

EXECUTION VERSION

Access Contract (Freight Services)

In relation to the Metro Shared Network

between

- (1) Tyne & Wear Passenger Transport Executive
- (2) Freightliner Limited

Dated 30 November 2022

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This Contract is made the 30 day of November 2022

Between

- (1) **Tyne & Wear Passenger Transport Executive**, (trading as Nexus), whose principal address is at Nexus House, St James' Boulevard, Newcastle upon Tyne, NE1 4AX ("**Nexus**"); and
- (2) **Freightliner Limited**, a company registered in England under number 3118392 having its registered office at 6th Floor, The Lewis Building, 35 Bull Street, Birmingham, B4 6EQ (the "**Train Operator**").

Background:

- (A) Nexus is owner of the Metro Shared Network and a facility owner for the purposes of the Act; and
- (B) Nexus hereby grants to the Train Operator permission to use the Metro Shared Network on the terms and conditions of this contract.

It is agreed as follows:

1. **Interpretation**

1.1 **Definitions**

In this contract, unless the context otherwise requires:

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

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

"Act" means the Railways Act 1993;

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

"Affiliate" means, in relation to any company:

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

and for these purposes **"holding company"** and **"subsidiary"** have the meanings ascribed to them in section 1159 of the Companies Act 2006;

"Alternative Train Slot" means, in relation to any Train Slot in the Working Timetable which becomes unavailable, an alternative Train Slot established under paragraphs 4 or 5 of Schedule 4;

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

"Applicable System" means any system which the parties may agree to use for the safe planning and operation of Train Slots over the Metro Shared Network;

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

"Cancellation" has the meaning ascribed to it in paragraph 8.1 of Schedule 8;

"Charging Period" means each period of 28 days which coincides with a Nexus accounting period save that:

- (a) the first period and the last period may be of less than 28 days if:
 - (i) the Transfer Date does not coincide with the first day of one of Nexus's accounting periods; or
 - (ii) the Expiry Date does not coincide with the last day of one of Nexus's accounting periods; and
- (b) the duration of the first and last such period in any Financial Year may be varied so as to coincide with the duration of Nexus's accounting periods, by notice from Nexus to the Train Operator;

"Claims Allocation and Handling Agreement" means the agreement of that name approved by ORR;

"CMEO" means the Railways (Class and Miscellaneous Exemptions) Order 1994;

"Collateral Agreements" means the agreements and arrangements listed in Schedule 3;

"Commercially Sensitive Information" has the meaning given to it in clause 14.7.3;

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

"contract" means this document including all schedules and appendices to it and the Metro Network Code;

"Contract Year" means each yearly period commencing on the Transfer Date and subsequently on each anniversary of such date;

"Decision Criteria" has the meaning ascribed to it in Part D of the Metro Network Code;

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

"Destination" means, in relation to a Service:

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

"Diverted Service" means a Service, as such term is defined in paragraph 1.2 of Schedule 4, operated using an Alternative Train Slot established under paragraphs 4 or 5 of Schedule 4;

"Empty Service" means a Service which does not convey:

- (a) loaded wagons; or
- (b) empty passenger rolling stock;

"Environmental Condition" has the meaning ascribed to it in Part E of the Metro Network Code;

"Environmental Damage" has the meaning ascribed to it in Part E of the Metro Network Code;

"European licence" has the meaning ascribed to it in section 6(2) of the Act;

"Event of Default" means a Train Operator Event of Default or a Nexus Event of Default;

"Exercised" has the meaning ascribed to it in Part D of the Metro Network Code;

"Expiry Date" means the earlier of:

- (a) 2359 on the Principal Change Date in the year 2026; and
- (b) unless all of Nexus's rights and obligations under this contract are novated or otherwise transferred in full to another Service Provider (and the ORR has provided its approval to such novation), the date on which Nexus otherwise ceases to be the Service Provider of the Metro Shared Network;

"Financial Year" means a year commencing at 00:00 hours on 1 April and ending immediately before 00:00 hours on the next succeeding 1 April save that:

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

"FOIA" means the Freedom of Information Act 2000 and the Environmental Information Regulations 2004;

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

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

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

"Indemnity Claim" has the meaning ascribed to it in Clause 11.6.4;

"Indemnity Incident Cap" means the sum calculated in accordance with Clause 11.6.5;

"Information" means all information of whatever nature, however conveyed and in whatever form, including in writing, orally, by demonstration, electronically and in a tangible, visual or machine readable medium (including CD ROM, magnetic and digital form);

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

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

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;

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

unless:

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

"Joint Transport Committee" means the joint transport committee of the NECA and NoTCA;

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

"Licensing Regulations" means the Railways (Licensing of Railway Undertakings) Regulations 2005;

"Longstop Date" means 20 September 2022;

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

"Metro Engineering Access Statement" means the Metro Engineering Access Statement in force in respect of the Metro Shared Network on the Transfer Date, as from time to time amended or replaced under Part D of the Metro Network Code;

"Metro Network Code" means the document by that name published by Nexus;

"Metro Shared Network" means the infrastructure of that part of the Tyne and Wear Metro Network which is indicated by purple colouring on diagram 2 in Schedule Schedule 11, which comprises of:

- (a) parts of the railway that was known as the Jarrow branch line (at the Transfer Date), and which is not exempt from the licensing and facility access provisions of the Act; and
- (b) parts of the Tyne and Wear Metro Network (as it existed at the Transfer Date) which is adjacent to the railway described in paragraph (a) and is exempt from the licensing and facility access provisions of the Act pursuant to the CMEO,

as more particularly shown in the schematic diagrams contained in Schedule Schedule 11, which reflects:

- (i) the network as at the Transfer Date (in diagram 1); and
- (ii) anticipated changes to the network after certain works are carried out (in diagram 2) (and which is subject to updates in accordance with the provisions of Schedule Schedule 11),

and, where appropriate, are accompanied with chainage references to identify the applicability of the CMEO to the network;

"Metro Timetable Planning Rules" means the Metro Timetable Planning Rules (as defined in Part D of the Metro Network Code) in force in respect of the Metro Shared Network on the Transfer Date, as from time to time amended or replaced under Part D of the Metro Network Code;

"NECA" means the North East Combined Authority;

"Network Rail" means Network Rail Infrastructure Limited, a company registered in England under company number 02904587 and having its registered office at 1 Eversholt Street, London, NW1 2DN;

"Network Rail Track Access Agreement" means each track access agreement entered into between Network Rail and the Train Operator which grants the Train Operator access to any Nominated Location where railway vehicles operating a Service under the control of the Train Operator may move onto and off the Metro Shared Network, and where reference is made to any right, obligation, liability or action taken under the Network Rail Track Access Agreement such reference shall include any right, obligation, liability or action taken under each such agreement that has effect at the relevant time;

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

"Nexus Event of Default" has the meaning ascribed to it in paragraph 1.3 of Schedule 6;

"Nominated Location" means, in relation to a Service, any of the Origin and Destination, and such other location where railway vehicles operating that Service under the control of the Train Operator will move onto and off the Metro Shared Network;

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

"NoTCA" means the North of Tyne Combined Authority;

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

"Operating Constraints" means:

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

"Origin" means, in relation to a Service:

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

"Performance Monitoring System" has the meaning ascribed to it in Part B of the Metro Network Code;

"Performance Order" has the meaning ascribed to it in Clause 13.3.2;

"Planned" means entered in the Working Timetable;

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

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

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

"Relevant Losses" means, in relation to:

- (a) a breach of this contract; or
- (b) in the case of Clause 10, any of the matters specified in Clause 10.1(a), (b) or (c) or Clause 10.2(a), (b) or (c) (each a **"breach"** for the purpose of this definition),

all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

"relevant Metro ADDR Forum" means the Forum, having the meaning ascribed to it in the Metro ADDR, to which a Relevant Dispute is allocated for resolution in accordance with the Metro ADDR;

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

"Request for Information" means a request for information under FOIA;

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

"ROGS" means the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

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

"safety authorisation" has the meaning ascribed to it by regulation 2 of the ROGS;

"safety certificate" has the meaning ascribed to it by regulation 2 of the ROGS;

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

"Secretary of State" means the Secretary of State for Transport;

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

1.1A specified in the Rights Table (as defined in Schedule 5); or

1.1B where not specified in the Rights Table, specified in an Access Proposal, Rolled Over Access Proposal, Train Operator Variation Request, or in a proposal by the Train Operator of an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4, and accepted by Nexus;

"Service Provider" has the meaning given to "service provider" in the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016;

"Service Variation Sum" means the Service Variation Sum of █████, as adjusted under paragraphs 2.7.1 and 2.7.2 of Schedule 7;

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

"Short Notice Service" means a Service in respect of which the Train Operator Variation Request for the Train Slot to which it relates is made to Network Rail later than 10:00 hours on day A and which would, if the request were accepted, be planned to operate between 10:00 hours on day A and 00:01 hours on day C; for the purposes of this definition:

- (a) day A is the first day (excluding Saturdays and Sundays);
- (b) day B is the second day (excluding Sundays); and
- (c) day C is the third day,

of any 3 consecutive days from (and including) the day on which the request is made;

"SNRP" has the meaning ascribed to it in the Licensing Regulations;

"Specified Equipment" means the railway vehicles which the Train Operator is entitled to use in the provision of Services on the Metro Shared Network, as specified in paragraph 4 of Schedule 5;

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

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

"Track Charges" means the charges payable by or on behalf of the Train Operator to Nexus or its nominee, as set out in Schedule 7;

"Train Operator Event of Default" has the meaning ascribed to it in paragraph 1.1 of Schedule 6;

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

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

"Train Slot" has the meaning ascribed to it in Part D of the Metro Network Code;

"Transfer Date" means the date on which Nexus becomes the Service Provider in respect of the Metro Shared Network;

"Value Added Tax" means value added tax as provided for in the Value Added Tax Act 1994, and any tax similar or equivalent to value added tax or any turnover tax replacing or introduced in addition to them, and **"VAT"** shall be construed accordingly;

"Week" means a period of 7 days commencing at 00:00 hours on Sunday and ending immediately before 00:00 hours on the next succeeding Sunday;

"Working Day" has the meaning ascribed to it in Part A of the Metro Network Code; and

"Working Timetable" has the meaning ascribed to it in Part A of the Metro Network Code.

1.2 ***Interpretation***

In this contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) any one gender includes the other;
- (c) all headings are for convenience of reference only and shall not be used in the construction of this contract;
- (d) reference to an item of primary or secondary legislation is to that item as amended or replaced from time to time;
- (e) reference to a contract, instrument or other document is to that contract, instrument or other document as amended, novated, supplemented or replaced from time to time;
- (f) reference to a party is to a party to this contract, its successors and permitted assigns;
- (g) reference to a recital, Clause or Schedule is to a recital, clause or schedule of or to this contract; reference in a schedule to a Part of or an Appendix to a schedule is to a part of or an appendix to the schedule in which the reference appears; reference in a Part of a Schedule to a paragraph is to a paragraph of that part; reference to a Part of an appendix is to a part of the appendix in which the reference appears; and reference in a schedule to a Table is a reference to the table included in or annexed to that schedule;

- (h) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (i) references to the word "person" or "persons" or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;
- (j) "otherwise" and words following "other" shall not be limited by any foregoing words where a wider construction is possible;
- (k) the words "including" and "in particular" shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (l) words and expressions defined in the Act, the ROGS and Nexus's network licence shall, unless otherwise defined in this contract, have the same meanings in this contract;
- (m) any reference to the term "possession", either by itself or as part of any composite definition, shall be construed as a reference to a Restriction of Use;
- (n) words and expressions defined in the Metro Network Code shall have the same meanings in this contract;
- (o) if there is any conflict of interpretation between this contract and the Metro Network Code, the Metro Network Code shall prevail; and
- (p) references to "the Agreement" or "this Agreement" shall be construed as references to "the contract" or "this contract".

