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Conformed and annotated copy incorporating all changes as at 24th November
2008
REDACTED

TRACK ACCESS AGREEMENT (PASSENGER SERVICES)

between

NETWORK RAIL INFRASTRUCTURE LIMITED
(FORMERLY KNOWN AS RAILTRACK PLC)^{2nd}
as Network Rail

and

TYNE AND WEAR PASSENGER TRANSPORT
EXECUTIVE
as Nexus

relating to

the route between Pelaw Junction and South Hylton
Station via Sunderland Station

Amended by the:

- (i) First Supplemental Agreement dated 30 January 2002
- (ii) Third Supplemental Agreement dated 20 December 2002
- (iii) Second Supplemental Agreement dated 31 October 2003
- (iv) Fourth Supplemental Agreement dated 06 September 2004
- (v) Fifth Supplemental Agreement dated 19 December 2003

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THIS AGREEMENT is dated the 22 day of December 1999 and made

BETWEEN:

- (1) **NETWORK RAIL INFRASTRUCTURE LIMITED**,^{2nd} (“Network Rail”), a private company limited by shares registered in England under company number 2904587 having its registered office at 40 Melton Street, London, NW1 2EE; and
- (2) **TYNE AND WEAR PASSENGER TRANSPORT EXECUTIVE**, (“Nexus”), of Nexus House, St James’ Boulevard, Newcastle-upon-Tyne, NE1 4AX^{2nd}.

WHEREAS:-

- (A) Network Rail is the owner and (under the Railways Act 1993) the infrastructure manager of that part of the Route between Pelaw Junction and Sunderland Station.
- (B) Subject to the construction thereof, Network Rail will be the owner and (under the Railways Act 1993) the infrastructure manager of that part of the Route between Sunderland Station and South Hylton.
- (C) Network Rail has agreed to grant to Nexus permission to use the track comprised in the Route on the terms and subject to the conditions of this Agreement.

IT IS HEREBY AGREED AS FOLLOWS:-

1. **INTERPRETATION**

1.1 **Definitions**

In this Agreement where the context admits:-

“Access Conditions”	means The Railtrack Track Access Conditions 1995 (Issue 3) as modified from time to time either before or after the Commencement Date;
“the Act”	means the Railways Act 1993;
“Actual Completion Date”	means the earliest date by which, in accordance with the Project Agreement, the parties have agreed or it has otherwise been determined in accordance with the dispute resolution procedure in the Project Agreement that Substantial Station Completion Certificates for each of the Stations, the Substantial MSOA Completion Certificate and the Substantial Network Completion Certificate are to be issued;
“Affiliate”	means, in relation to any company:- <ol style="list-style-type: none">(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” shall each have the meaning given in Section 736 of the Companies Act 1985;

“Agreement”	means the agreement comprised herein including all schedules and appendices hereto and the Access Conditions;
“an after tax basis”	<p>means, for the purposes of Clause 8 (and for the avoidance of doubt, shall not, unless otherwise specified in this Agreement, apply to any other provisions in this Agreement relating to payments), payments of the monies which are the subject of the indemnity after:-</p> <p>(a) first, if the cost, loss or other matter in respect of which the monies are to be paid gives rise to any relief from taxation for the beneficiary of the indemnity, by reducing the amount of such payment by the amount of tax saved (or deemed to be saved on the basis of the assumptions set out below) by the beneficiary by virtue of the relief; and</p> <p>(b) secondly, if the indemnity payment is subject to taxation in the hands of the beneficiary, by increasing the amount of the payment after any reduction under (a) above such that the net amount retained by the beneficiary after the deduction of the tax suffered (or deemed to be suffered on the basis of the assumptions set out below) by the beneficiary in respect of such indemnity payment equals the amount of the payment after any reduction under (a) above,</p> <p>and, in applying the above, it shall be assumed that:-</p> <p>(i) for the purposes of paragraph (a) above, the beneficiary has sufficient profits in the accounting period in which any relief from tax first becomes available to utilise such relief; and</p> <p>(ii) for the purposes of paragraph (b) above, the beneficiary has no reliefs available in the accounting period in which the indemnity payment is subject to tax against which to offset such tax liability;</p>
“associate”	has the meaning attributed to it in section 17 of the Act;
“Claims Allocation and Handling Agreement” and “CAHA”	means the agreement of that name providing for (inter alia) the allocation and handling of third Party claims against railway industry participants as approved from time to time by the Regulator;
“Charging Systems”	means systems used to record information in respect of train movements for the calculation by Network Rail of Variable Charges;
“Collateral Agreements”	means the agreements listed in Schedule 3;
“Commencement Date”	means the date determined in accordance with

	paragraph 3 of Schedule 1;
“Confidential Information”	means any information of a confidential nature disclosed, whether in writing, orally or by any other means, directly or indirectly from one party to this Agreement to the other either before or after the date of this Agreement and in respect of this Agreement or the relationship created hereby;
“Default Interest Rate”	means the interest rate set out in paragraph 2 of Schedule 1;
“Default Train Consist Data”	means the data listed in Annex 7C of Schedule 7 as amended from time to time in accordance with Clause 15.14;
“Emergency Access Code”	means the agreement called the Railway Industry Emergency Access Code as may be modified, revised, supplemented or replaced providing, inter alia, for access to railway facilities in emergency situations;
“Event of Default”	means a Nexus Event of Default or a Network Rail Event of Default as the context requires;
“Existing Stations”	means the stations situated on the Route known as Brockley Whins, East Boldon, Seaburn and Sunderland;
“Expiry Date”	means the date determined in accordance with paragraph 4 of Schedule 1;
“Insolvency Event”	means, in relation to Network Rail and in relation to any successor of Nexus to this Agreement which is not a publicly owned entity, where:- <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£” there was substituted £ or such higher figure as the parties may agree in writing from time to time; (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 expiration 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 served 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);
- (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, in any case, a railway administration order (or application therefor) 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 the party in question pursuant to Sections 60, 61 or 62 or the Act and for so long as any such order (or application) remains in force or pending, or unless, in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely recourse to all appropriate measures and procedures;

“Metro System Operational Area”

means the Tyne and Wear Light Transit Railway (which, for the avoidance of doubt, does not include any part of the Route);

“Metro Works Specification”

means the specification of the works to be undertaken to the Metro System Operational Area set out in Schedule 12;

“Network Rail Event of Default”

has the meaning given to that term in Clause 9.2(C);

“New Stations”

means the stations known as or, at the date of this Agreement intended to be known as, Fellgate, Stadium, Monkwearmouth, Park Lane, University, Millfield, Pallion and South Hylton to be situated on the Route;

“Nexus Event of Default”	has the meaning given to that term in Clause 9.2(A);
“Passenger Change Date”	means any of the dates upon which significant changes may be made to a Passenger Timetable being those dates specified by the European Passenger Timetable Conference;
“Passenger Development Period”	means any Timetable Development Period ending on a Passenger Change Date;
“Passenger Timetable”	means any timetable of railway passenger services published or procured to be published to the public by Network Rail;
“Period”	means each consecutive period of 28 days during the term of this Agreement provided that: <ul style="list-style-type: none"> (i) if the Commencement Date is not 1 April, the first Period shall commence on the Commencement Date and end at 23:59 hours on the day immediately preceding the first day of the immediately subsequent Period which shall be established on the assumption that the Commencement Date was 1 April; and (ii) the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to Nexus;
“Planned Completion Date”	means, subject to any variation to such date pursuant to the Project Agreement, 12 January 2002;
“Project Agreement”	means the agreement dated 22 December 1999 between Network Rail (formerly Railtrack PLC) and Nexus, pursuant to which Network Rail (formerly Railtrack PLC) has agreed to deliver the Project Outputs, as that agreement may be modified, revised, supplemented or replaced from time to time whether in whole or in part; ^{2nd}
“Project Outputs”	means the undertaking by Network Rail to: <ul style="list-style-type: none"> (A) make such changes as are necessary to the Route so as to permit the operation of Specified Equipment on the Route in exercise of the rights of Nexus in Schedule 5; (B) make such changes to the Metro System Operational Area as are required by the Metro Works Specification; and (C) in the case of each of the Stations, make such changes to the Existing Stations and construct the New Stations, respectively, so as to comply with the relevant Station Specification;
“Railway Code Systems”	means Necessary Systems within the meaning of the Systems Code;
“relevant invoice”	means an invoice issued by Network Rail to the Train Operator for any Period in accordance with Clause

	15.13.2 in respect of Variable Charges;
“Route”	means that part of the Network described in Schedule 2;
“Safety Case”	has the meaning given to that term in the Railways (Safety Case) Regulations 1994;
“Safety Obligations”	means all applicable obligations and laws concerning health and safety (including any duty of care arising at common law, and any arising under statute, statutory instrument or mandatory codes of practice) in Great Britain;
“Services”	means the railway passenger services described in Schedule 5;
“Specified Equipment”	means, in relation to the Route, the railway vehicles to be used in the provision of the Services on that Route as specified in Schedule 5;
“Stabling”	means the parking or laying up of the Specified Equipment, such parking or laying up being necessary or expedient for giving full effect to the movements of Specified Equipment required for the provision of the Services; and “Stable” and “Stabled” shall be construed accordingly;
“Stations”	means the Existing Stations and the New Stations;
“Station Specification”	means, in respect of each of the Stations, the relevant specification set out in Schedule 11;
“Strategic Rail Authority”	means the body known as the Strategic Rail Authority established under the Act as amended from time to time; ^{2nd}
“Substantial MSOA Completion Certificate”	means a certificate in substantially the form set out in Part 2 of Schedule 13;
“Substantial Network Completion Certificate”	means a certificate in substantially the form set out in Part 3 of Schedule 13;
“Substantial Station Completion Certificate”	means a certificate in substantially the form set out in Part 1 of Schedule 13;
“Suspension Notice”	means a notice in writing served by the relevant party on the other party in accordance with Clause 9.3;
“Systems Code”	means the Code of Practice relating to the Management and Development of Railway Information Systems as approved by the Regulator and made under Network Rail’s Network Licence;
“Termination Notice”	means a notice in writing served by the relevant party on the other party in accordance with Clause 9.4;
“Train Consist Data”	means the information relating to the number(s) and type(s) of railway vehicle comprised in a train movement;
“Track Charges”	means the charges payable by or on behalf of Nexus in respect of the permission to use the Routes granted

	under this Agreement as set out in and calculated in accordance with Schedule 7;
“Value Added Tax”	means Value Added Tax as provided for in the Value Added Tax Act 1994 and legislation supplemental thereto or replacing, modifying or consolidating such legislation and any reference to “VAT” shall be construed accordingly;
“Variable Charges”	means the Variable Track Usage Charge and, where the context admits, the Traction Electricity Charge as such terms are defined in Schedule 7;
“Working Timetable”	has the meaning ascribed to it in Part A of the Access Conditions. ^{4th}

1.2 **Permission to use**

References in this Agreement to permission to use the Route shall, except where the contrary is indicated, be construed to mean permission:-

- (A) to use the track comprised in the Route for the provision of the Services using the Specified Equipment; and
- (B) to make Ancillary Movements;

and to the extent reasonably necessary to give full effect to the permissions in Clauses 1.2(A) and 1.2(B) and subject to Clause 1.3:

- (C) for Nexus and its associates to enter upon that part of the Network comprising the Route, with or without vehicles; and
- (D) for Nexus and its associates to bring things on to that part of the Network comprising the Route and keep them there

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

- (1) the Access Conditions;
- (2) the applicable Rules of the Route;
- (3) the applicable Rules of the Plan; and
- (4) the Act and any directions made under the Act

and to any other restriction on such permission which may from time to time be imposed by Network Rail in accordance with this Agreement.

1.3 **Permission under Clauses 1.2(C) and 1.2(D)**

In relation to the permissions specified in Clauses 1.2(C) and 1.2(D):-

- (A) Nexus shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of Network Rail, which consent shall not be unreasonably withheld or delayed;
- (B) Nexus shall remove any vehicle or other thing so brought onto any part of the Network when reasonably directed to do so by Network Rail; and

- (C) whilst exercising any rights conferred by Clauses 1.2(C) and 1.2(D), Nexus shall, and shall procure that its associates shall, comply with such reasonable restrictions or instructions as Network Rail shall specify.

1.4 **Access Conditions**

Where the context admits, words and expressions defined in and rules of interpretation set out in the Access Conditions shall apply throughout this Agreement and for the purposes of this Agreement references to the Access Conditions in such words, expressions and rules shall be construed as references to this Agreement.

1.5 **References to Person**

A “person” shall be construed as a reference to any person, firm, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of these, and includes that person’s legal personal representatives, successors and permitted assigns.

1.6 **References to Tables**

Where in any of the Schedules to this Agreement there is a reference to any Table such reference shall be construed as a reference to the table annexed to or created in accordance with that particular Schedule.

1.7 **Clauses, Schedules, Paragraphs and Conditions**

Unless otherwise stated, references to Clauses and Schedules are to clauses and schedules of this Agreement and references to sub-clauses or paragraphs are, unless otherwise stated, references to sub-clauses of the Clause or paragraphs of the Schedule in which the reference appears. References to any Condition shall be construed as a reference to the relevant Access Condition.

2. **ENTRY INTO EFFECT**

2.1 Clause 1, Clause 2, Clause 6.8 and Clauses 10 to 14 and 16 to 20 inclusive of this Agreement and Part A (Organisation of the Access Conditions and Definitions), Part C (Modifications to the Access Conditions), Part D (Timetable Change), Part F (Vehicle Change) and Part G (Network Change) of the Access Conditions shall take effect and be binding upon the parties immediately upon signature of this Agreement.

2.2 All Clauses of this Agreement and Parts of the Access Conditions other than those listed in Clause 2.1 shall come into effect and be binding upon the parties on the Commencement Date.

3. **PERMISSION TO USE THE ROUTES**

Network Rail hereby grants Nexus permission to use the Route with effect from the Commencement Date.

4. **SAFETY**

4.1 Each of the parties shall, with effect from the Commencement Date, ensure that its Safety Case is accepted and maintained in accordance with the Railways (Safety Case) Regulations 1994.

4.2 Nexus shall comply with any reasonable request by Network Rail as regards any aspect of Nexus' operations which affects or is likely to affect compliance by Network Rail with its Safety Obligations in relation to the Route or the operation of the Route and, to the extent that it affects or is likely to affect the same, compliance by Network Rail with its Safety Obligations in relation to the remainder of the Network or the operation of the remainder of the Network.

5. **ACCESS CONDITIONS**

5.1 The Access Conditions are incorporated in and shall form part of this Agreement.

5.2 Except where the Regulator shall have directed otherwise in the exercise of his powers under the Act or the Access Conditions, Network Rail shall ensure that all operators of trains having permission to use any track comprised in the Network agree to comply with the Access Conditions.

5.3 Each of the parties agrees that for the purpose of the Access Conditions there is no Engineering Strategy applicable to this Agreement and, accordingly, any amendments to the Rules of the Route or Rules of the Plan proposed by Network Rail under Part D of the Access Conditions shall be deemed to be within and consistent with the Engineering Strategy.

6. **OBLIGATIONS OF THE PARTIES**

6.1 **Operation and Maintenance of Trains**

- (A) Nexus shall ensure, at all times following the Commencement Date, that it is authorised by a licence granted under section 8 of the Act to be the operator of trains for the provision of the Services or is exempt from the requirement to be so authorised under section 7 of the Act.
- (B) Nexus shall ensure that the Specified Equipment is maintained and operated to a standard which will permit provision of the Services in accordance with Schedule 5.
- (C) Nexus shall ensure that adequate and suitably qualified personnel are engaged in the provision of the Services and any Ancillary Movements.

6.2 **Operation and Maintenance of the Network**

- (A) Network Rail shall ensure, at all times following the Commencement Date, that it is authorised by a licence granted under section 8 of the Act to be the operator of that part of the Network comprising the Route or is exempt from the requirement to be so authorised under section 7 of the Act.
- (B) Network Rail shall ensure that adequate and suitably qualified personnel are engaged in the operation and maintenance of that part of the Network comprising the Routes.
- (C) Network Rail shall ensure that the Network is maintained and operated to a standard which shall permit the provision of the Services using the Specified Equipment in accordance with Schedule 5.

6.3 **Track Charges**

The provisions of Schedule 7 shall apply.

6.4 **Use of Railway Code Systems**

- (A) The parties shall use the Railway Code Systems in their dealings with each other in connection with matters provided for in this Agreement. Both parties shall observe and comply with the provisions of the Systems Code.
- (B) Nexus consents to the use by Network Rail of any data or information supplied by Nexus to Network Rail in the course of complying with its Safety Obligations for the purpose of monitoring Nexus' performance of its obligations under this Agreement and calculating the amount of Track Charges.

6.5 **Stabling**

Nexus shall use all reasonable endeavours to specify in the applicable Bid any Stabling requirements to enable the train movement envisaged by any particular Train Slot to be completed without obstructing the Network.

6.6 **Service Specification**

The provisions of Schedule 5 shall apply.

6.7 **Possessions Regime**

The provisions of Schedule 4 shall apply.

6.8 **Collateral Agreements**

Each of the parties shall:

- (A) by no later than the Commencement Date, ensure that, insofar as within its control, each of the Collateral Agreements is executed and delivered by all the respective parties thereto and is unconditional in all respects; and
- (B) thereafter and throughout the term of this Agreement, perform its obligations set out in the Collateral Agreements in so far as those obligations relate (directly or indirectly) to the permission to use granted by this Agreement.

6.9 **Moderation of Competition**

The provisions of Schedule 10 shall apply.

7. **PERFORMANCE**

The provisions of Schedule 8 shall apply.

8. **INDEMNITIES AND LIABILITY FOR PERFORMANCE**

8.1 Nexus shall indemnify Network Rail and keep it indemnified (on an after tax basis) against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by Network Rail:-

- (A) as a result of a failure by Nexus to comply with its obligations under the Safety Obligations;

- (B) as a result of any Environmental Damage arising directly from Nexus' operations or the proper taking by Network Rail in accordance with Condition E2 of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct or indirect result of the operations of Nexus; or
- (C) as a result of any damage to the Network arising directly from Nexus' wilful default, negligence or failure to comply with its obligations under this Agreement

save to the extent that any such damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses result from Network Rail's wilful default, negligence or breach of this Agreement, and provided that (without prejudice to the provisions of Schedule 8) this indemnity shall not extend to loss of revenue or other indirect loss and shall be subject to any limitations provided for in the Claims Allocation and Handling Agreement.

8.2 Network Rail shall indemnify Nexus and keep it indemnified (on an after tax basis) against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by Nexus:-

- (A) as a result of a failure by Network Rail to comply with its obligations under the Safety Obligations;
- (B) as a result of any Environmental Damage arising directly from the operations of the British Railways Board prior to 1st April 1994 or from the operations of Network Rail; or
- (C) as a result of any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this Agreement arising directly from Network Rail's wilful default, negligence or failure to comply with its obligations under this Agreement

save to the extent that any such damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses result from Nexus' wilful default, negligence, breach of this Agreement, and provided that (without prejudice to the provisions of Schedule 8) this indemnity shall not extend to loss of revenue or other indirect loss and shall be subject to any limitations provided for in the Claims Allocation and Handling Agreement.

8.3 **Liability for Late Trains**

The rights and obligations of the parties set out in Schedule 4 and 8 represent the parties' sole entitlement as between themselves to any compensation in respect of any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses arising from cancellations, interruptions or delays to trains.

8.4 **Restrictions on Claims**

- (A) A party wishing to claim under the indemnity in Clause 8.1 or Clause 8.2 must notify the other party of the relevant facts giving rise to that claim as soon as reasonably practicable (and in any event within 90 days) of its first becoming aware that those facts may give rise to a claim.
- (B) A party wishing to claim under the indemnity in Clause 8.1 or Clause 8.2 shall, where practicable given the circumstances, consult with the other party as to the

ways in which the circumstances giving rise to that claim and any damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders or out of pocket expenses connected with that claim may be prevented, defended, mitigated or restricted and shall take all reasonable steps to prevent, mitigate, defend and restrict any and all of the same.

8.5 **Exclusion of Claims**

Neither party to this Agreement may recover from the other party any loss of revenue (including fare revenue, subsidy, access charges, Track Charges and incentive payments) or other consequential loss in connection with the subject matter of this Agreement caused to it by the other party, save to the extent otherwise provided in this Agreement or any other agreement between them.

9. **TERM AND EVENTS OF DEFAULT**

9.1 **Term**

Subject to Clause 2, this Agreement shall come into effect on the Commencement Date and continue in force until the earlier of:-

- (A) termination pursuant to this Clause 9; and
- (B) 23:59 on the Expiry Date.

9.2 **Events of Default**

(A) **Nexus Events of Default**

The following shall be Nexus Events of Default:-

- (1) Nexus ceases to be authorised to be the operator of trains for the provision of the Services by a licence granted under Section 8 the Act unless it is otherwise exempt from the requirement to be so authorised under section 7 of the Act;
- (2) without prejudice to Clause 12, in the event that Nexus assigns this Agreement to, and/or Nexus' business is transferred to, an entity which is not wholly publicly owned (the "Private Successor"), an Insolvency Event occurs in relation to such Private Successor.
- (3) any breach by Nexus of this Agreement or of the Safety Obligations or any material breach of the Collateral Agreements which, by itself or taken together with any other such breach by Nexus, Network Rail reasonably considers constitutes a serious threat to the safe operation of any part of the Network;
- (4) any material amount due from Nexus to Network Rail pursuant to this Agreement (including by way of Track Charges) remains unpaid for more than 14 days after its due date except where liability to pay any such sum shall be contested by Nexus in good faith and with timely recourse to appropriate means of redress; and
- (5) any breach of this Agreement by Nexus (other than of the kind referred to in (4) above) which, by itself or taken together with any other such breach, results, or will or is likely to result, in serious financial loss to Network Rail.

(B) Nexus shall notify Network Rail promptly on becoming aware of the occurrence of a Nexus Event of Default.

(C) **Network Rail Events of Default**

The following shall be Network Rail Events of Default:-

- (1) Network Rail ceases to be authorised to be the operator of that part of the Network comprised in the Route by a licence granted under section 8 of the Act unless otherwise exempt from the requirement to be so authorised under section 7 of the Act;
- (2) an Insolvency Event occurs in relation to Network Rail;
- (3) any breach by Network Rail of this Agreement or of the Safety Obligations or any material breach of the Collateral Agreements which, by itself or taken together with any other such breach by Network Rail, Nexus reasonably considers constitutes a serious threat to the safe operation of the Metro System Operational Area;
- (4) any material amount due from Network Rail to the Train Operator pursuant to Schedule 4 or Schedule 8 remains unpaid for 14 days after its due date except where liability to pay any such sum shall be contested by Network Rail in good faith and with timely recourse to appropriate means of redress; and
- (5) any breach of this Agreement by Network Rail (other than of the kind referred to in (3) above) which, by itself or taken together with any other such breach, results, or will or is likely to result, in serious financial loss to Nexus.

(D) Network Rail shall notify Nexus promptly on becoming aware of the occurrence of a Network Rail Event of Default.

9.3 **Suspension**

(A) **Right to suspend**

- (1) Network Rail may serve a Suspension Notice where a Nexus Event of Default has occurred and is continuing.
- (2) Nexus may serve a Suspension Notice where a Network Rail Event of Default has occurred and is continuing.

(B) **Contents of Suspension Notice**

A Suspension Notice shall specify:-

- (1) the nature of the relevant Event of Default;
- (2) the date and time at which suspension is to take effect;
- (3) in the case of a Suspension Notice served on Nexus:- reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Route or any parts thereof or any other part of the Network;
- (4) in the case of a Suspension Notice served on Network Rail:- details of any necessary suspension of the Services; and

- (5) where the Event of Default is capable of remedy:-
 - (a) the steps reasonably required to remedy the Event of Default; and
 - (b) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure of either party to pay any amount due to the other, 14 days from the service of the Suspension Notice shall be a reasonable grace period).

(C) Effect of Suspension Notice served by Network Rail

Where Network Rail has served a Suspension Notice on Nexus:-

- (1) Nexus shall comply with any reasonable restriction thereby imposed on it;
- (2) 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 Nexus pursuant to Clause 9.3(E)(5);
- (3) service of a Suspension Notice shall not affect Nexus' continuing obligation to pay the Track Charges or the operation of Schedule 8; and
- (4) the service of the Suspension Notice shall not affect any of Nexus' Firm Contractual Rights as defined in Part D of the Access Conditions and Schedule 5 of this Agreement.

