

STATIONS ACCESS

Application to ORR on appeal under Regulations 29 and 30¹ of the Railway Infrastructure (Access and Management) Regulations 2005

1. Introduction

This form should be used to apply to ORR (as the appointed regulatory body) for the determination of an appeal under regulation 29 of the Railway Infrastructure (Access and Management) Regulations 2005 in respect of access to a terminal or port (as defined in regulation 6) or services (as defined in regulation 7). This form sets out our standard information requirements for considering appeals under regulation 29. Applicants are strongly encouraged to read ORR's guidance document setting out how it intends to assess such appeals² before making an application.

Where the level of access or service provision sought falls entirely within the scope of section 17 or 22A of the Railways Act 1993 (the Act) an applicant must, in accordance with regulation 29(3), lodge the appeal under the relevant section. Where the matter of the appeal falls outside the scope of directions which may be sought under sections 17 or 22A of the Act, the applicant seeking the right to use a railway facility or procure a service must lodge an appeal by using this form.

As ORR intends to limit itself, as far as possible, to making a determination based only upon the information presented by the parties rather than undertaking any extensive research of its own, it is very important that this application contains as many relevant details as possible.

A copy of this form in Word format, and of our guidance note on the appeals process, can be accessed electronically and downloaded via the ORR website at <http://www.rail-reg.gov.uk/server/show/nav.249>, or on disc or CD-Rom from ORR.

¹ TfL notes that the ORR does not have a prescribed form for a complaint under Regulation 30 of the Regulations. TfL has therefore incorporated its Regulation 30 complaint within this Regulation 29 application.

² [Guidance on Appeals to ORR under the Railway Infrastructure \(Access and Management\) Regulations 2006](#), Office of Rail Regulation, March 2006

2. The application

Title of agreement:

Station access arrangements for access to the Heathrow Rail Infrastructure (being the railway infrastructure (including stations) which forms part of the spur from the Great Western Main Line to Heathrow Airport).

Contact details (company and named individual for queries):

Company	Transport for London ("TfL")
Contact individual:	Howard Smith
Job title:	Operations Director, Crossrail
Address:	25 Canada Square, London E14 5LQ
Telephone number:	0203 197 5976
E-mail address:	HowardSmith@crossrail.co.uk

Licence and railway safety case

Please state whether the applicant intends to operate the services itself or have them operated on its behalf.

Please state whether the proposed operator of the services:

- (a) holds a valid train operating European licence or a licence under section 8 of the Act or an exemption under section 7; and
- (b) has an accepted railway safety case under the Railways (Safety Case) Regulations 2000.

If the answer to (a) or (b) is no, please state the point which that person has reached in their obtaining of the licence, exemption or railway safety case (as the case may be).

TfL (the applicant) is one of the sponsors of the Crossrail project. TfL or a railway undertaking nominated by TfL, currently TfL's concessionaire MTR Corporation (Crossrail) Limited ("**MTR Crossrail**") intends to operate the train services to Heathrow Airport utilising the Heathrow Rail Infrastructure. MTR Crossrail holds a valid train operating European passenger licence (with GB Statement of National Regulatory Provisions) under the Railway (Licensing of Railway Undertakings) Regulations 2005 and also has an accepted safety certificate under The Railways and Other Guided Transport Systems (Safety) Regulations 2006.

TfL is a body or undertaking with public or commercial interest in procuring infrastructure capacity on the Heathrow Rail Infrastructure as required of an applicant by Regulation 3 of the Railways Infrastructure (Access and Management) Regulations 2005 ("**the Regulations**"). Once TfL has secured the terms of access to the Heathrow Rail Infrastructure, it will procure that a railway undertaking nominated by TfL (currently MTR Crossrail) will enter into station access arrangements consistent with those terms.

3. The proposed agreement

Details of facility or service to which access is requested:

Name of facility or service:	Access to the stations comprising the Heathrow Rail Infrastructure
Facility owner:	Heathrow Airport Limited (" HAL ")
Contact individual:	Simon Earles
Job title:	Planning and Surface Access Director
Address:	The Compass Centre, Nelson Road, Hounslow, Middlesex TW6 2GW
Telephone number:	0844 335 1801
E-mail address:	simon_earles@heathrow.com

Executive summary

Please provide an executive summary of the proposed appeal. This should cover the type and level of rail access required (including number of train slots and timings if relevant) or any services that are required to be provided by the facility owner, the commercial terms and the applicant's reasons for seeking the contract in the terms proposed. Where possible, this application form should be accompanied by a draft agreement setting out the contractual terms that the applicant wishes to enter into with the facility owner. This section should also include an explanation of the extent to which the applicant has evaluated available capacity at the named facility in order to satisfy itself that the level and type of services being sought can be accommodated.

The Department for Transport ("DfT") and TfL are the joint sponsors and co-funders of the Crossrail Project. Under the terms of the agreement between them, TfL is responsible for providing the Crossrail passenger services which are planned to operate between Shenfield/Abbey Wood and Heathrow Airport/Reading, through the new, largely tunnelled infrastructure currently under construction beneath central London. As such, TfL (on behalf of itself and a railway undertaking nominated by TfL, currently MTR Crossrail) is seeking to secure terms for access to the Heathrow Rail Infrastructure to enable it to provide a regular 4tph scheduled service between Paddington and Heathrow Airport from May 2018, and then provide a service through the tunnel to and from the airport (Central Terminals Area and Terminal 4 stations) – expected to be from December 2019. Appendix 3 sets out in more detail the access rights sought.

The Heathrow Rail Infrastructure currently benefits from an exemption from sections 17 and 18 of the Railways Act 1993, as granted pursuant to the Railways (Heathrow Express) (Exemptions) Order 1994 (the "**Exemption**"). An application cannot therefore be lodged under section 17 of the Railways Act 1993. Hence this application is made under Regulation 29 of the Regulations and concurrently under Regulation 30 given the undesirable developments in relation to competition in the rail services market demonstrated by HAL's behaviours.

TfL has evaluated the available capacity on the Heathrow Rail Infrastructure and is satisfied that the level and type of services being sought can be accommodated. As far as TfL is aware, HAL has also accepted that the level and type of services sought can be accommodated at the stations comprised within the Heathrow Rail Infrastructure at which access is sought.

In July 2015, HAL undertook a consultation process to enable it to bring the Heathrow Rail Infrastructure into compliance with the Regulations. HAL's proposals in that consultation process, both as to the terms of access to its infrastructure and the price it proposed to charge, are fundamentally flawed such that no reasonable party could agree to them. TfL responded comprehensively to HAL's consultation. Within that consultation response and more generally, TfL has been engaged with HAL to fix some of the deficiencies, particularly in the access documentation. Notwithstanding that TfL considers it has had grounds for appeal to the ORR for some time pursuant to Regulation 29 and Regulation 30 of the Regulations (as set out in Appendix 2), TfL has sought to agree with HAL a way forward so that adequate documentation would be available in the timescales required. HAL has rejected the vast majority of the concerns of TfL and (during a period of engagement from the beginning of October until the beginning of December 2015) has failed to address the serious concerns of TfL both as to the detail of the documentation and more generally. Given the time constraints, TfL now considers it has no option but to apply to the ORR to make a determination pursuant to Regulation 29 and Regulation 30 of the Regulations, on the terms of this document.

TfL has said that it is happy to accept terms that are consistent with the current contracts and regulatory arrangements applicable to Network Rail, amended only where necessary to reflect the nature of the Crossrail service and the particular characteristics and regulatory status of the Heathrow Rail Infrastructure. As noted above, HAL has rejected that offer. HAL has offered terms that vary materially and without justification from the industry standard terms. Necessary protections relating to the management and the operation of the Heathrow Rail Infrastructure more generally have not been included. Further, the station access arrangements are incomprehensible and we consider that this is because they are based on the wrong template - using the franchise operator, rather than independent stations, model. As requested by this application form, to the extent possible, TfL has provided a drafted and annotated HAL Station Access Agreement and HAL Station Access Conditions to accompany this application.