1.3 ***Indemnities***

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

1.4 ***Schedules***

Schedule 1 and Schedule 3 to this contract shall have effect.

2. **Metro Network Code**

2.1 ***Incorporation***

The Metro Network Code is incorporated in and forms part of this contract.

2.2 ***Modification to the Metro Network Code***

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

2.3 ***Compliance by other operators***

Except where ORR has directed otherwise in the exercise of its powers under the Act or the Metro Network Code, Nexus shall ensure that all operators of trains having permission to use any track comprised in the Metro Shared Network agree to comply with the Metro Network Code.

3. **Conditions precedent and duration**

3.1 ***Effective date***

The provisions of this contract, other than Clause 5, take effect from the later of the signature of this contract and the Transfer Date.

3.2 **Conditions precedent to Clause 5**

Clause 5 shall take effect when the following conditions precedent have been satisfied in full:

- (a) to the extent required by the Act and/or the Licensing Regulations, the Train Operator is authorised to be the operator of trains for the provision of the Services by:
 - (i) a licence granted under section 8 of the Act; and/or
 - (ii) a European licence and corresponding SNRP;
- (b) Nexus is authorised by a licence granted under section 8 of the Act to be the operator of the Metro Shared Network or is exempt from the requirement to be so authorised under section 7 of the Act;
- (c) each of the Collateral Agreements is executed and delivered by all the parties to such agreement and is unconditional in all respects (save only for the fulfilment of any condition relating to this contract becoming unconditional);
- (d) each of the parties has, as necessary, a valid safety certificate or safety authorisation as required by the ROGS and has established and is maintaining a safety management system which meets the requirements of the ROGS; and
- (e) the provisions of this contract, other than Clause 5, have taken effect in accordance with Clause 3.1.

3.3 **Obligations to satisfy conditions precedent to Clause 5**

Each party shall use all reasonable endeavours to secure that the following conditions precedent are satisfied as soon as practicable, and in any event not later than the Longstop Date:

- (a) in the case of Nexus, the conditions precedent contained in Clause 3.2(b) and, insofar as within its control, Clauses 3.2(c) and 3.2(d); and
- (b) in the case of the Train Operator, the conditions precedent contained in Clause 3.2(a) and, insofar as within its control, Clauses 3.2(c) and 3.2(d).

3.4 **Consequences of non-fulfilment of conditions precedent to Clause 5**

If the conditions precedent set out in Clause 3.2 have not been satisfied in full on or before the Longstop Date:

- (a) this contract shall lapse save for the obligations contained in Clause 14 which shall continue in force; and
- (b) neither party shall have any liability to the other except in respect of any breach of its obligations under this contract.

3.5 **Expiry**

This contract shall continue in force until the earliest of:

- (a) lapse under Clause 3.4;
- (b) termination under Schedule 6; and

- (c) the Expiry Date,

provided that where the Expiry Date of the Network Rail Track Access Agreement (as defined therein) is extended in accordance with the terms of such agreement, Nexus shall act reasonably in considering any request by the Train Operator that the Expiry Date under this contract be extended to the same date.

3.6 ***Suspension and termination***

Schedule 6 shall have effect.

4. **Standard of performance**

4.1 ***General standard***

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

- (a) Service Provider (in the case of Nexus); and
- (b) train operator (in the case of the Train Operator).

4.2 ***Good faith***

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

5. **Permission to use**

5.1 ***Permission to use the Metro Shared Network***

Nexus grants the Train Operator permission to use the Metro Shared Network.

5.2 ***Meaning***

References in this contract to permission to use the Metro Shared Network shall, except where the context otherwise requires, be construed to mean permission:

- (a) to use the track comprised in the Metro Shared Network for the provision of the Services using the Specified Equipment;
- (b) to use the track comprised in the Metro Shared Network in order to implement any plan established under Part H of the Metro Network Code;
- (c) to make Ancillary Movements;
- (d) not used;
- (e) for the Train Operator and its associates to enter upon the Metro Shared Network with or without vehicles; and
- (f) for the Train Operator and its associates to bring things on to the Metro Shared Network and keep them there,

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

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

5.3 ***Permission under Clauses 5.2(e)5.2(d) and 5.2(f)***

In relation to the permissions specified in Clauses 5.2(e)5.2(d) and 5.2(f):

- (a) the Train Operator shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of Nexus, which consent shall not be unreasonably withheld or delayed;
- (b) the Train Operator shall remove any vehicle or other thing so brought on to any part of the Metro Shared Network when reasonably directed to do so by Nexus; and
- (c) whilst exercising any rights conferred by Clauses 5.2(e)5.2(d) and 5.2(f), the Train Operator shall, and shall procure that its associates shall, comply with such reasonable restrictions or instructions as Nexus shall specify.

5.4 ***Changes to Metro Engineering Access Statement and Metro Timetable Planning Rules***

Changes to the Metro Engineering Access Statement and the Metro Timetable Planning Rules are subject to Part D of the Metro Network Code.

5.5 ***Variations to Services***

Schedule 4 shall have effect.

5.6 ***Services***

Schedule 5 shall have effect.

5.7 ***Performance***

Schedule 8 shall have effect.

5.8 ***Not used***

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

Schedule 2 shall have effect.

6. ***Operation and maintenance of trains and the Metro Shared Network***

6.1 ***General***

Without prejudice to the other provisions of this contract:

- (a) the Train Operator shall maintain and operate the Specified Equipment used on the Metro Shared Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Metro Shared Network in accordance with the permission to use under this contract; and
- (b) Nexus shall maintain and operate the Metro Shared Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Metro Shared Network using the Specified Equipment in accordance with the permission to use under this contract.

6.2 ***Trespass, vandalism and animals***

Without prejudice to the other provisions of this contract, each of the parties shall use all reasonable endeavours (including participating in such consultation and joint action as is reasonable in all the circumstances) to reduce:

- (a) trespass;
- (b) vandalism; and
- (c) intrusions on to the Metro Shared Network by animals,

in each case as may affect either the provision of the Services or those parts of the Metro Shared Network on which the Services are provided.

6.3 ***Safety***

In relation to Safety Obligations:

- (a) the Train Operator shall comply with any reasonable request by Nexus in relation to any aspect of the Train Operator's operations which affects or is likely to affect the performance of Nexus's Safety Obligations; and
- (b) Nexus shall comply with any reasonable request by the Train Operator in relation to any aspect of Nexus's operations which affects or is likely to affect the performance of the Train Operator's Safety Obligations.

6.4 ***Movements of trains onto and off the Metro Shared Network***

6.4.1 ***Suitable access***

In order that railway vehicles under the control of the Train Operator be promptly:

- (a) accepted off the Metro Shared Network; and/or
- (b) presented onto the Metro Shared Network,

the Train Operator shall ensure that in respect of each Nominated Location suitable access has been granted to it in relation to such location by the party which controls the relevant facility connected to the Metro Shared Network at the Nominated Location.

6.4.2 ***Prompt presentation onto the Metro Shared Network***

Where railway vehicles under the control of the Train Operator will move onto and off the Metro Shared Network, the parties shall ensure that in respect of each Nominated Location they will facilitate (to the extent they are able) the prompt presentation of such railway vehicles onto and off the Metro Shared Network.

6.5 ***Use of Applicable Systems***

6.5.1 ***General***

The parties shall use any Applicable System in their dealings with each other in connection with matters provided for in this contract.

6.5.2 ***Provision of train consist data***

Without prejudice to Clause 6.5.1, the Train Operator shall, or shall procure that Network Rail shall:

- (a) provide to Nexus such train consist data as Nexus may reasonably require; and
- (b) ensure that such data is true and accurate as far as is reasonable in the circumstances.

6.5.3 *Notification of movement on to and off the Metro Shared Network*

The Train Operator shall notify Nexus of any movement onto the Metro Shared Network and off the Metro Shared Network of any railway vehicle under the control of the Train Operator by promptly making a full and accurate train release or acceptance entry to the appropriate Applicable System.

6.5.4 *Nexus audit*

Subject to Clauses 6.5.5 and 6.5.6, Nexus may:

- (a) carry out checks and inspections necessary to establish whether the Train Operator is complying with its obligations under this Clause 6.5; and
- (b) carry out such inspections of the books and records kept by or on behalf of the Train Operator in connection with the Services as Nexus may reasonably consider to be necessary for such purpose.

6.5.5 *Notice of audit*

Nexus shall:

- (a) give to the Train Operator reasonable written notice of the checks and inspections to be carried out in accordance with Clause 6.5.4; and
- (b) ensure that the checks and inspections are carried out between 09:00 hours and 17:00 hours on a Working Day.

6.5.6 *Material discrepancy*

If any such check or inspection carried out by Nexus in accordance with Clauses 6.5.4 and 6.5.5 reveals a material discrepancy in information previously supplied to Nexus by the Train Operator:

- (a) the Train Operator shall pay the reasonable costs incurred by Nexus in carrying out the checks and inspections in accordance with Clauses 6.5.4 and 6.5.5; and
- (b) Nexus shall:
 - (i) make the appropriate and consequent adjustments to the Track Charges; and
 - (ii) provide to the Train Operator evidence of such costs as the Train Operator may reasonably request.

6.5.7 *Consent to use information*

The Train Operator consents to the use by Nexus of any data or information supplied by the Train Operator in the course of complying with its Safety Obligations, for the purpose of:

- (a) monitoring the Train Operator's performance of its obligations under this contract; and
- (b) calculating the amount of Track Charges.

7. **Track Charges and other payments**

Schedule 7 shall have effect.

8. **Liability**

8.1 ***Performance Orders in relation to breach***

In relation to any breach of this contract:

- (a) the Innocent Party shall be entitled to apply under Clause 13.3 for a Performance Order against the party in breach; and
- (b) if a Performance Order is made, the party against whom it has been made shall comply with it.

8.2 ***Compensation in relation to breach***

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

9. **Not Used**

10. **Liability - other matters**

10.1 ***Train Operator indemnity***

The Train Operator shall indemnify Nexus against all Relevant Losses resulting from:

- (a) a failure by the Train Operator to comply with its Safety Obligations;
- (b) any Environmental Damage arising directly from the acts or omissions of the Train Operator or the proper taking by Nexus under Condition E2 of the Metro Network Code of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct result of the acts or omissions of the Train Operator; and
- (c) any damage to the Metro Shared Network arising directly from the Train Operator's negligence.

10.2 ***Nexus indemnity***

Nexus shall indemnify the Train Operator against all Relevant Losses resulting from:

- (a) a failure by Nexus to comply with its Safety Obligations;
- (b) any Environmental Damage to the Metro Shared Network arising directly from any acts or omissions of the British Railways Board prior to 1 April 1994 and any Environmental Damage arising directly from the acts or omissions of Nexus; and
- (c) any damage to the Specified Equipment or other vehicles or things brought on to the Metro Shared Network in accordance with the permission to use granted by this contract arising directly from Nexus's negligence.

11. **Restrictions on claims**

11.1 ***Notification and mitigation***

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

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

11.2 ***Restrictions on claims by Nexus***

Any claim by Nexus against the Train Operator for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from a cancellation of or a delay in commencement to a Restriction of Use; and
- (b) shall exclude payments to any person under or in accordance with the provisions of any Access Agreement other than any such payments which are for obligations to compensate for damage to property, and so that any claim for indemnity under this contract for such payments for damage to property, in relation to any incident, shall be limited to:
 - (i) the maximum amount for which the Train Operator would be liable for such damage in accordance with the Claims Allocation and Handling Agreement; less
 - (ii) any other compensation which the Train Operator has an obligation to pay for such damage;
- (c) shall exclude loss of revenue in respect of permission to use any part of the Metro Shared Network under or in accordance with any Access Agreement with any person; and
- (d) shall:
 - (i) include Relevant Losses only to the extent that these constitute amounts which Nexus would not have incurred as network operator of the Metro Shared Network but for the relevant breach; and
 - (ii) give credit for any savings to Nexus which result or are likely to result from the incurring of such amounts.