(D) Effect of a Suspension Notice served by Nexus

Where Nexus has served a Suspension Notice on Network Rail:-

- (1) it shall have the effect of suspending Nexus' permission to use the Route to provide the Services to the extent specified in such Suspension Notice;
- (2) in relation to Services suspended as specified in such Suspension Notice Nexus shall be entitled to an abatement of the Track Charges on a daily basis of an amount equal to the greater of:
 - (a) the amount payable under Schedule 8 for a cancelled Service where cancellation is attributed to Network Rail fault, on the basis that each suspended Service shall be treated as cancelled; and
 - (b) the proportion of passenger vehicle miles not run in any day divided by the passenger vehicle miles timetabled for that day, as multiplied by the daily amount of the Track Charges;
- (3) 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 Nexus to Network Rail pursuant to Clause 9.3(E)(5); and
- (4) the service of the Suspension Notice shall not affect any of Nexus' Firm Contractual Rights as defined in Part D of the Access Conditions and Schedule 5 of this Agreement or the operation of Schedule 8.

(E) Suspension to be proportionate to breach

(1) A Suspension Notice served pursuant to Clause 9.3(C) in respect of any of Nexus Events of Default shall be proportionate to the breach and, so far as reasonably practicable, apply only to the:-

- (a) railway vehicles;
- (b) Services;
- (c) part of the Route; or
- (d) categories of train movements or railway vehicles

(or (as the case may be) parts or part thereof) to which the relevant Nexus Event of Default relates and the remainder of the rights and obligations of the parties shall remain in full force and effect.

(2) A Suspension Notice served pursuant to Clause 9.3(D) in respect of any Network Rail Event of Default shall be proportionate to the breach and, so far as reasonably practicable, apply only to the:-

- (a) railway vehicles;
- (b) Services;
- (c) part of the Route; or
- (d) categories of train movements or railway vehicles

(or (as the case may be) parts or part thereof) to which the relevant Network Rail Event of Default relates and the remainder of the rights and obligations of the parties shall remain in full force and effect.

(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 shall be reasonable and necessary 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.

(4) The party (“recipient”) served with a Suspension Notice which specifies an Event of Default which is not capable of remedy may nevertheless require that the suspension effected by that Suspension Notice is revoked (pursuant to Clause 9.3(E)(5)) if, within 7 days of service of the Suspension Notice (or such longer period as the party which served the Suspension Notice (the “non-defaulting party”) may (in its absolute discretion) allow), the recipient puts the non-defaulting party (and to the non-defaulting party’s satisfaction, acting in a proper (and not a frivolous or vexatious) manner) in the position it would have been in had the Event of Default, the subject of the Suspension Notice, not occurred.

(5) Where a party served with a Suspension Notice has complied with its obligations under Clause 9.3(E)(3)(a) (whether in whole or in part) or, as the case may be, Clause 9.3(E)(4) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (in the case of Clause 9.3(E)(3)(a), whether in whole or in part), the party which shall have 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.

9.4 **Termination**

(A) **Network Rail's Right to Terminate**

Network Rail may serve a Termination Notice on Nexus:-

- (1) where Nexus fails to comply with any material restriction in a Suspension Notice;
- (2) where Nexus fails to comply with its obligations under Clause 9.3(E)(3)(a) within the grace period referred to in Clause 9.3(B)(5);
- (3) where the Nexus Event of Default described in Clause 9.2(A)(1) has occurred and has continued for more than 28 days;
- (4) where the Nexus Event of Default specified in a Suspension Notice served by Network Rail is not capable of being remedied, is not rectified in accordance with Clause 9.3(E)(4) and three months have elapsed from the service of the said Suspension Notice,

provided always that Network Rail may only serve a Termination Notice on Nexus where the basis for the Termination Notice is an Event of Default as described in Clause 9.2(A)(2) or Clause 9.2(A)(4) if that Event of Default has occurred and is continuing.

(B) **Nexus' Right to Terminate**

Nexus may serve a Termination Notice on Network Rail:-

- (1) where Network Rail fails to comply with any material restriction in a Suspension Notice;
- (2) where Network Rail fails to comply with its obligations under Clause 9.3(E)(3)(a) within the grace period referred to in Clause 9.3(B)(5);
- (3) where the Network Rail Event of Default described in Clause 9.2(C)(1) has occurred and has continued for more than 28 days;
- (4) where the Network Rail Event of Default specified in a Suspension Notice served by Nexus is not capable of being remedied, is not rectified in accordance with Clause 9.3(E)(4) and three months have elapsed from the service of the said Suspension Notice,

provided always that Nexus may only serve a Termination Notice on Network Rail where the basis for the Termination Notice is an Event of Default as described in Clause 9.2(C)(2) or Clause 9.2(C)(4) if that Event of Default has occurred and is continuing.

(C) **Contents of Termination Notice**

A Termination Notice shall specify:-

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

- (3) where the relevant Event of Default is capable of remedy:-
 - (a) the steps reasonably required to remedy the Event of Default; and
 - (b) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of either party to pay any amount due to the other, 14 days from the service of the Termination Notice shall be a reasonable grace period).

(D) **Effect of Termination Notice**

Where Network Rail or Nexus has served a Termination Notice on the other:-

- (1) the service of such Termination Notice shall not affect the parties' continuing rights and obligations under this Agreement up to the date of termination as specified in the Termination Notice or such later date as the party which has served the Termination Notice may notify to the other following the service of the Termination Notice but prior to the date upon which it shall have been specified to have effect;
- (2) 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 or is deemed remedied; and
- (3) this Agreement shall terminate on the date and time specified in the Termination Notice or such later date and time as the party which has served the Termination Notice may notify to the other prior to the date and time upon which it shall have been specified to have effect.

9.5 **Consequences of Termination**

- (A) Immediately prior to, upon or following termination or expiry of this Agreement, Nexus shall comply or procure compliance with all reasonable directions given by Network Rail regarding the positioning and location of the Specified Equipment. If Nexus fails to comply with any such directions Network Rail shall be entitled to remove from the Network or Stable any 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 Nexus to Network Rail. If so requested by Nexus, Network Rail shall provide such evidence of such costs as Nexus shall reasonably request.
- (B) If this Agreement is terminated as a result of a Network Rail Event of Default, then Network Rail shall pay the reasonable costs and expenses incurred by Nexus in removing the Specified Equipment from the Network, provided that Nexus shall, if so requested by Network Rail, provide such evidence of such costs as Network Rail shall reasonably request.
- (C) If this Agreement is terminated as a result of a Network Rail Event of Default, and no Nexus Event of Default has occurred and is subsisting at the time of such termination, Network Rail shall cooperate with Nexus in the event that Nexus should seek to put in place alternative arrangements for the purpose of allowing Nexus access to the Route and, for the avoidance of doubt, nothing in this Clause 9.5 shall prevent Nexus from making an application for access to the Route under Section 17 of the Act, as, from time to time, modified or re-enacted so far as such modification or re-enactment applies or is capable of applying to Section 17 of the Act.

- (D) This Clause 9.5 and Clause 17 shall survive termination of this Agreement irrespective of the reason for termination.

9.6 **Exclusion of Termination Rights**

Save where otherwise agreed between the parties in writing, the suspension and termination rights set out in this Clause 9 shall be the parties' only rights to suspend or terminate this Agreement whether pursuant to its terms or at law.

10. **COMMUNICATIONS AND NOTICES**

10.1 **Method of Sending Written Notices**

(A) Any notice given under or pursuant to this Agreement shall, unless otherwise provided in this Agreement, be in writing and shall be sent to the party on whom the notice is to be served at the address for service of that party specified in Schedule 1 or to such other address as that party may from time to time have notified to the other in accordance with this Clause 10.1:-

- (1) by prepaid first class post when sent from and to any place within the United Kingdom;
- (2) by hand or by recorded delivery;
- (3) by facsimile; or
- (4) by electronic data transfer.

(B) If there shall be specified in Schedule 1 any person to whom copies of notices shall also be sent, the party serving a notice in the manner required by this Clause 10.1 shall send a copy of the notice in question to such person at the address for serving 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 in accordance with this Clause 10.1. Such copy notice shall be sent immediately after the original notice.

10.2 **Deemed Receipt**

Notices required to be in writing and served in accordance with Clause 10.1 shall be deemed to have been received by the party to be notified:-

- (A) if by prepaid first class post, from and to any place within the United Kingdom, three days after posting unless otherwise proven;
- (B) if by hand or by recorded delivery, when delivered;
- (C) if by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) or by electronic data transfer, upon sending where such transmission occurs before 17:00 on the day of transmission and, in any other case, at 09:00 on the day following the day of transmission unless otherwise proven.

11. **DISPUTES AND CLAIMS**

- 11.1 Save where otherwise provided in this Agreement, any dispute or claim arising out of or in connection with this Agreement shall be resolved by mediation followed, if necessary, by arbitration pursuant to and in accordance with the Access Disputes Resolution Rules .
- 11.2 Any dispute or claim arising under or pursuant to the Access Conditions shall be determined in accordance with the terms of the relevant Access Condition.
- 11.3 Any dispute or claim arising under Schedule 7 of this Agreement shall be referred for determination by the Regulator pursuant to Part E of the Access Dispute Resolution Rules, save that in the event of the Regulator declining to act in the matter, the dispute or claim shall be referred for determination by arbitration pursuant to Part C of the Access Dispute Resolution Rules. Any arbitration award in respect of a dispute or claim arising out of Schedule 7 shall be treated as confidential and paragraph C6.3 of the Access Dispute Resolution Rules shall not apply in relation thereto.

12. **ASSIGNMENT**

- 12.1 Save as provided in Clauses 12.2 and 12.3, neither party may assign or otherwise transfer its rights and obligations hereunder without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.
- 12.2 Network Rail may at any time and from time to time without the consent of Nexus assign, transfer, charge or otherwise dispose of, or create security over, or grant sub-participations in respect of, all or any part of its rights and benefits under this Agreement provided that no such assignment, transfer, charge, disposal, creation of security or grant shall in any way affect the obligations of Network Rail under this Agreement (which obligations shall remain in full force and effect) or the rights or benefits of Nexus under this Agreement including, without prejudice to the generality of the foregoing, (a) its ability to set-off, counterclaim or abate any sums due and payable to it under this Agreement from any sums due and payable by it under this Agreement and (b) its rights under Clause 15.3.
- 12.3 Nexus may at any time, without the consent of Network Rail, to the extent that such assignment is, in Nexus' reasonable opinion, necessary as a direct consequence of the statutory dissolution or reorganisation of Nexus, assign its rights and benefits under this Agreement to any entity or entities, whether publicly owned or not (each a "Nexus Successor") and, to the extent that a novation of this Agreement to any Nexus Successor is, in Nexus' reasonable opinion, necessary as a direct consequence of the statutory dissolution or reorganisation of Nexus, Nexus shall give to Network Rail as much prior notice of such statutory dissolution or reorganisation or of the likelihood of such statutory dissolution or reorganisation occurring as is reasonably practicable, whereupon Network Rail and Nexus shall discuss the timing and process for such novation and Network Rail and Nexus shall, and Nexus shall procure that each Nexus Successor shall, prior to such statutory dissolution or reorganisation having effect, join in a novation of this Agreement to such Nexus Successor in the form or substantially the form set out at Schedule 9, provided that such novation shall have no effect unless approved by the Regulator and effected in accordance with his directions and provided further that until such approval of the Regulator has been issued, Nexus shall continue to be bound by the terms of this Agreement.
- 12.4 This Agreement may only be novated by Nexus to any privately owned entity or entities (each a "Private Successor") under Clause 12.3 if in Nexus' reasonable opinion each Private Successor is able to comply with the obligations of Nexus under this Agreement,

provided such restriction shall not apply

- (A) if Nexus is legally obliged under any statute (which expression "statute" shall in this clause 12 include any law, regulation, directive, statute, subordinate legislation or other national or local law) to novate this Agreement to any Private Successor; or
- (B) if Nexus would be in material breach of any statute if it did not novate this Agreement to any Private Successor,

and if the provisions of (A) or (B) above apply, Nexus shall use its reasonable endeavours (so far as it is able and having regard to the fact that such procurement may depend upon a third party) to procure that each Private Successor to which this Agreement may be novated is able to comply with the obligations of Nexus under this Agreement.

13. **INVALIDITY**

If any provision in this Agreement shall be held to be void, illegal, invalid or unenforceable, in whole or in part, under any rule of law, such provision or part shall to that extent be deemed not to form part of this Agreement but the legality, validity and enforceability of the remainder of this Agreement shall not be affected.

14. **NON WAIVER**

No waiver by either party of any default by the other in the performance of any obligation under this Agreement shall operate or be construed as a waiver of any other or further default whether of a like or different character. The failure to exercise or delay in exercising a right or remedy under this Agreement shall not constitute a waiver of the right or remedy or a waiver of any other right or remedy and no single or partial exercise of any right or remedy under this Agreement shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

15. **PAYMENTS, INTEREST AND VAT**

Payments

- 15.1 Without prejudice to the specific provisions of Clause 15.2 and Clause 9, either party may set-off, counterclaim and/or abate from sums due and payable by it under this Agreement to the other party (including to any assignee, transferee, chargee, disposee, beneficiary of security, participant or sub-participant of that other party) any amount due and payable to it under this Agreement by the other party (including by any assignee, transferee, chargee, disposee, beneficiary of security, participant or sub-participant of that other party). Notwithstanding the foregoing provisions of this Clause 15.1 (and without prejudice to the provisions of Clause 15.2) if the parties shall agree that any payment or payments shall expressly be made in full without set-off, counterclaim or abatement then the payment or payments in question shall be paid in full without set-off, counterclaim or abatement.
- 15.2 In the event that any deduction or withholding in respect of duties, taxes or charges of a taxation nature is required by law from any sum due or payable by either party under this Agreement, the payer shall:-
 - (A) ensure that the deduction or withholding does not exceed the minimum amount legally required;
 - (B) account to the relevant taxation or other authorities within the period for payment permitted by the applicable law for the full amount of the deduction or withholding; and

- (C) furnish to the payee within the period for payment permitted by the relevant law either an official receipt of the relevant taxation or other authorities involved in respect of all amounts so deducted or withheld or if such receipts are not issued by the taxation or other authorities concerned a certificate of deduction or equivalent evidence of the relevant deduction or withholding.
- 15.3 Where either party wishes to contest any amount payable under an invoice issued to it by the other party, the first mentioned party shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute and shall pay the undisputed amount in accordance with the terms of the invoice (subject to Clause 15.1), unless the parties shall have otherwise agreed that the full amount under any such invoice is to be paid, in which case the full amount thereof shall be paid in accordance with the terms of the invoice.
- 15.4 All invoices shall be sent by electronic or facsimile transmission (with confirmation copy by prepaid first class post) to the address for service of the recipient referred to in Schedule 1.
- 15.5 Subject to Clause 15.3, all invoices shall unless otherwise specified in Schedule 7 or 8 be paid within 21 days of the date of their receipt and be reasonably itemised.
- 15.6 All payments shall be made in sterling such that cleared funds are received by the payee on or before the date on which such payment becomes due and payable.

Interest

- 15.7 Without prejudice to any other rights or remedies which either of the parties may have in respect of non-payment of any amount or any failure to credit on the date it is due and payable, such amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the due date (which for the purposes of Clauses 8.1 and 8.2 shall be the date on which the damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses in question occurred) until the date of actual payment or crediting (as well after judgement as before).

VAT

- 15.8 Where any taxable supply for VAT purposes is made under or in connection with this Agreement by one party to the other the payer shall, in addition to any payment required for that supply, pay upon presentation of a valid tax invoice such VAT as is chargeable in respect of it.
- 15.9 Where under this Agreement one party has agreed to reimburse or indemnify the other in respect of any payment made or cost incurred by the other then 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, or for any person with which 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.
- 15.10 Where under this Agreement 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 Customs & Excise 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.

15.11 Nexus' Operations

Nexus shall ensure that, so far as it is in its reasonable control, all Train Consist Data that it supplies to Network Rail in the course of using the Charging Systems shall be true and accurate in all material respects.

15.12 Default Train Consist Data

Network Rail shall calculate the Variable Charges payable by Nexus in respect of each Period using the Train Consist Data supplied by Nexus and, to the extent such Train Consist Data is not available to Network Rail, the Default Train Consist Data.

15.13 Right to Object To Invoices

(A) Network Rail will notify Nexus on a weekly basis of the train movement(s) for which Default Train Consist Data has been used to establish the Variable Charges payable by Nexus. At either party's request, the parties shall consult with a view to substituting Train Consist Data for Default Train Consist Data but such consultation should not delay the issue by Network Rail of the invoice for the Variable Charges in respect of the Period concerned.

(B) For each Period, Network Rail shall be entitled to invoice Nexus for Variable Charges in respect of any and all train movements operated by Nexus during that Period based on either:

- (1) Train Consist Data provided by Nexus in respect of any train movement at or prior to the time that such train movement is completed;
- (2) Train Consist Data agreed by the parties pursuant to Clause 15.13.1 in respect of any train movement;
- (3) Train Consist Data provided by Nexus in respect of any train movement (other than any train movement where the Specified Equipment used in operating the relevant movement is loco hauled) by the end of the day on which such train movement has been completed;

or (to the extent that (i) or (ii) or (iii) above do not apply) Default Train Consist Data. Each such invoice will be payable in accordance with the provisions of Clause 15.5.3(a).

(C) Either party shall be entitled at any time prior to the later of 23.59 hours on the fourteenth day following the expiration of the relevant Period and seven days following receipt by Nexus of the relevant invoice, to notify the other that it objects to any Train Consist Data (including, where applicable, the use of Default Train Consist Data) on which the whole or any part of the Variable Charges included in the relevant invoice are based and any such notice shall specify in reasonable detail what that party believes to be the Train Consist Data for the relevant train movement(s) ("notice of objection"). In the absence of any notice of objection being served within such time the Train Consist Data used in the relevant invoice shall be final and binding on the parties.

(D) The parties shall seek to agree the Train Consist Data specified in any notice of objection and any consequential financial adjustment required to the relevant invoice. If the parties are unable to agree that Train Consist Data within fourteen days following receipt of a notice of objection, that Train Consist Data shall be

determined at the request of either party by arbitration in accordance with Part C of the Access Dispute Resolution Rules save that:

- (1) the parties shall use their respective endeavours to ensure a joint paper setting out their respective positions on the matter in dispute is agreed for delivery to the arbitrator no later than three working days following the expiration of a period of 14 days following receipt of a notice of objection as specified above;
 - (2) the parties shall each request that the arbitrator's decision in writing (following any discussions or meetings between or with the parties that the arbitrator considers necessary) is delivered to the parties no later than fifty-six days after the expiration of the relevant Period and that the arbitrator establish such rules and procedures for the conduct of the arbitration as he sees fit having regard to such timescale; and
 - (3) each of the parties shall accept and abide by the rules and procedures established by the arbitrator under Clause 15.13.4(b).
- (E) Within seven days of any Train Consist Data being agreed or determined in accordance with Clause 15.13.4, Network Rail shall, if any consequential or financial adjustment of the relevant invoice is required, issue a further invoice to, or a credit note in favour of, Nexus (as the case may be in the amount of the relevant adjustment). The invoice or credit note shall be payable at the same time as the invoice for Variable Charges for the relevant Period or, if issued later than twenty-one days after the end of the relevant Period, within seven days after the date of its issue.
- (F) For the avoidance of doubt the actual volume of usage used to calculate any supplementary amount payable under paragraph 5 of Part 2 of Schedule 7 shall be established on the basis of the Train Consist Data and the Default Train Consist Data applied in calculating the Variable Charges for each of the Periods in relevant year t under Schedule 7 as adjusted in accordance with Clause 15.13.4 on or before ninety days after the end of relevant year t.
- (G) Where as a result of any invoice or credit note issued pursuant to Clause 15.13.5 any sum of money which has been paid shall become repayable or any sum of money which has been unpaid shall become payable the party to whom such sum shall be paid shall be paid or allowed interest at the Default Interest Rate on the said sum from the date when the said sum (if repayable) was paid or the date when the said sum (if payable) ought to have been paid until the date of payment or repayment.

15.14 **Unrepresentative Train Consist Data**

- (A) If at any time during this Agreement either party considers the Default Train Consist Data specified in Annex 7C of Schedule 7 is not representative of Nexus's Services and, in particular but without limitation, the type(s) of railway vehicles then in use and the regular number of carriages forming part of those railway vehicles in the operation of its Services, either party shall be entitled on written notice to the other to request that the Default Train Consist Data be amended. Any such request shall specify in reasonable detail the grounds for the request and the proposed amendments to the Default Train Consist Data.

- (B) The parties shall endeavour to reach agreement on any amendments to the Default Train Consist Data within twenty-one days of the date of the request referred to in paragraph 15.14.1 and if the parties are unable to agree such amendments within such time period, the matter shall be referred to expert determination in accordance with Part D of the Access Dispute Resolution Rules.
- (C) Upon the earlier of agreement between the parties or expert determination, the parties shall notify the Regulator of the proposed amendments to the Default Train Consist Data and, subject to the Regulator not objecting to the proposed amendments within fourteen days of receipt of the notification by the Regulator, such amendments shall take effect from the first day of the next Period following the earlier of the Regulator confirming his consent to the proposed amendments and the expiration of the period of fourteen days referred to above. If the Regulator objects to the proposed amendments within the period of fourteen days referred to above, the parties shall endeavour to reach agreement with the Regulator on the appropriate amendments, if any, to the Default Train Consist Data which shall then take effect on the first day of the next Period following that in which agreement is reached.

16. **GOVERNING LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with the laws of England and subject to Clause 11 the parties irrevocably agree that the Courts of England are to have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement.

17. **CONFIDENTIALITY**

17.1 Except as permitted by Clause 17.2, all Confidential Information shall be held confidential during the continuance of this Agreement and thereafter, and shall not be divulged in any way to any third party without the prior written approval of the other party.

17.2 Either party shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:-

- (A) to the Regulator or the Strategic Rail Authority^{2nd};
- (B) to the Health and Safety Executive;
- (C) to any Affiliate of such party upon obtaining an undertaking of strict confidentiality from such Affiliate;
- (D) to any officer or servant 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 expedient to enable the party in question to perform its obligations under this Agreement or to enforce its rights under this Agreement, upon obtaining an undertaking of strict confidentiality from such officer, servant 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 lender, security trustee, bank or other financial institution from whom such party is seeking or obtaining finance, or any advisers to any such entity, upon obtaining an undertaking of strict confidentiality from the entity or advisers in question;

- (G) to the extent required by the Act, any licence under section 8 of the Act held by the party in question, the Act, any other applicable law, the rules of any stock exchange or regulatory body or any written request of any taxation authority;
- (H) to the extent that it has become available to the public other than as a result of any breach of an obligation of confidence;
- (I) pursuant to the order of any court or tribunal of competent jurisdiction (including the Industry Committee or any sub-committee thereof) or Panel or Arbitrator; and
- (J) in the case of Nexus to any manager or potential manager of its business, upon obtaining an undertaking of strict confidentiality from such manager or potential manager.

18. **MISCELLANEOUS**

- 18.1 No variation of this Agreement shall be effective unless in writing and signed by the parties unless the variation is made pursuant to the Access Conditions.
- 18.2 This Agreement contains the entire agreement between the parties in relation to the subject matter of this Agreement and supersedes all prior agreements and arrangements in relation to that subject matter.
- 18.3 It is expressly agreed that no term shall be implied into this Agreement to the effect that any of the rights or obligations of either or both of the parties under this Agreement shall be capable of amendment, modification, revision, replacement or supplementation in consequence of any amendment, modification, revision, replacement or supplementation of the Project Agreement save with the approval in writing of the Regulator.
- 18.4 This Agreement may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into this Agreement by signing either of such counterparts.

19. **MODEL CLAUSES**

- 19.1 If at any time prior to the Expiry Date model clauses are prepared and published by the Regulator pursuant to and in accordance with section 21 of the Act (the "Model Clauses"), the parties shall discuss in good faith what changes, if any, should be made to this Agreement to reflect the incorporation into this Agreement of any one or more of the Model Clauses, and any changes consequent thereon (the "Model Clauses Adjustments").
- 19.2 If the parties agree to make changes to this Agreement as a result of the Model Clauses Adjustments, the parties shall submit the relevant changes agreed to this Agreement to the Regulator for his approval pursuant to section 22 of the Act.
- 19.3 If the parties do not consider that changes to reflect the Model Clauses Adjustments should be made to this Agreement or if the parties fail to agree that there should be changes or on what those changes should be within three months of commencing the discussions referred to in Clause 19.1, then no changes shall be made to this Agreement.

20. **TIMETABLE CHANGE PROCEDURE**

- 20.1 Network Rail shall keep Nexus informed, on a regular basis, of the likely date on which the Actual Completion Date will occur and in particular shall use its reasonable endeavours to give Nexus not less than 28 days notice of the date on which, in Network Rail's reasonable opinion, the Actual Completion Date will occur.

- 20.2 Network Rail shall include with the First Bidding Information in respect of:
- (A) the Passenger Development Period relating to the Passenger Change Date next preceding or occurring on the Planned Completion Date; and
 - (B) each subsequent Passenger Development Period which:
 - (1) relates to the Passenger Change Date next occurring after the Planned Completion Date; and/or
 - (2) commences on or before the Planned Completion Date,

a draft Working Timetable consistent with the exercise by Nexus of its contractual rights set out in Schedule 5 (the "Draft Metro Working Timetable").