Please see Appendix 2, TfL's consultation response and TfL's comments on HAL's response to TfL's consultation response set out in Appendix 1 for more detail of TfL's complaints in this regard.

The ORR is currently consulting on its proposed decision in relation to the investment recovery charge element of the HAL charging framework for use of the Heathrow Rail Infrastructure. TfL expects the consultation to be concluded around or before the end of May 2016. TfL has responded separately to that consultation and specifically reserves its position in relation to any element of the HAL charging framework and in particular any recovery by HAL of the historic costs of constructing the Heathrow Rail Infrastructure.

TfL asks ORR, pursuant to its powers and duties under Regulation 29 and Regulation 30:

- (a) to determine that access be granted to TfL and MTR Crossrail to the stations forming part of the Heathrow Rail Infrastructure:
 - (i) until May 2028 to be co-terminus with the anticipated expiry of the Exemption (before which point HAL will be required to revisit its access documentation);
 - (ii) consistent with the quantum and other access attributes reflected in Appendix 3 of the separate application made in respect of the track comprised in the Heathrow Rail Infrastructure on or about the date of this application; and
 - (iii) on the terms set out in Appendix 4 in relation to the HAL Station Access Conditions and the HAL Station Access Agreement, reflecting the concerns of TfL as set out in Appendix 1;
- (b) to direct HAL to enter into access documentation consistent with those key commercial terms. To assist the ORR and HAL, TfL is providing as part of this application a suite of access documentation which reflects a position that TfL would be able and willing to accept and which TfL asks ORR to direct HAL to enter into;
- (c) to direct HAL to provide such information as may be required to finalise the drafting of the outstanding points in the suite of access documentation referred to in (b);

- (d) to set a timeframe for HAL to comply with the above requirements to enable the terms of access to be in place as soon as possible and, in any event, by August 2016 at the latest; and
- (e) to direct HAL to reissue the HAL Network Statement by no later than 31 August 2016 in form and substance which takes into account the principles set out in the Heads of Terms documents and the suite of access documentation submitted by TfL as part of this application.

Grounds for making this appeal

Please set out here those specific reasons for making this appeal under the Regulations (e.g. has a restriction been imposed by the facility owner, has access been refused or does the applicant consider that it has been unfairly treated or discriminated against?). Please provide copies of correspondence between the applicant and facility owner that supports any argument.

Key areas of grievance

The access documentation proposed by HAL is defective in numerous ways, fails to provide important information and lacks transparency. Given these deficiencies, TfL considers that HAL cannot be said to have met its obligation under the Regulations to provide the minimum access package. **Appendix 2** sets out TfL's grounds for application in detail, cross-referencing other information as necessary. As this application relates to station access, TfL requests that the ORR considers the specific references to station access and charging (track access is the subject of a separate (but linked) application).

The key areas of concern for TfL are summarised below. We would emphasise that this is not a comprehensive list.

- 1 The charging structure proposed by HAL – both: (i) proposing to have separate charging for track and stations but including all charges under the track access agreement, with only a nominal charge payable under the station access agreement; and (ii) the inherently discriminatory circumstances created thereby, whereby users of other stations subsidise the use of Terminal 5 station.
- 2 The level of access charges proposed by HAL and HAL's refusal to engage with us in relation to: (i) how it has reached the proposed levels of charges; and (ii) our valid concerns in relation to those charges.
- 3 Given HAL has used the Network Rail documentation as the starting point (which is predicated on the existence of a network licence) there is a need to include certain contractual provisions in the access documentation in place of the requirement for HAL to hold a network licence (for example, ensuring robust asset management strategies are in place to ensure the track and stations are maintained, renewed and repaired so that they operate safely and efficiently) which will have an impact on the charging system.
- 4 HAL's documentation does not explain how the process for modifying the network, stations and terms of access can operate given the charges lie in the track access contract.
- 5 There is no effective performance regime to compensate TOCs for the effects of operational disruption or planned engineering works, contrary to Regulation 14.
- 6 There is no visibility of HAL's arrangements with its key supplier, Network Rail, and what role Network Rail will play in operating the track and stations. Equally there is no clarity about HEOC's role in operating the stations.
- 7 In places the structure of the documentation enables HAL to act in a way which would favour HEOC, its subsidiary, over the Crossrail concessionaire. Regulations 12(7) and 16(3) require separation, in its legal form, organisation and decision-making functions, of the infrastructure manager role from the train operating role. HAL has refused to include contractual assurances in relation to such separation.

More generally, TfL remains aggrieved at HAL's failure adequately to address the other comments set out in TfL's response to HAL's consultation (see Appendix 1).

Regulation 29 of the Regulations

Given the issues described in this application, TfL: (i) considers that it has been unfairly treated and discriminated against by HAL; (ii) is aggrieved by the process that HAL has undertaken in determining the terms on which it proposes to offer access and the disregard for the valid comments and complaints made by TfL and other consultees in relation to such access arrangements and therefore the terms upon which HAL now proposes to grant access to the Heathrow Rail Infrastructure; and (iii) is in particular aggrieved by decisions taken by HAL concerning:

- (a) its network statement produced in accordance with regulation 11 of the Regulations;
- (b) the information which, by virtue of regulation 11(4) of the Regulations, must be included in such network statement;
- (c) the allocation process and its result as prescribed in Part 5 and Schedule 4 of the Regulations;
- (d) the charging scheme and charging structure established in accordance with regulation 12 of the Regulations;
- (e) the level or structure of infrastructure fees, the principles of which are prescribed in Part 4 and Schedule 3 of the Regulations, which TfL (through its own account or through its concessionaire) is required to pay; and
- (f) the arrangements in connection with the entitlements to access granted under Part 2 and Schedule 2 of the Regulations.

Regulation 30 of the Regulations

Further, TfL believes that it has been treated unjustly, been the subject of discrimination and has otherwise been injured by HAL. This has led to undesirable developments in relation to competition in the rail services markets.

Suitability of preferred facility

Please explain why you consider that this particular facility is competent to supply the access or service required, together with the purpose for which the access or service is required including:

- (a) a detailed explanation of any corresponding services that the applicant is providing to a third party customer (including details of any commercial arrangements that are in place in this respect);
- (b) a detailed description of the characteristics of the facility specifically required which makes it necessary to use the proposed facility;
- (c) an explanation of why it is considered that no other facility is capable of providing these services (including comments regarding the commercial viability of any possible alternative arrangements);
- (d) an explanation of why the services required cannot be provided by the applicant; and
- (e) a description of any other facilities that provide similar access or services to that required, and an explanation of why these are not considered to be viable in this particular instance (either from an operational or commercial point of view).

TfL wishes to provide a 4tph service between Heathrow Airport and Paddington in the first instance as part of the Crossrail Services, replacing and supplementing the existing Heathrow Connect services from May 2018. The Heathrow Rail Infrastructure is the only rail infrastructure available for this service. Viable alternatives for this service in market conditions do not exist.

4. Other

Associated applications to ORR

Please provide details of any other applications that are being made to ORR in parallel with this application (e.g. under sections 17, 18 or 22 of the Act).

TfL submitted a detailed response to the consultation issued by HAL prior to the ORR determination of the charging framework for access to the Heathrow Rail Infrastructure pursuant to Regulation 12 of the Regulations. The ORR was copied into such response and a further copy was provided to the ORR as part of TfL's consultation response on the ORR's proposed "charging framework for the Heathrow Spur". Further copies are available on request.