11.3 ***Restrictions on claims by Train Operator***

Any claim by the Train Operator against Nexus for indemnity for Relevant Losses:

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

11.4 ***Restriction on claims by both parties***

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

- (a) do not arise naturally from the breach; and
 - (b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:
 - (i) at the time of the making of this contract; or
 - (ii) where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,
- as the probable result of the breach.

11.5 ***Limitation on liability***

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

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

11.6 ***Claims Allocation and Handling Agreement***

11.6.1 ***General***

Clauses 16 and 17 of the Claims Allocation and Handling Agreement provide that claims between parties to it are limited to specified amounts unless the parties expressly contract otherwise.

11.6.2 ***Restriction of application***

Except as otherwise expressly provided in this contract, Clauses 16 and 17 of the Claims Allocation and Handling Agreement shall not apply as between the parties to this contract if and to the extent that the giving of any right or remedy as provided for under this contract would be prevented or restricted by Clauses 16 and 17 of the Claims Allocation and Handling Agreement.

11.6.3 ***Liability for small claims***

Nothing in this contract shall affect the application as between the parties of the provisions of the Claims Allocation and Handling Agreement which relate to liability for small claims equal to or below the Threshold (as defined in that agreement).

11.6.4 ***Further limitation of liability***

In relation to any claim or claims made by a party to which Schedule 9 applies ("**Indemnity Claim**") in addition to the limitations on liability that apply under Schedule 9 the liability of the parties to one another shall also be limited so that:

- (a) for any Indemnity Claim that relates to or results from a single incident, event or circumstance then the other party shall not be liable to make payments that over any period of time exceed an amount equal to the Indemnity Incident Cap;

- (b) if under Clause 11.6.4(a) the Indemnity Incident Cap is exceeded then any Indemnity Claim shall be extinguished to the extent that it relates to such excess and the other party shall have no further liability for that excess; and
- (c) any Indemnity Claim (or any part of an Indemnity Claim) that is extinguished under Clause 11.6.4(b) shall not be taken into account when calculating the amount of Relevant Losses in respect of any Indemnity Claim that is admitted or determined in a Contract Year under Schedule 9.

11.6.5 *Indexation of the Indemnity Incident Cap*

The Indemnity Incident Cap for the first Contract Year shall mean the sum of:

- (a) in the case of Nexus, [REDACTED]; and
- (b) in the case of the Train Operator, [REDACTED]; and

in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{CPI_n}{CPI_1} \right]$$

where:

- (i) C_1 is the sum of:
 - (A) in the case of Nexus, [REDACTED]; and
 - (B) in the case of the Train Operator, [REDACTED];
- (ii) C_n is the Indemnity Incident Cap in the nth subsequent Contract Year;
- (iii) CPI_n is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n; and
- (iv) CPI_1 is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the first month of the first Contract Year.

11.6.6 *Applicable Contract Year for indexation*

For the purposes of determining the Indemnity Incident Cap under Clause 11.6.5, the applicable Contract Year shall be the Contract Year in which the relevant incident, event or circumstance begins to occur.

12. **Governing law**

This contract shall be governed by and construed in accordance with the laws of England and Wales.

13. **Dispute resolution**

13.1 **Metro ADRR**

A Relevant Dispute shall be referred for resolution in accordance with the Metro Access Dispute Resolution Rules in force at the time of the reference, as modified by this Clause 13, unless:

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

13.2 **Unpaid sums**

If either party fails to pay:

- (a) any invoice issued to it under this contract in respect of Track Charges; or
- (b) any other sum which has fallen due in accordance with any provision of this contract,

then, subject to Clause 16.1.1:

- (i) the amount invoiced or sum due, as referred to in Clause 13.2(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any invoice or other sum due);
- (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and
- (iii) the dispute resolution procedures in Clauses 13.1 and 13.3 to 13.5 shall not apply to proceedings commenced under this Clause 13.2.

13.3 **Performance Orders**

13.3.1 *Power to order provisional relief*

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

13.3.2 *Performance Orders*

A Performance Order:

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

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

13.3.3 *Duties of arbitrator in relation to Performance Orders*

Without prejudice to any additional remedies that may be ordered by the arbitrator under Clause 13.4, where a dispute is allocated in accordance with the Metro ADDR to arbitration and a party has applied for a Performance Order, the parties shall agree in a Procedure Agreement, as defined in the Metro ADDR, that:

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

13.4 **Remedies**

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

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

13.5 **Exclusion of applications on preliminary points of law**

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

14. **Confidentiality**

14.1 **Confidential Information**

14.1.1 *General obligation*

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

14.1.2 *Nexus - Affiliates*

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

14.1.3 *Train Operator - Affiliates*

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

14.2 **Entitlement to divulge**

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

- (a) to ORR;
- (b) to the Secretary of State, the National Audit Office or the Cabinet Office;

- (c) to the Joint Transport Committee, NECA or NoTCA;
- (d) to any Affiliate of either party;
- (e) to any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
- (f) 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;
- (g) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance, upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
- (h) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
- (i) to the extent required by the Act, FOIA (in accordance with Clause 14.7), the Licensing Regulations, any other applicable law, the rules of any recognised stock exchange or regulatory body or any written request of any taxation authority;
- (j) to the extent that it has become available to the public other than as a result of a breach of confidence;
- (k) under the order of any court or tribunal of competent jurisdiction (including the Allocation Chair or any relevant Metro ADDR Forum, each as defined in the Metro ADDR); and
- (l) to Network Rail or any of its successors and permitted assigns with regard to any relevant systems, access, performance regime or infrastructure related issue, or as otherwise required pursuant to this Agreement.

14.3 ***Return of Confidential Information***

Each of Nexus and the Train Operator shall promptly return to the other party any Confidential Information requested by the other party if such request:

- (a) is made on or within 2 months after the Expiry Date or, if this contract lapses or is terminated earlier, is made within 2 months after the date on which this contract lapses or is terminated;
- (b) is reasonable; and
- (c) contains a sufficient description of the relevant Confidential Information to enable such information to be readily identified and located.

14.4 ***Retention or destruction of Confidential Information***

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

14.5 ***Ownership of Confidential Information***

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

14.6 **Metro Network Code**

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

14.7 **Freedom of Information**

14.7.1 The Train Operator acknowledges that Nexus is subject to the requirements of FOIA. Accordingly, the Train Operator shall:

- (a) provide all necessary assistance and co-operation as reasonably requested by Nexus (to the extent relating to the Metro Shared Network and/or this contract) to enable Nexus to comply with its obligations under the FOIA including compliance with the timescales for compliance set out in section 10 of the Freedom of Information Act 2000 or Regulation 5 of the Environmental Information Regulations 2004 as applicable;
- (b) transfer to Nexus any Request for Information received by the Train Operator (or its agents or subcontractors) as soon as practicable and in any event within two (2) Working Days of receiving any such Request for Information; and
- (c) provide Nexus with a copy of all Information stipulated in a Request For Information which is in the Train Operator's possession or control (or that of the relevant agent or subcontractor) in the form that Nexus requires within five (5) Working Days (or such other period as Nexus may reasonably specify) of Nexus's request for such Information.

14.7.2 The Train Operator acknowledges that Nexus may be required under the FOIA to disclose Information without consulting or obtaining consent from the Train Operator. Nexus shall notify the Train Operator of any Request For Information that seeks disclosure of Confidential Information of the Train Operator to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Agreement) Nexus shall be responsible for determining in its absolute discretion whether any Information (including any Confidential Information) is exempt from disclosure in accordance with the FOIA.

14.7.3 The Train Operator may provide to Nexus details of any information which the Train Operator believes is exempt from disclosure in accordance with the provisions of FOIA ("**Commercially Sensitive Information**"). For each such item of Commercially Sensitive Information, the Train Operator should specify:

- (a) the exact information that the Train Operator believes should be exempt from disclosure; and
- (b) the reason why the Train Operator believes that such exemption of Commercially Sensitive Information is justified in accordance with FOIA.

14.7.4 Nexus shall consult with the Train Operator in relation to the proposed Commercially Sensitive Information. If the Train Operator and Nexus are unable to agree upon any proposed Commercially Sensitive Information, Nexus shall be entitled to determine, in its absolute discretion, whether or not such information shall be treated as Commercially Sensitive Information.

14.7.5 In the event that the Train Operator (acting reasonably) disagrees with Nexus's decision that Confidential Information is not exempt from disclosure in accordance with the FOIA (pursuant to Clause 14.7.2) or that information is not Commercially Sensitive Information (pursuant to Clause 14.7.4) and such Confidential Information or such Commercially Sensitive Information (as the case may be) is disclosed by Nexus pursuant to this Clause 14.7, then, notwithstanding that such disclosure has been made pursuant to this Clause 14.7, the Train Operator may bring

a claim against Nexus (as a Relevant Dispute) as if Nexus had breached the obligation to keep confidential such Confidential Information in accordance with this Clause 14.

15. **Assignment and novation**

15.1 **Assignment**

Subject to Clause 15.2, neither party may assign, transfer, novate or create any encumbrance or other security interest over the whole or any part of its rights and obligations under this contract except to the extent approved by ORR following consultation with the other party, and subject to the conditions (if any) of ORR's approval.

15.2 **Novation**

To the extent approved by ORR following consultation with the other party, and subject to the conditions (if any) of ORR's approval, Nexus shall be entitled to novate or otherwise transfer in full all of its rights and obligations under this contract, without the consent of the Train Operator, to any other Service Provider to whom the Metro Shared Network is transferred at the direction of the Joint Transport Committee where Nexus ceases to be Service Provider of the Metro Shared Network.

If Nexus exercises its rights under this Clause 15.2 then the Train Operator shall fully co-operate with Nexus to achieve such novation or transfer, including by promptly entering into any other documents reasonably requested by Nexus in relation to the exercise of such rights.

16. **Payments, interest and VAT**

16.1 **Payment**

16.1.1 *No deduction*

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

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

16.1.2 *Delivery of invoices*

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

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

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

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

16.1.4 *Method of payment*

All payments shall be made by direct debit mandate or standing order mandate, CHAPS transfer, BACS transfer or other electronic or telegraphic transfer to a London clearing bank or

such other financial institution as may be approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

16.1.5 *Credit notes*

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

16.2 ***Disputed amounts***

16.2.1 *Notification of a dispute*

Except as otherwise provided in this contract, within 14 days of receipt of an invoice or statement of amounts payable issued under any provision of this contract, the recipient shall notify the issuer of any aspects of the invoice or statement which it disputes, giving reasons for any dispute. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement.

16.2.2 *Payment in full*

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

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

16.2.3 *Right to withhold payment of disputed amount*

If:

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

then:

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

16.3 ***Interest***

16.3.1 *Amounts not paid by due date*

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under this contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (as well after judgment as before), except to the extent that late payment arises from any failure by the invoicing party to comply with Clause 16.1.2 or Clause 16.1.3(b).

