made to part G of the network code is to exclude part G compensation being payable by Network Rail to train operators in respect of any costs, direct losses or expenses incurred by train operators as a consequence of any restriction of use in connection with the implementation of a proposed network change.</i>”</p>	