20.3 Upon the issue by Network Rail of the First Bidding Information in accordance with Clause 20.2, Nexus shall be required to make a bid into the Draft Metro Working Timetable, each such bid to be made pursuant to Part D of the Track Access Conditions.

20.4 Within 14 days after the Appeal Implementation Period relating to each Passenger Development Period referred to in Clause 20.2, Network Rail shall provide Nexus with details of the Working Timetable developed on the basis of bids made in relation to the Draft Metro Working Timetable.

20.5 The Working Timetable referred to in Clause 20.4 developed in relation to the Timetable Period in which occurs the date which falls 7 days after the Actual Completion Date shall be the first Working Timetable in which Nexus shall be entitled to operate the Services (the "First Metro Working Timetable"). The First Metro Working Timetable shall come into full force and effect as soon as the parties shall agree is reasonably practicable after the Actual Completion Date but in any event not later than 14 days after the Actual Completion Date.

20.6 For the purposes of this Clause 20:

- (A) "First Bidding Information" means the Bidding Information issued by Network Rail prior to the first Bidding Period relating to any Passenger Change Date falling on or after the Anticipated Path Availability Date; and
- (B) "Timetable Period" means the period of time between (and including) one Passenger Change Date and (but excluding) the immediately succeeding Passenger Change Date.

21. **RTPA**

Notwithstanding any other provision of this Agreement, (or any arrangement arising from this Agreement), no provision of this Agreement or arrangement which is of such a nature which would have made the Agreement or arrangement liable to registration under the Restrictive Trade Practices Act 1976 ("the RTPA Act") or which, were the Competition Act 1998 fully in force, would cause the Agreement or arrangement to be notified under the Competition Act 1998 shall take effect until the Agreement or arrangement has been notified or duly furnished to the Director General of Fair Trading pursuant to the RTPA Act or the Competition Act 1998. This Clause shall not apply if this Agreement is, or is by virtue of the Competition 1998 to be treated as, a non-notifiable agreement within the meaning of Section 27A of the RTPA Act.

22. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999^{2nd}**

22.1 **Application to third parties**

Save as provided in this Clause 22 or as expressly provided elsewhere in this Agreement, no person who is not a party to this Agreement shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

22.2 **Application to Regulator**

The Regulator shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to him under this Agreement.

IN WITNESS whereof Network Rail and Nexus have by their duly authorised representatives respectively entered into this Agreement on the date first above written.

SCHEDULE 1: CONTRACT PARTICULARS

1.

(A)^{2nd} Network Rail's address for the service of notices is:

Network Rail Infrastructure Limited
40 Melton Street
London NW1 2EE

Tel: 020 7557 8118
Fax: 020 7557 9029

All written notices to be marked:

“URGENT: ATTENTION THE COMPANY SECRETARY AND SOLICITOR”
and copied to:

The Director
Network Rail
London North Eastern Zone
Main Headquarters Building
Station Rise
York
YO1 6HT

Tel: 01904 523 403
Fax: 01904 524 319

(B) Nexus' address for the service of notices is:-

Tyne and Wear Passenger Transport Executive
Nexus House
St James' Boulevard
Newcastle-upon-Tyne
NE1 4AX^{2nd}

Tel: 0191 203 3333
Fax: 0191 203 3181

All written notices to be marked:-

“URGENT: ATTENTION OF THE SECRETARY”^{2nd}

2. The Default Interest Rate shall be 2 per cent above the average of the Base Lending Rates published by Barclays Bank plc during any period in which an amount is payable under this Agreement and remains unpaid.
3. The Commencement Date: means the later of:-
- (A) the Actual Completion Date; and
 - (B) the day on which the First Metro Working Timetable comes into full force and effect in accordance with Clause 20 of this Agreement.

4. The Expiry Date: means the 30th anniversary of the Commencement Date.

SCHEDULE 2: THE ROUTE

The Route comprises the route between Pelaw Junction and South Hylton Station via Sunderland Station (as shown, for identification purposes only, in blue on the map attached to this Schedule 2 as Annex 2A).

SCHEDULE 3 : COLLATERAL AGREEMENTS

- The Claims Allocation and Handling Agreement
- The Emergency Access Code

SCHEDULE 4: POSSESSIONS REGIME^{2nd 1}

PART 1

“Competent Authority Rate” shall have the meaning set out in paragraph 4;

“Corresponding Day” means in respect of any day (the “first day”)

(a) a day:

- (i) in respect of which the Services scheduled in the First Working Timetable in respect of that day are the same as would have been scheduled on the first day but for the Possessions taken on the first day in respect of which there are no restrictions on the use of all or any part of the Route; or if no day is found under this paragraph (a)(i) then,
- (ii) which is contained in the Working Timetable applicable to a Timetable Period commencing on the Subsidiary Change Date or the Principal Change Date (as the case may be) immediately preceding the relevant Working Timetable which includes the first day in respect of which there were no restrictions of use of all or any part of the Route; or where no day is found under (a)(i) or (a)(ii) above, either^{4th}
- (iii) such other day as the parties may agree; or
- (iv) such other day of Services (whether or not such a day of Services has existed in any timetable) as the parties may agree, based on the rights in Schedule 5 and the Cancellation Minutes in Column H of Appendix 1 to Schedule 8;

“Direction” means any direction, requirement, instruction or rule binding on either or both of the parties, and includes any modification, extension or replacement of any such direction, requirement, instruction or rule for the time being in force;

“good industry practice” means the exercise of that degree of skill, diligence, prudence, foresight and practice which would reasonably and ordinarily be expected from a skilled and experienced infrastructure provider engaged in the

¹ These provisions take effect from the Commencement Date and cease to have effect on the Expiry Date or earlier termination of the Agreement.

same type of undertaking;

“First Working Timetable”

means, in respect of a day, the version of the Working Timetable required to be issued by Network Rail to Nexus in respect of that day pursuant to Access Condition D1.5.3 but modified so as to ignore any restriction on use of the routes which:

- (a) has been notified by Network Rail in accordance with paragraph 3.3 less than 26 weeks before the relevant Passenger Change Date; and
- (b) would not otherwise be excluded from the definition of “Possession”;

“Free Period”

means in respect of any point on any Route, the period between:

- (a) the time at which the last Train in the relevant Timetable on that day would have passed over that point; and
- (b) the time at which the first Train in the relevant Timetable on the next following day would have passed over that point;

if in each case the Train completed its journey in accordance with the relevant Timetable while at all times travelling between consecutive station stops shown for the Train in such Timetable at a speed representative of journey times achieved at the Commencement Date and for these purposes “relevant Timetable” means that table in Appendix 2 of this Schedule 4 if first and last Trains are shown in such table for each day for the Route section and direction in question, but otherwise means the Passenger Timetable in effect for the period from the Summer Change Date 2001 to the Summer Change Date 2002, and the last Train in such Passenger Timetable on a particular day means the last Train shown in such Timetable as part of a daily pattern of Services even if such Train runs in the early hours of the following morning and the first Train in such Timetable on the following day means the next following Train shown in such Timetable;

“legislative change”

means the application to any person of any legal requirement (as defined in the Access Conditions) which did not previously so apply or the change of any legal requirement applying to that person (including any such legal requirement ceasing to apply, being withdrawn or not being renewed) other than in relation to:-

- (a) corporation tax (or any other tax of a similar

nature replacing corporation tax on profits or gains); or

(b) Value Added Tax;

“Material Change in Circumstances”

means:-

(a) a change of law;

(b) a change in Railway Group Standards;

(c) a change in maintenance and operating procedures and practices, so as to be consistent with good industry practice established throughout a material part of the railway industry;

(d) a change to the condition of the Route arising from age (provided always that the Route has been maintained by Network Rail in accordance with the terms of this Agreement) but not from any change in the volume or nature of traffic (other than that of Nexus over and above that contemplated by this Agreement) over the Route;

(e) a change in passenger demand for Nexus's Services; and

(f) the issue by the Regulator of criteria regarding the drawing up of possessions regimes relating to the operation of passenger services on the national regulated network such that the possessions regime in this Agreement would not, unless amended, comply to a material extent with such criteria;

which in any such case:-

(a) has occurred since the later of the Commencement Date and the date of the last review date or will occur or is reasonably likely to occur during the relevant review period;

(b) may give rise to:-

(i) a material increase or, as the case may be, decrease in the cost to Network Rail or Nexus (directly or indirectly) of the taking of Possessions; and/or

(ii) a change from the practices which were the norm at the later of the Commencement Date and the date of the last review date relating to the manner in which or the days or times at

which any particular type of Possession can be taken such as materially affects, or is likely materially to affect or ought reasonably to affect materially, the way in which Network Rail undertakes the maintenance, repair and renewal of the Route; and

- (c) in the case of criteria issued by the Regulator, has not already been the subject of a change to the possessions regime since the last review date;

“Monitoring Point”	shall have the meaning set out in Schedule 8;
“Network Rail Possession”	means any Possession other than a Competent Authority Possession or an Operator Possession;
“Notification Factor”	shall have the meaning set out in paragraph 3.2;
“Operator Possession”	means a Possession of the type referred to in paragraph 2.4;
“Passenger Timetable”	shall have the meaning set out in Schedule 8;
“Period”	means each consecutive period of 28 days during the term of this Agreement commencing at 0:00 on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to Nexus;
“Possession”	<p>means, in respect of a day, any restriction on use (other than one caused by an engineering allowance which was contained in the Rules of the Plan applicable to that day at the time Network Rail notified each Bidder of any amendments to those Rules under Condition D2.1.4(b) ^{4th}) of all or any part of the Routes notified by Network Rail in accordance with paragraph 3.3, which necessitates:</p> <ul style="list-style-type: none">(a) in the case of restrictions on use of all or any part of the Route notified by Network Rail less than twenty-six weeks before the relevant Passenger Change Date, any difference between the Applicable Timetable on that day as compared to the First Working Timetable in respect of that day; or(b) in the case of restrictions on use of all or any part of the Route notified by Network Rail more than 26 weeks before the relevant Passenger Change Date:<ul style="list-style-type: none">(i) any difference between the First Working Timetable in respect of that day as

compared with the Applicable Timetable on the Corresponding Day; or

- (ii) (in the case of any such restriction not contained in the First Working Timetable), any difference between the Applicable Timetable on that day as compared with the First Working Timetable in respect of that Day.

but excluding any restriction on use of all or any part of the Route notified by Network Rail because of the condition of the Network or track. Such exclusions will not apply to any possession taken for, or in association with, inspection, maintenance, renewal, repair, enhancement or other modification of the Network or track;

“Possessions Allowance”	means the Possessions which Network Rail is entitled to notify without making any payment to Nexus as provided by paragraph 2.3;
“Relevant Costs”	means, in respect of any Competent Authority Possession, all costs, direct losses and expenses (including loss of revenue and, in the case of Network Rail, liabilities to other train operators but excluding liabilities under this Part 1 of Schedule 4) incurred by Network Rail or Nexus (as the case may be) as a consequence of the taking of that Competent Authority Possession;
“relevant year”	shall have the meaning set out in Schedule 7;
“Retail Prices Index”	shall have the meaning set out in Schedule 7;
“Service”	shall have the meaning set out in Schedule 8;
“Service Group”	shall have the meaning set out in Schedule 8;
“Summer Change Date”	means, in respect of a year the first day of the Summer Timetable in that year;
“Summer Timetable”	means the Working Timetable first published in respect of a period which commences on the Passenger Change Date in or around May in any year and ends immediately before the next following Passenger Change Date;
“Train”	shall have the meaning set out in Schedule 8;
“Week”	means, for the purposes of notification under this Schedule 4 and for no other, a period commencing at 00:00 hours on a Saturday and ending at 23:59 on the following Friday;

“weekday”	means each of Monday to Friday (inclusive) excluding common law and statutory public holidays; and
“Winter Timetable”	means the Working Timetable first published in respect of a period which commences on the Passenger Change Date in or around October in any year and ends immediately before the next following Passenger Change Date.

4.1 *Interpretation*

- (a) A Possession shall be deemed to be taken at the time(s) at which the notification under paragraph 3.3 states it will have effect.
- (b) Unless the context otherwise requires references in this Schedule 4 to paragraphs and appendices are to paragraphs and appendices of this Schedule.

4.2 *Suspension Notices*

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of Clause 9 and not of this Schedule 4. A Possession shall only be treated as a Possession to the extent that it involves a restriction of use of all or any part of the Route which is not covered by the restriction under that Suspension Notice.

5. **Application**

5.1 *Applicable Rules of the Route and Access Conditions*

The provisions of this Part 1 shall be without prejudice to:

- (A) Network Rail’s right to take Possessions under or pursuant to the Applicable Rules of the Route;
- (B) the establishment of any amended Working Timetable under Part H of the Access Conditions; and
- (C) any rights pursuant to the Access Conditions that Nexus may have to challenge any decision of Network Rail.

Free Periods

- 5.2 Network Rail shall not be obliged to make payments to Nexus under this Part 1 of Schedule 4 for any Network Rail Possession if and to the extent that it is taken during any Free Period.

Possessions Allowance

- 5.3 Without prejudice to the provisions of paragraph 2.2, Network Rail shall not be obliged to make payments to Nexus for the taking in respect of any section of Route specified in Column A of Appendix 1 of any Network Rail Possession of a type specified in Column B of Appendix 1 for that section of Route for a duration which is equal to or less than that specified in Column C of Appendix 1 for that section of Route during any period to which Appendix 1 applies (the “relevant period”) if and to the extent that:

- (A) the total number of such Network Rail Possessions for that section of Route not falling wholly within Free Periods, notified by Network Rail to Nexus as being

required during the relevant period does not exceed the relevant threshold specified in the relevant segment in Column D of Appendix 1; and

- (B) details of that Network Rail Possession are notified to Nexus at least twenty-two weeks before the day on which the Network Rail Possession is taken.

Nexus Possessions

5.4 Network Rail shall not be obliged to make any payments to Nexus for any one or more Possessions to the extent:

- (A) required as a result of any damage to the Network or track or Environmental Damage which in each case:
 - (1) arises wholly or mainly from the operations of Nexus or its failure to comply with its obligations under this Agreement; and
 - (2) Network Rail demonstrates is in excess of fair wear and tear arising from use of the Network or track by Nexus; or
- (B) requested by Nexus (other than for the purposes of inspection, maintenance, renewal or repair of the Network).

5.5 *Network Rail Payments*

- (A) The provisions in this paragraph regarding payments by Network Rail shall apply to Possessions notified by Network Rail to Nexus.
- (B) Subject to paragraphs 2.2, 2.3 and 2.4, Network Rail shall make payments to Nexus for Possessions taken on or in relation to the Route on the following basis:
 - (i) for each Network Rail Possession which is outside the Possessions Allowance or is taken outside the Free Period, in accordance with paragraph 3; and
 - (ii) for each Competent Authority Possession, in accordance with paragraph 5.

3. Compensation for Network Rail possessions

3.1 *Calculations*

- (a) For each Period and for each Service Group Network Rail shall calculate the compensation payable in respect of all Network Rail Possessions (RP) which are taken or deemed to be taken on each day in that Period by applying the following formula:

$$RP = \Sigma((WACM + REJT) \cdot BF \cdot RPR \cdot NF)$$

where:

WACM is the weighted average cancellation minutes for the Service(s) (or part(s) thereof) in that Service Group which have been cancelled, calculated in accordance with the following formula:

$$WACM = (CM - RPP) \cdot \Sigma \frac{(MPW \cdot CS)}{SS}$$

where:

CM is the Cancellation Minutes for the Service Group in question;

RPP is the Network Rail Performance Point for the Service Group in question specified in Column C of Appendix 1 to Schedule 8;

Σ is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to the Monitoring Point, as specified in Column N of Appendix 1 to Schedule 8;

CS is the number by which the number of Stops at that Monitoring Point scheduled for that day in the Applicable Timetable is less than SS as a result of the Possession; and

SS is the number of stops at the Monitoring Point scheduled for that day in the First Working Timetable or on the agreed Corresponding Day;

REJT is the extended journey time in respect of Services in that Service Group which are not cancelled calculated according to the following formula:

$$REJT = EJT \cdot \left(1 - \frac{\Sigma (MPW \cdot CS)}{SS}\right)$$

BF is the Busyness Factor, as calculated for each Service Group according to the following formula:

$$\frac{\Sigma (MPW \cdot SS)}{AS}$$

where:

AS is the average number of stops at that Monitoring Point per day scheduled in the Bi-Annual Timetable;

EJT is the extended journey time in respect of Services in that Service Group calculated according to the following formula:

if no Train in that Service Group is scheduled in the Applicable Timetable for that day,

$$EJT = 0$$

if otherwise

EJT is the lesser of:

a. the number of minutes specified as the Cap for the Service Group in Column I of Appendix 1 to Schedule 8; and

b. $AJT \cdot ((u-v)/v)$

where

- AJT is the average journey time for Trains in the Service Group scheduled for that First Working Timetable or agreed Corresponding Day, and shall be equal to the aggregate of the journey times scheduled in such timetable in respect of such Trains divided by the aggregate number of journeys scheduled in such timetable in respect of such Trains;
- u is the average speed of Trains in the Service Group scheduled for that day in the First Working Timetable or agreed Corresponding Day, and shall be equal to the aggregate of the number of miles run divided by the aggregate of the journey times scheduled in such timetable in respect of such trains;
- v is the speed to which the average speed of Trains in the Service Group scheduled for that day in the Applicable Timetable is reduced as a result of the Possession (calculated by reference to the aggregate of the number of miles which such Trains are scheduled in such timetable to run divided by the aggregate of the end to end journey times scheduled in such timetable in respect of such Trains);

and for the purposes of this paragraph 3

“journey”

means the journey of the Train scheduled in the relevant timetable from its station of origin to its destination station; provided that if a Train crosses a Service Group boundary then in respect of each Service Group the Train’s station of origin and destination station shall respectively mean the station at which the Train commences that part of its journey and the station at which it ends that part of its journey; and that where any Train in a Service Group splits to become more than one Train then that part of the Train’s journey up to the station where it splits shall be treated as one journey and each Train into which the Train splits shall be treated as making a separate journey; and

“journey time”

shall be calculated in respect of each journey by reference to the difference in minutes between the time of departure from the station of origin and the time of arrival at the destination station;

RPP is the Network Rail Performance Point for the Service Group as defined in Schedule 8 and specified in Column C of Appendix 1 to Schedule 8;

RPR is the Network Rail Payment Rate Specified in Column D of Appendix 1 to Schedule 8 and as indexed according to the relevant provisions of Schedule 8;

NF is the Notification Factor set out in paragraph 3.2; and

- Σ is the sum over all Network Rail Possessions and all days in the Period.
- (b) Network Rail shall calculate the compensation payable under sub-paragraph 3.1(a) separately in respect of each:
- (i) Network Rail Possession which is taken into account in the First Working Timetable for the day on which it is taken or deemed to be taken; and
 - (ii) Network Rail Possession which is not so taken into account but is taken into account in the Applicable Timetable for the day on which it is taken or deemed to be taken.
- (c) In respect of Network Rail Possessions described in sub-paragraph 3.1(b)(i) above the compensation will be calculated under sub-paragraph 3.1(a) as if:
- (i) references to the First Working Timetable were references to the Working Timetable first published in respect of the Corresponding Day or which would have been published where (a)(iii) or (a)(iv) of the definition of Corresponding Day applies; and
 - (ii) references to the Applicable Timetable were references to the First Working Timetable in respect of the day on which such Network Rail Possessions are taken or deemed to be taken.

3.2 *Notification Factors*

The Notification Factor in respect of a Network Rail Possession shall be equal to:

- (a) 60%, if details of the Possession are notified to Nexus more than forty-six Weeks before the relevant Passenger Change Date;
- (b) 65%, if
 - (i) details of the Possession are notified to Nexus forty-six weeks or less before the relevant Passenger Change Date but more than twenty-two weeks before the day on which the Network Rail Possession is taken; and
 - (ii) timetable effects of the Possession are entered in to the train service database more than 12 weeks before the day on which the Network Rail Possession is taken; provided that this sub-paragraph 3.2(b)(ii) shall not apply unless Nexus shall have given Network Rail a revised bid in accordance with Track Access Condition D4.8.3^{4th};
- (c) 80%, if
 - (i) details of the Network Rail Possession are notified to Nexus twenty-two weeks or less before the day on which the Network Rail Possession is taken but before 22.00 hours on the day before the day on which the Network Rail Possession is taken; or
 - (ii) sub-paragraph 3.2(b) would have been applicable but for a failure by Network Rail to fulfil the terms of sub-paragraph 3.2(b)(ii) notwithstanding Nexus having given a revised bid in accordance with Track Access Condition D4.8.3^{4th} as required by that paragraph.

If details of the Network Rail Possession are notified to Nexus after 22:00 hours on the day before the day on which the Network Rail Possession is taken, the amount of compensation (if any) shall be calculated in accordance with Schedule 8 (to the exclusion of any compensation under Schedule 4).

3.3 *Form of Notification*

- (a) For the purposes of this Part 1, details of a Possession shall be treated as notified to Nexus when:
- (i) Nexus is supplied by Network Rail with sufficient information to determine in respect of that Possession:
 - (1) its type;
 - (2) its duration;
 - (3) its location;
 - (4) the time(s) at which it will commence; and
 - (5) the time(s) at which it will cease;whether supplied as part of the Applicable Rules of the Route or amendments to the Applicable Rules of the Route or revision of an accepted Bid in accordance with the procedures established under Access Condition D2.1.8^{4th}; or
 - (ii) any amendment is made to the Working Timetable in accordance with Part H of the Access Conditions to reflect that possession.
- (b) Network Rail shall also provide any other information reasonably requested by Nexus, within 14 days of the supply of the information set out in sub-paragraph 3.3(a) above, so as to determine the likely effects of that Network Rail Possession on its Trains.
- (c) The Possession shall be treated as having been notified on the date when the information required under paragraph 3.3(a) is first provided, regardless of whether:
- (i) only part of the Possession is taken; and/or
 - (ii) a change is required by the relevant sub-committee of the Access Dispute Resolution Committee or the arbitrator pursuant to the Access Dispute Resolution Rules; and/or
 - (iii) any change has been made to the details of the Possession which does not require changes to the Applicable Timetable; and/or
 - (iv) before the issue of the Bidding Information under Access Condition D2.1.2^{4th} and certainly before T-29 Weeks before the relevant Passenger Change Date, any change has been made to the details of the information required under 3.3(a), if the change has been agreed by Nexus and Network Rail as part of the timetable development process.

3.4 *Consultation*

In respect of any day for which compensation may be payable under this paragraph 3, Network Rail shall consult with Nexus as soon as reasonably practicable (including where practicable before that day and in any event within 7 days of the end of the Period in which that day falls) regarding any Corresponding Day, the amendments to the relevant timetable and the causes of such amendments. Network Rail shall provide such supporting information as Nexus may reasonably request.

4. **Competent Authority Rate**

4.1 *Calculations*

The Competent Authority Rate shall be calculated as follows:

- (a) where any compensation paid to Network Rail in relation to a Competent Authority Possession is sufficient to cover the Relevant Costs of Nexus and of Network Rail, the Relevant Costs of Nexus; and
- (b) where such compensation is not so sufficient, such proportion of that compensation as Nexus's Relevant Costs bears to the sum of Network Rail's Relevant Costs and Nexus's Relevant Costs in respect of that Competent Authority Possession.

4.2 *Negotiation of Compensation with Competent Authority*

Network Rail shall use all reasonable endeavours to negotiate with the relevant Competent Authority a level of compensation in respect of the Competent Authority Possession which is sufficient to ensure that Nexus receives compensation for all of its Relevant Costs. Network Rail shall from time to time consult with Nexus and keep Nexus informed in reasonable detail of the progress of such negotiations.

4.3 *Notification of Nexus' Relevant Costs*

- (a) Within 28 days of the end of each Period in which a Competent Authority Possession is taken, Nexus shall supply to Network Rail:
 - (i) details of its Relevant Costs; and
 - (ii) reasonable details of any of its Relevant Costs which are not fully determined.
- (b) Save to the extent that Nexus supplies details of its Relevant Costs under sub-paragraph 4.3(a), such costs shall not be regarded as Relevant Costs.
- (c) Within 10 days of determination of any Relevant Costs which are supplied under sub-paragraph 4.3(a)(ii) as not fully determined, Nexus shall serve a supplemental notice on Network Rail, including final details of such Relevant Costs.

4.4 *Notification of Network Rail's Relevant Costs*

- (a) Within 28 days of receipt of information under paragraph 4.3(a), Network Rail shall supply to Nexus:
 - (i) details of its Relevant Costs; and

- (ii) reasonable details of any of its Relevant Costs which are not fully determined.
- (b) Save to the extent that Network Rail supplies details of its Relevant Costs under sub-paragraph 4.4(a), such costs shall not be regarded as Relevant Costs.
- (c) Within 10 days of determination of any Relevant Costs details of which are supplied under sub-paragraph 4.4(a)(ii) as not fully determined, Network Rail shall serve a supplemental notice on Nexus, including final details of such Relevant Costs.