16.3.2 *Amounts paid which were not properly due*

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

16.4 **VAT**

16.4.1 *Payment of VAT*

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

16.4.2 *Reimbursement of VAT*

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

16.4.3 *VAT credit note to be issued on repayment*

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

17. **Force Majeure Events**

17.1 ***Meaning of Force Majeure Event***

In this Clause 17:

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

"Force Majeure Event" means any of the following events (and any circumstance arising as a direct consequence of any of the following events):

- (a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war, revolution, riot, insurrection, civil commotion, demonstration or sabotage;
- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure;

- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and
- (g) strike or other industrial action which is a single circumstance, and which also is a strike or industrial action in sectors of the economy other than the railway industry;

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

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

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

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

17.2 ***Nature and extent of relief for force majeure***

Force majeure relief under this Clause 17:

- (a) extinguishes the obligation of the Affected Party to indemnify the other party under Clause 8.2 in respect of Relevant Losses sustained as a result of the failure of the Affected Party to perform a Relevant Obligation; but
- (b) is not available in respect of:
 - (i) any obligation to pay money under Schedule 4, Schedule 7 and Schedule 8; or
 - (ii) any other obligation to do or refrain from doing any other thing provided for in this contract; and
- (c) is only available in relation to a failure to perform an obligation under the Metro Network Code to the extent (including as to time and conditions) that the Metro Network Code so provides.

17.3 ***Entitlement to force majeure relief***

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

- (a) performance of the Relevant Obligation has been prevented or materially impeded by reason of a Force Majeure Event;
- (b) it has taken all reasonable steps, taking account of all relevant circumstances (including as to whether the event in question could reasonably have been anticipated):
 - (i) to avoid the occurrence of the Force Majeure Event; and
 - (ii) to minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform the Relevant Obligation; and

- (c) except in the case of Clause 17.1(g), none of the Affected Party, its officers, employees or agents caused the Force Majeure Event.

17.4 ***Procedure for claiming relief***

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

17.5 ***Force Majeure Notices and Reports***

17.5.1 *Force Majeure Notice*

In relation to any Relevant Force Majeure Event:

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

17.5.2 *Force Majeure Report*

Following the giving of a Force Majeure Notice:

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

17.5.3 *Other information*

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

17.6 ***Mitigation***

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

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

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

17.7 Duration of relief for force majeure

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

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

17.8 Availability of Performance Order

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

18. Miscellaneous

18.1 Non waiver

18.1.1 No waiver

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

18.1.2 Failure or delay in exercising a right or remedy

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

18.2 Variations

18.2.1 Amendments to be in writing and to be approved

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

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

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

18.2.2 Exceptions

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

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

18.2.3 No Office of Rail and Road approval needed

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

- (a) modifications effected by virtue of any of the Schedules to this contract; and
- (b) modifications effected by virtue of the Metro Network Code,

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

18.2.4 *Conformed copy of contract*

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

18.2A *Review of terms in the first two years following the Transfer Date*

18.2A.1 Subject to the remaining provisions of this clause and notification to ORR, on or before 12 September 2024, the parties to this contract shall commence (on the instigation of either party) a combined review of the terms of this contract and associated documents including the Metro Network Code (together with all other access beneficiaries holding Access Agreements) to prepare a document (a "**Proposal**") that proposes a simpler form of contract (including the Metro Network Code) for the parties to use (which is proportional to the Metro Shared Network) as may be reasonably necessary and expedient, taking into account:

- (a) the nature and extent of the Metro Shared Network;
- (b) the parties' experience of the contract (and all other Access Agreements) and the Metro Network Code following the Transfer Date;
- (c) any relevant guidance or regulatory statements published by ORR;
- (d) any material issues relating to the interface between the operation of the contract (and all other Access Agreements) and with the operation of corresponding arrangements in the Network Rail Track Access Agreements; and
- (e) where continued alignment between the operation of the contract (and all other Access Agreements) and with the operation of corresponding arrangements in the Network Rail Track Access Agreements remains beneficial for the parties,

and the Proposal shall include proposed amendments reflecting a simpler form of contract.

18.2A.2 The parties shall, within a reasonable time period and in any event no later than 60 Working Days of commencing the combined review with all access beneficiaries holding Access Agreements (as described in clause 18.2A.1), agree the Proposal (such Proposal being agreed by all other access beneficiaries holding Access Agreements). Following such agreement, and any wider industry consultation as required by any relevant ORR guidance, Nexus shall submit the proposed contract amendments to ORR under section 22 of the Act. After ORR approval, clause 18.2.4 shall apply.

18.2A.3 If the parties fail to agree a Proposal within the timeframe specified in clause 18.2A.2, Nexus shall inform ORR that no Proposal was agreed and accordingly there will not be a Proposal to take forward in accordance with clause 18.2A.2 (with regard to an industry consultation and the submission of proposed contract amendments to the ORR).

18.2A.4 This clause 18.2A and any report to ORR under 18.2A.3 shall not limit either party's right to propose any other changes to the contract pursuant to and in accordance with clause 18.2.

18.3 **Entire contract and exclusive remedies**

18.3.1 *Entire contract*

Subject to Clause 18.3.3:

- (a) this contract contains the entire agreement between the parties in relation to the subject matter of this contract;
- (b) each party acknowledges that it has not been induced to enter into this contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in this contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to any such matter; and
- (c) neither party shall have any right to rescind or terminate this contract either for breach of contract or for misrepresentation or otherwise, except as expressly provided for in this contract.

18.3.2 *Exclusive remedies*

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

- (a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and
- (b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

18.3.3 *Fraud, death and personal injury*

Without prejudice to the generality of this Clause 18.2A, nothing in this contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

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

18.4 **Notices**

18.4.1 *Giving of notices*

Any notice to be given under this contract:

- (a) shall be in writing; and

- (b) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by prepaid first class post, recorded delivery, or by email (where the parties agree), to the relevant address or email address set out in Schedule 1.

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

18.4.2 *Right to modify communication details*

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

- (a) to the other party as soon as reasonably practicable; and
- (b) to ORR within 14 days of such modification.

18.4.3 *Deemed receipt*

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

- (a) if sent by hand or recorded delivery, at the time of delivery;
- (b) if sent by prepaid first class post from and to any place within the United Kingdom, 3 Working Days after posting unless otherwise proven; and
- (c) if sent by email (subject to confirmation of receipt of delivery) before 17:00 hours on a Working Day, on the day of transmission and, in any other case at 09:00 hours on the next Working Day.

18.4.4 *Copyees*

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

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

18.5 **Counterparts**

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

18.6 **Survival**

Those provisions of this contract which by their nature or implication are required to survive expiry or termination of this contract (including the provisions of Clauses 8 (Liability), 10 (Liability - other matters), 11 (Restrictions on claims), 12 (Governing law), 13.2 (Unpaid sums), 14 (Confidentiality), 16 (Payments, interest and VAT), 17 (Force Majeure Events), paragraph 4 of Schedule 6 (Consequence of termination) and Schedule 9 (Limitation on liability)), shall so survive and continue in full force and effect, together with any other provisions of this contract necessary to give effect to such provisions.

18.7 **Contracts (Rights of Third Parties) Act 1999**

18.7.1 *Application to third parties*

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

18.7.2 Application to the Office of Rail and Road

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

18.7.3 Contract amendments

Subject to Clause 18.2, Nexus and the Train Operator shall not, after the Transfer Date enter into any agreement with a third party that requires the consent of any third party in order to amend this contract.

18.7.4 Novation to Nexus affiliate

Where pursuant to Clause 15.2 this contract is novated to any Service Provider who is subsidiary of Nexus, Nexus shall be entitled to enforce any rights directly under this contract which it continues to benefit from.

Schedule 1

(Contact particulars)

1. Nexus's address for service of notices is:

Nexus
Nexus House,
St James' Boulevard
Newcastle upon Tyne
NE1 4AX

Email: railcontracts@nexus.org.uk

All written notices to be marked:

"URGENT: ATTENTION Commercial Manager"

and copied to: contactmetro@nexus.org.uk or such other replacement details as may be advised in writing from time to time to the Train Operator.

2. The Train Operator's address for the service of notices is:

Freightliner Limited
6th Floor
The Lewis Building
35 Bull Street
Birmingham
B4 6EQ

Tel: [REDACTED]

Email: [REDACTED]

All written notices to be marked:

"URGENT: ATTENTION THE COMPANY SECRETARY"

and copied to:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Schedule 2

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

1. **Information Request**

If the Train Operator considers that:

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

the Train Operator may serve a request on Nexus for information (an "**Information Request**").

2. **Contents of the Information Request**

The Information Request shall contain:

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

3. **Agreement of the Information Request**

3.1 ***Notification by Nexus***

Nexus shall, within 5 Working Days of the service of the Information Request by the Train Operator, notify the Train Operator of:

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

3.2 ***Failure to agree on provision of specific information***

Following notification by Nexus pursuant to paragraphs 3.1(b) or (c), if the parties fail to agree on the information to be provided by Nexus in response to the Information Request and the timescales for the provision of such information within 5 Working Days of such notification by Nexus, those issues shall be resolved in accordance with the Metro ADDR.

3.3 ***Relevant Metro ADDR Forum resolution***

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

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

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

3.4 ***Provision of information by Nexus***

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

4. **Parts D and G of the Metro Network Code**

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

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

Schedule 3

(Collateral agreements)

1. An agreement under which the Train Operator agrees to become a party to the Claims Allocation and Handling Agreement and, for the purpose of Schedule 6, the Claims Allocation and Handling Agreement.

Schedule 4

(Variations to Services)

Part 1

(General Provisions)

1. Definitions

1.1 Definitions

In this Schedule 4 unless the context otherwise requires:

"Actual Costs" means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including those attributable to limb (f) of a Category 3 Disruption and any increase in Variable Costs but net of:

- (a) any benefit arising from a Category 3 Disruption including any decrease in Variable Costs as a consequence of a Category 3 Disruption; and
- (b) any Enhanced Planned Disruption Sum due to the Train Operator in connection with the relevant Service affected by a Category 3 Disruption;

"Actual Costs Claim Notice" has the meaning specified in paragraph 3.4.3;

"Applicable Service" means a Revised Base Service, a Diverted Service or any Service which suffers a Cancellation;

"Base Service" means:

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

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

"Category 1 Disruption" means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) the Planned departure time from Origin of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (b) the Planned arrival time at Destination of the Revised Base Service differs from that of the Base Service by more than 60 minutes;
- (c) the end to end journey of the Revised Base Service exceeds that of the Base Service by more than 10 miles; or
- (d) the imposition of more demanding length or weight restrictions for the Revised Base Service compared to the Base Service,

provided that:

- (i) the relevant variation arises as a direct result of a Nexus Early Notice Possession; and
- (ii) a Category 2 Disruption or Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

"Category 2 Disruption" means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service;
- (b) the imposition of more demanding gauge restrictions for the Revised Base Service compared to the Base Service;
- (c) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service; or
- (d) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Nexus has agreed to provide electricity for traction purposes for the Base Service as apparent from the column headed "Timing Load" in the Rights Table annexed to Schedule 5,

provided that:

- (i) the relevant variation arises as a direct result of a Nexus Early Notice Possession; and
- (ii) a Category 3 Disruption has not been claimed and paid in relation to the relevant Base Service;

"Category 3 Disruption" means a variation to any Base Service which would otherwise have operated, where such variation has one or more of the following effects:

- (a) there is no Revised Base Service and the access from the Origin or to the Destination of the Base Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route);
- (b)
 - (i) there is no Revised Base Service due to the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
 - (ii) the Revised Base Service does not have an applicable gauge cleared route between the Origin and the Destination where:
 - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and
 - (B) the Revised Base Service operates in whole, or in part, at the relevant location within this 60 hour period;
- (c) all or part of the goods planned to be carried by the Base Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination;
- (d) at least one additional locomotive is used for the Revised Base Service over the number used for the Base Service;

