

FREIGHT CUSTOMER TRACK ACCESS CONTRACT

Dated 01 May 2017

Between

NETWORK RAIL INFRASTRUCTURE LIMITED

- and -

VICTORIA HARBOUR LIMITED

Version published August 2016

Contents

1. INTERPRETATION.....	11
1.1 Definitions.....	11
1.2 Interpretation	19
1.3 Indemnities	20
2. NETWORK CODE	20
2.1 Incorporation	20
2.2 Modifications to the Network Code.....	20
2.3 Compliance by other operators.....	20
3. DURATION, SUSPENSION AND TERMINATION	21
3.1 Duration.....	21
3.2 Suspension and termination	21
4. STANDARD OF PERFORMANCE	21
4.1 General standard	21
4.2 Good faith.....	21
5. PERMISSION TO OPERATE	21
5.1 Permission to operate the Services.....	21
Drawdown Mechanics.....	22
Revocation of Appointed Operator’s Rights.....	23
Record of Freight Customer Access Rights	24
5.1.9 Conditions to exercise of rights under Operator Access Agreements	24
5.2 Meaning	24
5.3 [Not used].....	25
5.4 Changes to Engineering Access Statement and Timetable Planning Rules	25
5.5 Variations to Services	25
5.6 Services and appointment of a Timetable Agent.....	25
5.7 [Not used].....	27
5.8 Stabling	27
5.9 Information to assist submitting an Access Proposal or Train Operator Variation Request.....	27
6. USE OF RAILWAY CODE SYSTEMS	27
6.1 [Not used].....	27

6.2	[Not used].....	27
6.3	[Not used].....	27
6.4	[Not used].....	27
6.5	Use of Railway Code Systems.....	27
6.5.1	General.....	27
6.5.2	[Not used]	28
6.5.3	[Not used]	28
6.5.4	[Not used]	28
6.5.5	[Not used]	28
6.5.6	[Not used]	28
6.5.7	[Not used]	28
7.	ACCESS CHARGES	28
8.	LIABILITY	28
8.1	Performance Orders in relation to breach.....	28
8.2	Compensation in relation to breach	28
9.	[NOT USED]	28
10.	[NOT USED]	28
11.	RESTRICTIONS ON CLAIMS	28
11.1	Notification and mitigation	28
11.2	Restrictions on claims by Network Rail	29
11.3	Restrictions on claims by Freight Customer	29
11.4	Restriction on claims by both parties	29
11.5	Limitation on liability	30
11.6	[Not used].....	30
12.	GOVERNING LAW	30
13.	DISPUTE RESOLUTION	30
13.1	ADRR.....	30
13.1.1	Arbitration.....	30
13.2	Unpaid sums.....	31
13.3	Performance Orders.....	31
13.3.1	Power to order provisional relief	31
13.3.2	Performance Orders.....	31
13.3.3	Duties of arbitrator in relation to Performance Orders	31
13.4	Remedies	32

13.5	Exclusion of applications on preliminary points of law	32
14.	CONFIDENTIALITY	32
14.1	Confidential Information	32
14.1.1	General obligation	32
14.1.2	Network Rail - Affiliates	32
14.1.3	Freight Customer - Affiliates	32
14.2	Entitlement to divulge	33
14.3	Return of Confidential Information	34
14.4	Retention or destruction of Confidential Information	34
14.5	Ownership of Confidential Information	34
14.6	Network Code	34
15.	ASSIGNMENT	34
16.	PAYMENTS, INTEREST AND VAT	35
16.1	Payment	35
16.1.1	No deduction	35
16.1.2	Delivery of invoices	35
16.1.3	Payment and content of invoices and other statements of amounts payable	35
16.1.4	Method of payment	35
16.1.5	Credit notes	35
16.2	Disputed amounts	35
16.2.1	Notification of a dispute	35
16.2.2	Payment in full	36
16.2.3	Right to withhold payment of disputed amount	36
16.3	Interest	36
16.3.1	Amounts not paid by due date	36
16.3.2	Amounts paid which were not properly due	37
16.4	VAT	37
16.4.1	Payment of VAT	37
16.4.2	Reimbursement of VAT	37
16.4.3	VAT credit note to be issued on repayment	37
17.	FORCE MAJEURE EVENTS	37
17.1	Meaning of Force Majeure Event	37
17.2	Nature and extent of relief for force majeure	38

17.3	Entitlement to force majeure relief	39
17.4	Procedure for claiming relief.....	39
17.5	Force Majeure Notices and Reports	39
17.5.1	Force Majeure Notice.....	39
17.5.2	Force Majeure Report	40
17.5.3	Other information	40
17.6	Mitigation	40
17.7	Duration of relief for force majeure	40
17.8	Availability of Performance Order	41
17.9	[Not used].....	41
18.	MISCELLANEOUS	41
18.1	Non waiver	41
18.1.1	No waiver	41
18.1.2	Failure or delay in exercising a right or remedy.....	41
18.2	Variations.....	41
18.2.1	Amendments to be in writing and to be approved	41
18.2.2	Exceptions	41
18.2.3	No Office of Rail and Road approval needed.....	42
18.2.4	Conformed copy of contract	42
18.3	Entire contract and exclusive remedies.....	42
18.3.1	Entire contract.....	42
18.3.2	Exclusive remedies	42
18.3.3	Fraud, death and personal injury.....	43
18.4	Notices	43
18.4.1	Giving of notices	43
18.4.2	Right to modify communication details	43
18.4.3	Deemed receipt	44
18.4.4	Copyees	44
18.4.5	Notification of communication details to Appointed Operators	44
18.5	Counterparts.....	44
18.6	Survival	44
18.7	Contracts (Rights of Third Parties) Act 1999	45
18.7.1	Application to third parties.....	45
18.7.2	Application to the Office of Rail and Road.....	45

18.7.3 Contract amendments	45
18.7.4 Application to Appointed Operators.....	45
18.8 [Not used].....	45
SCHEDULE 1: CONTACT PARTICULARS.....	46
SCHEDULE 2: INFORMATION TO ASSIST SUBMITTING AN ACCESS PROPOSAL OR TRAIN OPERATOR VARIATION REQUEST	47
1. Information Request.....	47
2. Contents of the Information Request	47
3. Agreement of the Information Request.....	47
3.1 Notification by Network Rail.....	47
3.2 Failure to agree on provision of specific information.....	47
3.3 Relevant ADRR Forum Resolution	48
3.4 Provision of information by Network Rail	48
4. Parts D and G of the Network Code	48
5. Timetable Agents.....	48
SCHEDULE 3: FORMS OF NOTICES	49
Part A - Form of Drawdown Notice	49
ANNEX.....	52
Part B - Form of Revocation Notice	53
SCHEDULE 4: VARIATION TO SERVICES	56
1. Definitions	56
1.2 Interpretation	57
2. Payment.....	57
PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE	58
3. Disruption compensation.....	58
PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE.....	58
4. Services rescheduled following a Disruptive Event	58
4.1 Establishing an Alternative Train Slot.....	58
4.2 Freight Customer's response.....	58
4.3 Rejection of Alternative Train Slot.....	58
4.4 Measure of performance.....	58
4.5 Cancellation	59
4.6 Part H of the Network Code.....	59

5.	Other variations to Planned Services	59
5.1	Non-availability of a Service.....	59
5.2	Establishing an Alternative Train Slot.....	60
5.3	Freight Customer’s response.....	60
5.4	Rejection of Alternative Train Slot.....	60
5.5	Measure of performance.....	60
5.6	Cancellation	61
5.7	Services treated as a Cancellation	61
5.8	Drawn Down Rights	62
PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE		63
6.	Restrictions of Use before Possession Notice Date.....	63
SCHEDULE 5: SERVICES.....		64
1.	Definitions.....	64
2.	Rights and Services.....	66
2.1	Train Slots.....	66
2.2	Ancillary Movements	67
2.3	Train Operator Variation Services	67
2.4	Public holidays	68
3.	Network Rail’s Flexing Rights	68
3.1	Associations	68
4.	Services	68
4.1	Services	68
4.2	Specified Equipment.....	69
4.3	Information.....	69
5.	Amendment of the Rights Table	69
5.1	Circumstances in which parties may amend the Rights Table	69
5.2	Procedure for amendment of the Rights Table.....	69
ANNEX 1: RIGHTS TABLE		72
SCHEDULE 6: EVENTS OF DEFAULT, SUSPENSION AND TERMINATION ...		73
1.	Events of Default.....	73
1.1	Freight Customer Events of Default	73
1.2	Notification.....	73
1.3	Network Rail Events of Default	73
1.4	Notification.....	74

2. Suspension	74
2.1 Right to suspend	74
2.2 Contents of Suspension Notice	74
2.3 Effect of a Suspension Notice served by Network Rail	74
2.4 Effect of a Suspension Notice served by the Freight Customer	75
2.5 Suspension to be proportionate to breach	76
3. Termination	77
3.1 Network Rail's right to terminate	77
3.2 Freight Customer's right to terminate	77
3.3 Contents of Termination Notice	77
3.4 Effect of Termination Notice.....	78
3.5 Unilateral right of termination	78
3.6 Contents of unilateral termination notice.....	78
3.7 Effect of unilateral termination notice	79
4. Consequence of termination	79
4.1 Directions regarding location of Specified Equipment.....	79
4.2 Failure to comply with directions	79
4.3 Evidence of costs.....	79
SCHEDULE 7: ACCESS CHARGES	80
1. Definitions	80
2. Track Charges.....	80
2.1 Obligation on the Freight Customer to pay.....	80
2.2 Variable Charges	80
2.3 Freight Capacity Charge.....	80
2.4 Traction Electricity Charge.....	80
2.6 Incident Cap Access Charge Supplement	80
2.7 Price Variation	80
2.8 Incremental Costs	80
2.9 Office of Rail and Road's Qualifying Modification Criteria	83
2.10 Efficiency Benefit Share	84
2.11 Coal Spillage Charge	84
2.12 Coal Spillage Reduction Investment Charge.....	84
3. Access Charges Review	84
APPENDIX 1	85

SCHEDULE 8: [NOT USED]	86
SCHEDULE 9: LIMITATION ON LIABILITY	87
1. Definitions	87
2. Application	87
3. Limitation on Network Rail’s liability	87
4. Limitation on Freight Customer’s liability	87
5. Disapplication of limitation	88
6. Exclusion of legal and other costs.....	88
7. Exclusion of certain Relevant Losses.....	88
8. Continuing breaches	88
9. Final determination of claims	89
SCHEDULE 10: NETWORK CODE MODIFICATIONS	90
1. Automatic effect.....	90
1.1 General.....	90
1.2 Retrospective effect.....	90
2. Modification notice	90
2.1 Meaning.....	90
2.2 Contents of modification notice.....	90
3. Adaptation procedure.....	90
3.1 Application.....	90
3.2 Negotiation of Adaptations.....	90
3.3 Agreed adaptations - notice to the Office of Rail and Road	91
3.4 Agreed adaptations - Office of Rail and Road’s consent.....	91
3.5 Agreed requisite adaptations - Office of Rail and Road’s refusal of consent	91
3.6 Requisite adaptations - failure to agree or submit	91
3.7 Notice of determined requisite adaptations.....	92
3.8 Effect of requisite adaptations	92
4. Procedural matters	92
4.1 More than one notice	92
4.2 Differences etc. as to requisite adaptations	92
4.3 Co-operation and information.....	92
4.4 Office of Rail and Road’s criteria	93
4.5 Procedural modifications	93

4.6	Dates	93
4.7	Requirement for prior consultation	93
4.8	Consolidated contract	94
4.9	Saving	94
5.	Definitions	94

THIS CONTRACT is made as a deed the 01 day of May 2017

BETWEEN:

- (1) Network Rail Infrastructure Limited, a company registered in England under number 2904587 having its registered office at 1 Eversholt Street, London, NW1 2DN ("**Network Rail**"); and
- (2) Victoria Harbour Limited a company registered in England and Wales under number 04476519 having its registered office at 17-27 Queen's Square, Middlesbrough, TS2 1AH (the "**Freight Customer**").

WHEREAS:

- (A) Network Rail is the owner of the Network; and
- (B) Network Rail has been directed by the Office of Rail and Road to grant to the Freight Customer the right to require Network Rail to secure that one or more Appointed Operators obtain permission from Network Rail to use the Network to enable the Appointed Operators to operate the Services on the terms and conditions of this contract.

IT IS AGREED AS FOLLOWS:

1. INTERPRETATION

1.1 Definitions

In this contract, unless the context otherwise requires:

"**Access Agreement**" has the meaning ascribed to it in Part A of the Network Code;

"**Access Dispute Resolution Rules**" and "**ADRR**" have the meaning ascribed to them in Part A of the Network Code;

"**Access Proposal**" has the meaning ascribed to it in Part D of the Network Code;

"**Act**" means the Railways Act 1993;

"**Affected Party**" has the meaning ascribed to it in Clause 17.1;

"**Affiliate**" means, in relation to any company:

- (a) a company which is either a holding company or a subsidiary of such company; or
- (b) a company which is a subsidiary of a holding company of which such company is also a subsidiary,

and for these purposes "**holding company**" and "**subsidiary**" have the meanings ascribed to them in section 736 of the Companies Act 1985;

"**Alternative Train Slot**" has the meaning ascribed to it in paragraph 1.1 of Schedule 4;

"**Ancillary Movements**" has the meaning ascribed to it in Part D of the Network Code;

“Applicable System” means any system other than Railway Code Systems which the parties may agree to use for the safe planning of Train Slots over the Network;

“Appointed Operator” means such person or persons as the Freight Customer may specify in a Drawdown Notice from time to time to be the operator of all or any of the Services;

“associate” has the meaning ascribed to it in section 17 of the Act;

“Charging Period” means each period of 28 days which coincides with a Network Rail accounting period save that:

- (a) the first period and the last period may be of less than 28 days if:
 - (i) the date of signature of this contract does not coincide with the first day of one of Network Rail’s accounting periods; or
 - (ii) the Expiry Date does not coincide with the last day of one of Network Rail’s accounting periods; and
- (b) the duration of the first and last such period in any Financial Year may be varied so as to coincide with the duration of Network Rail’s accounting periods by notice from Network Rail to the Freight Customer;

“Confidential Information” means information relating to the affairs of one party to this contract or any of its Affiliates which has been provided by any such person to the other party under or for the purposes of this contract, or any matter or thing contemplated by this contract or to which this contract relates, the disclosure of which is likely materially to compromise or otherwise prejudice the commercial interests of any such person;

“contract” means this document including all schedules and appendices to it and the Network Code;

“Contract Year” means each yearly period commencing on the Drawdown Commencement Date and subsequently on each anniversary of such date;

“D-x” has the meaning ascribed to it in Part D of the Network Code;

“Decision Criteria” has the meaning ascribed to it in Part D of the Network Code;

“Default Interest Rate” is two percent above the base lending rate of Barclays Bank PLC, as varied from time to time;

“Departure Time” has the meaning ascribed to it in paragraph 1.1 of Schedule 5;

“Destination” means, in relation to a Service:

- (a) the location on the Network at which that Service is Planned to terminate; or

- (b) if the location at which that Service is Planned to terminate is not on the Network, the location on the Network which:
 - (i) will enable the train operating that Service to leave the Network;
and
 - (ii) is the most appropriate location for such train to use to terminate that Service on the Network;

“Diverted Service” has the meaning ascribed to it in paragraph 1.1 of Schedule 4;

“Drawdown Commencement Date” means 30th May 2017;