4.5 *Compensation received by Network Rail*

Network Rail shall inform Nexus of compensation received in respect of each Competent Authority Possession within 7 days of receipt of the compensation. Network Rail shall pay the compensation into an interest-bearing account and retain it in such an account until distributed in accordance with paragraph 5.

5. **Payment Procedures**

5.1 *Network Rail Possessions*

- (a) Within 14 days after the end of each Period, Network Rail shall provide to Nexus a statement showing:
 - (i) all Network Rail Possessions taken during that Period, distinguishing between those Network Rail Possessions within the Possessions Allowance and those Network Rail Possessions outside the Possessions Allowance;
 - (ii) all Competent Authority Possessions taken during that Period; and
 - (iii) any compensation payable in respect of the Network Rail Possessions identified as falling outside the Possessions Allowance;

in sufficient detail to enable Nexus to make an informed assessment thereof.

- (b) The aggregate liabilities of Network Rail and Nexus, in respect of any and all compensation for which either is liable to the other under this Part 1 of Schedule 4 in respect of each Period shall, to the extent that such compensation is not under dispute, be set off against each other and the balance, if any, shall be payable by Network Rail or Nexus, as the case may be, within 35 days after the end of that Period.

5.2 *Competent Authority Possessions*

Final Payments

- (a) Where all Relevant Costs have been finally determined under paragraph 4 in respect of a Competent Authority Possession for which compensation has been received by Network Rail, Network Rail shall:
 - (i) forward to Nexus a calculation of such sums as are due to Nexus in respect of that Possession; and
 - (ii) pay to Nexus any compensation due in accordance with paragraph 4 in respect of that Possession:

- (1) plus any interest accrued;
- (2) less any interim payments already made in respect of that Possession under sub-paragraph 5.2(c);

within 28 days after receipt of such compensation or after final determination of all Relevant Costs, whichever is the later.

Interim Payments

- (b) Where Network Rail has received compensation in respect of a Competent Authority Possession for which the Relevant Costs have not been fully determined within 28 days of receipt of the compensation, Network Rail shall within 35 days of receipt of the compensation forward to Nexus a statement of:
 - (i) all Relevant Costs which have been fully determined;
 - (ii) all Relevant Costs of which Network Rail is aware and which have not been fully determined;
 - (iii) interim payments already made under sub-paragraph 5.2(c) in respect of that Competent Authority Possession; and
 - (iv) its proposals for making an interim payment in respect of that compensation.
- (c) Within 24 days after serving the statement under sub-paragraph 5.2(b), Network Rail shall make an interim payment to Nexus in accordance with its proposals.

5.3 *Disputes*

- (a) Within 10 days of receipt of a statement from Network Rail under paragraphs 4.4, 5.1 or 5.2, Nexus shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, Nexus shall be deemed to have agreed the contents of the statement.
- (b) Within 10 days of receipt of a statement from Nexus under paragraph 4.3, Network Rail shall notify Nexus of any aspects of the statement which it disputes, giving reasons for any dispute. Save to the extent that disputes are so notified, Network Rail shall be deemed to have agreed the contents of the statement.

5.4 *Dispute Resolution*

The procedure for resolving disputes notified under paragraph 5.3 shall be as follows:

- (a) within 7 days of service of any notice under paragraph 5.3, the parties shall meet to discuss the disputed aspects of the statement with a view to resolving all disputes in good faith;
- (b) if, within 7 days of that meeting, the parties are for any reason still unable to agree the disputed aspects of the statement, each party shall promptly (and in any event within 7 days) prepare a written summary of the disputed aspects of the statement and the reasons for each such dispute and shall submit the summaries to the senior officer of each party;

- (c) within 28 days of the first meeting of the parties, the senior officers shall meet with a view to resolving all disputes;
- (d) if no resolution results within 14 days of that meeting, either party may require that the matter be resolved by the Access Dispute Resolution Committee;
- (e) if either party is dissatisfied with the decision of that Committee or the ruling of the Chairman (as the case may be) such party shall be entitled to refer the matter for arbitration, pursuant to Part C of the Access Dispute Resolution Rules.

5.5 *Payments in the Event of a Dispute*

Where any amount under paragraph 5.1 or 5.2 is in dispute:

- (a) the undisputed amount shall be paid in accordance with paragraph 5.1 or 5.2 as the case may be;
- (b) the disputed amount shall be paid within 28 days after the dispute is resolved or determined to the extent that the amount in dispute is adjudged or resolved to be payable; and
- (c) the disputed amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the date at which such amount would but for such dispute have been due to be paid.

PART 2: FIVE YEARLY REVIEW OF POSSESSIONS REGIME

8. Five Year Review

8.1 *Review – Material Change in Circumstances*

In respect of the period of 5 years commencing on (and including) the fifth anniversary of the Commencement Date (the “First Review Date”) and each period of 5 years commencing on each subsequent fifth anniversary of the First Review Date (each a “review period” and a “review date”) either party (“sponsor”) may serve a notice on the other (“recipient”) (“review notice”) requesting a review of the possessions regime for the remaining term of this Agreement (subject to any further review in accordance with this paragraph 8) as a result of a Material Change in Circumstances.

8.2 *Review Notice*

A review notice:-

- (A) may not be served more than 12 months nor less than 28 days before the review date (“service period”); and
- (B) shall be accompanied by a specification in reasonable detail of the changes proposed and of the Material Change in Circumstances giving rise to the request.

8.3 *Response Notice*

Within 60 days of the service of the review notice (“response period”), the recipient may serve notice (“response notice”) on the sponsor specifying:-

(A) that there is no Material Change in Circumstances which would give rise to any changes; and/or

(B) its objections to the changes being proposed,

in each case accompanied by a reasonably detailed statement of its reasons for so specifying.

8.4 *Negotiation in Good Faith*

If the recipient serves a response notice in accordance with paragraph 8.3 above, the parties shall negotiate in good faith with a view to agreeing whether or not:-

(A) there is any Material Change in Circumstances; and/or

(B) subject thereto, what changes (if any) should be made to the possessions regime and the other provisions of this Schedule 4.

8.5 *Disputes Determination*

(A) If the parties have failed to reach agreement on the matters referred to in paragraph 8.4 above within 28 days of service of the response notice, either party may refer the matter for determination under the Access Dispute Resolution Rules.

(B) It is the intention of the parties to refer for determination under (A) above only those issues upon which they have failed to reach agreement.

8.6 *Criteria*

If a reference is made under paragraph 8.5, the question which the arbitrator shall be required to answer shall be:-

(A) whether there is a Material Change in Circumstances, save where the parties have so agreed in which case the arbitrator shall only be required to determine the matter referred to in (B) below; and

(B) what changes (if any) should be made to the possessions regime, taking into account the criteria set out in paragraph 8.14.

8.7 *No Review Notice*

If a review notice is not served during the service period, then no changes shall be made to the possessions regime in respect of the review period.

8.8 *No Response Notice*

If a review notice is served within the service period and the recipient fails to serve a response notice within the response period, then changes shall be made to the possessions regime in respect of the relevant review period in accordance with the requirements of the review notice and Schedule 4 shall be amended accordingly.

8.9 *No Changes*

If a review notice is served within the service period and, following the service of a response notice, it is agreed or otherwise determined that:-

- (A) there is no Material Change in Circumstances; or
- (B) there is a Material Change in Circumstances but that no changes should be made to the possessions regime.

then no changes shall be made to the possessions regime in respect of the relevant review period.

8.10 *Change to Possessions Regime*

If a review notice is served within the service period and, following the service of a response notice during the response period, the parties agree, or it is subsequently determined, that there is a Material Change in Circumstances and the changes that should be made to the possessions regime, then the possessions regime in respect of the relevant review period shall be as so agreed or determined and this Schedule 4 shall be amended accordingly.

8.11 *Retrospective Effect*

If the possessions regime is not agreed by the parties or determined by the relevant review date:-

- (A) the then current possessions regime will continue to apply and the parties shall retrospectively apply the revised possessions regime following its agreement or determination so as to calculate the amount which would have been payable under the possessions regime in respect of the period from the relevant review date to the date on which the possessions regime is so agreed or determined; and
- (B) an adjusting payment shall be made within 28 days of such agreement or determination by the relevant party to the other in respect of such amount.

8.12 *Replacement of Schedule 4*

Upon any changes to the possessions regime being agreed or determined, the regime (as so changed) shall replace the relevant provisions of this Schedule 4, and accordingly shall constitute such provisions of Schedule 4 with effect from the relevant review date for the purposes of this Agreement.

8.13 *Review*

The new Schedule 4 shall contain the provisions of this paragraph 8, and provisions directly ancillary thereto.

8.14 *Criteria – Paragraph 8.6*

The criteria referred to in paragraph 8.6 are that the possessions regime should:-

- (A) *Possessions*
 - (1) contain an entitlement for Network Rail to take an unlimited number of Possessions at times which do not affect the operation of the Services (including outside of the operating day)(all of which may be taken by Network Rail without payment of compensation to Nexus), each for the purpose set out in paragraph (3) below;

- (2) contain an entitlement for Network Rail to take (without payment of compensation to Nexus) a specified number of Possessions at times which do affect the operation of the Services, each for the purpose set out in paragraph (3); and
- (3) contain an entitlement for Network Rail to take (subject to the payment of compensation at rates calculated in accordance with the criteria set out below) such Possessions as are required in order to carry out necessary maintenance, repair, renewal and other work to the Network and such as are required for the purpose of enabling Network Rail to discharge its obligations as landlord of any station to inspect, maintain, repair or renew the fabric of that station but not for the development of that station;

(B) *Compensation*

contain an entitlement for Nexus to receive compensation in an amount equal to the costs, direct losses and expenses (including loss of revenue) in each case relating to operation by Nexus of the Services or of passenger railway services on the Tyne & Wear metro network which can reasonably be expected to be incurred by Nexus as a result of the taking of Possessions, the amount of compensation to be calculated by reference to:-

- (1) the day on which and time at which the Possession is scheduled to be taken;
- (2) the duration of the scheduled Possession; and
- (3) the amount of notice given of the Possession;

(C) *Calculation of Compensation*

provide for the compensation payable to Nexus (as referred to in paragraph (B) above) to be calculated using values contained in Schedule 8 (performance regime) (as reviewed from time to time in accordance with paragraphs 17 and 18 of Schedule 8), which values may distinguish between peak and off peak hours;

(D) *Other Operators*

take into account the possessions regime(s) which Network Rail may have with other operators which operate over the Route or any part thereof;

(E) *Metro System Operational Area*

have due regard to any possessions regime which Nexus has implemented and which is in effect at the relevant time in respect of the maintenance and repair of the Metro System Operational Area;

(F) *Network Change*

be without prejudice to Part G of the Access Conditions, which shall be used to calculate the compensation (if any) payable to Nexus or Network Rail as a result of Network Change; and

(G) *Operator Possessions*

provide that Network Rail shall not be obliged to make any payments to Nexus for any one or more Possessions to the extent:-

- (1) required as a result of any damage to the Network or track which:-
 - (a) arises wholly or mainly from Nexus' wilful default, negligence or failure to comply with its obligations under this Agreement; and
 - (b) is in excess of fair wear and tear arising from use of the Network or track by Nexus; or
- (2) requested by Nexus (other than for the purposes of inspection, maintenance, renewal or repair of the Network).

8.15 Costs of Implementing Amendment

Nexus shall pay half of the costs and expenses which Network Rail incurs in connection with the negotiation, preparation, execution and carrying into effect of any amendment to this Agreement whose purpose is to give effect to any change to the possessions regime under this paragraph 8.

9. **Appendix 3**

Appendix 3 shall have effect in accordance with its terms.

PART 3: ARBITRATION PROCEDURE

10. *Rules*

If a reference is made to arbitration for the purposes of this Part 3 of Schedule 4, the arbitration rules shall be those contained or referred to in the Access Dispute Resolution Rules.

11. *Consolidation*

In circumstances where:-

- (A) the parties have failed to agree on any changes to the possessions regime pursuant to Part 2 of this Schedule 4; and
- (B) the parties have failed to agree on any changes to the performance regime pursuant to paragraph 18 of Schedule 8;

then, so far as practicable, the disputes shall be consolidated and considered by the same arbitrator as a single dispute.

APPENDIX 1

POSSESSION ALLOWANCE PER YEAR

Column A	Column B	Column C	Column D	
Route Section	Type of Possession	Duration	Possessions allowance (number of Possessions) for each timetable year	
			Weeknights	Weekends
Pelaw Junction to South Hylton via Sunderland	Blockage	52 hrs 55 mins	0	
	Blockage	28 hrs 55 mins	0	
	Blockage	12 hours	0	

APPENDIX 2

FREE PERIODS

Route Section and Direction	Monday to Friday	Saturday	Sunday
Pelaw Junction to South Hylton via Sunderland	00:30 to 05:25	00:30 to 05:25	00:30 to 06:30

APPENDIX 3

REVIEW OF SCHEDULE 4 INCENTIVE STRUCTURE

1. **Negotiations**

1.1 The parties shall negotiate in good faith with a view to agreeing the terms (the "relevant terms") of changes to paragraph 3 of this Schedule 4 Part 1 (and any consequential changes) so that its terms are in accordance with the criteria published by the Regulator in his Final Conclusions on the Schedule 4 Incentive Structure issued or expected to be issued in or around March 2002 ("Final Conclusions").

1.2 *Commencement of negotiations*

The negotiations provided for in paragraph 1.1 shall commence no later than 7 days following the publication by the Regulator of his Final Conclusions.

1.3 *Submission to Regulator*

If the parties agree the relevant terms they shall submit them to the Regulator for his approval as an amendment to this Schedule 4, and paragraph 3 of this Appendix shall apply to that submission.

2. **Arbitration**

2.1 *Right to refer to arbitration*

If the parties have failed to agree the relevant terms and submit them to the Regulator for his approval by 01 May 2002, either party shall be entitled to refer the determination of the relevant terms to an arbitrator under paragraph 4 and the relevant terms shall be determined by arbitration.

2.2 *Guidelines for Arbitrator*

If a reference is made to arbitration under paragraph 2.1, the arbitrator's remit shall be that he shall:

- (a) reach a decision which is fair and reasonable;
- (b) have regard to:
 - (i) the duties which are imposed on the Regulator by virtue of Section 4 of the Act; and
 - (ii) those matters set out in paragraph 1.1;
- (c) not make an award which is inconsistent with any provision of the Access Conditions; and
- (d) give his reasons.

3. **Regulatory approval**

3.1 *General*

The relevant terms agreed or determined in accordance with paragraph 1 or 2, as the case may be, shall be submitted to the Regulator as soon as is reasonably practicable and in any event within 14 days of their being so agreed or determined.

3.2 *Parties to encourage Regulator to approve the relevant terms*

Upon submission of the relevant terms to the Regulator under paragraph 3.1, each party shall use all reasonable endeavours to:

- (a) provide the Regulator and the other party with all relevant information in relation to the relevant terms including the bases and assumptions on which the relevant terms have been agreed or determined; and
- (b) persuade the Regulator to approve the relevant terms without modification.

3.3 *Modification notice – meaning*

A modification notice is a notice given to the parties by the Regulator, following consultation with the parties and such other persons as the Regulator shall consider appropriate, specifying those modifications, if any, which the Regulator considers appropriate to be made to the relevant terms submitted to him pursuant to paragraph 3.1.

3.4 *Obligation to execute amendment to this Agreement*

3.4.1 For the purposes of this Appendix 3, the “Amendment Date” shall be the Summer Change Date 2002 unless the Regulator shall appoint an alternative date for the purpose of giving effect to any changes to be made to Schedule 4 of the track access agreements of franchised train operators pursuant to his Final Conclusions, in which case the Amendment Date shall be such alternative date.

3.4.2 The parties shall promptly execute an amendment of this Schedule 4 giving effect from the Amendment Date:

- (a) to the relevant terms which have been approved by the Regulator following their submission to him under paragraph 3.1; and
- (b) where:
 - (i) the Regulator has given a modification notice; and
 - (ii) no notice of objection has been given by either party to the other and to the Regulator within 30 days of the date of the modification notice,

to any modifications to the relevant terms as is specified in the modification notice;

provided that if such amendment has not been executed by the Amendment Date, paragraph 5 shall apply.

3.5 *Objection by either party to Regulator's modifications*

If the Regulator has given a modification notice and either of the parties gives notice of objection to the other and to the Regulator within 30 days of the modification notice:

- (a) the parties shall not proceed with the execution of the amendment (as contemplated by paragraph 3.4); and
- (b) paragraphs 3.7 to 3.9 shall apply.

3.6 *Regulator's rejection of the relevant terms*

If the Regulator rejects all or any part of the relevant terms submitted to him, paragraphs 3.7 to 3.9 shall apply.

3.7 *Reasons for Regulator's modifications or rejection*

If any objection or rejection is made as envisaged under paragraph 3.5 or 3.6, the parties shall ask the Regulator to specify (to the extent that he has not already done so) his reasons for such modification or rejection.

3.8 *Renegotiation of the relevant terms to meet Regulator's objections*

Forthwith upon the Regulator notifying the parties of such reasons, or upon his declining to do so, the parties shall:

- (a) commence renegotiations of the relevant terms, or those parts of the relevant terms which are affected by any such modification or rejection; and
- (b) continue to conduct such renegotiations,

in good faith and with all due diligence with a view to reconciling the relevant terms with the Regulator's modification or rejection and/or the reasons (if any) given by the Regulator for such modification or rejection.

3.9 *Arbitration if failure to agree how to deal with Regulator's objections*

If, within 28 days of commencing to renegotiate in accordance with paragraph 3.8, the parties fail to agree on such reconciliation, either party may refer the matter for arbitration in accordance with paragraph 4.

3.10 *Criteria for arbitration*

If a reference to arbitration is made pursuant to paragraph 3.9, the arbitrator shall be required to determine the changes to the relevant terms which both:

- (a) most closely satisfy the criteria specified in paragraph 1.1; and
- (b) have a reasonable prospect of securing approval of the Regulator.

3.11 *Resubmission to Regulator*

The relevant terms incorporating such reconciliations as are agreed between the parties or determined in accordance with paragraph 3.9 shall be submitted by the parties to the Regulator for his approval.

3.12 *Effective date*

On approval of the relevant terms by the Regulator following their submission to him under paragraph 3.11, the parties shall promptly execute an amendment to this Schedule 4 giving effect to the relevant terms from the Amendment Date, provided that if such amendment has not been executed by such date, paragraph 5 shall apply.

4. **Arbitration procedure**

If a reference is made to arbitration for the purposes of this Appendix 3, the arbitration rules shall be those contained in Part C of the Access Dispute Resolution Rules except that:

- (a) in paragraph C2.2 of those rules:
 - (i) the period of 7 days shall be replaced by 14 days;
 - (ii) the appointment of the arbitrator shall be made on the application of either party by the President of the Law Society of England and Wales; and
 - (iii) the person making the appointment shall not be limited to making an appointment from the register of arbitrators maintained by the Disputes Secretary;
- (b) paragraph C6.3 of those rules shall not apply; and
- (c) to the extent that those rules (as amended above) do not contain adequate or appropriate rules and procedures for the conduct of the relevant arbitration the arbitration shall be conducted in accordance with the Arbitration Act 1996.

5. **Retrospective effect**

If an amendment to this Schedule 4 giving effect to the relevant terms has not been executed by the parties by the Amendment Date:

- (a) the parties shall retrospectively apply the relevant terms following the execution of such amendment so as to calculate the amount which would have been payable under the relevant terms in respect of the period from the Amendment Date to the date on which the amendment is executed; and
- (b) an adjusting payment shall be made promptly by the relevant party to the other in respect of such amount.

SCHEDULE 5 : THE SERVICES AND THE SPECIFIED EQUIPMENT

PART 1: INTERPRETATION

1. Definitions

In this Schedule 5, unless the context otherwise requires:-

- “Average Journey Time” means in respect of any Service having the calling pattern specified in paragraph 4.1, of Part II of this Schedule 5, the Journey Time described as “Average Journey Time” in paragraph 6.1 of Part II of this Schedule 5;
- “Average Pathing Time” means in respect of any Service having the calling pattern specified in paragraph 4.1 of Part II of this Schedule 5, the Pathing Time described as “Average Pathing Time” in paragraph 6.2 of Part II of this Schedule 5;
- “Flex” means the exercise by Network Rail of a Flexing Right;
- “Hour” means the 60 minute period between xx00 and the next succeeding xx00;
- “Journey Times” means, in respect of any Service:
- (a) the aggregate of the times for the items set out in sub-paragraph (b) below in respect of the timetabled departure time of a Service from a Station until its timetabled arrival time at another Station; and
 - (b) the items referred to in sub-paragraph (a) above are:-
 - (i) point to point timings as provided in the Applicable Rules of the Plan;
 - (ii) engineering recovery allowances, performance allowances and station dwell times each as provided in the Applicable Rules of the Plan; and
 - (iii) Pathing Time;
- “Passenger Train Slot” means a Train Slot which is or is intended to be used by Nexus under this Agreement as a service for the carriage of passengers by railway;
- “Pathing Time” means the timetabled amount of time (measured in minutes and half minutes) set out in the Working Timetable for a train to travel between two points above the minimum point to point running time caused by the application of margins required by the Applicable Rules

of the Plan between trains using the same part of the Network or arising as station dwell time in addition to that in the Applicable Rules of the Plan, but excludes that time which has been requested by Nexus for commercial purposes;

“Public Holiday”	means any day, excluding Saturdays and Sundays, on which banks generally are not open to do business in London;
“scheduled”	In relation to the quantum, timing or any other characteristic of a train movement, means that quantum, timing or other characteristic as included in the applicable Working Timetable;
“Weekday”	means any day (including a public holiday) which is not a Saturday or Sunday; and
“xx20”	means, as an example of this notation “20 minutes past the hour”.

2. **Interpretation**

- 2.1 When in this Schedule 5 a period is stated between two times, such period shall be inclusive of both those times unless the context otherwise requires.
- 2.2 Cognate words and expressions deriving from the definitions given in paragraph 1 shall be construed accordingly.

PART 2: THE SERVICES

1. **Number of Passenger Train Slots**

- 1.1 Subject to paragraph 1.2, Nexus shall be entitled to operate up to six Passenger Train Slots per Hour in each direction between South Hylton Station and Pelaw Junction.
- 1.2 Nexus shall be entitled to operate
- (A) a maximum of 114 Passenger Train Slots on each Weekday;
 - (B) a maximum of 114 Passenger Train Slots on any Saturday; and
 - (C) a maximum of 105 Passenger Train Slots on any Sunday.
- in each direction between South Hylton Station and Pelaw Junction.
- 1.3 All Passenger Train Slots operated pursuant to this paragraph 1 shall be scheduled to operate over the Route.

2. **Access Times for Passenger Train Slots**

- 2.1 Nexus shall only have Firm Contractual Rights to operate Services to depart from each of Pelaw Junction and South Hylton Station
- (A) on any Weekday or Saturday, after 05:25 on that day or before 00:30 on the next following day; and
 - (B) on any Sunday, after 06:30 on that day or before 00:30 on the next following day.

3. **Public Holidays**

- 3.1 Subject to paragraph 3.3, but without prejudice to Nexus's rights under paragraph 1, on any Public Holiday Nexus has the right to operate up to and including the number of Passenger Train Slots specified for that day of the week in paragraph 1.2.
- 3.2 For the avoidance of doubt, subject to paragraph 3.3, Nexus has the right under paragraph 3.1 to its normal timetabled Service for that day of the week on which the Public Holiday falls.
- 3.3 Except as provided in (A) and (B) of this paragraph 3.3, Nexus shall not be entitled to operate the Services on the Routes on 25 and 26 December of any year provided that:
- (A) Nexus shall be entitled to carry out Ancillary Movements between midnight and 02:00 on 25 December and between 22:00 and midnight on 26 December; and
 - (B) Nexus may bid, provided such bid is made by no later than 30 April (or 30 September, in respect of Passenger Train Slots bid to operate on 26 December 2004) in the year during which the Services ("Boxing Day Services") are bid to operate, to operate up to, in aggregate, 50 Passenger Train Slots on 26 December (provided, unless the parties otherwise agree, their departure from the station of origin or, as the case may be, their passing the point of entry onto the network occurs between 08:00 and 20:00) between South Hylton Station and Pelaw Junction.^{4th}

- 3.4 Nexus may bid, provided such bid is made by no later than 30 April (or 30 September, in respect of Passenger Train Slots bid to operate on 1 January 2005) in the year immediately preceding that during which the Services (“New Year’s Day Services”) are bid to operate, to operate up to, in aggregate, 12 additional Passenger Train Slots on 1 January (provided, unless the parties otherwise agree, their departure from the station of origin or, as the case may be, their passing the point of entry onto the network occurs between 00:31 and 03:00) between South Hylton Station and Pelaw Junction.^{4th}
- 3.5 Nexus shall, at its own cost, procure and comply with all consents, permissions, approvals, authorisations, acceptances, licenses, exemptions, registrations and other matters, official or otherwise, which are required in connection with the operation of any Boxing Day or New Year’s Day Services it may bid to operate (including any consents, permissions etc. required pursuant to the Fire Precautions (Sub-surface Railway Stations) Regulations 1998 and the Station Access Conditions), of or from any Competent Authority or third party.^{4th}
- 3.6 Where reference is made in this Schedule to “Nexus may bid”, or any cognate expression, such right to bid has been included so that the Bid does not give rise to any Firm Contractual Right on the part of Nexus.^{4th}

4. **Calling Pattern and Service Interval**

- 4.1 All of the Services shall be Bid and scheduled to be operated shall call at each of the Stations and shall have an average station dwell time not exceeding 25 seconds, save in the case of Sunderland Station where they shall have a dwell time not exceeding 1 minute.
- 4.2 Nexus shall be entitled to a regular service interval between each of the services in each direction such that:
- (A) where 6 Services are either to depart from South Hylton or to arrive onto the Network at Pelaw Junction in any Hour, being operated in the same direction, the maximum service interval between two such Services which are consecutive shall not exceed 13 minutes and the minimum service interval between two such consecutive Services shall not be less than 7 minutes; and
 - (B) where 4 Services are either to depart from South Hylton or to arrive onto the Network at Pelaw Junction in any Hour, being operated in the same direction, the maximum service interval between two such Services which are consecutive shall not exceed 17 minutes and the minimum service interval between two such consecutive Services shall not be less than 13 minutes.