- (e) a diesel locomotive is required to be used for the Revised Base Service in circumstances where Nexus has agreed to provide electricity for traction purposes for the Base Service as apparent from the column headed "Timing Load" in the Rights Table annexed to Schedule 5; or
- (f) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Revised Base Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Base Service,

provided that the relevant variation arises as a direct result of a Nexus Early Notice Possession;

"Category 3 Disruption Trigger" means where the Train Operator incurs Actual Costs as a consequence of a Category 3 Disruption arising from a single Nexus Early Notice Possession;

"Disruption Claim Notice" has the meaning specified in paragraph 3.4.2;

"Disruptive Event" has the meaning ascribed to it in Part H of the Metro Network Code;

"Early Notice Possession" means any Restriction of Use of all or part of the Metro Shared Network notified in all material respects to a Train Operator in accordance with sections 4 and 5 of the Metro Engineering Access Statement prior to the Possession Notice Date;

"Enhanced Planned Disruption Sum" means the Enhanced Planned Disruption Sum specified in Appendix 1;

"Late Notice Actual Costs" means any costs, direct losses and expenses (including any loss of revenue) reasonably incurred or reasonably expected to be incurred by the Train Operator including any increase in Variable Costs but net of:

- (a) any benefit arising from a Relevant Cancellation or Relevant Service Variation (as the case may be) including any decrease in Variable Costs as a consequence of such Relevant Cancellation or Relevant Service Variation (as the case may be); and
- (b) any Service Variation Sum due to the Train Operator in connection with the relevant Service affected by such Relevant Cancellation or Relevant Service Variation (as the case may be);

"Late Notice Actual Costs Claim Notice" has the meaning specified in paragraph 9.3;

"Late Notice Actual Costs Claim Trigger" means:

- (a) in respect of a Relevant Cancellation, the condition specified in paragraph 9.1(b); or
- (b) in respect of a Relevant Service Variation, the condition specified in paragraph 9.2(b);

"Nexus Early Notice Possession" means any Early Notice Possession other than an Operator Early Notice Possession;

"Normal Planned Disruption Sum" means the Normal Planned Disruption Sum specified in Appendix 1;

"Operator Early Notice Possession" means any Early Notice Possession to the extent:

- (a) required as a result of any damage to the Metro Shared Network or Environmental Damage which in each case:
 - (i) arises wholly or mainly from the operations of the Train Operator or its failure to comply with its obligations under this contract; and

- (ii) Nexus demonstrates is in excess of fair wear and tear arising from use of the Metro Shared Network by the Train Operator; or
- (b) requested by the Train Operator (other than for the purposes of inspection, maintenance, renewal or repair of the Metro Shared Network); or
- (c) required in connection with a Metro Network Change proposed by the Train Operator under Condition G3 of the Metro Network Code;

"Original Service" means a Planned Service which:

- (a) is affected by a Disruptive Event as described in paragraph 4.1; or
- (b) is not able to operate because of the non-availability of any part of the Metro Shared Network as described in paragraph 5.1;

"Originally Requested" has the meaning specified in paragraph 4.1;

"Planned Disruption Sum" means a Normal Planned Disruption Sum or an Enhanced Planned Disruption Sum;

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

"Relevant Cancellation" has the meaning specified in paragraph 9.1;

"Relevant Service Variation" has the meaning specified in paragraph 9.2;

"Revised Base Service" means a Base Service which is varied and/or operated using a revised Train Slot established in accordance with Condition D2 or D3 of the Metro Network Code;

"Round Trip" means any Service conveying loaded wagons and any Empty Services and Ancillary Movements associated with that Service;

"Service Variation" has the meaning attributed to it in paragraph 7.1;

"Variable Costs" means the Train Operator's costs which vary as a result of a Category 3 Disruption, a Relevant Cancellation or a Relevant Service Variation (as the case may be) arising directly from changes in train mileage including staff, maintenance, fuel or electricity costs.

1.2 **Interpretation**

References in this Schedule to a **"Service"**, except in the definition of "Round Trip", shall include, in relation to any Planned Service, any Empty Services or Ancillary Movements associated with such Planned Service.

1.3 It is acknowledged and agreed by Nexus and the Train Operator that, in view of the Metro Shared Network adjoining Network Rail's network, either:

1.3.1 the provisions of this Schedule may apply in response to circumstances arising under a Train Operator's Network Rail Track Access Agreement; or

1.3.2 the operation of the provisions in this Schedule may also lead to the operation of equivalent provisions in the Train Operator's Network Rail Track Access Agreement,

and if the circumstances described in paragraph 1.3.1 apply, no compensation or other sums shall be due from Nexus to the Train Operator.

- 1.4 Nexus shall use its reasonable endeavours to work with Network Rail in respect of establishing an Alternative Train Slot (pursuant to paragraph 4 or 5) that is compatible with the relevant Service operating on Network Rail's network.

2. **Payment**

- 2.1 Subject to and in accordance with this Schedule 4 and paragraph 9 of Schedule 8, Nexus shall, in respect of each Charging Period, pay or procure payment of:

- (a) a Service Variation Sum in respect of each Service Variation and, where applicable subject to paragraph 9.2, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (b) where applicable subject to paragraph 9.1, any Late Notice Actual Costs arising from the process set out in paragraph 9.4 and in accordance with paragraph 9.4;
- (c) a Normal Planned Disruption Sum in respect of each Category 1 Disruption;
- (d) an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption; and
- (e) an Enhanced Planned Disruption Sum in respect of each Category 3 Disruption and, where applicable subject to paragraph 3.3.2, the Actual Costs arising from the process set out in paragraph 3.3.3 and in accordance with paragraph 3.3.3,

provided that a Train Operator shall not be entitled to receive more than one Planned Disruption Sum or one Service Variation Sum in respect of an Applicable Service, whether under this Schedule 4 or under Schedule 8 or otherwise.

Part 2

(Compensation for notification before the Possession Notice Date)

3. **Disruption compensation**

3.1 ***Category 1 Disruption***

Subject to paragraphs 2, 3.4.1 and 3.5, Nexus shall be liable in any Charging Period for a Normal Planned Disruption Sum in respect of each Category 1 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) a Freight Access Right as described in sub-paragraph "(a)" of that definition contained in Schedule 5 which but for a Nexus Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.2 ***Category 2 Disruption***

Subject to paragraphs 2, 3.4.1 and 3.5, Nexus shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Category 2 Disruption in respect of any Base Service which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) a Freight Access Right as described in sub-paragraph "(a)" of that definition contained in Schedule 5 which but for a Nexus Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3 **Category 3 Disruption**

3.3.1 Subject to paragraphs 2, 3.4.1 and 3.5, Nexus shall be liable in any Charging Period for an Enhanced Planned Disruption Sum in respect of each Base Service affected by a Category 3 Disruption which is either:

- (a) Planned to depart its Origin in that Charging Period; or
- (b) a Freight Access Right as described in sub-paragraph "(a)" of that definition contained in Schedule 5 which but for a Nexus Early Notice Possession a Train Slot in accordance with those rights would have been Planned to depart its Origin in that Charging Period.

3.3.2 If the Train Operator reasonably believes or expects that the Category 3 Disruption Trigger will be satisfied then the Train Operator will be entitled to serve an Actual Costs Claim Notice.

3.3.3 Within 56 days (or such other period as the parties may agree) of receipt by Nexus of an Actual Costs Claim Notice, Nexus shall notify the Train Operator that either:

- (a) it agrees that the Category 3 Disruption Trigger is satisfied and agrees to the amount of Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Nexus shall also pay such Actual Costs to the Train Operator within 56 days of receipt by Nexus of the relevant Actual Costs Claim Notice; or
- (b) it agrees that the Category 3 Disruption Trigger is satisfied but does not agree to the amount of the Actual Costs claimed by the Train Operator in the Actual Costs Claim Notice, in which case Nexus shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Nexus Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator its Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Category 3 Disruption Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with Clause 13, and if it is determined in accordance with Clause 13 that the Category 3 Disruption Trigger is satisfied then Nexus shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Actual Costs in respect of the Base Service(s) affected by a Nexus Early Notice Possession and shall continue such negotiations in good faith until they are concluded or until the Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator such Actual Costs within 28 days of those Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

3.4 **Notification, Disruption Claim Notices and Actual Costs Claim Notices**

3.4.1 The Train Operator shall notify Nexus of any Nexus Early Notice Possession that it reasonably considers is likely to give rise to any Category 3 Disruption as soon as reasonably practicable after it has been notified of such Nexus Early Notice Possession.

3.4.2 The Train Operator must notify Nexus of any Category 1 Disruption, Category 2 Disruption or Category 3 Disruption, unless otherwise agreed in writing, within 56 days of its occurrence and

include within such notice details of the affected Base Services and the Planned Disruption Sums claimed (a **"Disruption Claim Notice"**).

3.4.3 In respect of a claim for Actual Costs for Category 3 Disruptions relating to a single Early Notice Possession, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Nexus:

- (a) no later than the day falling 56 days after the end of the occurrence of Nexus Early Notice Possession giving rise to a Category 3 Disruption; or
- (b) where an Early Notice Possession is reasonably believed to have exceeded 13 consecutive Charging Periods in length or upon the termination or expiry of this contract, whichever comes first, no later than the day falling 112 days after the end of the 13th consecutive Charging Period or the termination or expiry of this contract (as applicable),

whichever is the earlier, and such claim must include details of the estimate of the Actual Costs which are attributable to all relevant Category 3 Disruptions triggered by the relevant Nexus Early Notice Possession (an **"Actual Costs Claim Notice"**).

3.4.4 Nothing in paragraph 3.4.3 shall prevent the Train Operator from issuing more than one Actual Costs Claim Notice in respect of the same Nexus Early Notice Possession, provided that:

- (a) each such Actual Costs Claim Notice relates to a different period covered by the relevant Nexus Early Notice Possession; and
- (b) no Actual Costs Claim Notice can be issued after the last day for serving notice specified under paragraph 3.4.3.

3.5 ***Planned Disruption Sum on Round Trip***

Nexus shall not be liable to the Train Operator for more than one Planned Disruption Sum in respect of any Round Trip.

3.6 ***Early notice of potential Actual Cost claims***

The parties may at any time engage in discussions on any matter likely to result in payments of any Actual Costs and shall use reasonable endeavours to agree whether such Actual Costs arising from the process set out in paragraph 3.3 are likely to arise and/or what mitigating actions should be contemplated to reduce or avoid such Actual Costs. The party initiating such discussions shall provide to the other reasonable evidence in writing of why it considers such Actual Costs will arise and what mitigating actions should be contemplated. Following any agreement or determination that such Actual Costs are likely to arise in connection with one or more future Nexus Early Notice Possessions or that mitigating actions should be contemplated, the parties shall where reasonably practicable engage in discussions on any options for mitigating costs, revenue loss and/or disruption including any advance compensation for such Nexus Early Notice Possession(s) to the extent such advance compensation would or would reasonably be expected to facilitate the mitigation of the contemplated disruption. Nothing in this Agreement shall prevent Nexus and the Train Operator agreeing any options for mitigating costs and disruption in respect of any Nexus Early Notice Possession(s). Unless otherwise agreed, the timescales for claiming Actual Costs in paragraph 3.4 shall still apply.