The DfT (as joint sponsor of the Crossrail project) and MTR Crossrail (as TfL's current concessionaire of the Crossrail services) support this Regulation 29 and Regulation 30 application. Letters of support from each of them are included with this application (as an Appendix to the cover letter).

TfL is making a separate (but linked) appeal to the ORR in relation to accessing the track comprised in the Heathrow Rail Infrastructure.

Supporting information

Please indicate here any further justification or relevant information in support of the application, including a list and explanation of any other material being submitted (and supply copies with the application).

TfL refers to:

- (a) its response, the DfT's response and MTR's response to HAL's consultation, all of which support an application for access to the Heathrow Rail Infrastructure on fair, reasonable and transparent terms (copies of these responses are included with this application);
- (b) Appendix 1, which sets out TfL's comments on certain parts (relevant to this application) of HAL's response to TfL's initial consultation response;
- (c) Appendix 2 which sets out TfL's specific grounds of appeal, cross-referencing the consultation responses where appropriate;
- (d) Appendix 3 containing details of the access rights sought by TfL;
- (e) Appendix 4 containing key commercial terms for the access arrangements sought by TfL;
- (f) the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions (marked to show differences from Network Rail "model form" equivalent documents);
- (g) letters of support for this application from DfT and MTR Crossrail at Appendix 4 to the covering letter to this application; and
- (h) the covering letter to this application, including certain information appended thereto, which summarises TfL's proposals.

Appendix 5 of the cover letter to this application sets out all supporting information in full.

Side letters and collateral agreements

Please confirm here that, where applicable, the whole of the proposed agreement between the parties has been submitted with this application and that there are no side letters or other documents which qualify or

TfL asks ORR, pursuant to its powers and duties under Regulation 29 and Regulation 30:

- (a) to determine that access be granted to TfL and MTR Crossrail to the Central Terminals Area and Terminal 4 station forming part of the Heathrow Rail Infrastructure:
 - (i) until May 2028 to be co-terminus with the anticipated expiry of the Exemption (before which point HAL will be required to revisit its access documentation);
 - (ii) consistent with the quantum and other access attributes and reflected in Appendix 3 of the separate application made in respect of the track comprised in the Heathrow Rail Infrastructure on or about the date of this application; and
 - (iii) on the terms set out in Appendix 1 and Appendix 4 in relation to the HAL Station Access Conditions and the HAL Station Access Agreement;
- (b) to direct HAL to enter into access documentation consistent with those key commercial terms. To assist the ORR and HAL, TfL is providing as part of this application a suite of access documentation which reflects a position that TfL would be able and willing to accept and which TfL asks ORR to direct HAL to enter into;
- (c) to direct HAL to provide such information as may be required to finalise the drafting of the outstanding points in the suite of access documentation referred to in (b);
- (d) to set a timeframe for HAL to comply with the above requirements to enable the terms of access to be in place as soon as possible and, in any event, by August 2016 at the latest; and
- (e) to direct HAL to reissue the HAL Network Statement by no later than 31 August 2016 in form and substance which takes into account the principles set out in the Heads of Terms documents and the suite of access documentation submitted by TfL as part of this application.

No side letters or other documents qualify or otherwise affect the proposed application.

Confidentiality exclusions

Please indicate clearly any elements in the application and the proposed agreement that the parties would wish to exclude from wider consultation on the grounds of confidentiality specified in section 71(2) of the Act, and provide a full justification for each instance by reference to those statutory grounds. Subject to our decision on such exclusions, it is our intention to publish this application and the proposed agreement on the ORR website.

None.

5. Certification

Warning: Under section 146 of the Act, any person who, in giving any information or making any application under or for the purposes of any provision of the Act (including section 17), makes any statement which they know to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence and so liable to criminal prosecution.

I certify that the information provided in this form is true and complete to the best of my knowledge and that Transport for London is willing to enter into an agreement based on the commercial terms appended to this Regulation 29 appeal.

Signed: 

Date: 29 April 2015

Name (in caps): HOWARD SMITH.....

Job title: Operations Director, Crossrail.....

For (company): Transport for London

6. Submission

What to send

Please supply, in hard copy, the signed top copy of this application form, three copies of the proposed draft agreement (where appropriate), copies of any documents incorporated by reference (other than established standard industry codes or other instruments) and any other attachments, supporting documents or information. Please also supply the application, the proposed agreement and, insofar as it is possible, any other supporting information, in electronic form, by e-mail or on disc, in plain Microsoft Word format (i.e. excluding any macros, auto-paragraph or page numbering, or other auto-formatting).

Where to send it:

E-mail: david.robertson@orr.gsi.gov.uk

or by post to:

David Robertson,
Head of Track Access
Directorate of Access Planning and Performance
Office of Rail Regulation
One Kemble Street
LONDON
WC2B 4AN

Appendix 1 – TfL response to HAL’s comments on TfL’s initial consultation response

Appendix 2 – Grounds for Application

The following table sets out the grounds for application or complaint under Regulations 29 and 30 of the Railways Infrastructure (Access and Management) Regulations 2005 and provides examples from the TfL Consultation response to HAL in support of those grounds for application. Capitalised terms have the same meaning as set out in the TfL Response.

Grounds for application/complaint	Examples from TfL Consultation Response (the "Response")
<p>unfairly treated (Regulation 29(1))</p> <p>treated unjustly (Regulation 30(2))</p>	<p>TfL considers overall that it has been unfairly treated and treated unjustly. The proposed access documentation and terms of the access documentation from HAL are deficient and show a lack of information, missing information and lack of transparency. As set out in the consultation response, TfL also considers that HAL has not undertaken a proper or adequate consultation. There has also been a lack of engagement by HAL with TfL (who will be a key beneficiary of access on the Heathrow Rail Infrastructure) and an unwillingness on the part of HAL to reach agreement on – or in some cases even discuss – key issues.</p> <p>The behaviours demonstrated by HAL as part of the constructive engagement have neither been constructive nor have demonstrated a willingness to progress matters expeditiously. HAL has continually sought to exploit its dominant position as infrastructure manager of this key facility to its own advantage.</p> <p>HAL has used the Network Rail templates as the starting point for its documentation. This assumes an entity regulated in the same way as Network Rail (which is not the case for HAL due the existence of an exemption from the requirement to hold network and station licences). HAL has been unwilling to consider the inclusion of additional key provisions for accessing the Heathrow Rail Infrastructure in lieu of licence provisions.</p> <p>TfL refers the ORR to its duties under the Railways Act 1993 and invites the ORR to consider those duties in making any determination of an application (see Schedule 5 of the Response which highlights some particular areas for ORR consideration).</p> <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station</p>

Grounds for application/complaint	Examples from TfL Consultation Response (the "Response")
	Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents).
discriminated against (Regulation 29(1)) subject of discrimination (Regulation 30(2))	<p>We raise a number of areas across the Response where TfL considers that it has been discriminated against, including:</p> <ul style="list-style-type: none"> (a) Paragraph 6.1 (proposal inherently discriminatory due to favouring HEOC); (b) Paragraph 25.3 (FTAC inherently discriminatory due to the fact that it has never been charged to HEOC); (c) Paragraphs 32 and 59.1.2 (paying for infrastructure that is not being used); and (d) Paragraph 61 (general discrimination). <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents).</p>
any other way aggrieved (Regulation 29(1)) injured in any other way (regulation 30(2))	<p>As well as the specific grounds of application elsewhere in this table, TfL is also aggrieved by the behaviour of HAL, including the following examples from the Response:</p> <ul style="list-style-type: none"> (a) Abuse of dominant position by HAL (Part 10 in particular); (b) Lack of clarity around jurisdictional issue with the CAA (Part 3); and (c) Lack of an effective change mechanic and link with stations charging e.g. in the stations arrangements. <p>TfL also refers to the comments and points made in the "unfairly treated" and "treated unjustly" category above.</p> <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station</p>