5. **Station Platforming and Turn Round Times**

- 5.1 Nexus shall not be entitled to have more than two trains calling at South Hylton station at any one time.
- 5.2 Nexus shall be entitled to a turn round time at South Hylton of a minimum of 4 minutes.

6. **Journey Times and Pathing Time**

6.1 **Average Journey Times**

- (A) Network Rail shall ensure that in timetabling each Passenger Train Slot, the Average Journey Time between Pelaw Junction and South Hylton Station (in each direction) on any day of the week for Passenger Train Slots to be operated over

the Route shall not exceed 29 minutes, where the Average Journey Time is calculated by dividing the total Journey Time for all Passenger Train Slots by the total number of Passenger Train Slots operated on that day provided that each Passenger Train Slot taken into account in such calculation shall have the calling pattern specified in paragraph 4.1.

- (B) Any calculations made in accordance with paragraph 6.1(A) above shall exclude:
- (1) any Passenger Train Slots which operate between the hours of 0001 and 0600 or on a Sunday, which Network Rail is required to Flex due to engineering work of any description taking place over the Route; and
 - (2) any dwell time at any Station specified in any Bid which exceeds the dwell time for that Station contained in the Applicable Rules of the Plan.

6.2 Average Pathing Time

In addition to Nexus's rights to the Average Journey Time contained in paragraph 6.1(A) Network Rail shall ensure that, in timetabling each Passenger Train Slot, the Average Pathing Time between Pelaw Junction and South Hylton Station (in each direction) on any day of the week for Passenger Train Slots to be operated over the Route does not exceed 1 minute per Passenger Train Slot, where the Average Pathing Time is calculated by dividing the total Pathing Time for all Passenger Train Slots operated on that day by the total number of Passenger Train Slots operated on that day provided that each Passenger Train Slot taken into account in such calculation shall have the calling pattern specified in paragraph 4.1.

6.3 Variations to Average Journey Time and Average Pathing Time

Either party may request the other to agree a reduction or increase in any of the Average Journey Time or Average Pathing Time. Any such request shall be in writing and (unless the other party agrees to the contrary) the party making the request (the "requesting party") shall be required to demonstrate:

- (A) in the case of an increase in the Average Journey Time or Average Pathing Time, that the amount of the increase requested is necessary either (a) as a result of the minimum point to point running time as set out in the Applicable Rules of the Plan for the Route in relation to which the Average Journey Time is calculated being revised upwards after the Commencement Date or (b) to maximise available capacity on the Route in order to allow Network Rail to accommodate the rights of other Nexus, and that, having regard to the effect on the Journey Times of the Services, such increase in the Average Journey Time or Average Pathing Time is restricted to the minimum necessary to achieve such purpose having due regard to the Decision Criteria; and
- (B) in the case of a reduction in the Average Journey Time or Average Pathing Time, that the amount of the reduction requested is necessary either (a) as a result of the minimum point to point running time as set out in the Applicable Rules of the Plan for the Route in relation to which the Average Journey Time is calculated being revised downwards after the Commencement Date or (b) that, if the proposed reduction is not as a result of such a downwards revision of the minimum point to point running time referred to in (a) above, if the proposed reduction is made, such reduction will not have a materially adverse affect on Network Rail's ability to timetable the Services on the Route having due regard to the Decision Criteria.

If any such request is not agreed by the parties within 60 days of notification of the request being received, the requesting party may refer the request for determination to the Timetabling Committee and the matter shall then be determined in accordance with Condition D5 of the Access Conditions. Subject to obtaining the approval of the Regulator, the Average Journey Time or Average Pathing Time shall then be varied as agreed by the parties or as determined in accordance with Condition D5 of the Access Conditions.

7. **Relevant Information**

Nexus may supply to Network Rail operational information (including information in relation to the utilisation of Nexus's staff and the Specified Equipment) which, provided that the information is supplied to Network Rail in a reasonable format and in sufficient time to enable Network Rail to consider its contents prior to the taking of the relevant decision, Network Rail shall take into account in applying the Decision Criteria under Condition D6^{4th} of the Access Conditions.

8. **Stabling and Ancillary Movements**

8.1 Nexus shall have the right, subject to Network Rail's Flexing Right, to use the siding at Sunderland station for 2 metro cars with a length of no more than 57 metres for stabling purposes.

8.2 Nexus shall be entitled to Bid for the right, but shall have no Firm Contractual Right, to operate Ancillary Movements on the Route using Specified Equipment of a length of up to 115 metres for the sole purpose of positioning Specified Equipment to enable Nexus to operate the services. Nexus shall be entitled to Bid for such rights in respect of operations on any day during the hours specified in paragraph 2 when it has firm contractual rights to operate services and at other times subject to the Rules of the Route.

9. **Network Rail Flexing Rights**

9.1 Network Rail shall be entitled to Flex the arrival time and departure time at any Station of any Service which Nexus Bids to operate in either direction on the Route by up to 5 minutes earlier or later.

9.2 The parties acknowledge that Network Rail's rights to Flex the arrival times and departure times of trains referred to in paragraph 9.1 (except where the context expressly provides otherwise and subject to paragraph 9.3 below) are cumulative which, for the avoidance of doubt, shall mean that, if the characteristics of a Bid (such as, but not limited to, calling patterns) of Nexus are such that the pattern for the Service provides Network Rail with two or more separate rights of Flex, Network Rail shall have the right to Flex that Bid by using any or all such rights of Flex made available to it by the pattern for that Service and shall not be limited to the use of only one such right of Flex, subject always to the Decision Criteria.

9.3 The cumulative nature of Network Rail's rights of Flex as referred to in paragraph 9.2 above is without prejudice to Nexus's right to the maximum and minimum service intervals specified in paragraph 4.2.

10. **Protected Rights**

The rights of Nexus to operate the Services as set out in this Schedule 5 shall be protected rights as such term is defined in and for the purposes of Condition C8 of Part C of the Access Conditions.

11. **Surrender of Passenger Train Slots by Nexus**

Nexus may, at any time following the Commencement Date, by notifying Network Rail in writing, surrender its right to Bid for one or more of the Passenger Train Slots referred to in paragraph 1.2 of this Part 2 and shall, in making such notification, specify to Network Rail whether such surrender is for the remaining term of this Agreement or otherwise, on terms such that:

- (A) the Passenger Train Slot or Slots the subject of the surrender shall, for the period of the surrender, be excluded from the rights available to Nexus under this Schedule 5; and
- (B) to the extent that Network Rail is able to grant to one or more other operators of railway services a train slot or slots which is or are to be operated wholly or partly on the Route and which could not, but for the surrender by Nexus of such Passenger Train Slot or Passenger Train Slots, have been operated wholly or partly on the Route, there shall be paid to Nexus, by way of an abatement of the Track Charges (as such term is defined in Schedule 7), an amount equal to 50% of that part of the track charges attributable to the operation of such train slot or slots (or part of such train slot or slots) on the Route payable by such other operator(s) to Network Rail for such train slot or slots, such abatement to be made following the end of each relevant Period. For the avoidance of doubt, charges payable by such operators of railway services in respect of traction electricity for the operation of such train slot or slots shall not be the subject of such abatement but shall be payable as appropriate in accordance with paragraph 4(B) of Part 2 of Schedule 7.

PART 3: THE SPECIFIED EQUIPMENT

1. Rolling Stock

1.1 Nexus has the right to operate the Services using the following Specified Equipment:

Tyne and Wear Metro Passenger Train.

1.2 Specified Equipment shall also include, in the case of emergency, any other railway vehicles, provided that such vehicles are cleared to operate over the relevant Route by Network Rail (either as at the Commencement Date or subsequently),

AND FURTHER PROVIDED THAT:

- (A) nothing in this paragraph 1.2 shall give Nexus the right to make a Bid to operate the Services using any of the railway vehicles specified in this paragraph 1.2; and
- (B) where the railway vehicles used by Nexus pursuant to this paragraph 1.2 are not railway vehicles capable of at least equivalent performance to the railway vehicles for each Service described in paragraph 1.1 above, then the rights of Nexus in respect of such Service shall be subject to the contractual rights of any other operator of trains on the Route.

2. Train Length

Save in respect of the Ancillary Movements referred to in paragraph 8.2 Part 2, which may be operated by Specified Equipment of a length of up to 115 metres, train movements shall be operated by Specified Equipment of a length no greater than 57 metres.

SCHEDULE 6 : NOT USED

SCHEDULE 7: TRACK CHARGES

PART 1: DEFINITIONS AND INTERPRETATION

1. Definitions

In this Schedule 7, unless the context otherwise requires:-

“Capital Investment Charge”	Means the track charge calculated in accordance with paragraph 2 of Part 2 of this Schedule 7;
“Index of Industrial Electricity Costs”	Means the index of prices of fuels purchased by Manufacturing industry in Great Britain - electricity purchased by moderately large users published quarterly by the Department of Trade and Industry or:- (a) if the index for any quarter in any year shall not have been published on or before the last day of the fourth month after such quarter, such index for such period or periods as the parties may agree to be the most nearly equivalent index or, failing such agreement, as may be so determined in accordance with Clause 11.1 of this Agreement; or (b) if there is a material change in the basis of the index, such other index as the parties may agree to be the most nearly equivalent index or, failing such agreement, as may be so determined in accordance with Clause 11.1 of this Agreement;
“Network Rail Recoverable Advance”	Means an amount of £ (in November 1998 prices) to be recovered by Network Rail from Nexus in respect of Network Rail’s costs and expenditure on the Project;
“Operational and Maintenance Charge”	Means the track charge calculated in accordance with paragraph 3 of Part 2;
“Project”	Means the design, construction, testing, commissioning and completion of the Project known as Sunderland Metro, including the delivery of the Project Outputs, in compliance with the terms of the Project Agreement;
“relevant year”	Means a year commencing on 1 April and ending on the next following 31 March; “relevant year t” means the relevant year for the purposes of which any calculation falls to be made; “relevant year t-1” means the relevant year preceding relevant year t and similar expressions shall be construed accordingly;
“Retail Price Index”	Means the general index of retail prices published by the Office of National Statistics each month in respect of all items or:-

- (a) if the index for any month in any year shall not have been published on or before the last day of the third month after such month, such index for such month or months as the parties may agree to be the most nearly equivalent index or, failing such agreement, as may be so determined in accordance with Clause 11.1 of this Agreement; or
- (b) if there is a material change in the basis of the index, such other index as the parties may agree to be the most nearly equivalent index or, failing such agreement, as may be so determined in accordance with Clause 11.1 of this Agreement;

“Traction Electricity”

means the amount payable by Nexus pursuant to Paragraph 4.

2. **Interpretation**

In this Schedule 7, unless the context otherwise requires, references in Parts of this Schedule to paragraphs are references to paragraphs in the Parts in which they appear.

PART 2 : CHARGES

1. The Track Charge

With effect from the Commencement Date, during each relevant year (and, in respect of C_t and OMC_t , prorated for each day of any period of this Agreement which comprises less than a full relevant year), Network Rail shall make and Nexus shall pay track charges in 13 equal instalments in accordance with the following formula:

$$T_t = C_t + OMC_t + EC_t$$

where:-

T_t means Track Charges in relevant year t ;

C_t means an amount in respect of Capital Investment Charge in relevant year t derived from the formula in paragraph 2;

OMC_t means an amount in respect of the Operational and Maintenance Charge in relevant year t calculated in accordance with paragraph 3; and

EC_t means an amount in respect of the traction electricity charge in relevant year t calculated in accordance with paragraph 4.

2. Capital Investment Charge - C

2.1 For the purposes of paragraph 1, the term C_t means an amount in each relevant year t which is derived from the following formula:

$$C_t = RRA_t + RP_t$$

RRA_t shall be an amount in respect of the Network Rail Recoverable Advance calculated in accordance with paragraph 2.2 below; and

RP_t shall be an amount in respect of the risk assumed by Network Rail in undertaking the Project calculated in accordance with paragraph 2.4 below.

2.2 For the purpose of the formula contained in paragraph 2.1, the term RRA_t means an amount for each relevant year t starting with the relevant year in which the Commencement Date falls subject to any adjustments pursuant to paragraph 2.3 which is derived from the following formula:

$$RRA_t = RRA_{t-1} \left[1 + \frac{RPI_{t-1}}{100} \right]$$

where

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Price Index published or determined with respect to November in the relevant year $t-1$ and the index published or determined with respect to November in relevant year $t-2$

but so that in relation to the relevant year commencing on 1 April 1998, RRA_t would have had the value of £ and, subject to any amendment pursuant to paragraph 2.3, in relation to the next following year RRA_{t-1} shall have the same value.

2.3 Weighted Average Cost of Capital:

- (A) The amount specified for RRA_t in paragraph 2.2 assumes, at the date of this Agreement, that the Weighted Average Cost of Capital (“WACC”), as established by the Regulator from time to time, is 7½% per annum.
- (B) In the event that the Regulator, at any stage during the term of this Agreement, amends WACC from its existing level, RRA_t shall be calculated as follows and not in accordance with the formula set out in paragraph 2.2:

$$Y = \sum [(PO_1 \times RRA_w) + (PO_2 \times RRA_w) + \dots + (PO_n \times RRA_w) + \dots + (PO_{max} \times RRA_w)]$$

where

- Y means the present value in relevant year t of the outstanding amount of the Network Rail Recoverable Advance;
- m means the number of years from the Commencement Date to the relevant year in which such amendment to WACC comes into effect;
- PO_n means the discount factor which, if applied to RRA_w in year n gives the present value of RRA_w in relevant year t with $WACC_{old}$ applied;
- max means, as applied to PO_{max} , 30-m;
- RRA_w is equal to $RRA_{t-1} [1 + \frac{RPI_{t-1}}{100}]$; and
- $WACC_{old}$ means the percentage per annum for WACC prior to such amendment of WACC by the Regulator,

having calculated the value of Y, RRA_t should then be derived from the following formula:

$$Y = \sum [(PN_1 \times RRA_t) + (PN_2 \times RRA_t) + \dots + (PN_n \times RRA_t) + \dots + (PN_{max} \times RRA_t)]$$

where

- Y means the present value in relevant year t of the outstanding amount of the Network Rail Recoverable Advance;
- m means the number of years from the Commencement Date to the relevant year in which such amendment to WACC comes into effect;
- PN_n means the discount factor which, if applied to RRA_t in year n gives the present value of RRA_t in relevant year t with $WACC_{new}$ applied;
- max means, as applied to PN_{max} , 30-m; and
- $WACC_{new}$ means the percentage per annum for WACC as amended by the Regulator during relevant year m,

but so that in any subsequent relevant year during the term of this Agreement RRA_t shall, unless the Regulator further amends WACC (in which case the provisions of this

paragraph 2.3(B) shall apply mutatis mutandis), be calculated in accordance with the formula set out in paragraph 2.2.

- 2.4 For the purpose of the formula contained in paragraph 2.1, the term RP_t means an amount for each relevant year t starting with the relevant year in which the Commencement Date falls which is derived from the following formula:

$$RP_t = RP_{t-1} \left[1 + \frac{RPI_{t-1}}{100} \right]$$

where

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Network Rail Price Index published or determined with respect to November in the relevant year $t-1$ and the index published or determined with respect to November in relevant year $t-2$

but so that in relation to the relevant year commencing on 1 April 1998, RP_t would have had the value of £ and in relation to the next following year RP_{t-1} shall have the same value.

3. **Operational and Maintenance Charge - OMC_t**

For the purposes of paragraph 1, the term OMC_t means an amount in respect of the Operational and Maintenance Charge in relevant year t and which is derived from the following formula:

$$OMC_t = OMC_{t-1} \left[1 + \frac{RPI_{t-1} - X}{100} \right]$$

where

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Price Index published or determined with respect to November in the relevant year $t-1$ and the index published or determined with respect to November in relevant year $t-2$; and

X in relation to the period prior to 1 April 2001 has the value 2.0, and in relation to any subsequent period has the value determined from time to time by the Regulator as being applicable to access contracts for passenger railway services throughout the industry,

but so that in relation to the relevant year commencing on 1 April 1998, OMC_t would have had a value of £ and in relation to the next following year OMC_{t-1} shall have the same value.

4. **Traction Electricity Charge**

For the purposes of paragraph 1, the term EC_t means an amount in respect of traction electricity charge in relevant year t which is derived from the total costs and expenses to Network Rail of supplying or procuring the supply of traction electricity to the Route in relevant year, provided that:

- (A) in the event that, in any relevant year t , Nexus supplies or procures the supply of all traction current to the Route at no cost to Network Rail, EC_t shall be nil;
- (B) in the event that, in any relevant year t , any other train operator(s) should operate railway services on the Route using traction electricity, the parties shall determine

a fair and equitable apportionment between Nexus and such other train operator(s) of the total costs and expenses to Network Rail and/or Nexus (as the case may be) of supplying or procuring the supply of traction electricity to the Route and EC_i shall

reflect such fair and equitable apportionment and if the parties fail to determine such apportionment within 90 days of Network Rail notifying Nexus in writing that such other train operator(s) will be operating railway services on the Route using traction electricity, either party shall be entitled to refer the matter for determination in accordance with the Access Dispute Resolution Rules; and

- (C) Network Rail shall at all times use its reasonable endeavours to minimise the costs and expenses which it incurs in procuring traction electricity for the Route.

5. **Charges for train operations on 26 December and 1 January**^{4th}

5.1 Subject to paragraph 5.3 of this Schedule 7, in respect of:

- (A) any Boxing Day Service or Services Bid to be operated by Nexus pursuant to paragraph 3.3 of Schedule 5; and
- (B) any additional New Year's Day Service or Services Bid to be operated by Nexus pursuant to paragraph 3.4 of Schedule 5,

in any year commencing with effect from December 2003, Nexus shall, in addition to any other amount payable to Network Rail under this Agreement, in respect of that Service or those Services (together the "Extra Services") (including for Traction Electricity, if applicable) pay to Network Rail the aggregate of:

- (1) those costs (the "Extra Costs"), if any, reasonably and properly incurred by Network Rail in relation to the scheduling and/or operation of the Extra Services but only to the extent that those costs would not have been incurred by Network Rail but for the scheduling and/or operation of the Extra Services; and
- (2) £ (an "Additional Fixed Charge") multiplied by the number of Passenger Train Slots actually operated on 26 December and 1 January.

5.2 The Additional Fixed Charge shall be adjusted on 01 April in each year (commencing on 01 April 2004) in accordance with the following formula:

$$R_t = R_{t-1} \left[\frac{1 + RPI_{t-1}}{100} \right]$$

where:

R_t is the relevant value in the relevant year t;

R_{t-1} is the relevant value in the relevant year t-1; and

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Prices Index published or determined with respect to November in relevant year t-1 and the index published or determined with respect to November in the relevant year t-2;

but so that in relation to the relevant year commencing on 01 April 2003, R_t shall amount to £ and in relation to the next following relevant year R_{t-1} shall have the same value.

5.3 If Nexus gives not less than 14 days (exclusive of the scheduled day of operation of the relevant Extra Services) written notice cancelling all (but not part only) of the Extra

Services scheduled to operate on Boxing Day or New Years Day (as the case may be) so that no Services operate on the day in question, Nexus shall have no liability to pay to Network Rail any Extra Costs for the relevant day in relation to those Extra Services.

PART 3: REVIEW OF LEVEL OF TRACK CHARGES

1. **Termination**

This Agreement shall cease to have effect upon:

- (A) the date specified in a termination notice given to the parties by the Regulator for the purposes of this Part 3; or
- (B) the happening of such event as shall be specified in the termination notice.

2. **Conditions for termination**

A termination notice may be given following a Quinquennial Review Date if the following conditions shall have been satisfied:

- (A) the Regulator shall have given to the parties a review notice by a date which is not later than the relevant Quinquennial Review Date;
- (B) either:
 - (1) the parties shall have failed to submit to the Regulator for this approval proposed amendments to this Agreement within 45 days following the relevant Quinquennial Review Date;
 - (2) the parties having submitted proposed amendments to him, the Regulator shall have failed to approve them within 4 months following the relevant Quinquennial Review Date; and
- (C) the termination notice in question shall specify the date, or the happening of an event, upon which it shall have effect, which date or event shall not be earlier than 150 days after the giving of the termination notice.

3. **Review Notice**

A review notice shall be a notice given by the Regulator stating his conclusions in relation to his review in respect of the parties' arrangements under this Agreement in relation to the amounts payable by either party to the other (including any risk premium relating to Schedule 4 and Schedule 8) and the manner in which, and dates by which, such amounts shall be payable.

4. **Limitation**

The Regulator shall be entitled to give no more than one review notice in respect of each quinquennial review date during the term of this Agreement.

5. **Time extension**

The Regulator shall be entitled, by notice to the parties and the Strategic Rail Authority^{2nd}, to substitute for any date or period specified in this Part 3 a date which is not more than 90 days later, or a period which is not more than 90 days longer, than that so specified.

6. **Grounds for time extension**

No notice may be given under paragraph 5 of this Part 3 unless the Regulator shall be satisfied on reasonable grounds that the information available to him for the purposes of

the review in questions is insufficient in any material respect or that his conclusions as to the matters in question are likely to be incomplete or unsatisfactory in any material respect if the notice in question is not given.

7. **Time extension - limitation**

A notice under paragraph 5 may be given at any time and from time to time, provided:

- (A) the Regulator shall first have consulted the parties and have taken into account any representations or objections which any of them shall have made to him within such period as he shall have specified for the purpose; and
- (B) where the notice is given after the date of the expiry of the period to which it relates, it shall not:
 - (x) be given later than 30 days after such date or expiry; and
 - (y) substitute a date which is, or a period which expires, later than 60 days after the date or period to which it relates.

8. **Application under Section 17 of the Act**

Nothing in this Part 3 shall prevent Nexus from making an application for a New Access Contract under section 17 where a termination notice has been given or is likely to be given by the Regulator to the parties pursuant to paragraph 2.

Notwithstanding any other provision of this part 3, this Agreement will continue to have effect whilst any application by Nexus under section 17 in respect of a New Access Contract is outstanding and has not been finally determined by the Regulator.

As part of any application under section 17, and as between themselves, the parties agree that if directions are given by the Regulator for a New Access Contract, the parties shall co-operate ensure, as far as reasonably practicable, but subject always to the terms of the relevant termination notice, that this Agreement shall only cease to have effect immediately prior to the entry into effect of a New Access Contract, and ensure, as far as reasonably practicable, but subject always to the terms of the relevant termination notice, that there shall be no disruption to or discontinuance of Nexus' rights of access to the Route or the provision of Services by Nexus resulting from the termination of this Agreement and the entry into any New Access Contract.

Clause 9.5(A) shall not apply to any termination of this Agreement where directions have been issued by the Regulator in respect of a New Access Contract.

9. **Definitions**

In this Part 3:

“New Access Contract” means any access contract granting Nexus rights of access to the Route or any part thereof which either of the parties may be directed to enter into by the Regulator under section 17;

“Quinquennial Review Date” means each date during the term of this Agreement on which the Regulator notifies the parties of the outcome of a quinquennial review and such dates are as at the date of this Agreement expected to be 31 August in each of 2005, 2010, 2015, 2020, 2025 and 2030;

“review notice” means a notice of the kind described in paragraph 3; and

“section 17” means section 17 of the Act as, from time to time, modified or re-enacted so far as such modification or re-enactment applies or is capable of applying to section 17 of the Act;

“termination notice” means a notice given under paragraph 1.