Part 3

(Processes and compensation for notification after the Possession Notice Date)

4. **Services rescheduled following a Disruptive Event**

4.1 ***Establishing an Alternative Train Slot***

Where there is a Disruptive Event:

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

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

4.2 ***Train Operator's response***

On receiving Nexus's nomination (if any) of an Alternative Train Slot under paragraph 4.1, the Train Operator shall promptly by notice to Nexus either:

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

4.3 ***Rejection of Alternative Train Slot***

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

4.4 ***Measure of performance***

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

- (a) Nexus shall permit the Train Operator to make the relevant movement in accordance with that Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the original Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

4.5 ***Cancellation***

4.5.1 Where:

- (a) Nexus is not able to nominate an Alternative Train Slot under paragraph 4.1;

- (b) the Train Operator rejects the Alternative Train Slot nominated by Nexus under paragraph 4.2(b) and does not propose a different Alternative Train Slot under paragraph 4.3; or
- (c) the Train Operator proposes a different Alternative Train Slot under paragraph 4.3 and this is not accepted by Nexus,

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8 and paragraph 2 of Schedule 4 and paragraphs 8 and 9 of Schedule 8 shall apply.

4.5.2 Where an Alternative Train Slot is:

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

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

4.6 ***Part H of the Metro Network Code***

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

5. **Other variations to Planned Services**

5.1 ***Non-availability of a Service***

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

- (a) a Restriction of Use to be taken pursuant to the Metro Engineering Access Statement which has been notified in all material respects prior to the Possession Notice Date; and
- (b) the circumstances envisaged by paragraph 4,

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

- (i) Attributable to Nexus (MSN) (as defined in Schedule 8); and
- (ii) known about in sufficient time for an alternative Service to be the subject of a Train Operator Variation Request and entered into the Working Timetable as a new Planned Service.

5.2 ***Establishing an Alternative Train Slot***

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

5.3 ***Train Operator's response***

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

- (a) accept the Alternative Train Slot nominated by Nexus (in which case the nomination by Nexus and its acceptance by the Train Operator shall be treated as a Train Operator Variation); or

- (b) reasonably reject the Alternative Train Slot nominated by Nexus.

5.4 **Rejection of Alternative Train Slot**

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

5.5 **Measure of performance**

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

- (a) Nexus shall permit the Train Operator to make the relevant movement in accordance with the Alternative Train Slot;
- (b) the Service Characteristics of the Planned Service shall be those of the Alternative Train Slot; and
- (c) the performance of the movement shall be measured accordingly.

5.6 **Cancellation**

5.6.1 Where:

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

the relevant Service shall be treated as a Cancellation for the purposes of paragraph 8.1(d) of Schedule 8, paragraph 2 of Schedule 4 shall apply.

5.6.2 Where an Alternative Train Slot is:

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

the Original Service shall not be treated as a Cancellation for the purposes of Schedule 8.

Part 4

(Restrictions of Use before Possession Notice Date)

6. **Restrictions of Use before Possession Notice Date**

Without prejudice to any invoices issued under paragraphs 2 or 3 of Schedule 4 or paragraph 9 of Schedule 8, if Nexus nominates that any part of the Metro Shared Network will not be available for a Service to operate at the Planned time by reason of a Restriction of Use to be taken pursuant to the Metro Engineering Access Statement which has been notified to the Train Operator in all material respects prior to the Possession Notice Date, Nexus shall have no liability to the Train Operator under Parts 3, 5 or 7 of Schedule 4 or Schedule 8 in respect of the effect of that Restriction of Use on such Service.

Part 5

(Service Variation)

7. **Service Variation**

7.1 **Service Variation**

For the purposes of this Schedule 4, "**Service Variation**" means a variation to any Service which:

- (a) the Train Operator has accepted under paragraphs 4 or 5, and which is Attributable to Nexus (MSN) (as defined in Schedule 8); and
- (b) has one or more of the following effects:
 - (i) the end to end journey of the Diverted Service exceeds that of the Original Service by more than five miles;
 - (ii) the addition of at least one Planned reversing movement for the Diverted Service over the number of Planned reversing movements for the Original Service;
 - (iii) the imposition of any more demanding length, weight or gauge restrictions for the Diverted Service compared with the Original Service;
 - (iv) the use of:
 - (A) at least one additional locomotive for the Diverted Service over the number for the Original Service;
 - (B) a diesel locomotive for the Diverted Service in circumstances where Nexus has agreed to provide electricity for traction for that Original Service as shown in Schedule 5;
 - (v) the Planned departure time from Origin of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours;
 - (vi) the Planned arrival time at Destination of the Diverted Service differs from that of the Original Service by more than 30 minutes but less than 12 hours; and
 - (vii) while the Train Operator Originally Requested the Train Slot in accordance with Part D of the Metro Network Code, the nomination and acceptance of the Alternative Train Slot which is established for the Diverted Service is treated as a Short Notice Service because an act or omission of Nexus resulted in the Originally Requested Train Slot not being Planned in accordance with Part D.

7.2 **Nexus liability**

Subject to paragraphs 7.3 and 7.4, Nexus shall be liable in any Charging Period for a Service Variation Sum in respect of each Service Variation relating to a Service Planned to depart its Origin in that Charging Period.

7.3 **Service Variation Sum on Round Trip**

Nexus shall not be liable to the Train Operator for more than one Service Variation Sum in respect of any Round Trip.

7.4 **Service Variation / Cancellation**

Nexus shall not be liable to the Train Operator for a Service Variation Sum if, following the Service Variation, the Train Operator is entitled to seek Late Notice Actual Costs in respect of the Diverted Service.

Part 6

(Not Used)

8. **Not Used**

Part 7

(Late Notice Actual Costs Claims)

9. **Late Notice Actual Costs Claims**

9.1 **Late Notice Actual Costs Claim arising from Relevant Cancellation**

If the circumstances in paragraph 5.6.1 apply in respect of a Cancellation (a "**Relevant Cancellation**"), and:

- (a) either:
 - (i) the Relevant Cancellation occurs because the access from the Origin or to the Destination of the Original Service is blocked to all rail freight services (except as a result of the non-availability of the applicable gauge cleared route); or
 - (ii) the Relevant Cancellation occurs because of the lack of an applicable gauge cleared route between the Origin and the Destination which has lasted or lasts in total for more than 60 hours; or
 - (iii) as a result of the Relevant Cancellation, all or part of the goods planned to be carried by the Original Service are required to be transported by any mode other than rail, for all or any part of the journey from its Origin to its Destination; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Cancellation, then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

9.2 **Late Notice Actual Costs Claim arising from Relevant Service Variation**

If, pursuant to paragraph 7, Nexus is liable for a Service Variation Sum in respect of a Service Variation (other than a Service Variation which arises from a variation to a Service which the Train Operator has accepted under paragraph 4) (a "**Relevant Service Variation**"), and:

- (a) either:
 - (i) the Diverted Service does not have an applicable gauge cleared route between the Origin and the Destination where:
 - (A) the lack of such applicable gauge cleared route has lasted or lasts in total for more than 60 hours; and

- (B) the Diverted Service operates in whole, or in part, at the relevant location within this 60 hour period; or
 - (ii) at least one additional locomotive is used for the Diverted Service over the number used for the Original Service; or
 - (iii) a diesel locomotive is required to be used for the Diverted Service in circumstances where Nexus has agreed to provide electricity for traction for the Original Service as shown in Schedule 5; or
 - (iv) the parties agree that there is a requirement for a specified number of the Train Operator's train crew to acquire knowledge of any diversionary route which may form part of the Diverted Service and such requirement has come about as a direct result of the exceptional nature of the variation to the Original Service; and
- (b) the Train Operator incurs Late Notice Actual Costs as a consequence of the Relevant Service Variation,

then the Train Operator will be entitled to serve a Late Notice Actual Costs Claim Notice in accordance with paragraph 9.3 below.

9.3 **Late Notice Actual Costs Claim Notice**

In respect of a claim for Late Notice Actual Costs arising under paragraphs 9.1 or 9.2 above, the Train Operator shall, unless otherwise agreed in writing, serve a claim on Nexus no later than the day falling 56 days after the occurrence of the Relevant Cancellation or Relevant Service Variation (as the case may be), and such claim must include details of the estimate of the Late Notice Actual Costs which are attributable to the Relevant Cancellation or Relevant Service Variation (as the case may be) (a "**Late Notice Actual Costs Claim Notice**").

9.4 **Late Notice Actual Costs Claim Process**

Within 56 days (or such other period as the parties may agree) of receipt by Nexus of a Late Notice Actual Costs Claim Notice, Nexus shall notify the Train Operator that either:

- (a) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied and agrees to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Nexus shall also pay such Late Notice Actual Costs to the Train Operator within 56 days of receipt by Nexus of the relevant Late Notice Actual Costs Claim Notice; or
- (b) it agrees that the Late Notice Actual Costs Claim Trigger is satisfied but does not agree to the amount of the Late Notice Actual Costs claimed by the Train Operator in the Late Notice Actual Costs Claim Notice, in which case Nexus shall:
 - (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
 - (ii) pay to the Train Operator its Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be); or
- (c) it does not agree that the Late Notice Actual Costs Claim Trigger is satisfied, in which case the matter shall be immediately referred for determination in accordance with

Clause 13, and if it is determined in accordance with Clause 13 that the Late Notice Actual Costs Claim Trigger is satisfied then Nexus shall:

- (i) (if it has not already done so) commence negotiations with the Train Operator in respect of its Late Notice Actual Costs and shall continue such negotiations in good faith until they are concluded or until the Late Notice Actual Costs are determined in accordance with Clause 13; and
- (ii) pay to the Train Operator such Late Notice Actual Costs within 28 days of those Late Notice Actual Costs being agreed or determined in accordance with Clause 13 (as the case may be).

Appendix 1

The Normal Planned Disruption Sum shall be [REDACTED], amount to be expressed in pounds sterling and rounded to zero decimal places.

The Enhanced Planned Disruption Sum shall be [REDACTED], amount to be expressed in pounds sterling and rounded to zero decimal places.

Schedule 5

(Services)

1. Definitions

1.1 Definitions

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

"Association" means a Special Term linking the planning of two Services at any location or locations;

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

"Day" means any period of 24 hours beginning at 00:00 hours and ending immediately before the next succeeding 00:00 hours, and any reference in this Schedule to any named day of the week shall be to such period commencing on that named day. The following convention shall be used to denote days of the week:

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

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

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

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

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

"Departure Window" means the period of time during which the Service shall be Planned to depart from its Origin;

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

"Exercised" has the meaning ascribed to it in Part D of the Metro Network Code;

"Firm Right" has the meaning ascribed to it in Part D of the Metro Network Code;

"Flexing Rights" has the meaning ascribed to it in Part D of the Metro Network Code;

"Freight Access Right" means either:

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

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

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

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

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

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

"Priority Right" means a firm right for a Train Slot pursuant to the terms of a Network Rail Track Access Agreement to and from the Jarrow oil terminal as existed at the Transfer Date and which, following the Transfer Date is a firm right for a Train Slot to and from the Pelaw Junction Connection Point, (and which is identified in the Rights Table by the notation "Priority" in the column headed "Special Terms");

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

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

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

"Routing" means the route which Nexus is to use for a Service in preparing the New Working Timetable or the Working Timetable;

"Special Terms" means any special characteristic of a Service which is specified as such in the Special Terms column of the Rights Table;

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

"Timing Load" has the meaning ascribed to it in Part D of the Metro Network Code;

"Train Operator Variation Services" means Services in relation to which Train Operator Variation Requests are made by the Train Operator pursuant to paragraph 2.3;

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

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

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

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

2. **Rights and Services**

2.1 ***Train Slots***

2.1.1 The Train Operator has:

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

and certain of those Firm Rights may be identified as a Priority Right (in the "Special Terms" column), which are given priority in accordance with Condition D4.2 of Part D of the Metro Network Code.

2.2 ***Ancillary Movements***

2.2.1 The Train Operator has:

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

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

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

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

2.3 ***Train Operator Variation Services***

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

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

2.3.2 The duration of any Train Operator Variation Service shall not exceed 12 months.

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

- (a) shall not include Services for the purpose of testing under vehicle acceptance procedures; but

- (b) shall include Services for the purpose of testing rolling stock (including testing for the purpose of mileage accumulation) which has secured an engineering acceptance certificate and a certificate of interim operation.