“Drawdown Notice” means a notice from the Freight Customer to Network Rail and an Appointed Operator substantially in the form of Part A of Schedule 3;

“Drawdown Service” means a Service in respect of which the Freight Customer has issued a Drawdown Notice;

“Engineering Access Statement” means the Engineering Access Statement in force in respect of the Network on 01st May 2017, as from time to time amended or replaced under Part D of the Network Code;

“Event of Default” means a Freight Customer Event of Default or a Network Rail Event of Default;

“Exercised” has the meaning ascribed to it in Part D of the Network Code;

“Expiry Date” has the meaning ascribed to it in Clause 3.1;

“Final Service” means, in respect of any Appointed Operator, the last Drawdown Service scheduled to be operated by that Appointed Operator prior to a revocation of the rights of that Appointed Operator in accordance with Clause 5.1.7;

“Financial Year” means a year commencing at 0000 hours on 1 April and ending immediately before 0000 hours on the next succeeding 1 April save that:

- (a) the first such period shall commence on the date upon which all the provisions of this contract come into effect in accordance with Clause 3;
and
- (b) the last such period shall end on the Expiry Date;

“Force Majeure Event” has the meaning ascribed to it in Clause 17.1;

“Force Majeure Notice” has the meaning ascribed to it in Clause 17.1;

“Force Majeure Report” has the meaning ascribed to it in Clause 17.1;

“Freight Customer Access Rights” means the rights granted in Clause 5.1 and Clause 5.8, and all rights ancillary thereto which are provided for in this contract;

“Freight Customer Event of Default” has the meaning ascribed to it in paragraph 1.1 of Schedule 6;

“Freight Customer Specified Equipment” has the meaning ascribed to it in paragraph 4.1 of Schedule 6;

“Innocent Party” means, in relation to a breach of an obligation under this contract, the party who is not in breach of that obligation;

“Insolvency Event”, in relation to either of the parties, has occurred where:

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph:
 - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there were substituted “£100,000” or such higher figure as the parties may agree in writing from time to time; a
 - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;
- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or sued out against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation

on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed); or

- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above, unless:
 - (i) in any case in relation to Network Rail only, a railway administration order (or application for such order) has been made or such order (or application) is made within 14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to Network Rail under section 60, 61 or 62 of the Act and for so long as any such order (or application) remains in force or pending; or
 - (ii) in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by the party in question with timely recourse to all appropriate measures and procedures;

“Intermediate Point” means, in relation to a Service:

- (a) a location on the Network at which that Service is Planned to call; or
- (b) if the location at which that Service is Planned to call is not on the Network, a location on the Network which:
 - (i) will enable the train operating that Service to be accepted off and presented onto the Network; and
 - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;

“Liability Cap” has the meaning ascribed to it in paragraph 1 of Schedule 9;

“Network” means the network of which Network Rail is the network operator and which is situated in England, Wales and Scotland;

“Network Code” means the document by that name published by Network Rail;

“Network Rail Event of Default” has the meaning ascribed to it in paragraph 1.3 of Schedule 6;

“New Working Timetable” has the meaning ascribed to it in Part D of the Network Code;

“Non-affected Party” has the meaning ascribed to it in Clause 17.1;

“Office of Rail and Road” has the meaning ascribed to it under Section 15 of the Railways and Transport Safety Act 2003, and references to **“ORR”** shall be construed as references to the Office of Rail and Road;

“Operating Constraints” means:

- (a) the Engineering Access Statement;
- (b) the Timetable Planning Rules; and
- (c) the Working Timetable and all appendices to the Working Timetable including the sectional appendices as defined in the Working Timetable and all supplements to the sectional appendices;

“Operator Access Agreement” means each track Access Agreement approved by ORR and entered into or to be entered into between Network Rail and an Appointed Operator, pursuant to which, among other things, Network Rail grants that Appointed Operator permission to use the Network to enable that Appointed Operator to operate all or any of the Services;

“Operator Access Agreement Event of Default” means, in relation to any Operator Access Agreement, a “Network Rail Event of Default” as defined in that Operator Access Agreement;

“Origin” means, in relation to a Service:

- (a) the location on the Network at which that Service is Planned to commence; or
- (b) if the location at which that Service is Planned to commence is not on the Network, the location on the Network which:
 - (i) will enable the train operating that Service to be presented onto the Network; and
 - (ii) is the most appropriate location for such train to use to move onto the Network to reach the Destination of that Service;

“Performance Order” has the meaning ascribed to it in Clause 13.4.2;

“Planned” means entered in the Working Timetable;

“Railway Code Systems” means necessary systems within the meaning of the Systems Code;

“regulated access agreement” means an access agreement as that term is defined in section 83 of the Act;

“relevant ADRR Forum” means the Forum, having the meaning ascribed to it in the ADRR, to which a Relevant Dispute is allocated for resolution in accordance with the ADRR;

“Relevant Dispute” means any difference between the parties arising out of or in connection with this contract;

“Relevant Force Majeure Event” has the meaning ascribed to it in Clause 17.1;

“Relevant Losses” means, in relation to a breach of this contract, all costs, losses (including loss of profit and loss of revenue), expenses, payments,

damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

“Relevant Obligation” has the meaning ascribed to it in Clause 17.1;

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

“Retail Prices Index” and **“RPI”** mean the General Index of Retail Prices All Items measured by CHAW. If, for any given month (the **“relevant month”**):

- (a) RPI for that relevant month shall not have been published on or before the month falling three months after (and excluding) that relevant month; or
- (b) there is a material change in the base composition of RPI,

then the parties may agree to such other index as they deem appropriate with the object of placing both parties in the position in which they would have been if either RPI had been published for the relevant month or if there had been no change in the base composition of RPI (as applicable);

“Revocation Notice” means a written notice served by the Freight Customer on Network Rail and an Appointed Operator pursuant to Clause 5.1.7 substantially in the form of Part B of Schedule 3;

“Rolled Over Access Proposal” has the meaning ascribed to it in Part D of the Network Code;

“Safety Obligations” means all applicable obligations concerning health and safety (including any duty of care arising at common law, and any obligation arising under statute, statutory instrument or mandatory code of practice) in Great Britain;

“Service Characteristics” means, in relation to a Service, the characteristics of that Service:

- (a) specified in the Rights Table (as defined in Schedule 5); or
- (b) where not specified in the Rights Table:
 - (i) specified in an Access Proposal, Rolled Over Access Proposal, Train Operator Variation Request; or
 - (ii) where the rights to operate that Service have been drawn down by the Freight Customer into an Operator Access Agreement in accordance with this contract, in a proposal by the relevant Appointed Operator of an Alternative Train Slot under paragraphs 4 or 5 of schedule 4 to that Operator Access Agreement, and accepted by Network Rail; or

- (iii) in all other circumstances, in a proposal by the Freight Customer of an Alternative Train Slot in accordance with paragraph 5 of Schedule 4;

“Services” means the services for the carriage of goods by railway specified in paragraph 4.1 of Schedule 5;

“Specified Timetable Agent’s Rights” has the meaning ascribed to it in Clause 5.6.3(b);

“Specified Equipment” means the railway vehicles which may be used by any Appointed Operator in the provision of Services on the Network, as specified in paragraph 4 of Schedule 5;

“Stabling” means the parking or laying up of the Specified Equipment or such other railway vehicles as may be used on the Network in accordance with this contract, such parking or laying up being necessary or reasonably required for giving full effect to the movements of Specified Equipment required for the provision of the Services;

“Supplemental Period” has the meaning ascribed to it in Part D of the Network Code;

“Suspension Notice” means a notice in writing served by the relevant party on the other party under paragraph 2 of Schedule 6;

“Systems Code” means the Code of Practice relating to the Management and Development of Railway Information Systems as from time to time approved by ORR under Network Rail’s network licence;

“Termination Notice” means a notice in writing served by the relevant party on the other party under paragraph 3 of Schedule 6;

“Timetable Agent” has the meaning ascribed to it in Clause 5.6.2;
“Timetable Agent’s Rights” has the meaning ascribed to it in Clause 5.6.2;

“Timetable Participant” has the meaning ascribed to it in Part D of the Network Code;

“Timetable Planning Rules” means the Timetable Planning Rules in force in respect of the Network on 01st May 2017, as from time to time amended or replaced under Part D of the Network Code;

“Track Charges” means the charges payable by or on behalf of the Freight Customer, as set out in or calculated under Schedule 7;

“Train Operator Variation” has the meaning ascribed to it in Part D of the Network Code;

“Train Operator Variation Request” has the meaning ascribed to it in Part D of the Network Code;

“Train Slot” has the meaning ascribed to it in Part D of the Network Code;

“Value Added Tax” means value added tax as provided for in the Value Added Tax Act 1994, and any tax similar or equivalent to value added tax or

any turnover tax replacing or introduced in addition to them, and “VAT” shall be construed accordingly;

“**Week**” means a period of seven days commencing at 0000 hours on Sunday and ending immediately before 0000 hours on the next succeeding Sunday;

“**Working Day**” has the meaning ascribed to it in Part D of the Network Code; and

“**Working Timetable**” has the meaning ascribed to it in Part A of the Network Code.

1.2 Interpretation

In this contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) any one gender includes the other;
- (c) all headings are for convenience of reference only and shall not be used in the construction of this contract;
- (d) reference to an item of primary or secondary legislation is to that item as amended or replaced from time to time;
- (e) reference to a contract, instrument or other document is to that contract, instrument or other document as amended, novated, supplemented or replaced from time to time;
- (f) reference to a party is to a party to this contract, its successors, permitted assigns and permitted transferees;
- (g) reference to a recital, Clause or Schedule is to a recital, clause or schedule of or to this contract; reference in a schedule to a Part of or an Appendix to a schedule is to a part of or an appendix to the schedule in which the reference appears; reference in a Part of a Schedule to a paragraph is to a paragraph of that part; reference to a Part of an appendix is to a part of the appendix in which the reference appears; and reference in a schedule to a Table is a reference to the table included in or annexed to that schedule;
- (h) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (i) references to the word “person” or “persons” or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;

- (j) “otherwise” and words following “other” shall not be limited by any foregoing words where a wider construction is possible;
- (k) the words “including” and “in particular” shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (l) words and expressions defined in the Railways Act 1993 and Network Rail’s network licence shall, unless otherwise defined in this contract, have the same meanings in this contract;
- (m) [Not used];
- (n) words and expressions defined in the Network Code shall have the same meanings in this contract;
- (o) if there is any conflict of interpretation between this contract and the Network Code, the Network Code shall prevail;
- (p) references to “the Agreement” or “this Agreement” shall be construed as references to “the contract” or “this contract”; and

1.3 Indemnities

Indemnities provided for in this contract are continuing indemnities in respect of the Relevant Losses to which they apply, and hold the indemnified party harmless on an after tax basis.

2. NETWORK CODE

2.1 Incorporation

2.1.1 Subject to Clause 2.1.2, the Network Code is incorporated in and forms part of this contract and the parties agree that, for the purposes of the Network Code, the Freight Customer shall be considered to be an Access Option Holder (as that term is defined in Condition A1.2 of the Network Code).

2.1.2 The Freight Customer shall have no obligation under this contract pursuant to condition A1.3 of the Network Code to procure that any Appointed Operator performs any obligation it may have under any Operator Access Agreement pursuant to the Network Code.

2.2 Modifications to the Network Code

If the Network Code is modified at any time, Schedule 10 shall have effect.

2.3 Compliance by other operators

Except where ORR has directed otherwise in the exercise of its powers under the Act or the Network Code, and except in relation to London Underground Limited and Heathrow Express Operating Company Limited to the extent that such persons are not party to the Network Code, Network Rail

shall ensure that all operators of trains having permission to use any track comprised in the Network agree to comply with the Network Code.

3. DURATION, SUSPENSION AND TERMINATION

3.1 Duration

The provisions of this contract shall take effect from the date of the execution of this contract and shall continue in force until the earliest of:

- (a) termination under Schedule 6; and
- (b) 2359 hours on Principal Change Date December 2021, (the “**Expiry Date**”).

3.2 Suspension and termination

Schedule 6 shall have effect.

4. STANDARD OF PERFORMANCE

4.1 General standard

Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner and, in the case of Network Rail, with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced network owner and operator.

4.2 Good faith

The parties to this contract shall, in exercising their respective rights and complying with their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith.

5. PERMISSION TO OPERATE

5.1 Permission to operate the Services

5.1.1 Subject to Clauses 5.1.2 to 5.1.7 (inclusive) and Clause 5.1.9, Network Rail:

- (a) grants to the Freight Customer the right to require Network Rail to secure that one or more Appointed Operators obtain permission from Network Rail to use the Network to enable any such Appointed Operator to operate the Services; and
- (b) acknowledges that to give effect to the Freight Customer’s rights under Clause 5.1.1(a), Network Rail will be required to enter into one or more Operator Access Agreements with the relevant Appointed Operator pursuant to which Network Rail grants or will grant that Appointed

Operator (among other things) permission to use the Network to enable that Appointed Operator to operate the Services.

Drawdown Mechanics

5.1.2 The Freight Customer may exercise the right referred to in Clause 5.1.1 on one or more occasions at any time on or after the Drawdown Commencement Date by serving a Drawdown Notice on Network Rail and the Appointed Operator who will be operating the Services to which it relates (with a copy to ORR) in accordance with Clause 5.1.3.

5.1.3 A Drawdown Notice shall not be valid unless:

- (a) it has been:
 - (i) duly completed and signed by the Freight Customer; and
 - (ii) served by the Freight Customer on both Network Rail and the Appointed Operator who will be operating the Services to which it relates (in each case using the same delivery method) not later than 20 Working Days prior to the date on which the Freight Customer requires that Appointed Operator to start operating those Services;
- (b) it specifies:
 - (i) the Services to which it relates by reference to the Service Characteristics of such Services;
 - (ii) the Appointed Operator who will be responsible for operating those Services;
 - (iii) the date and time on which each such Service shall cease to be operated by the Appointed Operator, which must be not later than the date and time on which the Freight Customer's rights under this contract in relation to such Service is scheduled to expire;
 - (iv) the extent to which the Freight Customer has exercised any of its rights under Schedule 4 in relation to those Services;
 - (v) whether or not the Appointed Operator shall be entitled to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and exercise its rights under schedule 2 to its Operator Access Agreement in relation to those Services; and
 - (vi) the Appointed Operator has entered into an Operator Access Agreement with Network Rail.

5.1.4 If Network Rail receives a Drawdown Notice from the Freight Customer, and Network Rail, acting reasonably, considers that Drawdown Notice to be invalid under Clause 5.1.3, Network Rail shall promptly notify the Freight Customer of that fact in writing, specifying why it considers such Drawdown

Notice to be invalid. Any such notice shall also be copied to the relevant Appointed Operator and ORR.

5.1.5

- (a) Subject to Clause 5.1.5(b), the Freight Customer may not issue more than one Drawdown Notice in respect of the same Service.
- (b) If the Freight Customer has issued a Revocation Notice in respect of any Drawdown Service, the Freight Customer may issue a new Drawdown Notice in respect of such Drawdown Service so long as no more than one Appointed Operator has the right to operate such Drawdown Service at the same time.