SCHEDULE 8: PERFORMANCE REGIME^{2nd 2}

Interpretation

1.1 Definitions

In this Schedule 8 and its Appendix 1, unless the context otherwise requires:

“Applicable Timetable”	means, in respect of a day, that part of the Working Timetable in respect of that day which is required to be drawn up in accordance with Access Condition D1.6.1 ^{4th} as at 2200 hours on the day prior to that day, and which is applicable to the Trains;
“Bi-annual Timetable”	means in respect of any day or any Period the Passenger Timetable commencing on either the Principal Change Date or the Subsidiary Change Date (as the case may be) in which falls the last day of the Period containing that day or the last day of that Period respectively; ^{4th}
“Cancelled Stop”	means in relation to a Train scheduled in the Applicable Timetable to stop to set down passengers at a Monitoring Point, the Train failing to trigger that Monitoring Point (except where the failure of the train to trigger the Monitoring Point is due to a malfunction of the Monitoring Point);
“Cancellation Minutes”	means, in relation to a Cancelled Stop, the number of Cancellation Minutes specified in Column H of Appendix 1 for the Service Group which includes that Train;
“Cap”	means, in relation to a Monitoring Point, or a Train, the cap for the relevant Service Group in Column I of Appendix 1;
“First Working Timetable”	means, in respect of a day, the version of the Working Timetable required to be issued by Network Rail to Nexus in respect of that day pursuant to Access Condition D1.6.3 ^{4th} ;
“Joint Inquiry”	means a formal inquiry which is required by any of the Railway Group Standards to be held or is permitted by any of the Railway Group Standards to be held and is in fact held;
“Material Change in Circumstances”	means:- (a) a material change in the financial amounts referred to in paragraph 18.14(D) (including whether the cost increase factor continues to be appropriate) incurred or reasonably likely to be incurred by Network Rail during the relevant review period as a result of

² These provisions take effect from the Commencement Date and cease to have effect on the Expiry Date or earlier termination of the Agreement.

incidents for which Nexus is allocated responsibility under the performance regime; and/or

- (b) a material change in the financial amounts referred to in paragraph 18.14(B) (including whether the revenue growth factor continues to be appropriate) incurred or reasonably likely to be incurred by Nexus during the relevant review period as a result of incidents for which Network Rail is allocated responsibility under the performance regime; and/or
- (c) a material change in the performance and reliability of Nexus' trains and/or infrastructure so that the Performance Point(s) is/are no longer representative of performance on the Route and accordingly is/are no longer at the appropriate level to incentivise the parties to improve performance on the Route, provided that:-
 - (i) the Network Rail Performance Point shall not be adjusted to the extent that the Performance Point is no longer representative as a result of (aa) an increase and/or change in the volume and/or nature of traffic (other than that of Nexus over and above that contemplated by this Agreement) on the Route or (bb) a failure by Network Rail to maintain the Network in accordance with its statutory obligations or obligations under this Agreement; and
 - (ii) the Nexus Performance Point shall not be adjusted to the extent that the Performance Point is no longer representative as a result of a failure by Nexus to maintain the Specified Equipment in accordance with its statutory obligations or obligations under this Agreement; and/or
- (d) a material change in passenger demand for Nexus' Services; and/or
- (e) the issue by the Regulator of criteria regarding the drawing up of performance regimes relating to the operation of passenger services on the national regulated network such that the performance regime in this Agreement would not, unless amended, comply to a material extent with such criteria

and which in any such case has occurred since the later of the Commencement Date and the date of the last review date or will occur or is reasonably likely to occur during the relevant review period and which, in the case of criteria issued by the Regulator, has not already been the subject of a change to the performance regime since the last review date;

“Minutes Delay”	means, in relation to a Train and a Recording Point, the delay at that Recording Point, calculated in accordance with paragraph 3;
“Minutes Late”	means, in relation to a day and a Monitoring Point, the lateness at that Monitoring Point, calculated in accordance with paragraph 2;
“Monitoring Point”	means, in relation to a direction of a Service, a point listed in Column M of Appendix 1 as a point to be used for recording lateness of Trains in accordance with paragraph 2, and each such Monitoring Point shall be treated as a separate Monitoring Point notwithstanding that it may also be a Monitoring Point for the same Service in the opposite direction and/or for other Services;
“Network Rail Performance Point”	means, in relation to a Service Group, the Network Rail performance point specified in Column C of Appendix 1;
“Nexus Performance Point”	means, in relation to a Service Group, the Nexus performance point specified in Column F of Appendix 1;
“Nexus Period Cash Cap”	means, subject to paragraph 12.1(d) of this Schedule 8, a limit £ per Period in relation to any sums payable by Nexus, which shall apply until the fifth anniversary of the Commencement Date;
“Passenger Timetable”	means the timetable referred to within the Performance Monitoring System as the passenger timetable and which reflects the Applicable Timetable;
“Performance Data Accuracy Code”	means the version of the Performance Data Accuracy Code referred to in Part B of the Access Conditions;
“Performance Monitoring System”	means the recording system which Network Rail is required to operate under Part B of the Access Conditions;
“Performance Point”	means the Network Rail Performance Point or the Nexus Performance Point, as the context requires;
“Performance Sum”	means, in relation to a Service Group, a sum of money which Network Rail or Nexus is liable to pay to the other under this Schedule 8, as calculated in accordance with paragraph 9 or 10 as the case may be;
“Period”	means each consecutive period of 28 days during the term of this Agreement commencing at 0:00 on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to Nexus;
“Planned Incident”	has the meaning set out in paragraph 5.7.
“Possession”	means a Network Rail Possession, an Operator Possession or a Competent Authority Possession each as

	defined in Part 1 of Schedule 4;
“Recording Point”	means a point at which Network Rail records Trains using the Performance Monitoring System;
“Recovery Time”	means additional time incorporated in the Applicable Timetable to allow for a Train to regain time lost during an earlier part of its journey;
“relevant year”	has the meaning set out in Schedule 7;
“Retail Prices Index”	has the meaning set out in Schedule 7;
“Service”	means all Trains which for that part of their journey cover a route specified in Column A of Appendix 1;
“Service Code”	means the third, fourth and fifth digits of an eight character train service code applied in the Performance Monitoring System to Trains and used to identify them;
“Service Group”	means a collection of Services specified in Column A of Appendix 1;
“Train”	means each train operating a Service which is: <ul style="list-style-type: none"> (a) operated by or on behalf of Nexus pursuant to the permission to use the Route granted under this Agreement; and (b) used to provide services for the carriage of passengers by railway <p>but excludes any and all trains making an Ancillary Movement;</p>
“working day”	means each of Monday to Friday (inclusive) excluding common law and statutory public holidays.

1.2 Interpretation

For the purposes of this Schedule 8:

- (a) a Train shall be treated as being in a Service Group for that part of its journey during which it satisfies the characteristics specified in Columns A and K of Appendix 1 as forming a Service which is included in that Service Group;
- (b) events in respect of a Train shall be treated as occurring on the day on which the Train is scheduled in the Applicable Timetable to depart from the first point at which it is to pick up passengers;
- (c) save as otherwise provided, each final calculation of minutes shall be accurate to three decimal places; and

- (d) unless otherwise specified, references in this Schedule 8 to paragraphs are to paragraphs in this Schedule and references to Appendix 1 are to Appendix 1 of this Schedule 8.

1.3 *Suspension Notices*

Wherever a Suspension Notice is in force, the effects of that Suspension Notice shall be the subject of clause 9 and not of this Schedule 8. Accordingly, for the purposes of this Schedule 8:

- (a) neither Network Rail nor Nexus shall be allocated any responsibility for those effects; and
- (b) those effects shall not be regarded as causing any Minutes Late or Minutes Delay or Cancelled Stops.

2. **Calculation of Minutes Late**

The Minutes Late at a Monitoring Point on a day shall be derived from the following formula:

$$\text{Minutes Late} = \Sigma L$$

where:

L in respect of a Train is the lesser of:

- (i) the number of minutes (rounded down to the nearest whole minute) by which the time at which the Train stops at the Monitoring Point is later than the time at which that Train is scheduled in the Passenger Timetable to stop at that Monitoring Point; and
- (ii) the Cap;

provided that no regard shall be had for any Train which is not recorded as stopping at the Monitoring Point; and

Σ is the sum across all those Trains in the relevant Service Group which are scheduled in the Passenger Timetable to stop at that Monitoring Point on that day which do so stop.

3. **Calculation of Minutes Delay**

The Minutes Delay in respect of a Train when it triggers a Recording Point shall be equal to:

- (a) in respect of the first Recording Point triggered by that Train on any day, the number of minutes (rounded down to the nearest whole minute) by which the time at which that Train triggers the Recording Point is later than the time at which that Train is scheduled in the Applicable Timetable to do so; and
- (b) in respect of any other Recording Point, the lesser of:
 - (i) the number of Minutes Delay in respect of that Recording Point calculated in accordance with sub-paragraph 3(a) above (as if that Recording Point were the first Recording Point triggered by that Train); and

- (ii) the greater of $((A_1 - A_2) + B)$ and zero

where:

A_1 is the number of minutes between the time at which the Train triggers the Recording Point (rounded down to the nearest whole minute) and the time the Train last triggered a Recording Point (rounded down to the nearest whole minute);

A_2 is the relevant time lapse scheduled in the Applicable Timetable between those same two Recording Points; and

B is any Recovery Time between those Recording Points incorporated in the Applicable Timetable;

- (c) provided that:

- (i) any Minutes Delay which arise from a single incident or a series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero; and
- (ii) if for any Train the aggregate Minutes Delay in respect of all Recording Points caused by a single incident are in excess of the Cap specified in Column I of Appendix 1 for that Service Group, then such excess shall be disregarded.

4. Recording of Performance Information

4.1 *Recording of Lateness, Minutes Delay and Cancelled Stops*

Without prejudice to its obligations under Part B of the Access Conditions, Network Rail shall use the Performance Monitoring System to record for each day in respect of each Train scheduled in the Applicable Timetable:

- (a) the time at which the Train stops to set down passengers at each Monitoring Point;
- (b) each Cancelled Stop and the incident(s) causing such Cancelled Stop where the incident can be identified;
- (c) the time at which the Train triggers each Recording Point;
- (d) the Minutes Delay for that Train at each Recording Point; and
- (e) where the Minutes Delay which that Train has accrued since the last Recording Point are greater than or equal to three minutes:
 - (i) the incident(s) causing each minute of any delay included in Minutes Delay; and
 - (ii) those Minutes Delay for which Network Rail is unable to identify a cause.

The provisions of this Schedule 8, which concern the recording of train performance information or which refer to information regarding train performance, and the rights and remedies of the parties in respect of the recording of that information, shall be subject to and interpreted in accordance with the provision of the Performance Data Accuracy Code.

4.2 *Recording of Allocated Responsibility for Minutes Delay and Cancelled Stops*

Network Rail shall for each day for each Train scheduled in the Applicable Timetable record separately in the Performance Monitoring System those (i) Minutes Delay and (ii) Cancelled Stops caused by incidents:

- (a) for which Network Rail is allocated responsibility in accordance with paragraph 5.2;
- (b) for which Nexus is allocated responsibility in accordance with paragraph 5.3;
- (c) for which Network Rail and Nexus are allocated joint responsibility, in accordance with paragraph 5.4;
- (d) for which no cause can be identified; and
- (e) which are Planned Incidents in accordance with paragraph 5.7.

4.3 *Failed Recording Points*

Without prejudice to its obligations under Part B of the Access Conditions, Network Rail shall use all reasonable endeavours:

- (a) to restore as soon as reasonably practicable any failed Recording Point; and
- (b) pending such restoration, to compile such information from manual records and other sources, including Nexus, and otherwise to substitute such information as is appropriate to reflect as accurately as is reasonably practicable the actual performance of the relevant Trains for the purposes of this Schedule 8.

4.4 *Provision of Information by Nexus*

Nexus shall record and shall continue to record such information as Network Rail may reasonably require and which it is reasonable to expect Nexus to have or procure in connection with any Minutes Delay that may arise and shall provide such information to Network Rail promptly after such information first becomes available to Nexus.

Network Rail shall promptly notify Nexus upon Network Rail becoming aware of any failure or any likely failure to record accurately the information which it is required to record under paragraph 4.1 above. Any such information shall be in sufficient detail to enable Nexus to institute the recording of such information in connection with the Trains affected by such failure or likely failure as Nexus may reasonably achieve. Nexus shall institute such recording as soon as it is reasonably able following receipt of the notification from Network Rail and will provide Network Rail with the resulting information no later than 17:00 two working days following the day on which it was recorded.

5. **Allocation of Responsibility for Minutes Delay and Cancelled Stops**

5.1 *Assessment of Incidents Causing Minutes Delay and Cancelled Stops*

- (a) In assessing the cause of any Minutes Delay or Cancelled Stop, there shall be taken into account all incidents contributing thereto including:
 - (i) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents; and

- (ii) where a Possession overruns due to the start of such Possession being delayed by a late running train, the incident(s) giving rise to that late running;
- (b) The parties shall take reasonable steps to avoid and mitigate the effects of any incidents upon the trains and any failure to take such steps shall be regarded as a separate incident;
- (c) Network Rail shall identify:
 - (i) in respect of each incident recorded under sub-paragraph 4.1(e)(i) as causing Minutes Delay, the extent to which that incident caused each of the Minutes Delay; and
 - (ii) in respect of each incident recorded under sub-paragraph 4.1(b), the extent to which that incident caused the Cancelled Stop;
- (d) So far as Network Rail is reasonably able to do so, it shall identify whether responsibility for incidents causing Minutes Delay or Cancelled Stops is to be allocated to Network Rail or to Nexus or to them jointly in accordance with the following provisions of this paragraph 5.

5.2 *Network Rail Responsibility Incidents*

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Network Rail is allocated responsibility pursuant to this paragraph 5.2 shall be allocated to Network Rail. Unless and to the extent otherwise agreed, Network Rail shall be allocated responsibility for an incident other than a Planned Incident if that incident is caused wholly or mainly:

- (a) by breach by Network Rail of any of its obligations under this Agreement; or
- (b) (whether or not Network Rail is at fault) by circumstances within the control of Network Rail in its capacity as operator of the Network; or
- (c) (whether or not Network Rail is at fault) by any act, omission or circumstance originating from or affecting the Network (including its operation), including, subject to paragraph 5.3(b)(i), any incident in connection with rolling stock on the Network for which any train operator other than Nexus would be allocated responsibility if it were Nexus under this Agreement.

5.3 *Nexus Responsibility Incidents*

Responsibility for Minutes Delay and Cancelled Stops on a day caused by incidents for which Nexus is allocated responsibility pursuant to this paragraph 5.3 shall be allocated to Nexus. Unless and to the extent otherwise agreed, Nexus shall be allocated responsibility for an incident other than a Planned Incident if that incident:

- (a) is caused wholly or mainly:
 - (i) by breach by Nexus of any of its obligations under this Agreement; or
 - (ii) (whether or not Nexus is at fault) by circumstances within the control of Nexus in its capacity as an operator of trains; or

- (iii) (whether or not Nexus is at fault) by any act, omission or circumstance originating from or affecting rolling stock operated by or on behalf of Nexus (including its operation), including any such act, omission or circumstance originating in connection with or at any station (other than in connection with signalling under the control of Network Rail at that station or physical works undertaken by Network Rail at that station), any light maintenance depot or any network other than the Network; or
- (b) causes delay to:
 - (i) rolling stock operated by or on behalf of another train operator which is delayed in entering or leaving the Network due to any act, omission or circumstance originating in connection with a light maintenance depot or network other than the Network and, as a result of that delay, rolling stock operated by or on behalf of Nexus which is scheduled to leave or enter the Network at the connection with that light maintenance depot or other network is then delayed behind the first mentioned rolling stock; or
 - (ii) the commencement of a Train's journey, which is caused by the late running for any reason whatever of any rolling stock included in that Train when that rolling stock is operated by or on behalf of another train operator.

Notwithstanding the foregoing and the other provisions of this paragraph 5 and Appendix 1, no Cancelled Stops shall be allocated to Nexus where a Train is cancelled on network other than the Network and such cancellation does not affect the operation of Trains or the services of any other train operator on the Network.

5.4 *Joint Responsibility Incidents*

- (a) Network Rail and Nexus shall be allocated joint responsibility for:
 - (i) any incident which is not a Planned Incident caused by an act, omission or circumstance originating in connection with or at a station which:
 - (1) is an act, omission or circumstance which affects the Network, or its operation, and prevents a Train entering or passing through a station at the time it is scheduled to do so; and
 - (2) prevents the access of passengers through the station to or from the Train;

and paragraphs 5.2 and 5.3 shall not apply to any such incident; or
 - (ii) any identified incident in respect of which Network Rail and Nexus are equally responsible and for which neither Network Rail nor Nexus is allocated responsibility under paragraphs 5.2 or 5.3.
- (b) Unless and to the extent otherwise agreed, Minutes Delay or Cancelled Stops caused by incidents for which Network Rail and Nexus are allocated joint responsibility pursuant to sub-paragraph 5.4(a) shall be allocated 50% to Network Rail and 50% to Nexus.

5.5 *Unidentified Incidents: Minutes Delay*

Responsibility for Minutes Delay on any day in respect of a Service Group caused by incidents which are unidentified, as recorded under paragraph 4.2(d), shall be allocated as follows:

- (a) if there are any Minutes Delay in respect of the Service Group recorded as being caused by incidents for which Network Rail or Nexus are allocated responsibility:
 - (i) 50% of the unidentified Minutes Delay under paragraph 4.2(d) shall be allocated to Network Rail, Nexus and joint responsibility incidents *pro rata* to the aggregate Minutes Delay for that Service Group respectively recorded as being their responsibility under this paragraph 5 for that day; and
 - (ii) the balance of the Minutes Delay under paragraph 4.2(d) shall be allocated to Network Rail; and
- (b) if no Minutes Delay on that day in respect of the Service Group are recorded as being caused by incidents for which Network Rail or Nexus are allocated responsibility, then Network Rail and Nexus shall each be allocated 50% of the unidentified Minutes Delay recorded under paragraph 4.2(d).

5.6 *Unidentified Incidents: Cancelled Stops*

Responsibility for Cancelled Stops on a day in respect of a Service Group caused by incidents which are unidentified shall be allocated 50% to Network Rail and 50% to Nexus.

5.7 *Planned Incidents*

An incident shall be treated as a planned incident if and to the extent that

- (a) such incident was a Possession notified in accordance with Schedule 4 by Network Rail to Nexus; or
- (b) there is Recovery Time in respect of that incident.

5.8 *Allocation of Responsibility for Minutes Delay at Service Group level: Aggregate Minutes Delay*

In respect of a Service Group, the aggregate Minutes Delay on a day shall be the aggregate of all Minutes Delay recorded under sub-paragraphs 4.2(a) to 4.2(d) in respect of all Trains in that Service Group scheduled in the Applicable Timetable.

5.9 *Allocation of Responsibility for Minutes Delay at Service Group level: Network Rail Minutes Delay*

In respect of a Service Group, the Minutes Delay on a day allocated to Network Rail shall be the aggregate of any Minutes Delay allocated to Network Rail under paragraph 5.2, paragraph 5.4 and paragraph 5.5.

5.10 *Allocation of Responsibility for Minutes Delay at Service Group level: Nexus Minutes Delay*

In respect of a Service Group, the Minutes Delay on a day allocated to Nexus shall be the aggregate of any Minutes Delay allocated to Nexus under paragraph 5.3, paragraph 5.4 and paragraph 5.5.

5.11 *Network Rail Cancelled Stops at Monitoring Point Level*

In respect of a Monitoring Point, the Cancelled Stops on a day allocated to Network Rail shall be the aggregate of any Cancelled Stops allocated to Network Rail under paragraph 5.2, paragraph 5.4 and paragraph 5.6.

5.12 *Nexus Cancelled Stops at Monitoring Point Level*

In respect of a Monitoring Point, the Cancelled Stops on a day allocated to Nexus shall be the aggregate of any Cancelled Stops allocated to Nexus under paragraph 5.3, paragraph 5.4 or paragraph 5.6.

6. **Statement of Allocated Responsibility**

6.1 *Initial Statement*

For each day, Network Rail shall provide to Nexus as soon as reasonably practicable and in any event no later than the following working day:

- (a) the allocation of responsibility for incidents made by Network Rail under paragraph 5; and
- (b) a summary for each Service Group showing:
 - (i) the aggregate Minutes Delay and Cancelled Stops recorded under each category set out in paragraph 4.2; and
 - (ii) a list of the Minutes Delay and Cancelled Stops (in each case broken down by incident) recorded as the responsibility of Network Rail and as the responsibility of Nexus.

6.2 *Further Statements*

If Network Rail's nominated representative has reasonable grounds to believe that any further incident was the responsibility of Nexus or of Network Rail but was not shown as such in the information made available in accordance with paragraph 6.1, then Network Rail may, within 7 days after the last Minutes Delay or Cancelled Stop caused by that incident, issue a notice in accordance with paragraph 14 revising the information and/or allocations of responsibility made available under paragraph 6.1.

6.3 *Adjustment Statements*

If Access Condition B3.3 (Adjustment to Prior Results) applies in respect of all or part of a Period, then Network Rail shall promptly issue to Nexus a statement showing the necessary adjustments (if any) to statements already issued and Performance Sums already paid in respect of the Period, and any such adjusting statement shall be treated as if it were a statement under paragraph 11.1 and, subject to paragraph 12.2, an adjusting payment shall be payable within 28 days of Network Rail's statement.

6.4 *Disputes about Statements of Allocated Responsibility*

- (a) Except to the extent that it has, within two working days of receipt, notified Network Rail in accordance with paragraph 14 that it disputes the contents of a statement under paragraph 6.1, Nexus shall be deemed to have agreed the contents of that statement. Any notification of a dispute shall specify the reasons for that dispute.

- (b) The parties shall attempt to resolve disputes notified in accordance with paragraph 6.4(a) as follows:
- (i) within the next 2 clear working days after notification of any dispute, nominated representatives of the parties shall attempt to resolve that dispute;
 - (ii) if agreement has not been reached after two clear working days, representatives authorised by a more senior level of management of the parties shall use all reasonable endeavours to negotiate a resolution of the dispute; and
- (c) Negotiations under sub-paragraph 6.4(b)(ii) shall continue, if necessary, until a date no earlier than five clear working days after the end of the Period in which the event giving rise to the dispute referred to in sub-paragraph 6.4(a) occurred.

7. Allocation of Minutes Late to Network Rail

In respect of each Monitoring Point, the Minutes Late on a day at that Monitoring Point allocated to Network Rail (MLR) shall be calculated according to the following formulae:

if MD is greater than zero

$$MLR = \left(\frac{MDR \cdot ML}{MD} \right) + DMLR$$

or if MD is equal to zero

$$MLR = (0.5 \cdot ML) + DMLR$$

where:

- ML is the aggregate Minutes Late at that Monitoring Point on that day for all Trains in that Service Group, calculated in accordance with paragraph 2;
- MD is the aggregate Minutes Delay on that day in respect of the Service Group under which that Monitoring Point is listed in Column M of Appendix 1, calculated in accordance with paragraph 5.8;
- MDR is that part of such MD allocated to Network Rail in accordance with paragraph 5.9; and
- DMLR is the deemed minutes late at that Monitoring Point on that day allocated to Network Rail, derived from the following formula:

$$DMLR = RC \cdot CM$$

where:

- RC is the number of Cancelled Stops recorded at that Monitoring Point on that day for which Network Rail is allocated responsibility in accordance with paragraph 5.11; and

CM is the Cancellation Minutes for that Service Group set out in Column H of Appendix 1.

8. Allocation of Minutes Late to Nexus

In respect of each Monitoring Point, the Minutes Late at that Monitoring Point on a day allocated to Nexus (MLT) shall be calculated according to the following formulae:

if MD is greater than zero

$$MLT = \frac{MDT}{MD} \cdot ML + DMLT$$

or if MD is equal to zero

$$MLT = (0.5 \cdot ML) + DMLT$$

where:

ML is the aggregate Minutes Late at that Monitoring Point on that day for all Trains in that Service Group, calculated in accordance with paragraph 2;

MD is the aggregate Minutes Delay on that day in respect of the Service Group under which that Monitoring Point is listed in Column M of Appendix 1, calculated in accordance with sub-paragraph 5.8;

MDT is that part of such MD allocated to Nexus in accordance with sub-paragraph 5.10; and

DMLT is the deemed minutes late at that Monitoring Point on that day allocated to Nexus, derived from the following formula:

$$DMLT = TC \cdot CM$$

where:

TC is the number of Cancelled Stops recorded at that Monitoring Point on that day for which Nexus is allocated responsibility in accordance with paragraph 5.12; and

CM is the Cancellation Minutes for that Service Group set out in Column H of Appendix 1.