Grounds for application/complaint	Examples from TfL Consultation Response (the "Response")
	<p>Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents).</p>
<p>the network statement produced in accordance with Regulation 11 (Regulation 29(2)(a))</p>	<p>See Part 6 of the Response which contains specific issues regarding the quality and contents of the network statement. Some specific points include:</p> <p>(a) Consultation: Regulation 11 requires that the network statement must be published following consultation. TfL considers that to satisfy this requirement, the consultation must follow a defined process and adequately take into account comments raised as part of the consultation. This has not been satisfied by HAL. See also Part 2 of the Response.</p> <p>(b) Related documentation: The HAL Network Statement does not stand on its own – documents that are referred to in and incorporated into the HAL Network Statement also need to be settled (or a process in place to ensure that they are settled). For example the access arrangements and disputes procedures should be established. See comments generally in this note and the Response regarding inadequacy of the wider documentation.</p> <p>(c) Lack of clarity around role of Network Rail: TfL cannot understand how the HAL Network Statement can be said to be settled and final when there is no clarity around the role of Network Rail and, it seems, no current agreement or arrangement with Network Rail regarding what its role will be in relation to the operation of the Heathrow Rail Infrastructure.</p> <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents). Those documents also set out what TfL considers to be a fair, reasonable and non-discriminatory position in relation to charging and the performance regime (that would also need to be reflected in the Network Statement).</p>
<p>the information which, by virtue of</p>	<p>This is covered in Part 6 of the Response, in particular paragraph 49 which gives some specific examples of</p>

Grounds for application/complaint	Examples from TfL Consultation Response (the "Response")
Regulation 11(4), must be included in that network statement (Regulation 29(2)(b))	<p>where the network statement is inadequate and fails to meet the requirements in the Railways Infrastructure (Access and Management) Regulations 2005.</p> <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents). Those documents also set out what TfL considers to be a fair, reasonable and non-discriminatory position in relation to charging and the performance regime (that would also need to be reflected in the Network Statement).</p>
the charging scheme and charging system established in accordance with Regulation 12 (Regulation 29(2)(d))	<p>There are a number of grounds of application that TfL would like to raise – all of which are raised in our Response. Examples include:</p> <ul style="list-style-type: none"> (a) The failure to establish a charging regime under the Regulations despite being required to by law and under the Deed of Undertaking (see paragraphs 2, 11 and 12 of the Response in particular); (b) The fact that charges for accessing the stations have been rolled into the track access charge, demonstrating a lack of transparency and lack of cost reflectivity; (c) The failure of the charging regime/scheme to comply with the Regulations (see below); and (d) The inconsistency of the charging regime/scheme with other infrastructure managers (see also the PwC report which covers benchmarking of the HAL proposals against other infrastructure managers of similar infrastructure). <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents). Those documents also set out what TfL considers to be a fair, reasonable and non-discriminatory position in relation to charging and the performance regime (that would also need to be reflected in the Network Statement).</p>

Grounds for application/complaint	Examples from TfL Consultation Response (the "Response")
<p>the level or structure of infrastructure fees, the principles of which are prescribed in Part 4 and Schedule 3, which it is, or may be, required to pay (Regulation 29(2)(e))</p>	<p>In addition to the grounds above regarding the establishment of the charging system, TfL would like to raise specific issues around the proposed charging structure generally – and the proposed FTAC (investment recovery charge), although TfL notes that the FTAC is the subject of a separate consultation process currently being undertaken by the ORR (and therefore TfL expressly reserves its position in relation to the FTAC pending the outcome of such consultation process). Examples from the Response (and subsequent follow on questions from the ORR) include:</p> <ul style="list-style-type: none"> (a) The whole of Part 4 of the Response on the investment recovery charge; (b) The whole of Part 5 dealing with comments on the charging arrangements generally as well as stations issues on charging (contained in Part 9); (c) The analysis in Schedule 4 dealing with directly incurred costs; (d) The further paper prepared by TfL on the applicability of the mark-up provisions; and (e) PwC work and report on the establishment, level and structure of fees proposed by HAL. <p>TfL also refers to the drafted and annotated versions of a HAL Station Access Agreement and HAL Station Access Conditions that it has prepared, which shows the position that TfL is willing and able to accept (marked to show differences to Network Rail equivalent documents). Those documents also set out what TfL considers to be a fair, reasonable and non-discriminatory position in relation to charging and the performance regime (that would also need to be reflected in the Network Statement).</p>
<p>the arrangements in connection with the entitlements to access granted under Part 2 and Schedule 2 (Regulation 29(2)(f))</p>	<p>This ground does not appear to be overly relevant to the Crossrail services other than in relation to the access to services in Regulation 7 and Schedule 2. In this regard, there is some uncertainty over who provides services at stations (and whether that is HEOC or HAL). See paragraphs 12.1.1, 49.1.3 and 58.2.3 that provide some examples of issues around Regulation 7 and Schedule 2 of the Railways Infrastructure (Access and Management) Regulations 2005.</p>

Appendix 3 – Access rights sought

TfL is seeking access rights to the Central Terminals Area and Terminal 4 station which is commensurate with the quantum and other access attributes reflected in the separate application made in respect of the track comprised in the Heathrow Rail Infrastructure on or about the date of this application (as further detailed in Schedule 5 of the TfL proposed HAL Track Access Agreement).

Appendix 4 – Key commercial terms relating to access

Part I – Station Access Conditions Heads of Terms

This Part I of Appendix 4 is intended to set out the key terms and areas that will need to be reflected in HAL’s proposed Station Access Conditions published in early September 2015 (the “**HAL SACs**”). It is not intended to be an exhaustive exposition of all comments which Transport for London (“**TfL**”) may have on the documentation. Headings are those used in the Independent Station Access Conditions 2013 (England and Wales) (the “**Independent SACs**”) from the ORR website, referred to herein as the “**model clauses**”³. For the reasons set out under “Basis of Documentation” below, TfL believes that the Independent SACs would have been the better starting point for the HAL SACs.

Independent Station Access Conditions	Provision to be reflected or amended
General	
Basis of Documentation	<p>The HAL SACs appear to be based on the National Station Access Conditions 2013 (England and Wales). This model envisages generally that the principal operator calling at a station will operate that station. This means that the principal operator will typically bear the greatest portion of the costs of operating the station – i.e. providing a natural incentive to keep costs to a minimum.</p> <p>TfL considers that the HAL SACs should be based on the Independent SACs as the proposed HAL structure appears to more closely mirror the independent stations model, where a party who does not bear responsibility for any of the costs (such as HAL or Network Rail) operates the station, so needs to be contractually required to keep costs to a minimum⁴.</p>
Station Stewardship	<p>Information needs to be included setting out how long-term maintenance, renewal, enhancements and improvement of the stations will be secured. HAL will be the infrastructure manager with responsibility for station stewardship. As HAL is currently exempt from the requirement to hold a station licence, the HAL SACs will need to deal with how HAL will undertake station stewardship obligations in accordance with a specified performance regime. See Part 12 below and the additional contractual terms sought by TfL set out in the Annex to the Heads of Terms for the HAL Station Access Agreement.</p>
Scotland, Welsh Government and PTEs	<p>As the Heathrow Rail Infrastructure is located entirely within England, references to the Scottish and Welsh legal systems and to PTEs do not need to be included in the HAL SACs.⁵</p>
Statutory references	<p>The HAL SACs should not generally contain references to the Railways Act 1993 (except wherever generic in nature and not relating to HAL's</p>

³ We note that HAL has responded to some of TfL's concerns and has subsequently made amendments to the HAL SACs. TfL has not seen a copy of the revised version of the HAL SACs incorporating the amendments which HAL suggests it has made.