5.1.6 Unless otherwise expressly specified in the relevant Drawdown Notice or this contract, the Freight Customer may not exercise its rights (including its Timetable Agent's Rights), and shall not be obliged to perform its obligations under any of Schedule 2 (Information to assist submitting an Access Proposal or Train Operator Variation Request), Schedule 4 (Variation to Services), Schedule 5 (Services) or Schedule 7 (Access Charges) in relation to the Drawdown Services specified in that Drawdown Notice to the extent that such rights and/or obligations are equivalent to the rights and/or obligations of the relevant Appointed Operator in relation to those Drawdown Services under the corresponding schedules to its Operator Access Agreement until such time as either:

- (a) the Freight Customer exercises its rights under Clause 5.1.7 in relation to such Drawdown Services; or
- (b) the Appointed Operator's rights to operate such Drawdown Services are otherwise terminated or expire (whether by effluxion of time or otherwise),

provided that:

- (i) nothing in this Clause 5.1.6 shall prevent the Freight Customer from exercising its rights under this Clause 5.1; and
- (ii) the Appointed Operator shall remain liable for all obligations and liabilities that accrue under its Operator Access Agreement in relation to those Drawdown Services which are referable to the period from (and including) the date of the relevant Drawdown Notice to (and including) the date on which the Appointed Operator is no longer entitled to operate such Drawdown Services under its Operator Access Agreement.

Revocation of Appointed Operator's Rights

5.1.7 The Freight Customer may revoke the rights of any Appointed Operator to operate any Drawdown Service by serving a duly completed and signed Revocation Notice on each of Network Rail and that Appointed Operator not later than 20 Working Days prior to the Planned Departure Time of the Final Service. Any such Revocation Notice shall also be copied to ORR.

Record of Freight Customer Access Rights

5.1.8 Network Rail shall maintain a record of the Freight Customer Access Rights which have been included in any Operator Access Agreement as a result of the Freight Customer's exercise of its rights under Clause 5.1.1. This record shall include details of:

- (a) the Freight Customer Access Rights included in any Operator Access Agreement and the dates when the corresponding rights in any such Operator Access Agreement (pertaining to those Freight Customer Access Rights) are due to expire; and
- (b) the Freight Customer Access Rights not included in any Operator Access Agreement.

Network Rail shall provide a copy of this record to the Freight Customer and to ORR within 20 Working Days of the date of the first Drawdown Notice issue pursuant to this contract and within 20 Working Days of any change to such record.

5.1.9 Conditions to exercise of rights under Operator Access Agreements

Each party acknowledges and agrees that:

- (a) the permission to use the Network to be granted by Network Rail to one or more Appointed Operators in accordance with Clause 5.1.1 shall be subject to satisfaction of the following condition:
 - (b) the rights of the Freight Customer, its Timetable Agent or any Appointed Operator to make an Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests, and all other rights of the Freight Customer under this contract, are not subject to the conditions specified in clause 5.1.9(a) above.

5.2 Meaning

References in this contract to permission to use the Network to enable an Appointed Operator to operate the Services shall be construed to mean permission:

- (a) to use the track comprised in the Network for the provision of the Services using the Specified Equipment;
- (b) to use the track comprised in the Network in order to implement any plan established under Part H of the Network Code;
- (c) to make Ancillary Movements;
- (d) to Stable, which shall be treated, for the purposes of Part D of the Network Code, as the use of a Train Slot;

- (e) for that Appointed Operator and its associates to enter upon the Network with or without vehicles; and
- (f) for that Appointed Operator and its associates to bring things onto the Network and keep them there,

and such permission is subject, in each case and in all respects to:

- (i) the Network Code; and
- (ii) the Operating Constraints.

5.3 [Not used]

5.4 Changes to Engineering Access Statement and Timetable Planning Rules

Changes to the Engineering Access Statement and Timetable Planning Rules are subject to regulatory protection (including appeals) in accordance with Part D of the Network Code.

5.5 Variations to Services

Schedule 4 shall have effect.

5.6 Services and appointment of a Timetable Agent

5.6.1 Schedule 5 shall have effect.

5.6.2 Subject to Clause 5.6.6, the Freight Customer may appoint a third party who is not an Appointed Operator or other train operator as its agent (a "Timetable Agent") to exercise on behalf of the Freight Customer some or all of the Freight Customer's rights under this contract and the Network Code in connection with making an Access Proposal, Rolled Over Access Proposal and Train Operator Variation Request ("Timetable Agent's Rights"), including the Freight Customer's rights to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and to request information under Schedule 2, in each case to enable one or more Appointed Operators to operate the Services.

5.6.3 Where the Freight Customer appoints a Timetable Agent under Clause 5.6.2, the Freight Customer shall notify Network Rail in writing of:

- (a) the identity of that Timetable Agent; and
- (b) the Timetable Agent's Rights and corresponding Services to which the appointment of such Timetable Agent relates (the "**Specified Timetable Agent's Rights**").

5.6.4 In respect of any Timetable Agent appointed by the Freight Customer and notified to Network Rail in accordance with Clause 5.6.3, Network Rail shall be entitled:

- (a) without further investigation, to assume the power and authority of that Timetable Agent to exercise the Specified Timetable Agent's Rights on behalf of the Freight Customer;
- (b) to deal, and shall deal exclusively with that Timetable Agent in relation to the Specified Timetable Agent's Rights (to the exclusion of the Freight Customer and any other person purporting to exercise those Specified Timetable Agent's Rights); and
- (c) to treat, and shall treat the exercise by that Timetable Agent of the Specified Timetable Agent's Rights as if the Specified Timetable Agent's Rights had been exercised by the Freight Customer,

in each case until Network Rail has received notice from the Freight Customer confirming that the appointment of that Timetable Agent has been revoked by the Freight Customer. Upon receipt of such notice, Network Rail shall disregard any further exercise by that Timetable Agent of the Specified Timetable Agent's Rights and Network Rail shall only accept the exercise of those Specified Timetable Agent's Rights by either:

- (i) the Freight Customer;
- (ii) a replacement Timetable Agent notified by the Freight Customer to Network Rail in accordance with Clause 5.6.3; or
- (iii) the Appointed Operator of the relevant Services where the Freight Customer has notified Network Rail in the Drawdown Notice in respect of such Services that such Appointed Operator shall be entitled to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and exercise its rights under schedule 2 to its Operator Access Agreement in relation to such Services.

5.6.5 Unless otherwise notified in accordance with Clause 5.6.3, or unless the Freight Customer notifies Network Rail in a Drawdown Notice that the Appointed Operator specified in that Drawdown Notice shall be entitled to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and exercise its rights under schedule 2 to its Operator Access Agreement in respect of the Services identified in that Drawdown Notice, Network Rail shall be entitled to assume, and shall assume that the Freight Customer is the only person entitled to exercise the Timetable Agent's Rights in connection with the Services and Network Rail shall not accept the purported exercise of the Timetable Agent's Rights (or any rights of an Appointed Operator under an Operator Access Agreement in respect of such Services which are equivalent to the Timetable Agent's Rights) by any person other than the Freight Customer.

5.6.6 The Freight Customer shall not be entitled to appoint:

- (a) more than one Timetable Agent at the same time; and / or
- (b) a Timetable Agent in respect of any Drawdown Services where the relevant Appointed Operator has been authorised to make Access

Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and exercise its rights under schedule 2 to its Operator Access Agreement in relation to those Drawdown Services unless such rights are first revoked from the relevant Appointed Operator.

5.7 [Not used]

5.8 Stabling

Without prejudice to Network Rail's obligations, if any, under Schedule 5 to provide Stabling, Network Rail shall use all reasonable endeavours to provide such Stabling facilities as are necessary or expedient for or in connection with the provision of the Services in accordance with the Working Timetable.

5.9 Information to assist submitting an Access Proposal or Train Operator Variation Request

Schedule 2 shall have effect.

6. USE OF RAILWAY CODE SYSTEMS

6.1 [Not used]

6.2 [Not used]

6.3 [Not used]

6.4 [Not used]

6.5 Use of Railway Code Systems

6.5.1 General

The parties shall:

- (a) use the Railway Code Systems and any other Applicable System in their dealings with each other in connection with matters provided for in this contract; and
- (b) comply with the Systems Code.

6.5.2 [Not used]

6.5.3 [Not used]

6.5.4 [Not used]

6.5.5 [Not used]

6.5.6 [Not used]

6.5.7 [Not used]

7. ACCESS CHARGES

Schedule 7 shall have effect.

8. LIABILITY

8.1 Performance Orders in relation to breach

In relation to any breach of this contract:

- (a) the Innocent Party shall be entitled to apply under Clause 13.4 for a Performance Order against the party in breach; and
- (b) if a Performance Order is made, the party against whom it has been made shall comply with it

8.2 Compensation in relation to breach

In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

9. [NOT USED]

10. [NOT USED]

11. RESTRICTIONS ON CLAIMS

11.1 Notification and mitigation

A party wishing to claim under any indemnity provided for in this contract:

- (a) shall notify the other party of the relevant circumstances giving rise to that claim as soon as reasonably practicable after first becoming aware of those circumstances (and in any event within 365 days of first becoming so aware); and
- (b) subject to Clause 11.1(c), shall take all reasonable steps to prevent, mitigate and restrict the circumstances giving rise to that claim and any Relevant Losses connected with that claim; but
- (c) shall not be required to exercise any specific remedy available to it under this contract.

11.2 Restrictions on claims by Network Rail

Any claim by Network Rail against the Freight Customer for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from a cancellation of or a delay in commencement to a Restriction of Use;
- (b) [Not used];
- (c) shall exclude loss of revenue in respect of permission to use any part of the Network under or in accordance with any Access Agreement with any person (including any Operator Access Agreement); and
- (d) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which Network Rail would not have incurred as network owner and operator but for the relevant breach; and
 - (ii) give credit for any savings to Network Rail which result or are likely to result from the incurring of such amounts.

11.3 Restrictions on claims by Freight Customer

Any claim by the Freight Customer against Network Rail for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains; and
- (b) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which the Freight Customer would not have incurred as freight customer under this contract but for the relevant breach; and
 - (ii) give credit for any savings to the Freight Customer which result or are likely to result from the incurring of such amounts.

11.4 Restriction on claims by both parties

Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

- (a) do not arise naturally from the breach; and
- (b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:
 - (i) at the time of the making of this contract; or

- (ii) where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,

as the probable result of the breach.

11.5 Limitation on liability

11.5.1 Schedule 9 shall have effect so as to limit the liability of the parties to one another under the indemnities in Clauses 8.2 and 10, but:

- (a) shall not limit any liability arising under Schedules 4, 7 or 8;
- (b) in relation to a failure to perform an obligation under the Network Code, only to the extent (including as to time and conditions) that the Network Code so provides; and
- (c) subject to Clauses 11.5.2 and 18.3.3.

11.5.2 Any claim by the Freight Customer against Network Rail for indemnity for Relevant Losses shall exclude Relevant Losses to the extent that Network Rail owes and discharges its liability to indemnify an Appointed Operator in respect of any "Relevant Losses" under, and as defined in, that Appointed Operator's Operator Access Agreement which have been incurred or occasioned by the breach of this contract which gave rise to the Relevant Losses to which the Freight Customer's claim relates.

11.6 [Not used]

12. GOVERNING LAW

This contract and any non-contractual obligations connected with it shall be governed by and construed in accordance with the laws of England and Wales.

13. DISPUTE RESOLUTION

13.1 ADRR

13.1.1 Arbitration

A Relevant Dispute shall be referred for resolution in England in accordance with the ADRR, as modified by this Clause 13, unless:

- (a) any Part of the Network Code provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;
- (b) any Part of Schedules 7 or 8 provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply; or
- (c) Clause 13.2 applies.

13.2 Unpaid sums

If either party fails to pay:

- (a) any invoice issued to it under this contract in respect of Track Charges in accordance with the provisions of Schedule 7; or
- (b) any sum which has fallen due in accordance with any other provision of this contract, then, subject to Clause 16.1.1:
 - (i) the amount invoiced or sum due, as referred to in Clause 13.2(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any Track Charges or other sum due);
 - (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and
 - (iii) the dispute resolution procedures in Clauses 13.1 and 13.3 to 13.7 shall not apply to proceedings commenced under this Clause 13.2.

13.3 Performance Orders

13.3.1 Power to order provisional relief

For the purposes of section 39 of the Arbitration Act 1996, should any Relevant Dispute be allocated in accordance with the ADRR to arbitration under Chapter F of the ADRR, the arbitrator shall have power to order on a provisional basis any relief which he would have power to grant in a final award including Performance Orders.

13.3.2 Performance Orders

A Performance Order:

- (a) is an order made under Clause 13.3.3(b), relating to a Relevant Dispute, whether by way of interim or final relief; and
- (b) may be applied for by Network Rail or the Freight Customer in the circumstances set out in Clauses 8.1 and 9, subject to the qualifications in Clause 17.8,

and an application for a Performance Order shall be without prejudice to any other remedy available to the claimant under this contract (whether final or interim and whether by way of appeal under the Network Code or otherwise).

13.3.3 Duties of arbitrator in relation to Performance Orders

Without prejudice to any additional remedies that may be ordered by the arbitrator under Clause 13.4, where a dispute is allocated in accordance with

the ADRR to arbitration and a party has applied for a Performance Order, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that:

- (a) the arbitrator shall decide as soon as possible whether the application is well founded or not; and
- (b) if the arbitrator decides that the application is well founded, he shall be required to make an interim or final declaration to that effect and, in that event, the arbitrator may also make any interim or final order directing any party to do or to refrain from doing anything arising from such declaration which he considers just and reasonable in all the circumstances.

13.4 Remedies

The powers exercisable by the arbitrator as regards remedies shall include:

- (a) the powers specified in sections 48(3) to (5) of the Arbitration Act 1996;
- (b) the powers specified in the ADRR;
- (c) the power to make Performance Orders; and
- (d) the power to order within the same reference to arbitration any relief specified in Clause 13.4(a), (b) and (c) consequent upon, or for the breach of, any interim or final Performance Order previously made.

13.5 Exclusion of applications on preliminary points of law

Any recourse to any Court for the determination of a preliminary point of law arising in the course of the arbitration proceedings is excluded.

14. CONFIDENTIALITY

14.1 Confidential Information

14.1.1 General obligation

Except as permitted by Clause 14.2, all Confidential Information shall be held confidential during and after the continuance of this contract and shall not be divulged in any way to any third party without the prior written approval of the other party.

14.1.2 Network Rail - Affiliates

Except as permitted by Clause 14.2, Network Rail shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

14.1.3 Freight Customer - Affiliates

Except as permitted by Clause 14.2, the Freight Customer shall procure that its Affiliates and its and their respective officers, employees and agents shall

keep confidential and not disclose to any person any Confidential Information.

14.2 Entitlement to divulge

Either party, and its Affiliates, and its and their respective officers, employees and agents, shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:

- (a) to ORR;
- (b) to the Secretary of State or the Scottish Ministers;
- (c) to any Affiliate of either party;
- (d) to any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
- (e) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;
- (f) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance, upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
- (g) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
- (h) to the extent required by the Act, the Railways (Licensing of Railway Undertakings) Regulations 2005, any other applicable law, the rules of any recognised stock exchange or regulatory body or any written request of any taxation authority;
- (i) to the extent that it has become available to the public other than as a result of a breach of confidence;
- (j) under the order of any court or tribunal of competent jurisdiction (including the Allocation Chair or any relevant ADRR Forum, each as defined in the ADRR);
- (k) to any Appointed Operator to enable that Appointed Operator to operate the Services on behalf of the Freight Customer;

- (l) to any Timetable Agent appointed by the Freight Customer to enable that Timetable Agent to exercise its Specified Timetable Agent's Rights; and
- (m) to London Underground Limited, to the extent that;
 - (i) such information is in respect of the interaction between the operation of the Services and the provision and/or operation of railway passenger services by London Underground Limited on the Network; and
 - (ii) it is necessary to divulge such information for the safe and efficient operation of railway services on the Network.