2.3.4 For the purpose of this paragraph 2.3, where Train Operator Variation Requests for successive Train Operator Variation Services each having substantially the same characteristics are accepted, such Train Operator Variation Services shall be aggregated for the purpose of ascertaining whether the period of 12 months has been exceeded.

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

2.4 **Public holidays**

With the exception of Christmas Day and Boxing Day (25 and 26 December), for the purposes of this contract, public holidays are treated as normal named Days.

3. **Flexing Rights**

3.1 **Associations**

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

4. **Services**

4.1 **Services**

The Services under this contract comprise:

- (a) services with the characteristics set out in the Rights Table in columns 1 to 18;
- (b) any Diverted Services;
- (c) Ancillary Movements;
- (d) any Train Operator Variation Services; and
- (e) any Revised Base Service.

4.2 **Specified Equipment**

4.2.1 Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Firm Right to use any equipment registered with RSSB's R2 system which has performance characteristics identical to or better than the Timing Load specified in the Rights Table for such Service.

4.2.2 Subject to paragraph 4.2.3, the Train Operator has, in relation to a Service, a Contingent Right to use any equipment registered with RSSB's R2 system.

4.2.3 No rolling stock may be used unless and until it has achieved vehicle and route acceptance necessary for its use on the Metro Shared Network and in the case of electrified rolling stock, until the charges pursuant to Schedule 7 of this contract have been amended to include charges for electrified rolling stock.

4.3 **Information**

The parties make no representations regarding the data set out in columns headed "For information – not part of contract" in the Rights Table and rows entitled "Non-contractual

Comments" in the Rights Table. Such data does not form part of this contract and is included in the Rights Table for convenience and information only.

5. **Amendment of the Rights Table**

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

Either party may by notice to the other propose that the Rights Table be amended in accordance with this paragraph 5. Such amendment shall be restricted to a change to the extent of the window in either or both of the columns headed "Arrival Window" or "Departure Window" of the Rights Table. Both parties acknowledge that any change to the Rights Table will need to be aligned with the Train Operator's Rights Table in Schedule 5 of the relevant Network Rail Track Access Agreement.

5.2 ***Procedure for amendment of the Rights Table***

- (a) The party who wishes to amend the Rights Table shall notify the other party of any such proposed change and the date from which it proposes that such change will have effect provided that:
 - (i) the amendment may only take effect on a Principal Change Date or Subsidiary Change Date, but in any event shall not take effect before the Principal Change Date in 2022 (save to the extent that any proposed change is to align with a change to the Rights Table contained in the Network Rail Track Access Agreement, where, in such case, the parties shall use reasonable endeavours to align the timing of such amendments); and
 - (ii) the notice must be given on or before the first day of the month 15 months before the relevant Principal Change Date or the Subsidiary Change Date as the case may be.
- (b) Any notice under paragraph 5.2(a) shall specify that party's proposed amendments to the extent of the window in either or both of the columns headed "Arrival Window" or "Departure Window", and be accompanied by information in reasonable detail supporting the change proposed and setting out the reasons for it, including any changes to related rights under the Network Rail Track Access Agreement.
- (c) If the party receiving a notice issued under paragraph 5.2(a) agrees that the Rights Table should be amended in accordance with that notice, then it shall as soon as reasonably practicable (and in any event no later than 20 Working Days) after receiving that notice respond in writing setting out its agreement. The parties shall then ensure that ORR is furnished with the agreed amendment and such information and evidence as ORR requires to decide whether or not to approve the amendment.
- (d) If the party receiving a notice issued under paragraph 5.2(a) does not agree that the Rights Table should be amended in accordance with that notice, then it shall respond to that notice in writing in reasonable detail and with reasons for its response within 20 Working Days of service of such notice. Promptly (and in any event within 20 Working Days) following the service of such written notice of disagreement, the parties shall endeavour to agree whether the Rights Table should be amended in accordance with this paragraph 5 and, if so, the amendments. If they do so agree, the parties shall then ensure that ORR is furnished with the agreed amendment and such information and evidence as ORR requires to decide whether or not to approve the amendment.
- (e) If the parties fail to reach agreement within 40 Working Days of service of a notice under paragraph 5.2(a), or if prior to that date both parties agree that agreement is unlikely to be reached within that period:
 - (i) either party may notify ORR; and

- (ii) the parties shall furnish ORR with such information and evidence as ORR shall require in order to determine the matter, such determination to be binding on the parties.
- (f) In making its determination under paragraph 5.2(e)(ii), ORR shall have regard to the information and evidence provided by the parties, and the duties set out in section 4 of the Act.
- (g) An amendment to the Rights Table shall take effect only when it has been approved (in the case of an amendment agreed by the parties) or determined (in the case of a proposal referred to ORR under paragraph 5.2(e)) in writing by ORR, and shall apply from the relevant Principal Change Date proposed by the party requesting the change (in accordance with paragraph 5.2(a)).

Annex 1
(Rights Table)

For Information - not part of contract			Service characteristics																		
Service Group Reference	Flow No	Train Reporting Number	Origin Data						Destination Data				Additional Data				Equipment Characteristics				
			Minimum Turn Around Time at Origin	Days per Week	Departure Window From	Departure Window To	Origin	Origin Stanox	Destination	Arrival Window From	Arrival Window To	Destination Stanox	Minimum Turn Around Time at Destination	Routing	[Not used]	[Not used]	Special Terms	Timing Load	Maximum Length of Train	Route Availability (RA)	Loading Gauge

Schedule 6

(Events of Default, suspension and termination)

1. **Events of Default**

1.1 ***Train Operator Events of Default***

The following are Train Operator Events of Default:

- (a) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services in accordance with Clause 3.2(a);
- (b) an Insolvency Event occurs in relation to the Train Operator;
- (c)
 - (i) any breach by the Train Operator of this contract, its Safety Obligations or any of the Collateral Agreements; or
 - (ii) any event or circumstance which is reasonably likely to result in any such breach,

which, by itself or taken together with any other such breach, event or circumstance, Nexus reasonably considers constitutes a threat to the safe operation of any part of the Metro Shared Network;
- (d) any Track Charges or other amount due by the Train Operator to Nexus under this contract remain unpaid for more than 7 days after their due date;
- (e) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to Nexus; and
- (f) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators.

1.2 ***Notification***

The Train Operator shall notify Nexus promptly on becoming aware of the occurrence of a Train Operator Event of Default.

1.3 ***Nexus Events of Default***

The following are Nexus Events of Default:

- (a) Nexus ceases to be authorised to be the operator of the Metro Shared Network by a licence granted under section 8 of the Act unless exempt from the requirement to be so authorised under section 7 of the Act;
- (b) an Insolvency Event occurs in relation to Nexus;
- (c)
 - (i) any breach by Nexus of this contract, its Safety Obligations or any of the Collateral Agreements; or

- (ii) any event or circumstance which is reasonably likely to result in any such breach,

which, by itself or taken together with any other such breach, event or circumstance the Train Operator reasonably considers constitutes a threat to the safe operation of the Services or any Ancillary Movements; and

- (d) any breach of this contract or any material breach of any of the Collateral Agreements by Nexus which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Train Operator.

1.4 **Notification**

Nexus shall notify the Train Operator promptly on becoming aware of the occurrence of a Nexus Event of Default.

2. **Suspension**

2.1 **Right to suspend**

2.1.1 Nexus may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.

2.1.2 The Train Operator may serve a Suspension Notice where a Nexus Event of Default has occurred and is continuing.

2.2 **Contents of Suspension Notice**

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;
- (c) in the case of a Suspension Notice served on the Train Operator, reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Metro Shared Network or any parts of it;
- (d) in the case of a Suspension Notice served on Nexus, details of any necessary suspension of the Services; and
- (e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:
 - (i) the steps reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure to pay Track Charges or other amounts due, 7 days shall be a reasonable grace period).

2.3 **Effect of a Suspension Notice served by Nexus**

Where Nexus has served a Suspension Notice on the Train Operator:

- (a) the Train Operator shall comply with any reasonable restrictions imposed on it by the Suspension Notice;

- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from Nexus to the Train Operator under paragraph 2.5.4;
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Metro Network Code.

2.4 *Effect of a Suspension Notice served by the Train Operator*

Where the Train Operator has served a Suspension Notice on Nexus:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Metro Shared Network to provide the Services to the extent specified in the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to Nexus under paragraph 2.5.4; and
- (c) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purpose of Part D of the Metro Network Code.

2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Train Operator Event of Default relates.

2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of Nexus Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services; and
- (c) categories of train movements or railway vehicles,

or parts or part of them, to which the relevant Nexus Event of Default relates.

2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:

- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
- (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.

- 2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3, whether in whole or in part, and it is reasonable for the suspension effected by the Suspension Notice to be revoked, whether in whole or in part, the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

3. **Termination**

3.1 ***Nexus's right to terminate***

Nexus may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 2.5.3;
- (c) where the Train Operator Event of Default specified in paragraph 1.1(a) has occurred and is continuing; or
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by Nexus is not capable of being remedied and 3 months have elapsed from the service of that Suspension Notice.

3.2 ***Train Operator's right to terminate***

The Train Operator may serve a Termination Notice on Nexus:

- (a) where Nexus fails to comply with its obligations under paragraph 2.5.3;
- (b) where the Nexus Event of Default specified in paragraph 1.3(a) has occurred and is continuing; or
- (c) where the Nexus Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and 3 months have elapsed from the service of that Suspension Notice.

3.3 **Contents of Termination Notice**

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
 - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
 - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Train Operator to pay Track Charges or other amounts due, 7 days is a reasonable grace period).

3.4 ***Effect of Termination Notice***

Where Nexus or the Train Operator has served a Termination Notice on the other:

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

3.5 ***Unilateral right of termination***

The Train Operator may at any time serve a notice on Nexus to terminate this contract (a "**unilateral termination notice**"). In such circumstances, the Train Operator shall send a copy of the unilateral termination notice to ORR.

3.6 ***Contents of unilateral termination notice***

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

3.7 ***Effect of unilateral termination notice***

Where the Train Operator has served a unilateral termination notice on Nexus:

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

4. ***Consequence of termination***

4.1 ***Directions regarding location of Specified Equipment***

Immediately before, upon or following termination or expiry of this contract, the Train Operator shall comply or procure compliance with all reasonable directions given by Nexus concerning the location of the Specified Equipment.

4.2 ***Failure to comply with directions***

If the Train Operator fails to comply with any directions given under paragraph 4.1, Nexus shall be entitled to remove from the Metro Shared Network any Specified Equipment left on the Metro

Shared Network or to instruct a third party to do so and any reasonable costs incurred by Nexus in taking such steps shall be paid promptly by the Train Operator.

4.3 ***Evidence of costs***

Nexus shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Train Operator shall reasonably request.