⁴ In its response of 21 September 2015, HAL considers that it has appropriately amended and adapted the National Station Access Conditions 2013 (England and Wales) to account for HAL's position as both property owner and the party responsible for managing the stations, albeit that it intends to sub-contract the provision of some of the services to HEOC. TfL disagrees that HAL has achieved the same effects as the Independent SACs – in particular, cost minimisation requirements are not in place.

⁵ In its consultation response, HAL confirmed that such references will be deleted. TfL has not seen a revised version of the HAL SACs to confirm this.

Independent Station Access Conditions	Provision to be reflected or amended
	exemption) as the Heathrow Rail Infrastructure is currently exempt from certain provisions of the Railways Act ⁶ .
Other	A general review to pick up on internal inconsistencies and typos will need to be undertaken. For example: <ul style="list-style-type: none"> References to "HAL" should be replaced with "the Station Facility Owner".⁷
Part 1: Organisation of the Access Conditions and Definitions	
General Interpretation	These clauses should broadly follow the model clauses with only minor contextual amendments. Various definitions will need to be amended or deleted to reflect the specific circumstances of the Crossrail services (including the proposed charging model).
Network	This definition should remove reference to Scotland and Wales as the HAL Infrastructure is entirely located in England.
Part 2: Modifications to the Independent Station Access Conditions	
Approval or Rejection of a Conditions Change Proposal – Requisite Majority	The Requisite Majority should be set at 80%, in line with the industry norm (80%) and to avoid giving any one party a disproportionate influence ⁸ .
Part 3: Changes to the Station or to the Station Access Conditions	
Basis of Change	Clarity should be included in the Change mechanism over how proposed Changes will impact on the station access charges. In particular, clarity is required over the charging process to ensure that beneficial changes are not blocked due to an inability to quantify the financial consequences or charge for them. Charging should be on a facility-by-facility basis.
Third Party Investment	Information relating to how third party investment can be secured should be included in the Change mechanism, as currently the basis on which the Change procedure has been predicated and the lack of clarity surrounding charges means that it will be difficult to secure third party investment.
Approval by the ORR	As HAL is currently exempt from the requirement to be regulated by a network licence or a station licence, the ORR would appear to have no locus to approve proposals and hear appeals. The HAL SACs should be amended to reflect this unless it can be demonstrated that the ORR has accepted these obligations and on what basis. ⁹
Part 4: Works, Repairs and Maintenance	
Station Facility Owner's obligations	HAL should be responsible for performing all maintenance, repair and renewals, given its proposed arrangements to act as infrastructure manager and undertake a role equivalent to station facility owner. The Annexes should be amended to reflect this. The split of responsibility in the Annexes

⁶ In its response of 21 September 2015, HAL states that it is only exempt from certain provisions of the Railways Act 1993 and that many references to the Railways Act 1993 in the HAL SACs still therefore remain relevant. TfL has not seen a revised version of the HAL SACs to be able to confirm whether remaining references to the 1993 Act are appropriate.

⁷ In its response of 21 September 2015, HAL confirms that references to HAL have been deleted. This will need to be confirmed in revised documentation.

⁸ HAL proposed a simple majority of 51% which would not be acceptable to TfL.

⁹ HAL contends in its response of 21 September 2015 that the ORR still has locus to approve proposals and hear proposals because HAL is not exempt from sections 22, 22A or Schedule 4A of the Railways Act 1993. TfL does not agree and considers this does not make sense in any event. HAL's response does not pick up on the wider point in relation to the ORR functions in relation to the Heathrow Rail Infrastructure.

Independent Station Access Conditions	Provision to be reflected or amended
	and the categorisation of costs for these activities is crucial to understanding how repair and maintenance will be charged. ¹⁰
Users' obligations	As noted above in this Part 4, given the proposed structure, it is not appropriate for Users to be responsible for reimbursing HAL for the cost of HAL complying with its repair and maintenance obligations to address damage caused as HAL should be responsible for performing all maintenance, repair and renewals and so the obligation contained in Condition D12 should be removed.
Part 5: Insurance	
Destruction or Damage to the Station	The notion of a Minimum Sum should be introduced to provide users with comfort that insurance procured will be for an efficient price. ¹¹
Part 6: Access Charging	
General	To ensure that HAL is fully compliant with the Regulations, the charging arrangements for station access should be transparent and certain and must relate directly to the costs attributable to the services being provided. The charging arrangements for access should therefore use a charging model of a Long Term Charge and Qualifying Expenditure, whereby TfL is only responsible for paying those costs that are directly incurred by TfL as a result of operating the Crossrail services. ¹²
Long Term Charge	HAL should specify a Long Term Charge, which should be set until 2028, to enable it to recover the efficient maintenance, renewal and repair costs associated with the stations and provide train operators with clarity and certainty over HAL's maintenance and renewals outputs. In relation to the Central Terminals Area, TfL considers that it should only pay a Long Term Charge for those costs that it directly incurs for access the Central Terminals Area (for example, extra renewal works required solely due to the Crossrail services). In relation to Terminal 4 station, TfL recognises that it is the sole operator seeking access. It still requires a directly incurred Long Term Charge relating to only those costs arising because Crossrail services are using the station (and not costs which would arise in any event regardless of whether an operator called at the station or not).
Qualifying Expenditure	The concept of Qualifying Expenditure should provide clarity and certainty over how train operators will be charged for routine and foreseeable operational activities, but should be designed to require TfL to pay its directly incurred costs only. In relation to the Central Terminals Area, TfL considers that it should only pay Qualifying Expenditure that is directly incurred as a result of Crossrail accessing the Central Terminals Area (for example, increased cleaning costs and extra staff). This should be fixed until 2028. In relation to Terminal 4 station, TfL recognises that it is the sole operator seeking access. It still requires a charging model of directly incurred Qualifying Expenditure, but acknowledges that many of the costs (above mothballing costs) will be directly incurred as a consequence of the Crossrail services. Charging should be on a facility-by-facility basis.
Maintenance and repair	The maintenance and repair services to be provided by HAL need to be specified along the terms of the model clauses. This list of services will in

¹⁰ The 21 September 2015 version of the HAL SACs amends conditions D 5.1.1 and D 5.1.2 to clarify that the station facility owner is responsible for all maintenance and repair. The Annexes will need to be considered in due course.

¹¹ In its 21 September 2015 response, HAL contends that the absence of a specified Minimum Sum does not preclude HAL from obtaining insurance that is subject to an appropriate excess. TfL's concerns nevertheless remain.

¹² In its 21 September 2015 response, HAL states that it does not intend to charge for the use of the stations. This is not correct – as it will be charging, just opaquely by including the costs in the track charges.