14.3 Return of Confidential Information

Each of Network Rail and the Freight Customer shall promptly return to the other party any Confidential Information requested by the other party if such request:

- (a) is made on or within two months after the Expiry Date or, if this contract lapses or is terminated earlier, is made within two months after the date on which this contract lapses or is terminated;
- (b) is reasonable; and
- (c) contains a sufficient description of the relevant Confidential Information to enable such information to be readily identified and located.

14.4 Retention or destruction of Confidential Information

If Network Rail or the Freight Customer, as the case may be, has not received a request to return any Confidential Information to the other party under and within the time limits specified in Clause 14.3, it may destroy or retain such Confidential Information.

14.5 Ownership of Confidential Information

All Confidential Information shall be and shall remain the property of the party which supplied it to the other party.

14.6 Network Code

Nothing in this Clause 14 restricts the right of Network Rail to disclose information to which this Clause 14 applies to the extent that it is permitted or required so to do under the Network Code.

15. ASSIGNMENT

Except as contemplated by Clause 5, neither party may assign, transfer, novate or create any encumbrance or other security interest over the whole or any part of its rights and obligations under this contract except to the extent approved by ORR following consultation with the other party, and subject to the conditions (if any) of ORR's approval.

16. PAYMENTS, INTEREST AND VAT

16.1 Payment

16.1.1 No deduction

All amounts due or payable by either party under this contract shall be paid free and clear of any deduction, withholding or set off, except:

- a) as may be required by law; or
- b) as expressly provided in this contract.

16.1.2 Delivery of invoices

All invoices or statements of amounts payable issued under any provision of this contract shall be delivered by hand at, or sent by prepaid first class post or the address for service for the recipient specified in Schedule 1 and shall be deemed to have been received by the addressee in accordance with Clause 18.4.3.

16.1.3 Payment and content of invoices and other statements of amounts payable

Each invoice and statement of amounts payable shall, unless otherwise stated in this contract:

- a) be paid within 28 days of the date of its receipt; and
- b) contain such detail as to the constituent elements of the amounts stated to be payable as shall be necessary or expedient so as to enable the person to whom it is given to understand and check it.

16.1.4 Method of payment

All payments shall be made by direct debit mandate or standing order mandate, CHAPS transfer, BACS transfer or other electronic or telegraphic transfer to a London clearing bank or such other financial institution as may be approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

16.1.5 Credit notes

Where a credit note has been issued in accordance with any provision of this contract, the party in receipt of the credit note shall be entitled to apply the amount specified in it against any amount payable by it under this contract or any future invoice or statement of amounts payable it may receive under this contract.

16.2 Disputed amounts

16.2.1 Notification of a dispute

Except as otherwise provided in this contract, within 14 days of receipt of an invoice or statement of amounts payable issued under any provision of this

contract, the recipient shall notify the issuer of any aspects of the invoice or statement which it disputes, giving reasons for any dispute. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement.

16.2.2 Payment in full

Subject to Clause 16.2.3 and except as otherwise provided in this contract, where any amount contained in an invoice in accordance with Schedule 7 is in dispute under Clause 16.2.1:

- (a) the Freight Customer shall pay or procure payment (as applicable) of the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice;
- (b) payment of the disputed amount shall be without prejudice to the determination of whether such amount is properly due or not, and
- (c) Clause 16.3.2 shall apply.

16.2.3 Right to withhold payment of disputed amount

If:

- (a) any amount which is payable under any provision of this contract other than Schedule 7 is in dispute under Clause 16.2.1; or
- (b) an invoice or statement of amounts payable under any provision of this contract contains an error and the recipient of such invoice or statement has notified the issuer of any aspects of the invoice or statement which contain an error and which it disputes under Clause 16.2.1,

then:

- (i) the undisputed amount shall be paid in accordance with Clause 16.1.3, or as otherwise provided for in this contract;
- (ii) the disputed balance, or such part of it as has been agreed or determined to be payable, shall be paid or set off, as the case may be, within 35 days after the end of the Charging Period in which the dispute is resolved or determined; and
- (iii) Clause 16.3.1 shall apply also in respect of the disputed balance, or such part of it as has been agreed or determined to be payable.

16.3 Interest

16.3.1 Amounts not paid by due date

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under this contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (as well after

judgment as before), except to the extent that late payment arises from any failure by the invoicing party to comply with Clause 16.1.2 or Clause 16.1.3(b).

16.3.2 Amounts paid which were not properly due

Where a disputed amount is paid under Clause 16.2.2 and it is subsequently determined that such amount, or part of it, was not properly due, the payee shall repay the disputed amount, or relevant part, to the payer together with interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the date of actual payment until the date of actual repayment (as well after judgment as before).

16.4 VAT

16.4.1 Payment of VAT

Where any taxable supply for VAT purposes is made under or in connection with this contract by one party to the other the payer shall, in addition to any payment required for that supply, pay such VAT as is chargeable in respect of it.

16.4.2 Reimbursement of VAT

Where under this contract one party is to reimburse or indemnify the other in respect of any payment made or cost incurred by the other, the first party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other party (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.

16.4.3 VAT credit note to be issued on repayment

Where under this contract any rebate or repayment of any amount is payable by one party to the other, and the first party is entitled as a matter of law or of HM Revenue and Customs practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made, and the first party shall issue an appropriate VAT credit note to the other party.

17. FORCE MAJEURE EVENTS

17.1 Meaning of Force Majeure Event

In this Clause 17:

“**Affected Party**” means, in relation to a Force Majeure Event, the party claiming relief under this Clause 17 by virtue of that Force Majeure Event, and “**Non-affected Party**” shall be construed accordingly;

“Force Majeure Event” means, subject to Clause 17.9, any of the following events (and any circumstance arising as a direct consequence of any of the following events):

- (a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war, revolution, riot, insurrection, civil commotion, demonstration or sabotage;
- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure;
- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and
- (g) strike or other industrial action which is a single circumstance and which also is a strike or industrial action in sectors of the economy other than the railway industry;

“Force Majeure Notice” means a notice to be given by the Affected Party to the other party stating that a Force Majeure Event has occurred;

“Force Majeure Report” means a report to be given by the Affected Party to the other party following the giving of a Force Majeure Notice;

“Relevant Force Majeure Event” means a Force Majeure Event in relation to which an Affected Party is claiming relief under this Clause 17; and

“Relevant Obligation” means an obligation under this contract in respect of which a Force Majeure Event has occurred and the Affected Party has claimed relief under this Clause 17.

17.2 Nature and extent of relief for force majeure

Force majeure relief under this Clause 17:

- (a) extinguishes the obligation of the Affected Party to indemnify the other party under Clause 8.2 in respect of Relevant Losses sustained as a result of the failure of the Affected Party to perform a Relevant Obligation; but
- (b) is not available in respect of:
 - (i) any obligation to pay (or procure the payment of) money under Schedule 7; or

- (ii) any other obligation to do or refrain from doing any other thing provided for in this contract; and
- (c) is only available in relation to a failure to perform an obligation under the Network Code to the extent (including as to time and conditions) that the Network Code so provides.

17.3 Entitlement to force majeure relief

An Affected Party is entitled to force majeure relief if and to the extent that:

- (a) performance of the Relevant Obligation has been prevented or materially impeded by reason of a Force Majeure Event;
- (b) it has taken all reasonable steps, taking account of all relevant circumstances (including as to whether the event in question could reasonably have been anticipated):
 - (i) to avoid the occurrence of the Force Majeure Event; and
 - (ii) to minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform the Relevant Obligation; and
- (c) except in the case of Clause 17.1(f), none of the Affected Party, its officers, employees or agents caused the Force Majeure Event.

17.4 Procedure for claiming relief

Without prejudice to Clause 17.3, an Affected Party is only entitled to claim force majeure relief under this Clause 17 if it complies with the obligations to give Force Majeure Notices, Force Majeure Reports and provide other information under Clause 17.5 and to perform its obligations under Clause 17.6.

17.5 Force Majeure Notices and Reports

17.5.1 Force Majeure Notice

In relation to any Relevant Force Majeure Event:

- (a) as soon as reasonably practicable after the Affected Party becomes aware, or ought reasonably to have become aware, that such Force Majeure Event qualifies for relief under this Clause 17 (and, in any event, within 72 hours of becoming aware of such circumstances), the Affected Party shall give a Force Majeure Notice; and
- (b) the Force Majeure Notice shall include detailed particulars (to the extent available) of the Relevant Force Majeure Event and its consequences, its effects on the Affected Party, the Relevant Obligations, the likely duration of such consequences and effects and the remedial measures proposed by the Affected Party to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects.

17.5.2 Force Majeure Report

Following the giving of a Force Majeure Notice:

- (a) the Affected Party shall give a Force Majeure Report as soon as practicable, and in any event within 7 days of service of the Force Majeure Notice; and
- (b) the Force Majeure Report shall constitute a full report on the Relevant Force Majeure Event, amplifying the information provided in the Force Majeure Notice and containing such information as may reasonably be required by the Non-affected Party, including the effect which the Relevant Force Majeure Event is estimated to have on the Affected Party's performance of the Relevant Obligations.

17.5.3 Other information

The Affected Party shall promptly give the Non-affected Party all other information concerning the Relevant Force Majeure Event and the steps which could reasonably be taken, and which the Affected Party proposes to take, to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects as may reasonably be requested by the Non-affected Party from time to time.

17.6 Mitigation

The Affected Party shall, promptly upon becoming aware of the occurrence of a Force Majeure Event in respect of which it intends to claim relief, use all reasonable endeavours to:

- (a) minimise the effects of such Force Majeure Event on the performance of the Relevant Obligations; and
- (b) minimise the duration of such Force Majeure Event,

and shall keep the Non-affected Party fully informed of the actions which it has taken or proposes to take under this Clause 17.6.

17.7 Duration of relief for force majeure

The right of an Affected Party to relief under Clause 17.2 shall cease on the earlier of:

- (a) the date on which its performance of the Relevant Obligations is no longer prevented or materially impeded by the Relevant Force Majeure Event; and
- (b) the date on which such performance would no longer have been prevented or materially impeded if the Affected Party had complied with its obligations under Clause 17.6.

17.8 Availability of Performance Order

If, and to the extent that, a breach of this contract has been caused by a Relevant Force Majeure Event, the Non-affected Party shall not be entitled to a Performance Order except to secure performance by the Affected Party of its obligations under this Clause 17.

17.9 [Not used]

18. MISCELLANEOUS

18.1 Non waiver

18.1.1 No waiver

No waiver by either party of any failure by the other to perform any obligation under this contract shall operate or be construed as a waiver of any other or further default, whether of a like or different character.

18.1.2 Failure or delay in exercising a right or remedy

The failure to exercise or delay in exercising a right or remedy under this contract shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies, and no single or partial exercise of any right or remedy under this contract shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

18.2 Variations

18.2.1 Amendments to be in writing and to be approved

No amendment of any provision of this contract shall be effective unless:

- (a) such amendment is in writing and signed by, or on behalf of, the parties; and
- (b) if it is an amendment which:
 - (i) requires ORR's approval under section 22 of the Act; or
 - (ii) is made under section 22A or 22C of the Act or Schedule 4A to the Act

the amendment has been so approved or directed by ORR, as applicable.

18.2.2 Exceptions

Clause 18.2.1(b) does not apply to amendments of the following kinds:

- (a) an amendment made by virtue of a general approval issued by ORR under section 22 of the Act; and
- (b) a modification made by virtue of Clause 18.4.2.

18.2.3 No Office of Rail and Road approval needed

Modifications of the following kinds do not require ORR's approval under section 22 of the Act and so are not subject to Clause 18.2.1(b):

(a) modifications effected by virtue of any of the Schedules to this contract;
and

(b) modifications effected by virtue of the Network Code,

unless the relevant provision expressly states that it requires the approval of ORR.

18.2.4 Conformed copy of contract

Network Rail shall produce and send to the Freight Customer and to ORR a conformed copy of this contract within 28 days of the making of any amendment or modification to it (including any modification made by virtue of Schedule 10).

18.3 Entire contract and exclusive remedies

18.3.1 Entire contract

Subject to Clause 18.3.3:

(a) this contract contains the entire agreement between the parties in relation to the subject matter of this contract;

(b) each party acknowledges that it has not been induced to enter into this contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in this contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to any such matter; and

(c) neither party shall have any right to rescind or terminate this contract either for breach of contract or for misrepresentation or otherwise, except as expressly provided for in this contract.

18.3.2 Exclusive remedies

Subject to Clause 18.3.3 and except as expressly provided in this contract:

(a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and

(b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

18.3.3 Fraud, death and personal injury

Without prejudice to the generality of this Clause 18.3, nothing in this contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

- (a) any liability which either party would otherwise have to the other party, or any right which either party may have to rescind this contract, in respect of any statement made fraudulently by the other party before the execution of this contract;
- (b) any right which either party may have in respect of fraudulent concealment by the other party;
- (c) any right which either party may have in respect of a statement of the kind referred to in section 146 of the Act, whether or not proceedings have been instituted in that respect; or
- (d) any liability which either party may have towards the other party for death or personal injury resulting from its negligence or the negligence of any of its officers, employees or agents.

18.4 Notices

18.4.1 Giving of notices

Any notice to be given under this contract:

- (a) shall be in writing; and
- (b) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by prepaid first class post, recorded delivery to the relevant address to:
 - (i) in the case of Network Rail or the Freight Customer, the relevant address or facsimile number set out in Schedule 1; and
 - (ii) in the case of any Appointed Operator, such address or facsimile number as that Appointed Operator has notified to the Freight Customer and Network Rail from time to time in accordance with its Operator Access Agreement.

For the purposes of this Clause 18.4 and Clause 16.1.2, delivery by hand shall include delivery by a reputable firm of couriers.

18.4.2 Right to modify communication details

A party shall be entitled to modify in any respect the communication particulars which relate to it and which are set out in Schedule 1 by giving notice of such modification:

- (a) to the other party and each Appointed Operator as soon as reasonably practicable; and

- (b) to ORR within 14 days of such modification.

18.4.3 Deemed receipt

A notice shall be deemed to have been given and received:

- (a) if sent by hand or recorded delivery, at the time of delivery;
- (b) if sent by prepaid first class post from and to any place within the United Kingdom, three Working Days after posting unless otherwise proven; and
- (c) if sent by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) before 1700 hours on a Working Day, on the day of transmission and, in any other case, at 0900 hours on the next following Working Day.

18.4.4 Copyees

If Schedule 1 specifies any person to whom copies of notices shall also be sent:

- (a) the party giving a notice in the manner required by this Clause 18.4 shall send a copy of the notice to such person at the address for sending copies as specified in Schedule 1, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party under this Clause 18.4; and
- (b) such copy notice shall be sent immediately after the original notice.

provided that non-receipt of a copy notice by the person to whom a copy is required to be sent shall not affect the validity of an original notice duly received in accordance with this Clause 18.

18.4.5 Notification of communication details to Appointed Operators

At the same time as serving a Drawdown Notice on an Appointed Operator, the Freight Customer shall notify that Appointed Operator of the Freight Customer's communication particulars as set out in Schedule 1 (as the same may have been amended in accordance with Clause 18.4.2).