9. Network Rail Performance Sums

9.1 In respect of a Service Group, the Network Rail Performance Sum (RPS) for each Period shall be calculated according to the following formula:

$$RPS = (RPP - RWAML) \cdot BF \cdot RPR$$

where:

RPP is the Network Rail Performance Point for that Service Group specified in Column C of Appendix 1 for the year in which that Period falls;

RWAML is the aggregate for all Monitoring Points in the Service Group of the weighted average minutes late allocated to Network Rail in accordance with the following formula:

$$RWAML = \frac{\sum (MLR \cdot MPW)}{SP}$$

where:

Σ is the sum across all Monitoring Points in the Service Group;

MLR is the Minutes Late allocated to Network Rail in respect of each Monitoring Point in that Period, in accordance with paragraph 8;

MPW is the weighting attributable to that Monitoring Point, as specified in Column N of Appendix 1; and

SP is the aggregate number of stops to set down passengers at that Monitoring Point scheduled for the Period in the Applicable Timetable for which a stop or Cancelled Stop is recorded in accordance with paragraphs 4.1(a) and (b) except that if SP=0 for any Monitoring Point, then for that Monitoring Point it shall be deemed that $\frac{(MLR \cdot MPW)}{SP}$ shall equal zero;

BF is the relevant busyness factor estimated for the Period according to the following formula:

$$BF = \frac{\sum (MPW \cdot SD)}{AS}$$

where:

Σ is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to that Monitoring Point, as specified in Column N of Appendix 1;

SD is the aggregate number of stops to set down passengers at that Monitoring Point scheduled in the Applicable Timetable for that Period for that Service Group; and

AS is the average number of stops per day at the Monitoring Point scheduled in the Bi-Annual Timetable in respect of that Period except that if AS = 0 for any Monitoring Point it shall be deemed that $\frac{(MPW \cdot SD)}{AS}$ shall equal zero; and

RPR is the relevant Network Rail payment rate for that Service Group specified in Column D of Appendix 1 as indexed in accordance with the provisions in paragraph 13.

9.2 Where RPS is less than zero, Network Rail shall pay the amount of the RPS to Nexus. Where RPS is greater than zero, Nexus shall pay that amount to Network Rail.

10. **Nexus Performance Sums**

10.1 In respect of a Service Group, Nexus Performance Sum (TPS) for each Period shall be calculated according to the following formula:

$$TPS = (TPP - TWAML) \cdot BF \cdot TPR$$

where:

TPP is the Nexus Performance Point for the Service Group specified in Column F of Appendix 1;

TWAML is the aggregate for all Monitoring Points in the Service Group of the weighted average minutes late allocated to Nexus in accordance with the following formula:

$$TWAML = \sum \frac{(MLT \cdot MPW)}{SP}$$

where:

Σ is the sum across all Monitoring Points in the Service Group;

MLT is the Minutes Late allocated to Nexus in respect of each Monitoring Point in that Period, in accordance with paragraph 8;

MPW is the weighting attributable to that Monitoring Point, as specified in Column N of Appendix 1; and

SP is the aggregate number of stops to set down passengers at that Monitoring Point scheduled for the Period in the Applicable Timetable for which a stop or Cancelled Stop is recorded in accordance with paragraphs 4.1(a) and (b) except that if SP=0 for any Monitoring Point, then for that Monitoring Point it shall be deemed that $\frac{(MLT \cdot MPW)}{SP}$ shall equal zero;

BF is the relevant busyness factor estimated for the Period according to the following formula:

$$BF = \sum \frac{(MPW \cdot SD)}{AS}$$

where:

Σ is the sum across all Monitoring Points in the Service Group;

MPW is the weighting attributable to that Monitoring Point, as specified in Column N of Appendix 1;

SD is the aggregate number of stops to set down passengers at the Monitoring Point scheduled in the Applicable Timetable for that Period for that Service Group; and

AS is the average number of stops per day at the Monitoring Point scheduled in the Bi-Annual Timetable in respect of that Period except that if AS=0 for any Monitoring Point it shall be deemed that $(MPW \cdot \frac{SD}{AS})$ shall equal zero; and AS

TPR is the relevant Nexus payment rate for that Service Group specified in Column G of Appendix 1 as indexed in accordance with the provisions in paragraph 13.

10.2 Where TPS is less than zero, Nexus shall pay the amount of the TPS to Network Rail. Where TPS is greater than zero, Network Rail shall pay that amount to Nexus.

11. Notification of performance sums

11.1 Notification

Within 14 days after the end of each Period, Network Rail shall provide Nexus with a statement for each Service Group for that Period showing:

- (a) any Performance Sums for which Network Rail or Nexus is liable, together with such supporting information (other than information in respect of incidents recorded as the responsibility of Network Rail) as Nexus may reasonably require; and
- (b) any matter referred to in paragraph 6.1 which Nexus has disputed in accordance with paragraph 6.4(a) and which is still in dispute.

11.2 Disputes

Within 14 days after receipt by Nexus of a statement required under paragraph 11.1, Nexus shall notify Network Rail of any aspects of such statement which it disputes, giving reasons for each such dispute. Nexus shall not dispute any matter which it has agreed or deemed to have agreed under paragraph 6. Such disputes and any matter referred to in sub-paragraph 11.1(b) shall be resolved in accordance with the procedure in paragraph 15. Save to the extent that disputes are so notified, Nexus shall be deemed to have agreed the contents of each statement.

12. Payment procedures

12.1 Payments and Set-off

- (a) In respect of any and all Performance Sums for which Network Rail and Nexus are liable in any Period, the aggregate liabilities of Network Rail and Nexus shall be set off against each other. The balance shall be payable by Network Rail or Nexus, as the case may be, within 35 days after the end of the Period to which the payment relates provided that if such payment is payable by Nexus:
 - (i) it shall not exceed the Nexus Period Cash Cap; and
 - (ii) in the event that the Performance Sum is greater than the payment made by Nexus at the end of the Period, the balance of the Performance Sum not paid over as a consequence of the Nexus Period Cash Cap shall, subject to paragraph 12.1(b), be carried forward to the following Period and aggregated with any Performance Sums for which Nexus is liable in that Period. Any such aggregated Performance Sums shall be payable as normal, in accordance with this paragraph 12.1(a).
- (b) The balance of any Performance Sums not paid over as a consequence of the Nexus Period Cash Cap shall not be carried forward in accordance with paragraph 12.1(a)(ii) from the final Period in the first or second relevant year following the Commencement Date to the first Period in the next following relevant year, but subject thereto any unpaid balance at the end of any subsequent relevant year

shall be carried forward to the first Period of the next following relevant year and the provisions of paragraph 12(a)(ii) shall apply. If on the fifth anniversary of the Commencement Date any such unpaid balance remains accrued as a result of the application of the Nexus Period Cash Cap, Nexus shall promptly pay Network Rail an amount equal to the unpaid balance.

- (c) Subject to paragraph 12.2, and save as otherwise provided, all other sums payable under this Schedule 8 shall be paid within 35 days after the end of the Period to which such payment relates.
- (d) Within 28 days after each anniversary of the Commencement Date Network Rail may notify to Nexus in writing any adjustment which Network Rail believes should be made to the Nexus Period Cash Cap with its reasons (an "Adjustment Proposal"). If Nexus wishes to dispute an adjustment to the Nexus Period Cash Cap proposed under this paragraph 12.1(d) it shall notify Network Rail in writing within 14 days of the date of the Adjustment Proposal and the dispute shall be resolved in accordance with the procedure in paragraph 15. On agreement or determination of the adjustment, if any, to the Nexus Period Cash Cap the parties shall retrospectively apply any such adjusted Nexus Period Cash Cap so as to calculate the amount which would have been payable under this Schedule 8 in respect of the Periods from that in which Network Rail notified its Adjustment Proposal to that in which such agreement or determination is made, and any adjusting payment shall be made promptly by the relevant party to the other in respect of such amount.

12.2 *Payments in the Event of Dispute*

Where any sum which is payable under this paragraph 12 is in dispute:

- (a) the undisputed amount shall be paid or set off (as the case may be) in accordance with paragraph 12.1;
- (b) the disputed balance shall be paid or set off (as the case may be) within 35 days after the end of the Period in which the dispute is resolved or determined; and
- (c) from the date at which such balance would but for the dispute have been due to be paid or set off, the disputed balance shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate, unless the dispute relates to an incident the responsibility for which is the subject of a Joint Inquiry, in which case interest shall be payable at the prevailing base rate of Barclays Bank plc. For the avoidance of doubt, any such interest shall not be counted in calculations to determine whether the Nexus Period Cash Cap has been exceeded.

13. **Payment Rates**

- 13.1 Each payment rate in Columns D and G of Appendix 1 shall be adjusted in respect of Periods in relevant year t in accordance with the following formula:

$$R_t = R_{t-1} \left(1 + \frac{RPI_{t-1}}{100} \right)$$

where:

R_t is the relevant rate in the relevant year t

R_{t-1} is the relevant rate in the relevant year t-1

RPI_{t-1} means the percentage change (whether of a positive or negative value) in the Retail Prices Index published or determined with respect to November in the relevant year t-1 and the index published or determined with respect to November in the relevant year t-2

but so that in relation to the relevant year commencing on 1 April 2001, R_t shall have the relevant value specified in the relevant column (either D or G) of Appendix 1 and in the next following year R_{t-1} shall have the same value.

14. Notices

14.1 All notices under this Schedule 8 shall be given in writing and shall be sent by prepaid first class post, e-mail or fax or delivered by hand to the party in question at the address for service last notified by that party.

14.2 Any such notice shall be deemed to have been duly received:

- (a) if sent by prepaid first class post, three days after posting unless otherwise proven;
- (b) if sent by hand, when delivered;
- (c) if sent by facsimile, (subject to confirmation of uninterrupted transmission by a transmission report) upon sending; and
- (d) if sent by e-mail, (unless notice of non-delivery is received) upon receipt.

15. Disputes

15.1 If any dispute is notified under paragraph 11.2 or paragraph 12.1(d) it shall be resolved according to the following procedure:

- (a) within 7 days of service of the relevant notice (or, if the dispute relates to an incident the responsibility for which is or is to be the subject of a Joint Inquiry, within 7 days of publication of the conclusion of that Joint Inquiry), the parties shall meet to discuss the disputed aspects with a view to resolving all disputes in good faith;
- (b) if, for any reason, within 7 days of the meeting referred to in sub-paragraph 15.1(a), the parties are still unable to agree any disputed aspects, each party shall promptly and in any event within 7 days prepare a written summary of the disputed aspects and the reasons for each such dispute and submit such summaries to the senior officer of each party;
- (c) within 28 days of the first meeting of the parties, the senior officers of the parties shall meet with a view to resolving all disputes;
- (d) if no resolution results before the expiry of 14 days following that meeting, then either party may require that the matter be resolved by the Access Dispute Resolution Committee; and
- (e) if either party is dissatisfied with the decision of that Committee or the ruling of the Chairman thereof (as the case may be) such party shall be entitled to refer the matter for arbitration, pursuant in each case to Part C of the Access Dispute Resolution Rules.

16. Amendments to Appendix 1

16.1 *Circumstances in which Parties Agree to Amend Appendix 1*

Either party may by notice to the other propose that Appendix 1 be amended in accordance with this paragraph 16.

16.2 *Procedure for Amendments to Appendix 1*

- (a) The party who wishes to amend Appendix 1 shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect:
 - (i) in the case of changes coming into effect on the Subsidiary^{4th} Change Date, before 1 November in the preceding year; or
 - (ii) in the case of changes coming into effect on the Principal^{4th} Change Date, before 1 April in the same year.
- (b) Any notice under sub-paragraph 16.2(a) shall specify as far as possible that party's proposed amendments to Appendix 1. Promptly following the service of any such notice the parties shall endeavour to agree whether Appendix 1 should be amended in accordance with this paragraph 16 and if so the amendments.
- (c) If the parties fail to reach agreement within 90 days after service of the relevant notice, the matter shall be referred for expert determination in accordance with Part D of the Access Dispute Resolution Rules save that:
 - (i) the parties shall each request that the expert's determination in writing is delivered to the parties no later than 56 days after the date of referral of the matter to the expert, and that the expert establishes such rules and procedures for the conduct of the determination as he sees fit having regard to that timescale; and
 - (ii) each of the parties shall abide by the rules and procedures established by the expert.
- (d) Any amendment to Appendix 1 shall take effect only when it has been approved by the Regulator under section 22 of the Act. Accordingly, as soon as reasonably practicable after any such amendment is agreed or determined in accordance with this paragraph 16, the parties shall use all reasonable endeavours to ensure that the Regulator is furnished with such amendment and sufficient information and evidence as he shall require to determine whether or not to approve the amendment.
- (e) Any amendment to Appendix 1 shall apply with effect from the Summer Change Date or the Winter Change Date, as the case may be.

16.3 *Adjustments to the Performance Monitoring System*

Network Rail shall make appropriate amendments to the Performance Monitoring System to reflect the amendments to Appendix 1 by the date when in accordance with paragraph 16.2(e) such amendments are to take effect, or as soon as reasonably practicable thereafter. Where any such amendment to Appendix 1 or any consequential amendment to the Performance Monitoring System is not made until after that date, Network Rail shall, promptly following such amendments being made, issue to Nexus a statement showing

the necessary adjustments to the statements already issued and the payments already made in respect of Performance Sums up to and including the Period commencing on the date when in accordance with paragraph 16.2(e) such amendments to Appendix 1 are to take effect. Any such adjusting statement shall be treated as if it were a statement under paragraph 11.1 and, subject to paragraph 12.2, an adjusting payment shall be payable within 35 days of that adjusting statement.

16.4 *Costs of Implementing Amendment*

Network Rail shall (subject to any determination of an expert as to costs, where a matter is referred to that expert under paragraph 16.2(c)) be entitled to ninety percent (90%) of costs incurred by or on behalf of Network Rail in assessing and implementing any amendments to Appendix 1 and the Performance Monitoring System, provided that those costs shall be the minimum reasonably necessary for Network Rail to assess and implement that amendment.

16.5 *Paragraph 17 and 18*

The provisions of this paragraph 16 are in addition to (and not subject to) the provisions of paragraph 17 and 18.

17. **Initial Recalibrations of Performance Regime**

17.1 Network Rail and Nexus shall, within 28 days of the expiry of the first anniversary of the Commencement Date, review the Network Rail Performance Point and the Nexus Performance Point and using the criteria set out in paragraph 18.14 on the basis of the performance of the Specified Equipment on the Route during the period of one year following the Commencement Date and shall, to the extent necessary, reset each such Performance Point for the relevant year commencing on such anniversary, so as to ensure that, in relation to the Performance Points so established, each of the criteria referred to in paragraph 18.14 are satisfied, but substituting, for the purpose of this exercise, the one year period referred to in this paragraph 17.1 in place of the period referred to in paragraph 18.14(A)(1).

17.2 Network Rail and Nexus shall, within 28 days of the expiry of the second anniversary of the Commencement Date, review the Network Rail Performance Point and the Nexus Performance Point established pursuant to paragraph 17.1 and using the criteria set out in paragraph 18.14 on the basis of the performance of the Specified Equipment on the Route during the period of two years following the Commencement Date and shall, to the extent necessary, reset each such Performance Point for each of the relevant years commencing on the second, third and fourth anniversaries of the Commencement Date, so as to ensure that, in relation to the Performance Points so established, each of the criteria referred to in paragraph 18.14 are satisfied, but substituting, for the purpose of this exercise, the two year period referred to in this paragraph 17.2 in place of the period referred to in paragraph 18.14(A)(1).

17.3 If the Network Rail Performance Point or the Nexus Performance Point established under paragraph 17.1 or 17.2 in respect of any relevant year (the "New Relevant Year") differs from the Network Rail Performance Point or the Nexus Performance Point (as the case may be) applicable during the previous relevant year, and such difference is not established until after the start of the New Relevant Year, the parties shall retrospectively apply such revised Performance Point or Performance Points so as to calculate the amount which would have been payable under this Schedule 8 in respect of the period from such anniversary to the date on which such revised Performance Point or

Performance Points are established, and any adjusting payment shall be made promptly by the relevant party to the other in respect of such amount.

18. **Five Yearly Review**

18.1 *Material Change in Circumstances*

In respect of the period of 5 years commencing on (and including) the fifth anniversary of the Commencement Date (the "First Review Date") and each period of 5 years commencing on each subsequent fifth anniversary of the First Review Date (each a "review period" and a "review date") either party ("sponsor") may serve a notice on the other ("recipient") ("review notice") requesting a review of the performance regime for the remaining term of this Agreement (subject to any further review in accordance with this paragraph 18).

18.2 *Review Notice*

A review notice:

- (A) may not be served more than 12 months nor less than 28 days before the relevant review date ("service period"); and
- (B) shall be accompanied by a specification in reasonable detail of the changes proposed and of the Material Change in Circumstances giving rise to the request.

18.3 *Response Notice*

Within 60 days of the service of the review notice ("response period"), the recipient may serve notice ("response notice") on the sponsor specifying:-

- (A) that there is no Material Change in Circumstances which would give rise to any changes; and/or
- (B) its objections to the changes being proposed,

in each case accompanied by a reasonably detailed statement of its reasons for so specifying.

18.4 *Negotiation in Good Faith*

If the recipient serves a response notice in accordance with paragraph 18.3 above, the parties shall negotiate in good faith with a view to agreeing whether or not:-

- (A) there is any Material Change in Circumstances; and/or
- (B) subject thereto, what changes (if any) should be made to the performance regime and the other provisions of this Schedule 8.

18.5 *Disputes Determination*

- (A) If the parties have failed to reach agreement on the matters referred to in paragraph 18.4 above within 28 days of service of the response notice, either party may refer the matter for determination under the Access Dispute Resolution Rules.
- (B) It is the intention of the parties to refer for determination under (A) above only those issues upon which they have failed to reach agreement.

18.6 *Criteria*

If a reference is made under paragraph 18.5, the question which the arbitrator shall be required to answer shall be:-

- (A) whether there is a Material Change in Circumstances, save where the parties have so agreed in which case the arbitrator shall only be required to determine the matter referred to in (B) below; and
- (B) what changes (if any) should be made to the performance regime, taking into account the criteria set out in paragraph 18.14.

18.7 *No Review Notice*

If a review notice is not served during the service period, then no changes shall be made to the performance regime in respect of the relevant review period.

18.8 *No Response Notice*

If a review notice is served within the service period and the recipient fails to serve a response notice within the response period, then changes shall be made to the performance regime in respect of the relevant review period in accordance with the requirements of the review notice and Schedule 8 shall be amended accordingly.

18.9 *No Changes*

If a review notice is served within the service period and, following the service of a response notice, it is agreed or otherwise determined that:-

- (A) there is no Material Change in Circumstances; or
- (B) there is a Material Change in Circumstances but that no changes should be made to the performance regime.

then no changes shall be made to the performance regime in respect of the relevant review period.

18.10 *Change to Performance Regime*

If a review notice is served within the service period and, following the service of a response notice during the response period, the parties agree, or it is subsequently determined, that there is a Material Change in Circumstances and the changes that should be made to the performance regime, then the performance regime in respect of the relevant review period shall be as so agreed or determined and this Schedule 8 shall be amended accordingly.

18.11 *Retrospective Effect*

If the performance regime is not agreed by the parties or determined by the relevant review date:-

- (A) the then current performance regime will continue to apply and the parties shall retrospectively apply the revised performance regime following its agreement or determination so as to calculate the amount which would have been payable under the performance regime in respect of the period from the relevant review date to the date on which the performance regime is so agreed or determined; and

- (B) an adjusting payment shall be made within 28 days of such agreement or determination by the relevant party to the other in respect of such amount.

18.12 *Replacement of Schedule 8*

Upon any changes to the performance regime being agreed or determined, the regime (as so changed) shall replace the relevant provisions of this Schedule 8, and accordingly shall constitute such provisions of Schedule 8 with effect from the relevant review date for the purposes of this Agreement.

18.13 *Review*

The new Schedule 8 shall contain the provisions of this paragraph 18, and provisions directly ancillary thereto.

18.14 *Criteria – paragraph 18.6*

The criteria referred to in paragraph 18.6 are that the performance regime should be as follows:-

- (A) the regime will be a “benchmarked regime” which will be financially neutral if the level of performance is equal to benchmark performance and will, in the case of Network Rail’s performance, provide for payment flows to Network Rail in respect of bettering, and from Network Rail in respect of failure to achieve, the benchmark and, in the case of Nexus’ performance, provide for payment flows to Network Rail in respect of failure to achieve, and from Network Rail in respect of bettering, the benchmark. Each party shall provide the other with such information as the other may reasonably require in order to set an appropriate benchmark, including details of allocation of performance minutes and the performance of Nexus’ Metro Train operations on the Metro System Operational Area. There shall be two benchmarks, a Network Rail benchmark and a Nexus benchmark both of which shall initially be set:
 - (1) by identifying, for the period of two years prior to the First Review Date (or prior to the relevant subsequent review date, as the case may be), those performance minutes resulting from cancellations, interruptions, terminations of or delays to trains caused by incidents attributed to each of Network Rail and Nexus on the Route; and
 - (2) using the data obtained pursuant to (1) to simulate the operations of the Specified Equipment on the Route using appropriate simulation techniques,and for each benchmark taking into account:
 - (1) that the Project (as such term is defined in the Project Agreement) has been carried out;
 - (2) any other factor which ought reasonably to be taken into account so that the benchmarks are fairly representative of incidents occurring or are reasonably likely to occur on the relevant part of the Network; and
 - (3) any relevant criteria laid down by the Regulator;
- (B) compensate Nexus in an amount equal to the costs, direct losses and expenses (including loss of revenue) which can reasonably be expected to be incurred by

Nexus as a result of delays, interruptions and cancellations to or terminations of Trains attributed to Network Rail fault, which will include:-

- (1) in the case of a Train which is unable to complete its journey, the costs of conveying passengers to their station destination; and
 - (2) staffing costs;
- (C) provide for the compensation payable to Nexus to be in the form of:-
- (1) a value per Train (or series of values to take into account the cumulative effect) for cancellations, terminations or interruptions; and
 - (2) a value per minute (or series of values to take into account the cumulative effect) for Minutes Late;
- (D) compensate Network Rail in an amount equal to the amounts which Network Rail is required to pay to third party operators as a result of delays, interruptions and cancellations to or terminations of trains attributed to Nexus fault, and also compensate Network Rail for any costs, direct losses and expenses (including loss of revenue) arising from the impact of such delays and cancellations on possession planning which will include, in each case, a serial disruption factor to reflect the effect on the business of other operators and of Network Rail;
- (E) provide for the compensation payable to Network Rail to be in the form of:-
- (1) a value per train (or series of values to take into account the cumulative effect) for cancellations, terminations or interruptions, for the trains of all other operators whose services are cancelled or otherwise affected;
 - (2) a value per delay minute of delay, for the trains of all other operators delayed on the network and for the effect on scheduled possessions;
- (F) provide for the amounts of compensation payable by each of the parties to the other referred to in paragraph (C) and (E) above to be calculated by Network Rail on a 4 weekly basis, for such amounts to be set off against each other and for the balance to be payable by the relevant party to the other;
- (G) index link the values referred to in sub-paragraphs (C) and (E) above by reference to RPI (as defined in Schedule 7);
- (H) contain an obligation on Network Rail and Nexus to take reasonable steps to avoid and mitigate the effects of incidents upon Nexus' Services and the services of other train operators

and so that the performance regime under this Schedule 8 shall, so far as practicable, but having regard first to any criteria issued by the Regulator, be based on the provisions of performance regimes generally applicable to train operators of similar types of passenger railway services in force at the time at which the performance regime under this Schedule 8 is agreed or determined.

18.15 *Costs of Implementing Amendment*

Nexus shall pay half of the costs and expenses which Network Rail incurs in connection with the negotiation, preparation, execution and carrying into effect of any amendment to

this Agreement whose purpose is to give effect to any change to the possessions regime under this paragraph 18.

19. **Arbitration Procedure**

19.1 *Rules*

If a reference is made to arbitration for the purposes of paragraph 18 of this Schedule 8, the arbitration rules shall be those contained or referred to in the Access Dispute Resolution Rules.

19.2 *Consolidation*

In circumstances where:-

- (A) the parties have failed to agree on any changes to the performance regime pursuant to paragraph 18 of this Schedule 8; and
- (B) the parties have failed to agree on any changes to the possessions regime pursuant to Part 2 of Schedule 4;

then, so far as practicable, the disputes shall be consolidated and considered by the same Arbitrator as a single dispute.