Independent Station Access Conditions	Provision to be reflected or amended
	turn feed into the Qualifying Expenditure (to the extent that the services constitute directly incurred costs), providing clarity over how repair and maintenance will be charged.
Part 8: Litigation and Disputes	
Resolution of Disputes and Claims – ADRR	The general approach to access disputes resolution should be confirmed. TfL understands from its discussions with HAL that the Network Rail ADRR are intended to apply in their entirety to the Heathrow Rail Infrastructure. TfL notes however that the latest version of the HAL Network Code received by TfL on 10 March 2016 includes an amended version of the Network Rail ADRR, which indicates that HAL may be intending to create its own set of access dispute resolution rules. TfL considers that it would be simpler for HAL to use the Network Rail ADRR.
Part 9: Station Register	
Content of the Register	On the assumption that the concept of directly incurred Qualifying Expenditure will be introduced (see above at Part 6), the Station Facility Owner should be required to enter information in the Station Register which may have a material impact on the amount of the Qualifying Expenditure (to the extent that such amount would constitute a directly incurred cost).
Part 12: Performance Monitoring Regime and Remedies	
General	Information relating to HAL's station stewardship obligations and how performance relating to the upkeep of the stations will be measured needs to be included in the SACs in line with the terms of the model clauses. In the Annex to this Appendix 4, TfL sets out additional contractual obligations which should be included by HAL in the access documentation due to HAL being exempt from the requirement to hold network and stations licences.
Performance Monitoring	A performance monitoring regime measuring HAL's performance of station stewardship obligations and the upkeep of stations should be included. HAL has proposed a "Part L" performance regime as part of the HAL Network Code for certain asset classes, which needs to be extended to include all assets and needs to be on a station-by-station basis, rather than across all stations. HAL's current proposal would mean that good performance at one station potentially not used by Crossrail services could mean no payments are made to the Crossrail operator, suffering from poor performance. Any performance regime based on "Part L" should be included in the HAL Station Access Conditions in addition to the model clauses (and not left in the HAL Network Code).
Abatement and Self Help Remedies	The remedies available to train operators for poor performance of the Station Facility Owner need to be designed in conjunction with the charging arrangements, over which further clarity is required. In order to provide train operators with a meaningful remedy which is reflective of the services being received, the self-help remedies and abatement regime set out in the model clauses should be re-instated (with amendments as necessary to reflect TfL's proposed charging principles) to provide train operators with an adequate remedy for poor performance. ¹³
Limitation on Claims	The provisions relating to limitation on claims should broadly follow the model clauses but the overall limit on liability (and the appropriateness of HAL limiting its liability) needs to be considered in the context of the overall charging regime, following clarification of how charging will take place. In

¹³ In its response of 21 September 2015, HAL states that, as the HAL TAA contains the charging provisions, the self-help and abatement regime has been incorporated into the HAL TAA. TfL disagrees with this – there is no linkage between the provision of track access (where the charges lie) and the provision of station services under the separate station access agreement for a nominal charge. TfL remains firmly of the view that charging needs to be on a facility-by-facility basis to ensure remedies are meaningful.

Independent Station Access Conditions	Provision to be reflected or amended
	addition, there should be no cap on HAL's liability arising under the Relevant Agreements.
Part 14: Other Positive Obligations	
Station Facility Owner's Obligations	There are a number of positive obligations on the Station Facility Owner in the model clauses which should be re-instated given HAL's status as infrastructure manager of the stations, for example the requirement to minimise the cost of operations. ¹⁴ The Station Facility Owner's obligations should broadly follow the model clauses. In particular Conditions 81.1 (I) to (L) and (N) to (P) should be re-instated.
Part 16: Attribution of Costs	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 1 – Common Station Amenities and Services	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 2 – Qualifying Expenditure	
General	Annex 2 should be reinstated with amendments to reflect TfL's proposed charging principles for stations. The typical Qualifying Expenditure arrangements are not appropriate in the context of the Heathrow stations as they do not necessarily reflect the costs directly incurred. See specific comments on Part 6: Access Charging above.
Annex 3 – Common Station Amenities and Common Station Services which may be changed only by Unanimous Agreement of all Users	
Model Clauses	These clauses should broadly follow the model clauses to the extent relevant with only minor contextual amendments.
Annex 4 – Existing and Adjacent Works	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 5 – Existing Agreements	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 6 – Identified Abatable Charges for Common Station Amenities and Common Station Services	
General	Charges for common station amenities and common station services should not be incorporated into the track access contract. See specific comments on Part 6: Access Charging.
Model Clauses	These clauses should broadly follow the model clauses with amendments as necessary to reflect TfL's proposed charging principles. See specific comments on Part 6: Access Charging.
Annex 7 – Sliding scale of Abatement for failure to open Station during agreed opening times	
Model Clauses	These clauses should broadly follow the model clauses with amendments as necessary to reflect TfL's proposed charging principles. See specific comments on Part 6: Access Charging.
Annex 8 – Specified Provisions	
Requisite Majority	See comments above under Part 2.
Annex 9 – Disrepairs to be remedied	

¹⁴ The 21 September 2015 version of the HAL SACs has amended conditions N1.23 and N1 to include relevant additional positive obligations on the Station Facility Owner in accordance with the model clauses. We note that TfL has not seen the revised HAL SACs.

Independent Station Access Conditions	Provision to be reflected or amended
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 10 – Production of Specifications	
Model Clauses	These clauses should broadly follow the model clauses to the extent relevant with only minor contextual amendments.
Annex 11 – Repair and Maintenance Specifications	
Station Facility Owner's obligations	This Annex should be reinserted. See specific comments on Part 4: Works, Repairs and Maintenance.
Annex 12 – Review of Incentives	
Annex 13 – Performance Audit Form for Major Stations	
General	Annex 13 of the Independent SACs is not used in the HAL SACs. Annex 13 should be reinserted as part of a general performance monitoring regime measuring HAL's performance of station stewardship obligations and the upkeep of stations (which TfL notes HAL has confirmed it will be responsible for). See comments on Part 12: Performance Monitoring Regime and Remedies.
Annex 14 – Template Co-operation Agreement between industry parties (Station Facility Owner and Users)	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.
Annex 15 – Template Co-operation Agreement where Proposer is a Station Investor and Material Change Consultee is the Station Facility Owner or a User	
Model Clauses	These clauses should broadly follow the model clauses with only minor contextual amendments.

Part II – Station Access Agreement Heads of Terms

This Part II of Appendix 4 is intended to set out the key terms and areas that will need to be reflected in HAL’s proposed Station Access Agreement published in early September 2015 (the “**HAL Station Access Agreement**”). It is not intended to be an exhaustive exposition of all comments which Transport for London (“**TfL**”) may have on the documentation. Headings are those used in the Station Access Agreement (single station or multiple stations) (“**SAA**”) from the ORR website.

SAA	Provision to be reflected or amended
General	
Basis of documentation	<p>The HAL proposed Station Access Agreement appears to be based on the ORR template SAA (single station or multiple stations). This model envisages generally that the principal operator calling at a particular station will operate that station. As a result of the principal operator operating the station, it will generally be the party responsible for bearing the majority of the costs – and therefore will be naturally incentivised to keep those costs low.</p> <p>We consider that access to the stations should be based on the Independent Station Access Agreement, as the proposed HAL structure appears to more closely mirror the independent stations model¹⁵ - i.e. that a party who does not bear any of the costs is the operator of the station. Therefore additional protections are required to ensure costs efficiency – per the Network Rail model.</p>
Separate access agreements	As each station is an independent facility and will therefore be independently charged for access, TfL requires separate station access agreements for each station that TfL seeks access to.
Ownership of Heathrow Rail Infrastructure	The HAL Station Access Agreement should clearly identify who owns the Heathrow Rail Infrastructure – whether it is HAL as freeholder, or another legal entity within the Heathrow Airport company structure which in turn leases the stations to HAL. From TfL’s discussions with HAL, it understands that HAL has the property interest in the three stations and is the appropriate party to be granting access. However, as currently drafted, the contractual arrangements suggest that HAL's proprietary interests are granted to it by a superior party ¹⁶ .
Role of HEOC	The HAL Station Access Agreement should clearly state which party – HAL or HEOC - will undertake day-to-day infrastructure manager responsibilities and operations at the stations, including granting access ¹⁷ . From discussions with HAL, TfL understands that HAL will be the party granting access under the contract, although many of the day-to-day operations will

¹⁵ HAL states in the 21 September 2015 response that the HAL Station Access Agreement has been appropriately amended and adapted in order to account for HAL's position as both property owner and station facility owner. Some amendments have been made in the 21 September 2015 version of the HAL Stations Documentation (specifically the HAL Station Access Conditions) to further clarify this. However, TfL’s fundamental concerns in relation to the structure remain.