18.5 Counterparts

This contract may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into this contract by signing either of such counterparts.

18.6 Survival

Those provisions of this contract which by their nature or implication are required to survive expiry or termination of this contract (including the provisions of Clauses 8 (Liability), 9 ([Not used]), 10 ([Not used]), 11(Restrictions on Claims), 12 (Governing Law), 13.2 (Unpaid Sums), 14 (Confidentiality), 16 (Payments, Interest and VAT), 17 (Force Majeure

Events), paragraph 4 of Schedule 6 (Consequence of Termination) and Schedule 9 (Limitation on liability)), shall so survive and continue in full force and effect, together with any other provisions of this contract necessary to give effect to such provisions.

18.7 Contracts (Rights of Third Parties) Act 1999

18.7.1 Application to third parties

Save as provided in this Clause 18.7 or as expressly provided elsewhere in this contract, no person who is not a party to this contract shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this contract

18.7.2 Application to the Office of Rail and Road

ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under this contract.

18.7.3 Contract amendments

Subject to Clause 18.2, Network Rail and the Freight Customer shall not, after the Drawdown Commencement Date, enter into any agreement with a third party that requires the consent of any third party in order to amend this contract.

18.7.4 Application to Appointed Operators

Each Appointed Operator shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce Clause 18.4 (Notices) in respect of any notices to be served on it under this contract.

18.8 [Not used]

SCHEDULE 1: CONTACT PARTICULARS

1. Network Rail's address for service of notices is:

Network Rail Infrastructure Limited

1 Eversholt Street, London, NW1 2DN

Tel: ☒

Email: notices@networkrail.co.uk

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY AND SOLICITOR"

and copied to: ☒ Director – Freight & National Passenger Operators

Tel: ☒

Email: notices@networkrail.co.uk

2. The Freight Customer's address for the service of notices is:

VICTORIA HARBOUR LIMITED 17 – 27 Queen's Square, Middlesbrough, TS2 1AH

Tel: ☒

Email: @pdports.co.uk

All written notices to be marked:

"URGENT: ATTENTION ☒ BUSINESS DEVELOPMENT DIRECTOR – PD PORTS

and copied to: ☒ MANAGING DIRECTOR BULKS & LOGISTICS

Tel: ☒

Email: @pdports.co.uk

Fax:

SCHEDULE 2: INFORMATION TO ASSIST SUBMITTING AN ACCESS PROPOSAL OR TRAIN OPERATOR VARIATION REQUEST

1. Information Request

If the Freight Customer considers that:

- (a) it requires information in relation to the Network from Network Rail, including information about the available capacity of the Network;
- (b) the information is not contained in the Operating Constraints and could not reasonably be derived from the Operating Constraints by the Freight Customer; and
- (c) the information is reasonably required in connection with an Access Proposal or Train Operator Variation Request it is considering making,

the Freight Customer may serve a request on Network Rail for information (an “**Information Request**”).

2. Contents of the Information Request

The Information Request shall contain:

- (a) a list of the specific information which the Freight Customer considers reasonably necessary in order for it to inform its decision on whether to submit an Access Proposal or a Train Operator Variation Request and, if so, for which Train Slot; and
- (b) the timescale within which the Freight Customer considers it is reasonable for Network Rail to provide the information requested.

3. Agreement of the Information Request

3.1 Notification by Network Rail

Network Rail shall, within five Working Days of the service of the Information Request by the Freight Customer, notify the Freight Customer of:

- (a) the specific information which it is able to provide within the suggested timescale;
- (b) any information which it is not able to provide within the suggested timescale and its alternative timescale for the provision of such information; and
- (c) any information which it is not able to provide at all, giving reasons for such non-provision.

3.2 Failure to agree on provision of specific information

Following notification by Network Rail pursuant to paragraphs 3.1(b) or (c), if the parties fail to agree on the information to be provided by Network Rail in

response to the Information Request and the timescales for the provision of such information within five Working Days of such notification by Network Rail those issues shall be resolved in accordance with the ADRR..

3.3 Relevant ADRR Forum Resolution

The parties to any dispute referred under paragraph 3.2 above shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum which is to resolve the dispute shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
 - (i) the reasonableness of the Freight Customer's request for the specific information; and
 - (ii) the reasonable timescale for the provision of the information in the Information Request;
- (c) not make a determination which is inconsistent with the provisions of the Network Code; and
- (d) provide reasons.

3.4 Provision of information by Network Rail

Following agreement or determination of the information to be provided by Network Rail in response to the Information Request and the timescale for the provision of such information, Network Rail shall provide such information to the Freight Customer within the timescale so agreed or determined.

4. Parts D and G of the Network Code

The provisions of this Schedule 2 shall neither affect nor replace the rights and obligations of the parties contained in:

- (a) Part D of the Network Code concerning the provision of information about changes to the Timetable Planning Rules and/or the Engineering Access Statement and about Major Projects (as defined in Part D); and
- (b) Part G of the Network Code concerning the provision of information about Network Change, as defined in Part G.

5. Timetable Agents

In this Schedule 2, each reference to the Freight Customer shall be construed as a reference to (i) the Freight Customer and (ii) any Timetable Agent appointed by the Freight Customer to the extent of the Specified Timetable Agent's Rights.

SCHEDULE 3: FORMS OF NOTICES

Part A - Form of Drawdown Notice

From: VICTORIA HARBOUR LIMITED (the “Freight Customer”)

To: Network Rail Infrastructure Limited (“Network Rail”)

1 Eversholt Street, London, NW1 2DN

Email: notices@networkrail.co.uk

Attn: The Company Secretary and Solicitor

And to: *[Insert details of the Appointed Operator who will be operating the Services]*

Copy to: ORR

[Insert notice address details for ORR]

Dated: []

Dear Sirs

Track Access Contract (Freight Customer Access) between the Freight Customer and Network Rail dated 01 May 2017 (the “Access Contract”)

Comment [TC1]: From Page 11

- 1 We refer to the Access Contract. This is a Drawdown Notice. Terms defined in the Access Contract have the same meaning in this Drawdown Notice unless given a different meaning in this Drawdown Notice.
- 2 The Freight Customer hereby exercises its rights under Clause 5.1.1 of the Access Contract and therefore notifies Network Rail that:
 - (a) the Appointed Operator is *[insert name of the Appointed Operator]* (the “Appointed Operator”);
 - (b) the Appointed Operator’s access agreement pursuant to which the Freight Customer Services (as defined in paragraph (c) below) will be operated is *[insert details of the Appointed Operator’s Access Agreement pursuant to which the Freight Customer Services will be operated]* (the “Appointed Operator Access Agreement”);
 - (c) the Services which are to be included in the rights table in schedule 5 to the Appointed Operator Access Agreement in accordance with clause [5.10.1] of that Appointed Operator Access Agreement are set out in the Annex to this Drawdown Notice (the “Freight Customer Services”);
 - (d) the Appointed Operator [shall/shall not]¹ be entitled to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation

¹ Amend as appropriate to reflect whether or not the Appointed Operator shall be entitled to make Access Proposals, Rolled Over Access Proposals or Train Operator Variation Requests and exercise

Requests and exercise its rights under schedule 2 to the Appointed Operator Access Agreement in respect of the Freight Customer Services;

(e) as at the date of this Drawdown Notice:

[either:

- [(i) the Freight Customer has not exercised any of its rights under Schedule 4 to the Access Contract in relation to the Freight Customer Services;] or
- [(i) the Appointed Operator's rights and obligations under [paragraph[s] [] of Schedule 4] [and []] to the Appointed Operator Access Agreement shall not apply in respect of [the Freight Customer Services/the following Freight Customer Services: [insert details]] [; and / .]]²
- [(ii) the Freight Customer has secured the following Train Slot[s] in the Working Timetable, the access rights in respect of which should be incorporated into the Appointed Operator Access Agreement in accordance with clause [5.10.1] of that Appointed Operator Access Agreement:

[insert details of any Train Slots that have been secured by the Freight Customer in the Working Timetable prior to the date of this Drawdown Notice, the access rights in respect of which should be incorporated into the Appointed Operator Access Agreement.]; and/.]]³

- [[(ii) / (iii)] access rights in respect of the following Alternative Train Slots (established under Schedule 4 to the Access Contract by reference to the Working Timetable) should be incorporated into the Appointed Operator Access Agreement in accordance with clause [5.10.1] of that Appointed Operator Access Agreement:

[insert details of any Alternative Train Slots that have been established under Schedule 4, the access rights in respect of which are to be incorporated into the Appointed Operator Access Agreement]; and/.]]⁴

- [[(ii) / (iii) / (iv)] in accordance with Condition D4.3.2 of the Network Code:

its rights under schedule 2 to the Appointed Operator Access Agreement in respect of the Freight Customer Services. If not, the Freight Customer will either exercise the Timetable Agent's Rights itself or will appoint a Timetable Agent in accordance with Clause 5.6 to do so on its behalf.

² Include this paragraph if the Freight Customer has exercised any of its Schedule 4 rights in relation to the Freight Customer Services. This paragraph can also be used to specifically exclude from the draw down any other rights/obligations relating to the Freight Customer Services, if necessary.

³ Include this paragraph if the Freight Customer (or its Timetable Agent) has exercised its Timetable Agent's Rights and secured any Train slots in the Working Timetable prior to drawdown.

⁴ Include this paragraph if any Alternative Train Slots have been established under Schedule 4 to this contract and those Alternative Train Slots are to be drawn down into the Appointed Operator Access Agreement.

- (A) Network Rail has consulted with the Freight Customer with respect to; and
- (B) the Freight Customer has consented to,
- the exercise by Network Rail of its Flexing Rights in respect of the following Train Slot[s], the access rights to which shall be incorporated into the Appointed Operator Access Agreement:⁵

Details of Train Slot[s] to which the Freight Customer is entitled and which [is/are] affected by the exercise by Network Rail of its Flexing Rights pursuant to Condition D4.3.2 of the Network Code	Details of the corresponding revised Train Slot[s] to which the Freight Customer is entitled after the exercise by Network Rail of its Flexing Rights pursuant to Condition D4.3.2 of the Network Code

- 3 The first date on which the Appointed Operator shall commence operation of the Freight Customer Services is *[insert date, which should be not less than 20 Working Days from the date of the Drawdown Notice]* and the last date on which the Appointed Operator shall operate a Freight Customer Service is *[insert date, which should be not later than the scheduled Expiry Date]*.
- 4 The scheduled Expiry Date under the Access Contract is *[insert date of scheduled expiry date under this contract]*.
- 5 The Freight Customer confirms to Network Rail that this Drawdown Notice shall supersede all previous Drawdown Notices issued in relation to the Freight Customer Services to the extent only that such previous Drawdown Notices relate to such Freight Customer Services.

Yours faithfully

authorised signatory for

VICTORIA HARBOUR LIMITED

⁵ Insert in this table details of any Train Slots in respect of which (a) Network Rail has consulted with the Freight Customer in accordance with Condition D4.3.2 of the Network Code and (b) the Freight Customer has consented to the exercise by Network Rail of its Flexing Rights.

Part B - Form of Revocation Notice

From: VICTORIA HARBOUR LIMITED (the “**Freight Customer**”)

To: Network Rail Infrastructure Limited (“**Network Rail**”)

1 Eversholt Street, London, NW1 2DN

Email: [notices@networkrail.co.uk]

Attn: The Company Secretary and Solicitor

And to: [Insert details of the Appointed Operator who will be operating the Services]

Copy to: ORR

[Insert notice address details for ORR]

Dated: []

Dear Sirs

Track Access Contract (Freight Customer Access) between the Freight Customer and Network Rail dated 01 May 2017 (the “Access Contract”)

- 1 We refer to the Access Contract. This is a Revocation Notice. Terms defined in the Access Contract have the same meaning in this Revocation Notice unless given a different meaning in this Revocation Notice.
- 2 Pursuant to Clause 5.1.7 of the Access Contract we hereby notify you that, with effect from [insert date and time]⁶, we revoke the rights of the Appointed Operator to operate the Services specified below:

⁶ This should correspond to a date/time immediately following operation of the Final Service.

Yours faithfully

authorised signatory for
VICTORIA HARBOUR LIMITED

SCHEDULE 4: VARIATION TO SERVICES

1. Definitions

1.1 In this Schedule 4, unless the context otherwise requires:

“Alternative Train Slot” means, in relation to any Train Slot in the Working Timetable which becomes unavailable:

- (a) where the rights to that Train Slot have been drawn down by the Freight Customer into an Operator Access Agreement in accordance with this contract, an alternative Train Slot established under paragraph 4 or 5 of schedule 4 to that Operator Access Agreement; and
- (b) in all other circumstances, an alternative Train Slot established under paragraph 4 or 5 of this Schedule 4;

“Base Service” means:

- (a) a Planned Service which is not able to operate as Planned; or
- (b) a Train Slot in respect of a Freight Access Right as described in subparagraph “(a)” of that definition contained in Schedule 5 which is not able to be entered in the New Working Timetable or the Working Timetable in accordance with that right;

in either case because of the non-availability of any part of the Network as a result of a Network Rail Early Notice Possession;

“Cancellation” means a Service treated as a cancellation in accordance with paragraph 4.5.1 or paragraph 5.6.1;

“Disruptive Event” has the meaning ascribed to it in Part H of the Network Code;

“Diverted Service” means a Service operated using an Alternative Train Slot, where Service shall be interpreted in accordance with paragraph 1.2;

“Early Notice Possession” means any Restriction of Use of all or part of the Network notified in all material respects to either:

- (a) each relevant Appointed Operator where the Freight Customer has exercised its rights under Clause 5.1.1; or
- (b) the Freight Customer in all other circumstances,

in each case in accordance with section 4, 5 or 7 of the Engineering Access Statement prior to the Possession Notice Date;

“Network Change” has the meaning ascribed to it in Part G of the Network Code;

“Network Rail Early Notice Possession” means any Early Notice Possession other than an Operator Early Notice Possession;

“Operator Early Notice Possession” means:

- (a) where the Freight Customer has exercised its rights under Clause 5.1.1, an “Operator Early Notice Possession” as that term is defined in the Operator Access Agreement of the relevant Appointed Operator; and
- (b) in all other cases, any Early Notice Possession to the extent:
 - (i) requested by the Freight Customer (other than for the purposes of inspection, maintenance, renewal or repair of the Network); or
 - (ii) required in connection with a Network Change proposed by the Freight Customer under Condition G3 of the Network Code;

“Original Service” means a Planned Service which is not able to operate because of the non-availability of any part of the Network as described in paragraph 5.1;

“Originally Requested” has the meaning specified in paragraph 4.1;

“Possession Notice Date” means, in respect of each Service, the day which is 84 days before the day on which the Service is Planned to depart its Origin;

“Railway Operational Code” has the meaning ascribed to it in Part H of the Network Code;

“Relevant Date” has the meaning ascribed to it in paragraph 5.7; and

“Revised Base Service” means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D3 or D4.8 of the Network Code.

1.2 *Interpretation*

References in this Schedule to a “Service”:

- (a) where the rights to operate that Service have been drawn down by the Freight Customer into an Operator Access Agreement in accordance with this contract, shall be interpreted in accordance with paragraph 1.2 of schedule 4 to that Operator Access Agreement; and
- (b) in all other cases, shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

2. **Payment**

[Not used].

PART 2 - COMPENSATION FOR NOTIFICATION BEFORE THE POSSESSION NOTICE DATE

3. Disruption compensation

[Not used].