Appendix 1

A	B	C	D	E	F	G	H	I	J	K	L	M	N
	Network Rail			Nexus									
Service Group	Performance Point		Payment Rate	Performance Point		Payment Rate	Cancellation Minutes	Cap	Service Code		Direction	Monitoring Point	Weighting
PG01	relevant year	✗	✗	relevant year	✗	✗	10	10	798	(St. James) Pelaw Junction to South Hylton	South South North	Sunderland South Hylton Pelaw Junction	

SCHEDULE 9: FORM OF DEED OF NOVATION

DATED _____ **20[]**

NETWORK RAIL INFRASTRUCTURE LIMITED ^{2nd}(1)

TYNE AND WEAR PASSENGER TRANSPORT EXECUTIVE (2)

and

[SUCCESSOR TO NEXUS]

DEED OF NOVATION

THIS DEED dated

20[] is made

BETWEEN:-

1. **NETWORK RAIL INFRASTRUCTURE LIMITED**,^{2nd} ("Network Rail"), a private company limited by shares registered in England under company number 2904587 having its registered office at 40 Melton Street, London, NW1 2EE;
2. **TYNE AND WEAR PASSENGER TRANSPORT EXECUTIVE** of Nexus House, St James' Boulevard, Newcastle-upon-Tyne, NE1 4AX^{2nd} ("Nexus"); and
3. [SUCCESSOR TO NEXUS] of [] ("the Nexus Successor")

RECITALS

- (A) By a track access agreement ("the Track Access Agreement") (which expression shall include any enforceable agreements reached between Nexus and Network Rail which arise out of or relate to the Track Access Agreement) made the day of 1999 between Railtrack PLC (now known as Network Rail Infrastructure Limited)^{2nd} of the one part and Nexus of the other part, Railtrack PLC (now known as Network Rail Infrastructure Limited)^{2nd} agreed, inter alia, to grant Nexus certain rights of access to the railway track between Pelaw Junction and South Hylton Station via Sunderland Station.
- (B) It has been agreed between Network Rail and Nexus that in the event of a statutory dissolution or reorganisation of Nexus the Nexus Successor shall assume the obligations of Nexus under the Track Access Agreement.
- (C) It is intended that a [statutory dissolution]/[reorganisation] of Nexus takes place on [], [or about the date of this deed] and Network Rail consents to the substitution of the Nexus Successor for Nexus under the Track Access Agreement pursuant to such [statutory dissolution]/[reorganisation].

OPERATIVE PROVISIONS

1. **RELEASE BY NEXUS**

Nexus hereby releases and discharges Network Rail from further performance of Network Rail's obligations under the Track Access Agreement and from all claims and demands whatsoever arising out of or in respect of the Track Access Agreement whether arising prior to, on or subsequent to the date of this Deed.

2. **RELEASE BY NETWORK RAIL**

Network Rail releases and discharges Nexus from further performance of Nexus's obligations under the Track Access Agreement and from all claims and demands whatsoever arising out of or in respect of the Track Access Agreement whether arising prior to, on or subsequent to the date of this Deed.

3. **ACCEPTANCE OF LIABILITY BY NEXUS SUCCESSOR**

The Nexus Successor accepts the liabilities of Nexus under the Track Access Agreement including any accrued but unperformed obligations and agrees to perform all the duties and to discharge all the obligations of Nexus under it and to be bound by all its terms and conditions in every way as if it were named in the Track Access Agreement as a party ab initio in place of Nexus. Without limiting the generality of the foregoing the Nexus Successor acknowledges and agrees that it will receive and accept responsibility for

negotiating and settling all claims and demands whatsoever against Nexus arising out of or in respect of the Track Access Agreement whether arising prior to, on or subsequent to the date of this Deed.

4. ACCEPTANCE OF LIABILITY BY NETWORK RAIL

Network Rail agrees to perform all its duties and to discharge all its obligations under the Track Access Agreement and to be bound by all its terms and conditions in favour of the Nexus Successor in every way as if the Nexus Successor were named in the Track Access Agreement as a party ab initio in place of Nexus. Without limiting the generality of the foregoing Network Rail acknowledges and agrees that the Nexus Successor shall have the right to enforce the Track Access Agreement and pursue all claims and demands (future or existing) by Nexus whatsoever arising out of or in respect of the Track Access Agreement whether arising prior to, on or subsequent to the date of this Deed.

5. CONTRACT IN FORCE

The terms and conditions of this Deed represent the entire agreement between the parties relating to the novation of the Track Access Agreement and except as specifically amended by the Deed all the terms and conditions of the Track Access Agreement remain in full force and effect.

6. NO DISCHARGE OF NETWORK RAIL'S LIABILITY

Nothing in this Deed shall operate to discharge Network Rail from any liability in respect of duties performed prior to the execution of this Deed.

7. EXISTING CLAIMS

7.1 In this Clause 8 the "Existing Claims" means any breaches or alleged breaches of obligations under the Track Access Agreement as are at the date of this Deed the subject of arbitration or litigation between Nexus and Network Rail, brief details of which are set out in the Schedule to this Deed.

7.2 Notwithstanding any other provision herein, this Deed shall not operate to release or discharge Nexus or Network Rail in respect of Existing Claims.

7.3 Nexus hereby assigns to the Nexus Successor the right to pursue or defend the Existing Claims in the name of Nexus.

7.4 The Nexus Successor shall indemnify Nexus in respect of any costs, damages or expenses incurred by Nexus in consequence of the Nexus Successor pursuing or defending the Existing Claims.

7.5 Nexus shall account to the Nexus Successor in respect of any sums which Nexus receives from Network Rail in respect of the Existing Claims.

8. CONFIDENTIALITY

Notwithstanding the release contained in Clause 2 above, Nexus shall continue to be bound by Clause 17 (Confidentiality) of the Track Access Agreement.

9. GOVERNING LAW

This Deed shall be governed by and construed in accordance with the law of England and the parties hereby submit to the exclusive jurisdiction of the English courts.

IN WITNESS of which the parties have caused this document to be executed and delivered as a Deed the day and year first written above

SIGNED AS A DEED by)
NETWORK RAIL INFRASTRUCTURE)
LIMITED^{2nd} acting by:)

Director

Director/Secretary

SIGNED AS A DEED by)
TYNE AND WEAR PASSENGER)
TRANSPORT EXECUTIVE acting)
by:-)

Director

Director/Secretary

SIGNED AS A DEED by)
[NEXUS SUCCESSOR] acting by:)

Director

Director /Secretary

SCHEDULE 10: MODERATION OF COMPETITION

PART 1: DEFINITIONS AND INTERPRETATION

1. Definitions

In this Schedule the following expressions shall where the context so admits have the following meanings:

“access rights” means permission to use track for the purpose of the operation of trains on that track by a beneficiary in providing regular scheduled services for the carriage of passengers by railway and rights ancillary thereto;

“corresponding flow” means a point to point flow:

- (a) in respect of which Network Rail:
 - (i) has granted; or
 - (ii) would, but for paragraph 2 of Part 2 be entitled to grant,
access rights; and
- (b) which is between the same stations as are comprised in any Protected Flow

and “flow corresponding to” shall be construed accordingly;

“point to point flow” means a regular scheduled service for the carriage of passengers by railway on the Network between any two stations and whether or not following a single route (both directions being a single flow) and whether or not such service calls at any other station;

“Protected Flows” means the point to point flows listed in Part 3;

“Protection Period” means the period starting on the Commencement Date and ending on 31 March 2012;

“station” includes one which is in the course of construction or which is proposed to be constructed and at which Nexus is granted a right to call under this Agreement:

2. Interpretations

2.1 In this Schedule 10, unless the context otherwise requires:

- (A) references to Parts are to Parts of this Schedule; and
- (B) references in Parts of this Schedule to paragraphs are references to paragraphs in the Parts in which they appear.

PART 2: PROTECTION PERIOD

1. **Effects of designation as Protected Flow**

A Protected Flow is protected from competitive entry by a third party in the manner provided for, and to the extent specified, in paragraph 2.

2. **Restrictions on Network Rail**

During the Protection Period Network Rail shall not, without the consent of Nexus, grant any access rights to any third party which will have effect during the Protection Period for any point to point flow corresponding to a Protected Flow, unless such rights were granted in a third party access agreement entered into prior to the date of this Agreement.

PART 3: PROTECTED FLOWS

The following are Protected Flows for the purposes of this Schedule 10:-

(A) The point to point flows between the stations which are known, or at the date of this Agreement are intended to be known, as:

- South Hylton
- Pallion
- Millfield
- University^{2nd}
- Park Lane
- Sunderland
- St. Peter's^{2nd}
- Stadium of Light^{2nd}
- Seaburn
- East Boldon
- Brockley Whins
- Fellgate

and

(B) the point to point flows between each of the stations which are known, or at the date of this Agreement are intended to be known, by the name stated in column 1 below and each of the stations in column 2 below.

Column 1	Column 2
South Hylton Pallion Millfield University ^{2nd} Park Lane St. Peter's ^{2nd} Stadium of Light ^{2nd} Seaburn East Boldon Brockley Whins	Heworth Newcastle Central Metro Centre

Fellgate	
----------	--

SCHEDULE 11 THE STATION SPECIFICATIONS

Alterations to existing stations and provision of new stations incorporating, as a minimum, the functional arrangements provided in the following drawings:

Existing stations:

Brockley Whins	-	drawing 30077-22 issue O
East Boldon	-	drawing 30077-23 issue O
Seaburn	-	drawing 30077-24 issue O
Sunderland	-	drawing TWE1000/ST/3/08 issue F

New stations:

Fellgate	-	drawing 30077-21 issue O
Stadium of Light ^{2nd}	-	drawing 30077-25 issue A
St. Peter's ^{2nd}	-	drawing TWE1000/ST/3/06 issue F and related drawings 7408/M/01 to 23
Park Lane	-	drawing 30077-32 issue O and related drawings 4101/AD(O) 01 to 12
University ^{2nd}	-	drawing 30077-26 issue O
Millfield	-	drawing 30077-27 issue O
Pallion	-	drawing 30077-28 issue O
South Hylton	-	drawing 30077-29 issue O

The specification will include the criteria laid down in the Tyne and Wear Metro Building Design Guide (T&W Metro document TWM/GUIDE/BC/01 issue B) and all other documents listed in the List of Documents and Drawings (Sunderland Metro document SM/CONT/GP/05 issue A), and will provide a quality of design, materials and workmanship at least comparable to that provided on the existing Tyne and Wear Metro System when that system was designed and developed between 1974 and 1984.

SCHEDULE 12: THE METRO SYSTEM OPERATIONAL AREA WORKS SPECIFICATION

Permanent Way: Alterations to the Metro network to create new at-grade junctions from/to the Metro network and new chords to create grade separated junctions to the Network Rail network (per general scheme drawings 30077-30 issue – and 30077-31 issue O). Taken together with the signalling (see below) the arrangement will allow a train comprising two Metro articulated passenger vehicles (57 metres long) to stand clear of both these new junctions on the Metro network, between the new junctions and the single to double connection at Bill Quay, in both directions, and to allow Metro trains to simultaneously travel freely over the new Metro junctions to/from the chords connecting to the Network Rail network. Similarly, the arrangement will allow a train comprising two articulated passenger vehicles (57 metres long) to stand clear of both the Metro junctions and the new Network Rail junctions, on the new chords in both directions, and allow Metro trains to simultaneously travel freely over the new Metro junctions to/from Bill Quay, and heavy rail trains to travel freely along the Network Rail Up and Down lines.

The permanent way will be provided to meet, as a minimum, Tyne and Wear Metro permanent way standards.

Signalling and Related Control Systems: Alterations to the Metro network to accommodate the new junctions noted above and, when taken with the permanent way, the arrangement will allow the standage and train movements described above. Alternations to indications and control at South Gosforth Control Centre and Pelaw Relay Room consequent on the above. The signalling arrangements and alterations to South Gosforth Control Centre and Pelaw Relay Room and interfaces to the Network Rail signalling will be designed to Tyne and Wear Metro signalling standards.

Overhead Line Electrification: Alterations to the Metro network consequent to the permanent way and signalling alterations. Alterations to indications and control at South Gosforth Control Centre consequent to the above. The overhead line arrangements and electrical sectioning and alterations to South Gosforth Control Centre will be designed and installed to Tyne and Wear Metro overhead line standards as a minimum, and interfaced to the new Network Rail controlled overhead line network.

Telecommunications:

- (i) On existing Metro System Operational Area: ‘Operational’ lineside communication amendments consequent on signalling and overhead line alterations including any lineside phones and overhead line supervisory arrangements including alterations as a result at South Gosforth Control Centre. These will be included in the overhead line and signalling proposals. They will be signed off as part of this plan. There will be no separate telecommunications proposal in respect of these items.
- (ii) Train radio: Extension of Metro DOO(P) radio system to cover route to South Hylton. (Necessary derogation/authorities to use this system on Metro trains on Network Rail network to be gained by Nexus.) Provision of new base stations and any other transmission systems to cover route per findings of survey commissioned by Nexus. Provision of operator’s interface at Tyneside IECC. Alterations to operator interface at South Gosforth as necessary and to be agreed. Provision of trackside channel changeover facility and train identification protocol between Metro and Network Rail.
- (iii) Station Retail Communications – Provision of CCTV surveillance, real time audio and visual train information and passenger help points. Alterations to customer supervision desk at South Gosforth consequent on this provision.

SCHEDULE 13: FORMS OF COMPLETION CERTIFICATES

PART 1: STATION COMPLETION CERTIFICATE

SUNDERLAND METRO

SUBSTANTIAL STATION COMPLETION CERTIFICATE

(Schedule 14 – Part 1 of Project Agreement)

(Certificate No _____)

Description of Works _____

Date of Commencement
of Defects Liability Period _____

Date of Re-Commencement _____
(if applicable)

In compliance with the Project Agreement and following joint inspections and having agreed the content of outstanding and remedial items to be addressed during the Defects Liability Period, the works as described below are hereby taken over (for the purposes of station maintenance and upkeep) by Nexus as substantially complete, together with the Health and Safety Files in compliance with Regulation 14(f) of the CDM Regulations 1994.

The Outstanding Items are: _____

The Remedial Items are: _____

WORKS OR EQUIPMENT TAKEN OVER:

Network Rail Signature _____ Date _____
Name:

Nexus Signature _____ Date _____
Name:

PART 2: METRO SYSTEM OPERATIONAL AREA COMPLETION CERTIFICATE

SUNDERLAND METRO

SUBSTANTIAL MSOA COMPLETION CERTIFICATE

(Schedule 14 – Part 2 of Project Agreement)

(Certificate No _____)

Description of Works _____

Date of Commencement
of Defects Liability Period _____

Date of Re-Commencement _____
(if applicable)

In compliance with the Project Agreement and following joint inspections and having agreed the content of outstanding and remedial items to be addressed during the Defects Liability Period, the works as described below are hereby taken over by Nexus as substantially complete, together with the appropriate Health and Safety and technical documentation.

The Outstanding Items are: _____

The Remedial Items are: _____

WORKS OR EQUIPMENT TAKEN OVER:

Network Rail Signature _____ Date _____
Name:

Nexus Signature _____ Date _____
Name:

PART 3: NETWORK COMPLETION CERTIFICATE

SUNDERLAND METRO

NETWORK COMPLETION CERTIFICATE
(Schedule 14 – Part 4 of Project Agreement)

- In compliance with the Project Agreement and following the granting of completion certificates for construction and system equipping works, as listed below, together with (written) confirmation of the completion of Integrated System Testing, the network (electrified at 1500V D.C) between PELAW Junction and SOUTH HYLTON via SUNDERLAND (between Metro chainages X and Y) (the “Network”) is hereby deemed to be suitable for the operation of Metro Trains in exercise of the rights of Nexus in Schedule 5 of the TAA.
- Inspections of construction and systems equipment have been carried out by the H&SE (Railway Inspectorate) and subject to the satisfactory completion of outstanding and remedial works prior to, or where agreed, subsequent to the commencement of Nexus (Metro) passenger services, as identified in the relevant reports of the Inspecting Officer/Officers, within the specified timescales, the H&SE (Railway Inspectorate) has approved the use of the Network, as defined above, for the commencement of Nexus (Metro) passenger services, operating in joint running mode with heavy rail freight and passenger services.

CERTIFICATES PREVIOUSLY ISSUED AND DATES OF ISSUE

- Substantial Station Completion Certificate:
- Substantial MSOA Completion Certificate:

Signed on behalf of Network Rail:

Signed on behalf of Nexus

Appointment/Designation:

Appointment/Designation:

Date:

Date:]

SIGNED BY N POLLARD)
on behalf of)
RAILTRACK PLC)
(now known as)
NETWORK RAIL
INFRASTRUCTURE LIMITED)^{2nd}

SIGNED BY M PARKER)
on behalf of)
TYNE AND WEAR PASSENGER)
TRANSPORT EXECUTIVE)

The Route comprises the route between Pelaw Junction and South Hylton Station via Sunderland Station as shown, for identification purposes only, in (blue) on the map attached.

Key

Tyne & Wear Metro

"The Route"

Railtrack Network

Stations

Tyne and Wear Passenger Transport Executive (“Nexus”)

End Notes

(i) First Supplemental Agreement dated 30 January 2002 (Approved on 1 February 2002)

This Supplemental Agreement made provision for Driver Route Learning on the route between Pelaw Junction and South Hylton Station via Sunderland Station, prior to the Commencement Date of the Agreement. (Expired on the Commencement Date)

(ii) Third Supplemental Agreement dated 20 December 2002 (Approved on 20 December 2002)

This Supplemental granted additional access rights to operate on Boxing Day and New Years Day 2002/2003. (Expired on 1 January 2003)

(iii) Second Supplemental Agreement dated 31 October 2003 (Approved on 12 November 2003)

The Agreement was amended as follows:

- (A) The following amendments took effect from the 12 November 2003 and cease to have effect on the Expiry Date or earlier termination of the Agreement:

NETWORK RAIL – NAME CHANGE

- (1) On the front cover of the Agreement, the words “Railtrack PLC as Railtrack” were deleted and replaced with the words “Network Rail Infrastructure Limited (formerly known as Railtrack PLC) as Network Rail”.

- (2) In the parties clause on page 1 of the Agreement, the “(1)” and the words set out against it were deleted and replaced with the following:

“(1) NETWORK RAIL INFRASTRUCTURE LIMITED, (“Network Rail”), a private company limited by shares registered in England under company number 2904587 having its registered office at 40 Melton Street, London, NW1 2EE; and”

- (3) In the parties clause of Schedule 9, the “7” and the words set out against it were deleted and replaced with the following:

“7 NETWORK RAIL INFRASTRUCTURE LIMITED, (“Network Rail”), a private company limited by shares registered in England under company number 2904587 having its registered office at 40 Melton Street, London, NW1 2EE;”

- (4) Except as set out below in paragraph (5), the defined term “Railtrack” was deleted and replaced with the words “Network Rail” throughout the Agreement.

- (5) The word “Railtrack” was not replaced with “Network Rail” in the following circumstances where (as appropriate) the stated provisions were applied:

- (a) the title, 'The Railtrack Track Access Conditions 1995', remains unchanged wherever it occurs in the Agreement, including in the definition of "Access Conditions" in Clause 1.1;
 - (b) in the title of Schedule 9 (Form of Deed of Novation) the words "Railtrack PLC" were deleted and replaced with the words "Network Rail Infrastructure Limited";
 - (c) in paragraph (A) of the recitals to Schedule 9, the word Railtrack was deleted the second and third time it appeared and replaced, in each case, with the words "Railtrack PLC (now known as Network Rail Infrastructure Limited)";
 - (d) in the signature clause following paragraph 9 of Schedule 9, the words "RAILTRACK PLC" were deleted and replaced with the words "NETWORK RAIL INFRASTRUCTURE LIMITED";
 - (e) in the signature clause following Part 3 of Schedule 13, the words "(now known as NETWORK RAIL INFRASTRUCTURE LIMITED)" were inserted after the words "RAILTRACK PLC".
- (6) Where, as a direct result of any change made in accordance with paragraph (4), the definitions in any part of the Agreement which lists defined terms (whether for the purposes of the Agreement as a whole or for the purposes of a particular Schedule or Schedules) ceased to be in alphabetical order, such changes as were necessary were made to restore the alphabetical order of those defined terms in each such affected part.
- (7) Paragraph 1(A) of Schedule 1 was deleted and replaced with the following:

"1 (A) Network Rail's address for the service of notices is:

Network Rail Infrastructure Limited
40 Melton Street
London NW1 2EE

Tel: 020 7557 8118
Fax: 020 7557 9029

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY AND
SOLICITOR"
and copied to:

The Director
Network Rail
London North Eastern Zone
Main Headquarters Building
Station Rise
York
YO1 6HT

Tel: 01904 523 403
Fax: 01904 524 319".

AMENDMENTS TO THE AGREEMENT

- (8) The initial parties section, paragraph 1(B) of Schedule 1, and the parties section in the form of deed of novation at Schedule 9, were amended such that "Cuthbert House, All Saints, Newcastle upon Tyne, NE1 2DA" was deleted and replaced with "Nexus House, St James' Boulevard, Newcastle-upon-Tyne, NE1 4AX".
- (9) Clause 1.1 was amended such that:
- (a) the definition of "Franchising Director" was deleted and replaced, in alphabetical order, with the following:
- ""Strategic Rail Authority" means the body known as the Strategic Rail Authority established under the Act as amended from time to time"; and
- (b) the definition of "Project Agreement" was deleted and replaced with the following:
- ""Project Agreement" means the agreement dated 22 December 1999 between Network Rail (formerly Railtrack PLC) and Nexus, pursuant to which Network Rail (formerly Railtrack PLC) has agreed to deliver the Project Outputs, as that agreement may be modified, revised, supplemented or replaced from time to time whether in whole or in part;".
- (10) A new Clause 22 dealing with Third Party Rights was inserted into the agreement.
- (11) Paragraph 1(B) of Schedule 1 was amended such that the words "URGENT: ATTENTION DIRECTOR OF FINANCE AND ADMINISTRATION" were deleted and replaced with "URGENT: ATTENTION OF THE SECRETARY".
- (12) The words "Franchising Director" were, wherever they appeared in the Agreement, deleted and replaced with the words "Strategic Rail Authority", and corresponding references to "he" and "him" were changed to "it", and corresponding references to "his" were changed to "its".

SCHEDULES 10 (MODERATION OF COMPETITION) AND 11 (STATION SPECIFICATIONS)

- (13) Schedule 10 Part 3 and Schedule 11 were amended such that, in respect of each occurrence:
- (a) the words "University (Sunderland)" were deleted and replaced with "University";
- (b) the word "Monkwearmouth" was deleted and replaced with "St. Peter's"; and

- (c) the word “Stadium” was deleted and replaced with “Stadium of Light”.
- (B) The following amendments took effect from the Commencement Date and cease to have effect on the Expiry Date or earlier termination of the Agreement:

AMENDMENTS TO THE AGREEMENT

- (1) Schedule 4 (Possessions Regime)

The existing Schedule 4 was deleted and replaced in its entirety by a new Schedule 4.

- (2) Schedule 8 (Performance Regime)

The existing Schedule 8 was deleted and replaced in its entirety by a new Schedule 8.

- (C) **RETROSPECTIVE EFFECT**

Provision was made, as a result of the new Schedules 4 and 8 having retrospective effect, for the parties to calculate their net payment obligations to the other under each of the new Schedules, and for these obligations to be settled by way of adjusting payments.

(iv) **Fourth Supplemental Agreement dated 06 September 2004 (Approved on 09 September 2004)**

The amendments made pursuant to the Fourth Supplemental Agreement took effect from 09 September 2004 and cease to have effect on the Expiry Date or earlier termination of the Agreement and are as follows:

- (A) Front end:

In Clause 1.1 the meaning given to the defined term “Working Timetable” was replaced in its entirety.

- (B) Schedule 4:

The meaning given to the defined term “Corresponding Day” was amended. Several incorrect references to the Access Conditions were replaced by the correct references.

- (C) Schedule 5:

(a) Paragraphs 3.3 and 3.4 were deleted in their entirety and replaced with new clauses 3.3, 3.4, 3.5 and 3.6.

(b) In paragraph 7, “D4” was replaced with “D6”.

- (D) Schedule 7:

A new paragraph 5 entitled “Charges for train operations on 26 December and 1 January” was inserted.

(E) Schedule 8:

- (a) In the meaning given to the defined term “Applicable Timetable”, the reference to “D1.5.1” was deleted and replaced with a reference to “D1.6.1”.
- (b) The meaning given to the defined term “Bi-annual Timetable” was deleted and replaced in its entirety.
- (c) In the meaning given to the defined term “First Working Timetable”, the reference to “D1.5.3” was deleted and replaced with a reference to D1.6.3”.
- (d) The following defined terms and their meanings were deleted in their entirety: “Summer Change Date”, “Summer Passenger Timetable”, “Winter Change Date” and “Winter Passenger Timetable”.
- (e) In paragraph 16.2(a)(i), the word “Summer” was deleted and replaced with “Subsidiary”.
- (f) In paragraph 16.2(a)(ii), the word “Winter” was deleted and replaced with “Principal”.

(v) Fifth Supplemental Agreement dated 19th December 2003

Schedule 5 of the agreement was amended by providing Nexus firm rights to operate services on Boxing Day 2003 & New Years Day 2004. The rights ceased to have effect on 1200 1st January 2004.