¹⁶ HAL confirms in the 21 September 2015 response that HAL is the freehold owner of all three stations at Heathrow airport. HAL contends that this is reflected adequately in the HAL Station Access Agreement as currently drafted and does not intend to delete references to "Superior Estate Grant(s)" and "Superior Estate Owner(s)". TfL has not seen relevant title documentation to confirm HAL's status as freehold owner of all three stations and therefore requires contractual assurance from HAL under the HAL Station Access Agreement confirming that HAL is empowered to grant access to the Heathrow stations.

¹⁷ HAL confirms in the 21 September 2015 response that HAL will be entering into a separate Station Management Agreement with HEOC under which HEOC will be contracted to provide management, operation and maintenance services day-to-day. HAL asserts that the possibility of such an arrangement is already acknowledged in clause 7.6.1 of the HAL Station Access Agreement (whereby the Station Facility Owner may subcontract any of its obligations under the Station Access Agreement).

SAA	Provision to be reflected or amended
	be sub-contracted to HEOC. TfL is not clear on what responsibilities HEOC will be performing on a day-to-day basis (and what will remain with HAL), the processes for liaising with HEOC and the protections which will be built in given HEOC is a competitor (as well as being a subsidiary of HAL).
Interpretation	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Conditions Precedent and Duration	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Station Licence	As HAL currently benefits from an exemption from the requirement to hold a station licence, equivalent provisions to those typically set out in a station licence should be included in the HAL Station Access Agreement or the HAL Station Access Conditions – please see the Annex to Appendix 4 which sets out the additional terms which TfL has requested be included in the track and stations documentation as a consequence. Examples include asset stewardship, insurance, compliance with railway group standards, disability protection policy and arrangement and provision of information. ¹⁸
Safety Authorisation	The HAL Station Access Agreement should clarify whether HAL or HEOC will undertake safety obligations and should state that HAL or a suitably competent sub-contractor is required to hold a Safety Authorisation.
Insolvency Event	If HAL intends to sub-contract many of its day-to-day operations at the stations to HEOC, HEOC's solvency will also impact upon HAL's performance of its obligations under the HAL Station Access Agreement. It should therefore be a condition precedent of the HAL Station Access Agreement that HEOC has not suffered an Insolvency Event.
Permission to Use the Station	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Station Access Conditions	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Term and Termination	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Station Facility Owner Events of Default	Clause 5.2.3(e) of the HAL Station Access Agreement refers to HAL ceasing to hold a Safety Authorisation as a Station Facility Owner Event of Default. The HAL Station Access Agreement should be updated in line with the comments on the Safety Authorisation set out above.
Loss of Licence	TfL understands that HAL's exemption from the requirement to hold a licence is limited to a period of 30 years (" Licence Exemption Period ") and is expected to expire in 2028. TfL expects HAL to obtain a licence either prior to or on the expiration of the Licence Exemption Period and the HAL Station Access Agreement should specify that a failure to do so is a Station Facility Owner Event of Default.
Charges for Permission to Use the Station	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Station	The HAL Station Access Agreement should provide more information on

¹⁸ HAL confirms in the 21 September 2015 response that it is exempt from holding a station licence, which TfL acknowledges. However, HAL does not explain how it intends to contractually address concepts typically found in a station licence, which are set out in the note in the Annex.

SAA	Provision to be reflected or amended
Boundaries	station boundaries, specifically which assets form part of each station for the purposes of station access charges ¹⁹ (which TfL remains of the view should be levied on a facility-by-facility basis, rather than being aggregated, opaquely, in the track access charges).
Access Charge	HAL is required to provide certainty and transparency over the station charging arrangements under the general principles of charging in the 2005 Rail Regulations ²⁰ . Comments on the charging arrangements and structure as set out in the HAL Station Access Conditions heads of terms will apply equally to the HAL Station Access Agreement.
Whole Agreement, amendment and assignment	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Future Ownership	The HAL Station Access Agreement should clarify what the position would be if in the future HAL transferred the ownership of the Heathrow Rail Infrastructure to a third party or if the decision was taken to close a station. Some form of protection will be required for existing and potential users of a particular station, as well as other interested parties (such as the Mayor of London) ²¹ . TfL has proposed that HAL be restricted from disposing of its proprietary interest in a station to a third party until that third party enters into a new station access agreement with TfL.
Notices and communications	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Governing Law and submission to jurisdiction	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Rights of Third Parties	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Schedule 1- Contract Particulars	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments. References to Terminal 5 should not be included in any TfL agreement as TfL is not seeking access to Terminal 5.
Schedule 2- Exclusive Station Services	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.
Schedule 3 – Addresses for Service	
Model Clauses	These clauses should broadly follow model clauses with only minor contextual amendments.

¹⁹ HAL states in the 21 September 2015 response that sufficiently detailed plans of each station have been provided in the Annexes published for consultation and information regarding assets has been included in the revised consultation drafts of the HAL Station Access Conditions Annexes. TfL does not believe the information provided is sufficient.

²⁰ HAL states in the 21 September 2015 response that a full list of all rail costs (including those related to the station) has been provided as part of the pre-consultation engagement. TfL does not believe that sufficient certainty or transparency has been given – a point made in its consultation response.

²¹ HAL has noted this in the 21 September 2015 response and confirms that there are currently no plans for a change in ownership. However, HAL does not confirm how the HAL Station Access Agreement might be amended to clarify its position if indeed a change in ownership were to occur.

Annex - Additional Contractual terms to be included in the HAL access documentation

1 Purpose of this paper

- 1.1 In preparing its proposed contractual documentation (the “**Access Documentation**”) for use of the Heathrow spur and associated stations (the “**Heathrow Rail Infrastructure**”) Heathrow Airport Limited (“**HAL**”) has used certain Network Rail industry-standard documents as its starting point. Starting from suitable Network Rail documents is not contested by Transport for London or the Department for Transport (together, the “**Sponsors**”), although the Sponsors remain of the view that the starting point for the stations documentation should be the Network Rail “independent stations” model rather than the “national stations” which HAL has used.
- 1.2 In their responses to HAL’s consultation on the Access Documentation, the Sponsors noted that there were a number of areas which appeared to be missing from HAL’s documentation. This is partly as a result of HAL’s regulatory structure being quite different from the regulatory structure within which Network Rail operates – and accordingly Network Rail’s access contract documentation does not contain all of the requirements which would usually be expected and also needed to access the Heathrow Rail Infrastructure on a safe, fair and transparent basis. These gaps have also been discussed at a number of recent meetings between the Sponsors and HAL.
- 1.3 On 25 November 2015, the Sponsors undertook to provide HAL with a list of the additional provisions that Sponsors require to be incorporated in the Access Documentation and this paper sets these out. This paper is formed of the following sections:
- 1.3.1 **Overarching obligations:** these are obligations that should be included in both the track and the station elements of the Access Documentation;
 - 1.3.2 **Track:** these are obligations that should be included in the track elements of the Access Documentation; and
 - 1.3.3 **Stations:** these are obligations that should be included in the stations elements of the Access Documentation.

This document should not be considered to be proposed legal drafting for the Access Documentation. In the absence of the Sponsors having had sight of the updated Access Documentation, this should not be considered to be a comprehensive list of points in the areas set out in this note.

- 1.4 There are a number of reasons why the Sponsors believe that the additional contractual provisions set out in this paper need to be included in the Access Documentation which include:
- 1.4.1 to ensure the Heathrow Rail Infrastructure is operated safely and effectively;
 - 1.4.2 to ensure there is fairness and transparency in the proposed arrangements;
 - 1.4.3 to ensure all users of the Heathrow Rail Infrastructure are treated in a fair and non-discriminatory manner;
 - 1.4.4 to address obligations in the Network Rail standard industry arrangements which are missing from the HAL arrangements due to its different regulatory structure;

- 1.4.5 to contractually require HAL to provide the services that users of the Heathrow Rail Infrastructure are paying for, with appropriate remedies being available if the services are not provided; and
 - 1.4.6 to provide assurance to the Sponsors that HAL will take those steps which a reasonable and prudent infrastructure manager would take.
- 1.5 The sections below set out the types of points that the Sponsors would expect to be covered. The Sponsors understand that a number of the obligations set out below may be discharged in practice by: (1) Network Rail, as HAL's sub-contractor responsible for operating the track; or (2) HEOC, as HAL's sub-contractor responsible for operating the stations, in each case comprised in the Heathrow Rail Infrastructure.