PART 3 - PROCESSES AND COMPENSATION FOR NOTIFICATION AFTER THE POSSESSION NOTICE DATE

4. Services rescheduled following a Disruptive Event

4.1 Establishing an Alternative Train Slot

Where there is a Disruptive Event:

- (a) to the extent that there is appropriate capacity available on the relevant part of the Network; and
- (b) subject to Part H of the Network Code and the Railway Operational Code,

Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as originally included in an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request (“Originally Requested”) in respect of any Service which is affected by the Disruptive Event and notify the Freight Customer of it.

4.2 Freight Customer’s response

On receiving Network Rail’s nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Freight Customer shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Freight Customer shall be treated as a Train Operator Variation); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

4.3 Rejection of Alternative Train Slot

If the Freight Customer reasonably rejects under paragraph 4.2(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

4.4 Measure of performance

If an Alternative Train Slot is accepted under paragraph 4.2(a) or is accepted as a Train Operator Variation under paragraph 4.3, then:

- (a) Network Rail shall permit the Appointed Operator nominated by the Freight Customer in accordance with Clause 5.1 to operate the relevant

Service to make the relevant movement in accordance with that Alternative Train Slot;

- (b) the Service Characteristics of the Planned Service shall be those of the original Train Slot; and
- (c) the performance of the movement shall be measured accordingly under the relevant Operator Access Agreement.

4.5 *Cancellation*

4.5.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 4.1;
- (b) the Freight Customer rejects the Alternative Train Slot nominated by Network Rail under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3; or
- (c) the Freight Customer proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Network Rail,

the relevant Service shall be treated as a “Cancellation” and paragraph 5.7 shall apply.

4.5.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 4.2(a); or
- (b) accepted as a Train Operator Variation under paragraph 4.3,

the Original Service shall not be treated as a Cancellation and the Freight Customer shall be entitled to draw down its rights in relation to such Alternative Train Slot into an Operator Access Agreement in accordance with this contract.

4.6 *Part H of the Network Code*

This paragraph 4 is subject to the rights and obligations of the parties under Part H of the Network Code and the Railway Operational Code.

5. Other variations to Planned Services

5.1 *Non-availability of a Service*

This paragraph 5 applies if, for any reason other than:

- (a) a Restriction of Use to be taken pursuant to the Engineering Access Statement which has been notified in all material respects prior to the Possession Notice Date; and
- (b) [Not used],

Network Rail nominates that any part of the Network will not be available for a Planned Service to operate at the Planned time and such non-availability is:

- (i) not as a result of a request (including a request for a change which would affect a Service) from the Freight Customer; and
- (ii) known about in sufficient time for an alternative Service to be the subject of a Train Operator Variation Request and entered into the Working Timetable as a new Planned Service.

5.2 Establishing an Alternative Train Slot

To the extent that there is appropriate capacity available on the relevant part of the Network, and subject to Parts D and H of the Network Code and the Decision Criteria, Network Rail shall promptly nominate an Alternative Train Slot which most nearly accommodates the Service as Originally Requested and notify the Freight Customer of it.

5.3 Freight Customer's response

On receiving Network Rail's nomination (if any) of an Alternative Train Slot under paragraph 5.2, the Freight Customer shall promptly by notice to Network Rail either:

- (a) accept the Alternative Train Slot nominated by Network Rail (in which case the nomination by Network Rail and its acceptance by the Freight Customer shall be treated as a Train Operator Variation); or
- (b) reasonably reject the Alternative Train Slot nominated by Network Rail.

5.4 Rejection of Alternative Train Slot

If the Freight Customer reasonably rejects under paragraph 5.3(b) the Alternative Train Slot nominated by Network Rail, it may in its notice of rejection propose a different Alternative Train Slot, which Network Rail shall treat as a Train Operator Variation Request.

5.5 Measure of performance

If an Alternative Train Slot is accepted under paragraph 5.3(a) or is accepted as a Train Operator Variation under paragraph 5.4, then:

- (a) Network Rail shall permit the Appointed Operator nominated by the Freight Customer in accordance with Clause 5.1 to operate the relevant Service to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly under the relevant Operator Access Agreement.

5.6 *Cancellation*

5.6.1 Where:

- (a) Network Rail is not able to nominate an Alternative Train Slot under paragraph 5.2;
- (b) the Freight Customer rejects the Alternative Train Slot nominated by Network Rail under paragraph 5.3(b) and does not propose a different Alternative Train Slot under paragraph 5.4; or
- (c) the Freight Customer proposes a different Alternative Train Slot under paragraph 5.4 and this is not accepted by Network Rail,

the relevant Service shall be treated as a “Cancellation” and paragraph 5.7 shall apply.

5.6.2 Where an Alternative Train Slot is:

- (a) accepted under paragraph 5.3(a); or
- (b) accepted as a Train Operator Variation under paragraph 5.4,

the Original Service shall not be treated as a Cancellation and the Freight Customer shall be entitled to draw down its rights in relation to such Alternative Train Slot into an Operator Access Agreement in accordance with this contract.

5.7 *Services treated as a Cancellation*

Where, in accordance with paragraph 4.5.1 or paragraph 5.6.1 (as the case may be), a Service is treated as a Cancellation, each of the parties acknowledges and agrees that:

- (a) if the Freight Customer’s rights in respect of such Service have not been drawn down into an Operator Access Agreement in accordance with this contract before the date upon which such Service would have been operated had it been operated as Planned and not determined to be a Cancellation under paragraph 4.5.1 or paragraph 5.6.1 (as the case may be) (the “Relevant Date”), then Network Rail shall not be obliged to pay any compensation in respect of such Cancellation; and
- (b) if the Freight Customer’s rights in respect of such Service have been drawn down into an Operator Access Agreement in accordance with this contract before the Relevant Date, then Network Rail shall be obliged under that Operator Access Agreement to pay to the relevant Appointed Operator compensation in respect of such Cancellation to the extent that such Appointed Operator is entitled to compensation for a cancellation of that Service under that Operator Access Agreement.

5.8 Drawn Down Rights

5.8.1 Where the Freight Customer's rights in relation to any Train Slot have been drawn down into an Operator Access Agreement in accordance with this contract then, subject to paragraph 5.8.2:

- (a) where such draw down occurs prior to the Freight Customer's rights under either paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) in relation to such Train Slot becoming exercisable:
 - (i) neither party shall have any rights, obligations and/or liabilities under paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of this Schedule 4 in relation to such Train Slot; and
 - (ii) paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of schedule 4 to that Operator Access Agreement shall apply in relation to such Train Slot to the exclusion of paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of this Schedule 4, whether or not Network Rail and/or the relevant Appointed Operator exercise their respective rights under such provisions; and
- (b) where such draw down occurs after the Freight Customer's rights under either paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) have become exercisable in relation to such Train Slot but prior to the relevant Service being determined to be a Cancellation in accordance with paragraph 4.5.1 or paragraph 5.6.1 (as the case may be), then from the time of draw down paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of schedule 4 to that Operator Access Agreement shall apply to such Train Slot:
 - (i) to the extent that the Freight Customer has not already exercised its corresponding rights under paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of this Schedule 4 in relation to such Train Slot; and
 - (ii) to the exclusion of the Freight Customer's remaining rights under paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of this Schedule 4 in relation to such Train Slot,

provided that the relevant Appointed Operator shall not be entitled to exercise any of its rights under paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of schedule 4 to that Operator Access Agreement to the extent that the Freight Customer has already exercised its corresponding rights under this Schedule 4.

5.8.2 Nothing in paragraph 5.8.1 shall:

- (a) prevent either party from exercising its rights; and/or
- (b) relieve either party from any of its obligations and/or liabilities,

in each case under paragraph 4 or paragraphs 5.1 to 5.6 (inclusive) (as the case may be) of this Schedule 4 in relation to any Train Slot that has not been drawn down into an Operator Access Agreement at the time such rights become exercisable;

- (c) prevent the Freight Customer, in accordance with this contract, from drawing down the right to operate a Service using an Alternative Train Slot determined under paragraph 4 or 5; or
- (d) relieve Network Rail from its obligations and liabilities, or prevent an Appointed Operator from exercising its rights, in relation to any such Alternative Train Slot drawn down into the relevant Operator Access Agreement.

PART 4 – RESTRICTIONS OF USE BEFORE POSSESSION NOTICE DATE

6. Restrictions of Use before Possession Notice Date

[Not used].

SCHEDULE 5: SERVICES

1. Definitions

In this Schedule 5, unless the context otherwise requires:

“Arrival Window” means the period of time during which a Service shall be Planned to arrive at its Destination;

“Association” means a Special Term linking the Planning of two Services at any location or locations;

“Contingent Right” means a right under this Schedule 5 which is not a Firm Right and which is subject to the fulfilment of all competing Exercised Firm Rights and any additional contingency specified in this Schedule 5 (and which is identified in the Rights Table by the notation “Contingent” in the column headed “Special Terms”);

“Contract Miles” means, in relation to a train, or a portion of a train, the actual distance in miles travelled by that train, or that portion of a train, on the Network as specified in the Rights Table or as otherwise agreed by the Appointed Operator responsible for operating that train, or portion of a train (with the consent of the Freight Customer) and Network Rail;

“Day” means any period of 24 hours beginning at 0000 hours and ending immediately before the next succeeding 0000 hours, and any reference in this Schedule to any named day of the week shall be to such period commencing on that named day. The following convention shall be used to denote days of the week:

M - Monday; T - Tuesday; W - Wednesday; Th - Thursday; F - Friday;

S - Saturday; SUN - Sunday; EWD - Monday to Saturday inclusive;

O indicates Services are run on that day alone (e.g. MFO - Monday and Friday only); and

X indicates Services are run on days other than the day or days shown with the exception of Sunday (e.g. MX - Monday excepted);

“Days per week” means the Days on which the Train Operator has a Freight Access Right to a Train Slot to operate that Service, expressed as the Day on which that Service is to be Planned to commence from its Origin;

“Departure Window” means the time of departure of a Service from its Origin having due regard to Network Rail’s Flexing Rights;

“Destination Stanox” means a numeric reference used in Network Rail systems to describe the physical location, either part of the Network or a facility adjoining the Network, to which the Service will be Planned to operate;

“Exercised” has the meaning ascribed to it in Part D of the Network Code;

“Firm Right” has the meaning ascribed to it in Part D of the Network Code;

“Freight Access Right” means either:

- (a) a Firm Right to a Train Slot relating to a Service with the characteristics set out in the Rights Table; or
- (b) a Contingent Right to a Train Slot relating to a Service with the characteristics set out in the Rights Table (and which is identified in the Rights Table by the notation “Contingent” in the column headed “Special Terms”);

“Flexing Rights” has the meaning ascribed to it in Part D of the Network Code;

“International Freight Capacity Notice” has the meaning ascribed to it in Part D of the Network Code;

“International Freight Train Slot” has the meaning ascribed to it in Part D of the Network Code;

“Loading Gauge” has, in relation to any Service, the meaning ascribed to it by Section D2 of the “Working Manual for Rail Staff - Section 2 - Loading and Conveyance of Freight Traffic” (as defined for each section of the Network within the various sectional appendices to the Working Timetable), and as denoted in the Rights Table by the equivalent W number of the Specified Equipment, where this exceeds that permitted by the Operating Constraints;

“Maximum Length of Train” means, in relation to any Service, the train length, excluding the length of a locomotive and brakevan, expressed in standard length units (“SLUs”) of 21 feet, to be used in the compilation of the Working Timetable, where this exceeds that permitted by the Operating Constraints;

“Minimum Dwell Times at Intermediate Points” means the minimum period of time that the Service shall be Planned to stay at any relevant Intermediate Point;

“Minimum Turn Around Time at Destination” means the minimum time (expressed in minutes) that a Service shall be Planned to stay at its Destination;

“Minimum Turn Around Time at Origin” means the minimum time (expressed in minutes) that a Service shall be Planned to stay at its Origin;

“Origin Stanox” means a numeric reference used in Network Rail systems to describe the physical location, either part of the Network or a facility adjoining the Network, from which the Service will be Planned to originate;

“Principal Change Date” has the meaning ascribed to it in Part D of the Network Code;

“Revised Base Service” has the meaning ascribed to it in Schedule 4;

“Rights Table” means the table at Annex 1 of this Schedule 5;

“Route Availability” has, in relation to any Service, the meaning ascribed to it in the “Working Manual For Rail Staff - Freight Train Operations”, and as denoted in the Rights Table by the equivalent RA number, where this exceeds that permitted by the Operating Constraints;

“Routing” means the route which Network Rail is to use for a Service in preparing the New Working Timetable or the Working Timetable;

“Special Terms” means any special characteristic of a Service which is specified as such in a Rights Table;

“Subsidiary Change Date” has the meaning ascribed to it in Part D of the Network Code;

“Timetable Period” has the meaning ascribed to it in Part D of the Network Code;

“Timing Load” means, in relation to a Service, the timing reference code as defined in the Working Timetable which details the maximum speed and particular combination of traction type and trailing weight, together with whether any vehicles may be conveyed to which local speed restrictions will apply;

“Train Operator Variation Services” means Services in relation to Train Operator Variation Requests are made by the Freight Customer pursuant to paragraph 2.5;

“Y Path” means, in relation to a specified Service, where the Train Operator has a Freight Access Right to that Service to:

- (a) depart from one or more Origins to the same Destination; and/or
- (b) arrive at one or more Destinations from the same Origin,

as set out in the Rights Table, provided that the Train Operator shall not be entitled to more than one Y Path Option within any one Y Path on any particular Day, such Rights being identified by the letter “Y” in the column headed “Days per Week” and “Y with [*insert the relevant train reporting number*]” in the column headed “Special Terms”; and

“Y Path Option” means in relation to a Y Path, one Origin and one Destination from a combination of one or more Origins and one or more Destinations.

2. Rights and Services

2.1 Train Slots

The Freight Customer has:

- (a) Firm Rights to Train Slots in the Working Timetable relating to Services which are not Contingent Rights; and
- (b) Contingent Rights to Train Slots in the Working Timetable (and which are identified in the Rights Table by the notation "Contingent" in the column headed "Special Terms").

2.2 *Ancillary Movements*

2.2.1 The Freight Customer has:

- (a) Firm Rights to make Ancillary Movements of Specified Equipment to the extent necessary or reasonably required to give full effect to the other Firm Rights of the Freight Customer; and
- (b) Contingent Rights to make Ancillary Movements of Specified Equipment to the extent necessary or reasonably required to give full effect to the other Contingent Rights of the Freight Customer.

2.2.2 For the purposes of paragraph 2.2.1, Ancillary Movements shall include movements:

- (a) to and from maintenance depots for the purpose of maintaining rolling stock;
- (b) for driver training purposes; and
- (c) which do not convey loaded wagons or empty passenger rolling stock;

but shall not include movements of rolling stock for the purpose of testing in furtherance of vehicle acceptance procedures.

2.3 *Train Operator Variation Services*

2.3.1 Train Operator Variation Services are services for which the Freight Customer has made a Train Operator Variation Request in accordance with Part D of the Network Code and which Train Operator Variation Request Network Rail has:

- (a) accepted or been deemed to have accepted; or
- (b) modified, and that modification has either been accepted or been deemed to have been accepted by the Freight Customer.

2.3.2 The duration of any Train Operator Variation Service shall not exceed twelve months.

2.3.3 For the purposes of paragraph 2.3.1, Train Operator Variation Services:

- (a) shall not include Services for the purpose of testing under vehicle acceptance procedures; but
- (b) shall include Services for the purpose of testing rolling stock (including testing for the purpose of mileage accumulation) which has secured an engineering acceptance certificate and a certificate of interim operation.

2.3.4 For the purpose of this paragraph 2.3, where Train Operator Variation Requests for successive Train Operator Variation Services each having substantially the same characteristics are accepted, such Train Operator Variation Services shall be aggregated for the purpose of ascertaining whether the period of twelve months has been exceeded.

2.3.5 Paragraphs 2.3.2 and 2.3.4 shall not apply to any Service to which a Freight Access Right applies that has been the subject matter of a Train Operator Variation Request.

2.4 *Public holidays*

[Not Used]

3. Network Rail's Flexing Rights

3.1 *Associations*

Where Associations are shown as Special Terms in the Rights Table relating to Firm Rights, Network Rail's Flexing Rights shall not be used to break such Associations.

4. Services

4.1 *Services*

The Services under this contract comprise:

- (a) services with the characteristics set out in the Rights Table in columns 1 to 18;
- (b) any Diverted Services;
- (c) Ancillary Movements;
- (d) any Train Operator Variation Services;
- (e) any Revised Base Service; and
- (f) any service Planned to use an International Freight Train Slot listed in Section A of the International Freight Capacity Notice applicable for the relevant Timetable Period, and which is shown in the Working Timetable as having been allocated to the Train Operator.

4.2 *Specified Equipment*

- 4.2.1 Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Firm Right to use any equipment registered with Network Rail's rolling stock library which has performance characteristics identical to or better than the Timing Load specified in the Rights Table for such Service.
- 4.2.2 Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Contingent Right to use any equipment registered with Network Rail's rolling stock library.
- 4.2.3 No rolling stock may be used unless and until it has achieved vehicle and route acceptance necessary for its use on the Network.

4.3 *Information*

The parties make no representations regarding the data set out in columns headed "For information – not part of contract" in the Rights Table and rows entitled "Non-contractual Comments" in the Rights Table. Such data does not form part of this contract and is included in the Rights Table for convenience and information only.

5. **Amendment of the Rights Table**

5.1 *Circumstances in which parties may amend the Rights Table*

Either party may by notice to the other propose that the Rights Table be amended in accordance with this paragraph 5. Such amendment shall be restricted to a change to the extent of the window in either or both of the columns headed "Arrival Window" or "Departure Window" of the Rights Table.

5.2 *Procedure for amendment of the Rights Table*

- (a) The party who wishes to amend the Rights Table shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect provided that:
 - (i) the amendment may only take effect on a Principal Change Date or Subsidiary Change Date, but in any event shall not take effect before the Principal Change Date in 2019; and
 - (ii) the notice must be given on or before the first day of the month fifteen (15) months before the relevant Principal Change Date or the Subsidiary Change Date as the case may be.
- (b) Any notice under paragraph 5.2(a) shall specify that party's proposed amendments to the extent of the window in either or both of the columns headed "Arrival Window" or "Departure Window", and be accompanied by information in reasonable detail supporting the change proposed and setting out the reasons for it.

- (c) If the party receiving a notice issued under paragraph 5.2(a) agrees that the Rights Table should be amended in accordance with that notice, then it shall as soon as reasonably practicable (and in any event no later than 20 Working Days) after receiving that notice respond in writing setting out its agreement. The parties shall then ensure that ORR is furnished with the agreed amendment and such information and evidence as ORR requires to decide whether or not to approve the amendment.
- (d) If the party receiving a notice issued under paragraph 5.2(a) does not agree that the Rights Table should be amended in accordance with that notice, then it shall respond to that notice in writing in reasonable detail and with reasons for its response within 20 Working Days of service of such notice. Promptly (and in any event within 20 Working Days) following the service of such written notice of disagreement, the parties shall endeavour to agree whether the Rights Table should be amended in accordance with this paragraph 5 and, if so, the amendments. If they do so agree, the parties shall then ensure that ORR is furnished with the agreed amendment and such information and evidence as ORR requires to decide whether or not to approve the amendment.
- (e) If the parties fail to reach agreement within 40 Working Days of service of a notice under paragraph 5.2(a), or if prior to that date both parties agree that agreement is unlikely to be reached within that period:
 - (i) either party may notify ORR; and
 - (ii) the parties shall furnish ORR with such information and evidence as ORR shall require in order to determine the matter, such determination to be binding on the parties.
- (f) In making its determination under paragraph 5.2(e)(ii), ORR shall have regard to the information and evidence provided by the parties, and the duties set out in section 4 of the Act.
- (g) An amendment to the Rights Table shall take effect only when it has been approved (in the case of an amendment agreed by the parties) or determined (in the case of a proposal referred to ORR under paragraph 5.2(e)) in writing by ORR, and shall apply from the relevant Principal Change Date proposed by the party requesting the change (in accordance with paragraph 5.2(a)).

SCHEDULE 6: EVENTS OF DEFAULT, SUSPENSION AND TERMINATION

1. Events of Default

1.1 Freight Customer Events of Default

The following are Freight Customer Events of Default:

- (a) [Not used];
- (b) an Insolvency Event occurs in relation to the Freight Customer;
- (c) [Not used];
- (d) any Track Charges or other amount due by the Freight Customer to Network Rail under this contract remain unpaid for more than seven days after their due date;
- (e) any breach of this contract by the Freight Customer which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to Network Rail; and
- (f) any breach of this contract by the Freight Customer which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators.

1.2 Notification

The Freight Customer shall notify Network Rail promptly on becoming aware of the occurrence of a Freight Customer Event of Default.

1.3 Network Rail Events of Default

The following are Network Rail Events of Default:

- (a) Network Rail ceases to be authorised to be the operator of the Network by a licence granted under section 8 of the Act unless exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to Network Rail;
- (c) [Not used];
- (d) any breach of this contract by Network Rail which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Freight Customer; and
- (e) an Operator Access Agreement Event of Default occurs under any Operator Access Agreement pursuant to which, at the time of such Operator Access Agreement Event of Default, an Appointed Operator is entitled to operate any of the Services.

1.4 *Notification*

Network Rail shall notify the Freight Customer promptly on becoming aware of the occurrence of a Network Rail Event of Default.

2. Suspension

2.1 *Right to suspend*

2.1.1 Network Rail may serve a Suspension Notice where a Freight Customer Event of Default has occurred and is continuing.

2.1.2 The Freight Customer may serve a Suspension Notice where a Network Rail Event of Default has occurred and is continuing.

2.2 *Contents of Suspension Notice*

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;
- (c) in the case of a Suspension Notice served on the Freight Customer, reasonable restrictions imposed while the Suspension Notice is in force on the Freight Customer's right to require Network Rail to secure that one or more Appointed Operators obtain permission from Network Rail to use the Network or any parts of it to enable any such Appointed Operator to operate the Services;
- (d) in the case of a Suspension Notice served on Network Rail, details of any necessary suspension of the Services; and
- (e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:
 - (i) the steps reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure to pay or procure the payment (as applicable) of any Track Charges, or pay any other amounts due, seven days shall be a reasonable grace period).

2.3 *Effect of a Suspension Notice served by Network Rail*

Where Network Rail has served a Suspension Notice on the Freight Customer:

- (a) the Freight Customer shall comply, and shall procure that each relevant Appointed Operator complies with any reasonable restrictions imposed

on the Freight Customer and such Appointed Operator by the Suspension Notice;

- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from Network Rail to the Freight Customer under paragraph 2.5.4;
- (c) service of the Suspension Notice shall not affect the Freight Customer's Firm Rights (as defined in Schedule 5) for the purpose of making an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request as defined in Part D of the Network Code; and
- (d) to give effect to the Suspension Notice, in accordance with each relevant Operator Access Agreement Network Rail shall be entitled to serve a corresponding suspension notice on each Appointed Operator whose operation of the Services will be affected by the Suspension Notice.

2.4 Effect of a Suspension Notice served by the Freight Customer

Where the Freight Customer has served a Suspension Notice on Network Rail:

- (a) it shall have the effect of suspending the Freight Customer's right to require Network Rail to secure that one or more Appointed Operators obtain permission from Network Rail to use the Network to enable any such Appointed Operator to operate the Services to the extent specified in the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Freight Customer to Network Rail under paragraph 2.5.4;
- (c) the service of the Suspension Notice shall not affect the Freight Customer's Firm Rights (as defined in Schedule 5) for the purpose of making an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request, as defined in Part D of the Network Code;
- (d) the Freight Customer shall notify each Appointed Operator whose operation of the Services will be affected by the Suspension Notice that such Suspension Notice has been served, and each such Appointed Operator shall be entitled to serve a corresponding suspension notice on Network Rail in accordance with its Operator Access Agreement; and
- (e) the Freight Customer shall not be entitled to issue a Drawdown Notice at any time after a Suspension Notice has been served on the Freight Customer unless such Suspension Notice is revoked by Network Rail in accordance with paragraph 2.5.4.

2.5 *Suspension to be proportionate to breach*

- 2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Freight Customer Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:
- (a) railway vehicles;
 - (b) Services; and
 - (c) categories of train movements or railway vehicles,
- or parts or part of them, to which the relevant Freight Customer Event of Default relates.
- 2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of the Network Rail Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:
- (a) railway vehicles;
 - (b) Services; and
 - (c) categories of train movements or railway vehicles,
- or parts or part of them, to which the relevant Network Rail Event of Default relates.
- 2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:
- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
 - (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.
- 2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3, whether in whole or in part, and it is reasonable for the suspension effected by the Suspension Notice to be revoked, whether in whole or in part, the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.
- 2.5.5 Where a revocation of a Suspension Notice (whether in whole or in part) is made by Network Rail under paragraph 2.5.4, Network Rail shall also revoke any corresponding suspension notices served by Network Rail on any Appointed Operators under their Operator Access Agreements to the same extent.

2.5.6 Where a revocation of a Suspension Notice (whether in whole or part) is made by the Freight Customer under paragraph 2.5.4, the Freight Customer shall notify any Appointed Operators notified of the Suspension Notice in accordance with paragraph 2.4(d) and shall procure that such Appointed Operators revoke any corresponding suspension notices issued by those Appointed Operators under their Operator Access Agreements to the same extent.

3. Termination

3.1 Network Rail's right to terminate

Network Rail may serve a Termination Notice on the Freight Customer where:

- (a) the Freight Customer fails to comply with any material restriction in a Suspension Notice;
- (b) the Freight Customer fails to comply with its obligations under paragraph 2.5.3;
- (c) [Not used]; or
- (d) the Freight Customer Event of Default specified in a Suspension Notice served by Network Rail is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

3.2 Freight Customer's right to terminate

The Freight Customer may serve a Termination Notice on Network Rail:

- (a) where Network Rail fails to comply with its obligations under paragraph 2.5.3;
- (b) where the Network Rail Event of Default specified in paragraph 1.3(a) has occurred and is continuing; or
- (c) where the Network Rail Event of Default specified in a Suspension Notice served by the Freight Customer is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

3.3 Contents of Termination Notice

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and

- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
 - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Freight Customer to procure the payment of Track Charges, or pay any other amounts due, seven days is a reasonable grace period).

3.4 *Effect of Termination Notice*

Where Network Rail or the Freight Customer has served a Termination Notice on the other:

- (a) the service of the Termination Notice shall not affect the parties' continuing obligations under this contract up to the date of termination, which date shall be determined in accordance with paragraph 3.4(c);
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied; and
- (c) this contract shall terminate on the later of:
 - (i) the date and time specified in the Termination Notice for the contract to terminate (or such later date and time as the party which served the Termination Notice notifies to the other before the date and time so specified); and
 - (ii) the date on which a copy of the Termination Notice is given to ORR.

3.5 *Unilateral right of termination*

The Freight Customer may at any time serve a notice on Network Rail to terminate this contract (a "unilateral termination notice"). In such circumstances, the Freight Customer shall send a copy of the unilateral termination notice to ORR and each Appointed Operator that is operating Services on behalf of the Freight Customer.

3.6 *Contents of unilateral termination notice*

The unilateral termination notice shall specify a date and time on which termination of this contract is to take effect (which shall not be earlier than 12 months from the date on which the unilateral termination notice is served on Network Rail).

3.7 *Effect of unilateral termination notice*

Where the Freight Customer has served a unilateral termination notice on Network Rail:

- (a) the service of the unilateral termination notice shall not affect the parties' continuing obligations under this contract up to the date of termination specified in the unilateral termination notice; and
- (b) the contract shall terminate under Clause 3.5 on the later of:
 - (i) the date and time specified in the unilateral termination notice; and
 - (ii) the date upon which a copy of the unilateral termination notice is sent to ORR.

4. Consequence of termination

4.1 *Directions regarding location of Specified Equipment*

Immediately before, upon or following termination or expiry of this contract, the Freight Customer shall comply or procure compliance with all reasonable directions given by Network Rail concerning the location of any Specified Equipment owned or leased by the Freight Customer which is used by an Appointed Operator solely for the purpose of operating the Services ("Freight Customer Specified Equipment").

4.2 *Failure to comply with directions*

If the Freight Customer fails to comply or procure compliance with any directions given under paragraph 4.1, Network Rail shall be entitled to remove from the Network or Stable any Freight Customer Specified Equipment left on the Network or to instruct a third party to do so and any reasonable costs incurred by Network Rail in taking such steps shall be paid promptly by the Freight Customer.

4.3 *Evidence of costs*

Network Rail shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Freight Customer shall reasonably request.

SCHEDULE 7: ACCESS CHARGES

1. Definitions

In this Schedule 7 unless the context otherwise requires:

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

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

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

2. Track Charges

2.1 *Obligation on the Freight Customer to pay*

[Not used].

2.2 *Variable Charges*

[Not used].

2.3 *Freight Capacity Charge*

[Not used].

2.4 *Traction Electricity Charge*

[Not used].

2.5 [Not used].

2.6 *Incident Cap Access Charge Supplement*

[Not used].

2.7 *Price Variation*

[Not used].

2.8 *Incremental Costs*

2.8.1 Where:

- (a) the Freight Customer makes an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request;
- (b) the operation of the Service requested for would exceed the Operating Constraints applying as at 1 April 2014;
- (c) the Freight Customer notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints applying as at 1 April 2014 in a manner so as to permit the operation of the Service requested for under this contract;
- (d) Network Rail is reasonably able to effect such modifications in a timescale that meets the Freight Customer's requirements; and
- (e) the Incremental Costs of any such modifications are not estimated by Network Rail to exceed £300,000 in any Financial Year,

then paragraph 2.8.2 shall apply.

2.8.2 Network Rail shall, as soon as reasonably practicable following receipt of the Freight Customer's notification under paragraph 2.8.1, notify the Freight Customer that:

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

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

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

2.8.5 Where Network Rail notifies the Freight Customer under paragraph 2.8.2(b), if the Freight Customer disputes Network Rail's reasons under paragraphs 2.8.2(b)(i) or 2.8.2(b) (ii), it shall be entitled to refer the matter for resolution in accordance with the ADRR.

2.8.6 Where Network Rail incurs Incremental Costs pursuant to paragraph 2.8.1, the Freight Customer shall procure that the Appointed Operator which is the beneficiary of any modification to the Operating Constraints so as to enable that Appointed Operator to operate the relevant Service, or such Appointed Operator as the Freight Customer shall nominate (in each case

notwithstanding that any such Appointed Operator was not nominated by the Freight Customer at the time at which the Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request was made), shall pay to Network Rail such amounts as are either:

(a) agreed between the Network Rail and the Freight Customer prior to operation of the relevant Service; or

(b) if not so agreed between the parties, reasonable in the circumstances,

provided that, in all cases, the terms of any such payment of Incremental Costs by an Appointed Operator to Network Rail shall be in accordance with the relevant provisions in the Operator Access Agreement of the relevant Appointed Operator.