2 Overarching obligations

2.1 Independent facilities

The Sponsors consider that the Access Documentation must be structured and relevant drafting should be included in the Access Documentation:

- 2.1.1 making clear that each of: (i) the track; (ii) Central Terminals station; (iii) Terminal 4 station; and (iv) Terminal 5 station, are independent facilities;
- 2.1.2 as a consequence of 2.1.1, ensuring that access to each facility is independently contracted and charged for; and
- 2.1.3 providing for standalone remedies for breaching obligations for each such independent facility.

2.2 Asset stewardship

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.2.1 requiring the track and stations to be operated, maintained, renewed and replaced to a specified standard. The Sponsors consider that this should be in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of users of the track and stations;
- 2.2.2 requiring HAL to consult upon, take into account the views of users and subsequently publish its asset maintenance strategy and delivery plans;
- 2.2.3 preparing delivery plans setting out how the overarching obligations on asset stewardship will be met;
- 2.2.4 reflecting the asset maintenance strategy and delivery plans in the costs for using the track and stations (i.e. ensuring costs can be updated to reflect this);
- 2.2.5 implementing the asset maintenance strategy/plans in accordance with their terms;
- 2.2.6 incorporating the requirement for an asset register to be maintained and updated; and
- 2.2.7 ensuring that users of the track and stations have effective remedies if HAL does not maintain either the track or the stations either to the standard specified in

paragraph 2.2.1 or in accordance with the maintenance strategy and plans specified in paragraph 2.2.3.

2.3 Change of control, non-discrimination and separation

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.3.1 ensuring that HAL transfers any access options and any access agreements to any successor owner/infrastructure manager of the Heathrow Rail Infrastructure (please see our separate suggested wording in an email dated 07 January 2016 in relation to a restriction on the land register to effect this);
- 2.3.2 requiring HAL to act in a fair and non-discriminatory manner towards all current users and prospective users of the Heathrow Rail Infrastructure and not discriminate between persons or classes of persons; and
- 2.3.3 requiring HAL to provide information to users demonstrating how its governance structure and decision making (particularly in relation to capacity allocation and charging and who takes those decisions) meets the requirements of the Railways Infrastructure (Access and Management) Regulations 2005 (or their replacement, as the case may be) – both at the outset of an access agreement and on an ongoing basis during the term of that access agreement.

2.4 Remedies and specific performance

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.4.1 giving users of the Heathrow Rail Infrastructure an effective remedy if HAL does not comply with its obligations under the Access Documentation (as supplemented by the provisions described in this note); and
- 2.4.2 entitling users of the Heathrow Rail Infrastructure not only to damages for failing to meet the obligations but also a process to compel performance by HAL of those obligations – due to the nature of the obligations and the monopoly nature of the facilities, HAL is the only person who can provide the access and services.

2.5 Insurance

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.5.1 specifying particular levels and types of insurance to be held by HAL in providing the various track and stations services (these levels should be those prevailing in the wider industry from time to time); and
- 2.5.2 requiring evidence of the insurances referred to in paragraph 2.5.1 being in place to be provided periodically or upon request.

2.6 Environment

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.6.1 requiring HAL to have a written environmental policy designed to protect the environment from the activities associated with the Heathrow Rail Infrastructure;
- 2.6.2 ensuring HAL has operational objectives and management arrangements in place to give effect to the environmental policy referred to in paragraph 2.6.1;
- 2.6.3 review on a regular basis, consult upon and update the policy, objectives and arrangements referred to in paragraphs 2.6.1 and 2.6.2; and
- 2.6.4 in undertaking its obligations, HAL shall have regard to the policy and objectives and use reasonable endeavours to operate the arrangements effectively (as referred to in paragraphs 2.6.1 and 2.6.2).

2.7 Cooperation

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track requiring HAL to cooperate (in respect of the Heathrow Rail Infrastructure activities) with the Mayor of London and Transport for London as the statutory body responsible for transportation in London, as well as other third parties such as local authorities.

2.8 Cross subsidy

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.8.1 preventing HAL from receiving cross-subsidy from or giving cross-subsidy to any affiliated railway undertaking or from receiving any other form of unfair cross subsidy; and
- 2.8.2 ensure accounting records for the infrastructure management business are maintained separately from those of other businesses of HAL and its affiliates.

2.9 Claims allocation and handling

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.9.1 requiring HAL to become party to and thereafter remain party to the wider industry Claims Allocation and Handling Agreement; and
- 2.9.2 obliging HAL to procure that all users of the Heathrow Rail Infrastructure also become party to and thereafter remain party to the wider industry Claims Allocation and Handling Agreement.

2.10 Standards

The Sponsors consider that drafting should be included in the Access Documentation for both stations and track:

- 2.10.1 requiring HAL to comply with the Railway Group Standards code; and

- 2.10.2 requiring HAL to comply with such Railway Group Standards as may be relevant to the Heathrow Rail Infrastructure.

3 Track

3.1 Information for passengers

The Sponsors consider that drafting should be included in the track parts of the Access Documentation:

- 3.1.1 including a general obligation to cooperate with users of the Heathrow Rail Infrastructure;
- 3.1.2 requiring HAL (through its sub-contractor) to secure the provision of appropriate, accurate and timely information relating to planned and actual movements of trains on the Heathrow Rail Infrastructure;
- 3.1.3 providing information to users, passengers and prospective passengers when there is disruption on the Heathrow Rail Infrastructure;
- 3.1.4 facilitating the effective exchange of information relating to the operation of trains on the Heathrow Rail Infrastructure and cooperating with access beneficiaries to provide such information;
- 3.1.5 requiring a suitable timetabling process being put in place to ensure the capacity is fairly allocated, which then feeds into the information provided to passengers;
- 3.1.6 using reasonable endeavours to promptly resolve timetabling disputes and responding expeditiously to timetabling matters which an access beneficiary reasonably considers to be urgent;
- 3.1.7 procuring the provision to Network Rail of such information relating to train movements on the Heathrow Rail Infrastructure to allow Network Rail to publish a national timetable for passenger services; and
- 3.1.8 granting access to information to information to train movements on the Heathrow Rail Infrastructure to enquiry services.

4 Stations

4.1 Information for passengers

The Sponsors consider that drafting should be included in the stations parts of the Access Documentation requiring HAL to cooperate with train operators so far as reasonably necessary to enable train operators to meet their obligations to provide information to passengers.

4.2 Emergency access

The Sponsors consider that drafting should be included in the stations parts of the Access Documentation requiring HAL to grant access to the stations as may be necessary or expedient when an emergency occurs impacting the railway network.

4.3 Provision of services for disabled people

The Sponsors consider that drafting should be included in the stations parts of the Access Documentation:

- 4.3.1 requiring HAL to have in place a disabled persons protection policy designed to protect such persons when they use the stations forming part of the Heathrow Rail Infrastructure;
- 4.3.2 ensuring HAL has in place arrangements, procedures and services forming part of the policy referred to in paragraph 4.3.1;
- 4.3.3 regularly reviewing and consult upon any proposed amendments to the disabled persons protection policy; and
- 4.3.4 requiring HAL to provide copies of the disabled persons protection policy promptly and free of charge to any person requesting a copy.