2.8.7 [Not used].

2.8.8 [Not used].

2.8.9 [Not used].

2.8.10 If the parties have failed to agree the Incremental Costs in accordance with paragraph 2.8.6 within 20 Working Days of the date of the relevant request under paragraph 2.8.1(a), either party shall be entitled to refer the determination of the Incremental Costs for resolution in accordance with the ADRR.

2.8.11 [Not used].

2.8.12 [Not used].

2.8.13 If a reference for resolution is made under paragraphs 2.8.5, 2.8.10 or 2.8.11, the parties shall direct the expert to hold the expert determination under Part D of the Access Dispute Resolution Rules and shall:

(a) reach a decision which is fair and reasonable;

(b) have regard to:

(i) the matters in respect of which duties are imposed on ORR by virtue of section 4 of the Act; and

(ii) the policy which ORR has most recently published in relation to track access charges for freight train operators and the funding of enhancements to the Network;

(c) not make a determination which is inconsistent with any provisions of the Network Code; and

(d) give its reasons.

2.8.14 Network Rail undertakes to the Freight Customer that, subject to the approval of ORR, in any Operator Access Agreement granting access rights which are subject to the Operating Constraints and entered into by Network Rail with an

Appointed Operator after the date of signature of this contract, it will insert provisions that are, with only the necessary changes, the same as the terms set out in this paragraph 2.8.

2.8.15 [Not used].

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

2.8.17 The parties agree that where the Freight Customer's rights (a) in respect of any Service and/or (b) to make an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request in respect of any Service, have been drawn down by the Freight Customer into an Operator Access Agreement in accordance with this contract then, save as provided in paragraph 2.8.18, neither party shall have any rights or obligations under paragraphs 2.8.1 to 2.8.16 (inclusive) in respect of such Service and/or Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request, and the provisions of paragraph 2.8 of schedule 7 to the relevant Operator Access Agreement shall apply in relation to such Service and/or Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request to the exclusion of paragraphs 2.8.1 to 2.8.16 (inclusive) (whether or not the relevant Appointed Operator and/or Network Rail exercise such rights).

2.8.18 If, prior to the draw down into an Operator Access Agreement of any of the Freight Customer's rights (a) in respect of any Service and/or (b) to make an Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request in respect of any Service, the Freight Customer becomes obliged to procure that an Appointed Operator shall pay to Network Rail Incremental Costs in accordance with paragraph 2.8.6 in relation to such Service and/or Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request, then, notwithstanding paragraph 2.8.17, the Freight Customer's obligations under paragraph 2.8.6 shall not be discharged by the draw down of the Freight Customer's rights in respect of such Service and/or Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request into an Operator Access Agreement and the Freight Customer shall remain obliged to perform its obligations under paragraph 2.8.6 in respect of such Service and/or Access Proposal, Rolled Over Access Proposal or Train Operator Variation Request.

2.9 *Office of Rail and Road's Qualifying Modification Criteria*

2.9.1 ORR may at any time issue criteria:

- (a) [Not used]; and
- (b) setting out any guidance in relation to the funding of modifications to the Operating Constraints.

2.9.2 [Not used].

2.10 *Efficiency Benefit Share*

[Not used].

2.11 *Coal Spillage Charge*

[Not used].

2.12 *Coal Spillage Reduction Investment Charge*

[Not used].

3. *Access Charges Review*

3.1 It is acknowledged and agreed that, notwithstanding the fact that no amounts are payable under this contract in respect of access charges at the date of its execution, ORR may at any time carry out one or more access charges reviews of all or part of this contract if it considers it appropriate to do so.

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

APPENDIX 1

[Not used].

SCHEDULE 8: [NOT USED]

SCHEDULE 9: LIMITATION ON LIABILITY

1. Definitions

In this Schedule 9:

“**Liability Cap**” means:

- (a) in relation to the first Contract Year, the sum of £6,000,000; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{RPI_n}{RPI_1} \right]$$

where:

- (i) C_1 is the sum of £6,000,000;
- (ii) C_n is the Liability Cap in the nth subsequent Contract Year;
- (iii) RPI_n is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n; and
- (iv) RPI_1 is the Retail Prices Index (defined as RPI in Schedule 7) published or determined with respect to the month in which this contract became effective under Clause 3.1.

2. Application

The limitations on liability contained in this Schedule apply in the circumstances set out in Clause 11.5.

3. Limitation on Network Rail’s liability

In relation to any claim for indemnity made by the Freight Customer to which this Schedule 9 applies:

- (a) Network Rail shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and Network Rail shall have no further liability for it.

4. Limitation on Freight Customer’s liability

In relation to any claims for indemnity made by Network Rail to which this Schedule 9 applies:

- (a) the Freight Customer shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and the Freight Customer shall have no further liability for it.

5. Disapplication of limitation

To the extent that any Relevant Losses:

- (a) result from a conscious and intentional breach by a party; or
- (b) are in respect of obligations to compensate any person for liability for death or personal injury, whether resulting from the negligence of a party or the negligence of any of its officers, employees or agents or from a failure by a party to comply with its Safety Obligations,

such Relevant Losses:

- (i) shall not be subject to the limitation of liability in Schedule 9; and
- (ii) shall not be taken into account when calculating the amount of Relevant Losses in respect of claims admitted or finally determined in a Contract Year for the purposes of the limitations of liability in this Schedule 9.

6. Exclusion of legal and other costs

The limits on the parties' liabilities provided for in paragraphs 3 and 4 shall not apply to costs incurred in recovering any amount under a relevant claim, including legal, arbitral and other professional fees and expenses.

7. Exclusion of certain Relevant Losses

A party shall have no claim for Relevant Losses to the extent that such Relevant Losses result from its own negligence or breach of this contract.

8. Continuing breaches

Nothing in this Schedule 9 shall prevent a party making a new claim for indemnity in respect of a continuing breach of contract which:

- (a) is a continuing breach of contract which continues for more than 12 months;
- (b) is a continuing breach of contract which continues beyond a period within which it might reasonably be expected to have been remedied; or
- (c) is a breach of a Performance Order in relation to a breach of contract,

but any such new claim shall not include any sum which was the subject matter of a previous claim and was extinguished by virtue of paragraph 3(b) or 4(b).

9. Final determination of claims

For the purpose of this Schedule 9, a determination of a claim for Relevant Losses by a Court or other tribunal shall be treated as final when there is no further right of appeal or review from such determination or in respect of which any right of appeal or review has been lost, whether by expiry of time or otherwise.

SCHEDULE 10: NETWORK CODE MODIFICATIONS

1. Automatic effect

1.1 General

This contract shall have effect:

(a) with the modifications; and

(b) from the date,

specified by ORR in a modification notice as supplemented (where appropriate) by a notice of consent to requisite adaptations or a notice of determined requisite adaptations.

1.2 Retrospective effect

No relevant notice may have retrospective effect.

2. Modification notice

2.1 Meaning

A modification notice is a notice given by ORR to the parties for the purposes of this contract, which modifies specified provisions of this contract (other than this Schedule 10) by making such modifications as are consequential upon, or necessary to give full effect to, any change to the Network Code.

2.2 Contents of modification notice

A modification notice shall state:

(a) the modifications which are to be made to this contract;

(b) the date from which specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification; and

(c) which of the specified modifications are to be subject to adaptation and the backstop date for the requisite adaptations in question.

3. Adaptation procedure

3.1 Application

This paragraph 3 applies in the case of specified modifications which are specified as being subject to adaptation.

3.2 Negotiation of Adaptations

In respect of the modifications in each modification notice:

- (a) within 14 days of the date of service of the relevant modification notice, the parties shall meet and in good faith negotiate and attempt to agree the requisite adaptations;
- (b) each party shall ensure that:
 - (i) such negotiations are conducted in good faith in a timely, efficient and economical manner, with appropriate recourse to professional advice; and
 - (ii) ORR's criteria are applied in the negotiations; and
- (c) the negotiations shall not continue after the backstop date.

3.3 *Agreed adaptations - notice to the Office of Rail and Road*

If the parties have agreed the requisite adaptations on or before the backstop date, not later than seven days after the backstop date the agreed requisite adaptations shall be sent by the parties to ORR for its consent, together with a statement, signed by or on behalf of both parties:

- (a) stating the reasons for the agreed requisite adaptations;
- (b) stating the extent to which and ways in which ORR's criteria have been applied in arriving at the agreed requisite adaptations and, in any case where they have not been applied, the reasons; and
- (c) giving such other information as ORR may have requested.

3.4 *Agreed adaptations - Office of Rail and Road's consent*

If ORR is satisfied with the agreed requisite adaptations, and it gives a notice of consent to requisite adaptations, they shall have effect as provided for in paragraph 3.8.

3.5 *Agreed requisite adaptations - Office of Rail and Road's refusal of consent*

If ORR gives notice to the parties that it is not satisfied with any or all of the agreed requisite adaptations, it may:

- (a) require the parties again to follow the procedure for negotiating requisite adaptations (with such modifications as to time limits as it specifies), in which case they shall do so; or
- (b) determine the requisite adaptations itself.

3.6 *Requisite adaptations - failure to agree or submit*

If the parties have failed to submit agreed requisite adaptations to ORR for its consent within 7 days after the backstop date, it may determine the requisite adaptations itself.

3.7 *Notice of determined requisite adaptations*

A notice of determined requisite adaptations is a notice:

- (a) given by ORR to the parties for the purposes of this paragraph 3 following the failure of the parties to send to ORR within 7 days of the backstop date requisite adaptations to which it gives its consent; and
- (b) which states the requisite adaptations which ORR has determined should be made using its powers to do so under paragraph 3.5 or 3.6.

3.8 *Effect of requisite adaptations*

Requisite adaptations established either:

- (a) by agreement of the parties and in respect of which ORR has given a notice of consent to requisite adaptations under paragraph 3.4; or
- (b) by the determination of ORR under paragraph 3.5 or 3.6 and stated in a notice of determined requisite adaptations,

shall have effect from such date as ORR states in the relevant notice of consent to requisite adaptations or (as the case may be) the relevant notice of determined requisite adaptations.

4. Procedural matters

4.1 *More than one notice*

More than one modification notice may be given.

4.2 *Differences etc. as to requisite adaptations*

Any difference or question as to whether any thing is a requisite adaptation shall be determined by ORR:

- (a) on the application of either party; and
- (b) in accordance with such procedure (including as to consultation) as ORR may by notice to the parties determine.

4.3 *Co-operation and information*

If ORR gives notice to either or both of the parties that it requires from either or both of them information in relation to any requisite adaptation or proposed requisite adaptation:

- (a) the party of whom the request is made shall provide the requested information promptly and to the standard required by ORR; and
- (b) if that party fails timeously to do so, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in

relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

4.4 *Office of Rail and Road's criteria*

In relation to the negotiation of any requisite adaptation, ORR shall be entitled to:

- (a) give to the parties any criteria which it requires to be applied in the negotiations; and
- (b) modify the criteria after consultation.

4.5 *Procedural modifications*

In relation to the procedure in paragraph 3 for the agreement or establishment of requisite adaptations (including the times within which any step or thing requires to be done or achieved):

- (a) such procedure may be modified by ORR by a notice of procedural modification given by it to the parties; but
- (b) ORR may give a notice of procedural modification only if it is satisfied that it is necessary or expedient to do so in order to promote or achieve the objectives specified in section 4 of the Act or if such a notice is requested by both parties.

4.6 *Dates*

In this Schedule 10:

- (a) where provision is made for a date to be specified or stated by ORR it may, instead of specifying or stating a date, specify or state a method by which a date is to be determined, and references to dates shall be construed accordingly; and
- (b) any notice given by ORR which states a date may state different dates for different purposes.

4.7 *Requirement for prior consultation*

No relevant notice shall have effect unless:

- (a) ORR has first consulted the parties and the Secretary of State in relation to the proposed relevant notice in question;
- (b) in the consultations referred to in paragraph 4.7(a), ORR has made available to the parties and the Secretary of State such drafts of the proposed relevant notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each party and the Secretary of State the opportunity to make representations in relation to the proposed relevant notice and has

taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the relevant notice to be given;

- (d) ORR has notified the parties and the Secretary of State as to its conclusions in relation to the relevant notice in question (including by providing to each such person a copy of the text of the proposed relevant notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.7(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

4.8 *Consolidated contract*

Not later than 28 days after the giving of the last of:

- (a) a modification notice; and
- (b) a notice of determined requisite adaptations or a notice of consent to requisite adaptations (as the case may be),

Network Rail shall prepare and send to the Freight Customer, ORR and the Secretary of State a copy of this contract as so modified.

4.9 *Saving*

Nothing in this Schedule 10 affects:

- (a) the right of either party to approach and obtain from ORR guidance in relation to the requisite adaptations; or
- (b) the right of ORR at any time to effect modifications to the Network Code under Condition C8 of that code.

5. **Definitions**

In this Schedule 10 unless the context otherwise requires:

“backstop date” means the date (being not earlier than 28 days from the date of the modification notice) specified as such in a modification notice (or such later date as may be established under paragraph 3.5(a), 4.5 or 4.6);

“modification notice” has the meaning ascribed to it in paragraph 2.1;

“notice of consent to requisite means a notice given by ORR under paragraph 3.4;

adaptations”

“notice of determined requisite adaptations”

has the meaning ascribed to it in paragraph 3.7;

“notice of procedural modification”

means a notice given by ORR to the parties under paragraph 4.5 modifying any aspect of the procedure in this Schedule 10 for the agreement or establishment of requisite adaptations;

“ORR’s criteria”

means the criteria established by ORR for the purposes of the negotiation of requisite adaptations and given to the parties, or modified, under paragraph 4.4;

“relevant notice”

means a modification notice, notice of consent to requisite adaptations, notice of determined requisite adaptations, notice of procedural modification or notice of modification of ORR’s criteria;

“requisite adaptations”

in relation to specified modifications, means the amendments (including the addition of information) to the provisions in question which are necessary or expedient so as to give full effect to them in the particular circumstances of the case, and “adaptation” shall be construed accordingly; and

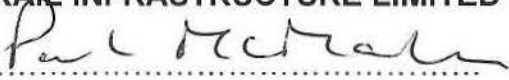
“specified”

means specified in a modification notice, and “specify” and “specifying” shall be construed accordingly.

IN WITNESS whereof the duly authorised representatives of Network Rail and the Freight Customer have executed this contract as a deed, and it has been delivered on the date stated at the beginning of this contract.

EXECUTED as a **DEED** by

NETWORK RAIL INFRASTRUCTURE LIMITED

acting by..... 

Paul McMahon, Director Freight & National Passenger Operators


In the presence of:..... 

Name: Craig Tomlin

Occupation: Customer Manager – Network Rail

Address: One Eversholt Street, London, NW1 2DN

EXECUTED as a **DEED** by

VICTORIA HARBOUR LIMITED acting by..... 

Dermot Russell – Company Secretary

In the presence of:

..... 

Name: Jerry Hopkinson – Director

Occupation:

Address: *WILLOW DENE HOUSE,
WEST OAK FARM,
BROOMLEY,
NORTHUMBRIA.*