Schedule 7

(Track Charges and other payments)

1. Definitions

In this Schedule 7 unless the context otherwise requires:

"Access Sum" means in relation to a Service, the sum payable in respect of that Service using the Metro Shared Network, which shall be [REDACTED], representing the average charges payable in respect of services using that part of the track (which, from the Transfer Date, is comprised in the Metro Shared Network) in the Financial Year immediately preceding the date of this contract, calculated on the basis set out in Appendix 1 to Schedule 7 (using an Assumed Train Consist) and as such charge may be varied in accordance with paragraph 3;

"Adjustment Factor" means the factor calculated in accordance with paragraph 2.7.2;

"Assumed Train Consist" has the meaning ascribed to it in paragraph 1 of Appendix 1 to this Schedule 7, as may be updated from time to time in accordance with this Schedule 7;

"Attributable to Nexus (MSN)" has the meaning attributed to it in Schedule 8 of this contract;

"CPI" means the Consumer Prices Index (all items) whose value is published each month by the Office for National Statistics in its statistical bulletin on consumer price inflation, or:

- (a) if the Consumer Prices 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 ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances; or
- (b) if there is a material change in the basis of the Consumer Prices Index, such other index as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances;

"Indexed Figures" means the Access Sum, the Enhanced Planned Disruption Sum, the Normal Planned Disruption Sum, the Prolonged Disruption Amount and the Service Variation Sum;

"Initial Assumed Train Consist" has the meaning ascribed to it in paragraph 1 of Appendix 1 to this Schedule 7;

"Initial Indexation Factor" is derived from the following formula

$$IIF = \left(1 + \frac{CPI_{2022} - CPI_{2021}}{CPI_{2021}} \right)^2$$

where:

IIF means the Initial Indexation Factor;

CPI₂₀₂₁ means the average value of the monthly CPI figures for the 12 months up to and including the month of December 2021; and

CPI₂₀₂₂ means the average value of the monthly CPI figures for the 12 months up to and including the month of December 2022.

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

"Relevant Year" means a year commencing at 00:00 hours on 1 April and ending at 23:59 hours on the following 31 March;

"Track Charges" means the charge calculated in accordance with paragraph 4;

2. Track Charges and invoices

2.1 *Obligation on Train Operator to pay*

In respect of each Charging Period, the Train Operator shall pay or procure payment of the Track Charges to Nexus or its nominee. The charges will be rounded to the nearest penny. Where a calculation ends up exactly half way between whole numbers it will be adjusted upward.

2.1.1 No Track Charges shall be payable by the Train Operator in respect of a Train Slot when the train has not reached its Planned Destination for a reason which is attributable to Nexus.

2.1.2 Nexus or its nominee shall issue to the Train Operator an invoice as soon as practicable, or as otherwise agreed, following the expiry of each Charging Period in respect of the Track Charges which are payable in respect of that Charging Period.

2.2 ***Not used.***

2.3 ***Not used.***

2.4 ***Not used.***

2.5 ***Not used.***

2.6 ***Not used.***

2.7 *Price variation*

2.7.1 For each Relevant Year commencing on and from 1 April 2023, the Indexed Figures shall be adjusted in accordance with paragraph 2.7.2.

2.7.2

(a) For the Relevant Year commencing on and from 1 April 2023, the Indexed Figures shall be adjusted as at 1 April 2023 by multiplying them by the Initial Indexation Factor.

(b) For the Relevant Year commencing on and from 1 April 2024, and for each subsequent Relevant Year, the adjusted Indexed Figures from the preceding Relevant Year shall be further adjusted as at the applicable 1 April by multiplying them by the Adjustment Factor for the Relevant Year in question (rounded to three decimal places).

For the purposes of this paragraph 2.7.2(b), the Adjustment Factor in respect of a Relevant Year shall be calculated in accordance with the following formula:

$$\text{Adjustment Factor} = 1 + \frac{(CPI_{t-1} - CPI_{t-2})}{CPI_{t-2}}$$

where:

CPI_{t-1} means the average value of the monthly CPI figures for the 12 months up to and including the month of December immediately preceding 1 April in the Relevant Year in question; and

CPI_{t-2} means the average value of the monthly CPI figures for the 12 months up to and including the month of December which falls 16 months before 1 April in the Relevant Year in question.

- (c) If this contract takes effect after 1 April 2023, the Indexed Figures shall be adjusted in accordance with paragraphs 2.7.2(a) and (b) as if this contract had been in effect on and from 1 April 2023.

3. Freight charging review

3.1 The Access Sum will be reviewed and adjusted by Nexus:

3.1.1 in accordance with paragraph 3.2; and/or

3.1.2 on 1 April 2024 and thereafter reviewed and adjusted on a five-yearly basis and the parties acknowledge and agree that such review and adjustment shall:

- (a) comply with relevant applicable law;
- (b) be consistent with the charging framework published by ORR in respect of the Network Rail network, such that the Access Sum in respect of the Metro Shared Network shall not be greater than the Access Sum that would have been payable in respect of access to the Metro Shared Network if the Metro Shared Network was part of the Network Rail network for the Assumed Train Consist; and
- (c) be calculated upon on the Assumed Train Consist and the calculations in Appendix 1 shall be adjusted to reflect that Assumed Train Consist.

3.2 In the event that the Specified Equipment used pursuant to this agreement to access the Metro Shared Network is materially different from the Assumed Train Consist upon which the Access Sum is calculated, then either party may notify the other party in writing (and in any event, the parties shall review whether the Specified Equipment used is materially different from the Assumed Train Consist at the same time as performance improvement meetings are held once a quarter pursuant to paragraph 12 of Schedule 8). Within two (2) Charging Periods of any such notification, the parties (in each case acting reasonably) agree that the Assumed Train Consist shall be adjusted to better reflect the actual Specified Equipment used and the Access Sum revised accordingly in accordance with paragraph 3.3. For the purpose of this paragraph, the parties agree that they shall act reasonably and in good faith in determining whether the threshold of "materially different" has been met (having regard to, for example, the extent of difference from the Assumed Train Consist and/or the length of time that there has been a variance to the Assumed Train Consist).

3.3 Where paragraph 3.2 applies, the parties agree that the changes to the Assumed Train Consist, the changes to the calculations in Appendix 1, including the resulting changes to the Access Sum shall:

3.3.1 be calculated using Network Rail's then current track usage price list and rates; and

3.3.2 be recorded in writing,

and accordingly that:

- (a) the calculations in Appendix 1 shall be deemed to be adjusted to reflect that Assumed Train Consist; and
- (b) the terms "Assumed Train Consist" and "Access Sum" shall be interpreted accordingly to reflect the latest position agreed in accordance with this paragraph 3.

4. **Track Charges**

- 4.1 The Track Charge in each Charging Period shall be the sum of the Access Sum in respect of each Service in that Charging Period.

Appendix 1

(Access Sum for an Assumed Train Consist)

1. Assumed Train Consist

As at the date of this contract, the Access Sum has been calculated on the basis of an initial assumed train consist comprising of the following Specified Equipment: a Class 60 locomotive hauling thirty (30) TEA wagons conveying petroleum products (comprised of: ten (10) TEAK wagons, ten (10) TEAL wagons and ten (10) TEAP wagons) (the "**Initial Assumed Train Consist**", as may be updated in accordance with this Schedule 7 (the current assumed train consist being the "**Assumed Train Consist**"). The Initial Assumed Train Consist is used to calculate the Access Sum using Network Rail's track usage price list and rates, which, as at the date of this Contract, uses 2022/23 values as set out in paragraph 2.

2. Access Sum calculation for the Initial Assumed Train Consist

2.1 Loaded Train (Lindsey Oil Refinery to Jarrow Oil Terminal)

(a) Class 60 locomotive: Network Rail rate when hauling petroleum wagons is [REDACTED] per kgfm.

(b) TEA wagons: Network Rail rate when carrying petroleum is:

(i) TEAK: [REDACTED];

(ii) TEAL: [REDACTED]; and

(iii) TEAP: [REDACTED],

which gives an average of [REDACTED] per kgfm (i.e. 10 wagons of each type).

(c) On the basis of (a) and (b), the sum in respect of a laden oil train is calculated as follows:

(i) [REDACTED]

(ii) [REDACTED],

[REDACTED]

2.2 Empty Train (Jarrow Oil Terminal to Lindsey Oil Refinery)

(a) Class 60 locomotive: Network Rail rate when hauling petroleum wagons is [REDACTED] per kgfm.

(b) TEA wagons: Network Rail rate when empty after carrying petroleum:

(i) TEAK: [REDACTED];

(ii) TEAL: [REDACTED]; and

(iii) TEAP: [REDACTED],

which gives an average of [REDACTED] per kgfm (i.e. 10 wagons of each type).

(c) On the basis of (a) and (b), the sum in respect of an unladen oil train is calculated as follows:

(i) [REDACTED]

(ii) [REDACTED],

[REDACTED] (rounded up to the nearest two decimal places).

2.3 The sum of calculations in paragraphs 2.1 and 2.2 for the Initial Assumed Train Consist gives a total for the Access Sum of [REDACTED] for each Service (being a round trip) over the Metro Shared Network (being the sum of [REDACTED]).

Schedule 8

(Performance regime)

1 Definitions

In this Schedule 8 unless the context otherwise requires:

"Attributable to both the Train Operator and Nexus (MSN)" means, in respect of any delay to or cancellation of a Service or a Third Party Train, a delay or cancellation in relation to which the parties have agreed or it is otherwise determined, having regard to the procedures for allocation of responsibility for incidents set out in Part B of the Metro Network Code, that both the Train Operator and Nexus are to be jointly responsible (in which case the delay or cancellation shall not fall within the definitions of "Attributable to the Train Operator (MSN)" or "Attributable to Nexus (MSN)");

"Attributable to Nexus (MSN)" means, in respect of any delay to or cancellation of a Service or any other matter:

- (a) any delay or cancellation or other matter, occurring on or off the Metro Shared Network, which is not Attributable to the Train Operator (MSN);
- (b) any delay to, or cancellation of, a Restriction of Use, which is not Attributable to the Train Operator (MSN);
- (c) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Nexus (MSN), but which the parties agree, or it is otherwise determined, is Attributable to Nexus (MSN); or
- (d) any delay or cancellation occurring on or off the Metro Shared Network, caused by an Other Train Operator Train on the Metro Shared Network,

and which excludes any such delay to or cancellation of a Service or any other matter arising as a result of a Planned Incident, in all cases having regard to the procedures for allocation of responsibility for incidents set out in Part B of the Metro Network Code;

"Attributable to the Train Operator (MSN)" means:

- (a) in respect of any delay to or cancellation of a Service, any such delay or cancellation arising as a result of:
 - (i) any acts or omissions of the Train Operator's staff or its agents, contractors or sub-contractors;
 - (ii) any Train Operator Omission;
 - (iii) any failure or defect in the Specified Equipment relating to a Service (including where Nexus shall have refused to permit the Service to move over the Metro Shared Network because the contents of the railway wagons have escaped, or there is pollution arising from the operation of such railway wagons);
 - (iv) any improperly loaded railway wagons which form the whole or part of any Service;
 - (v) any Service not being promptly accepted off the Metro Shared Network at a Destination for reasons not caused by Nexus (in its capacity as operator of the Metro Shared Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Nexus in its capacity as operator of the Metro Shared Network) (other than the Train Operator);

- (vi) any failures or delays arising off the Metro Shared Network, other than those which are caused by Nexus (in its capacity as operator of the Metro Shared Network), its agents, contractors or sub-contractors (acting as agent, contractor or sub-contractor for Nexus in its capacity as operator of the Metro Shared Network) (other than the Train Operator); or
 - (vii) that portion of any such delay to or cancellation of a Service that would otherwise be Attributable to both the Train Operator and Nexus (MSN), but which the parties agree or it is otherwise determined is Attributable to the Train Operator (MSN);
- (b) in respect of any delay to or cancellation of a Third Party Train, or of a Restriction of Use, any such delay or cancellation arising as a result of:
- (i) any delay to or cancellation of a Service Attributable to the Train Operator (MSN);
 - (ii) any Train Operator Omission; or
 - (iii) that portion of any such delay to, or cancellation of, a Service that would otherwise be Attributable to both the Train Operator and Nexus (MSN), but which the parties agree or it is otherwise determined is Attributable to the Train Operator (MSN),

in all cases:

- (aa) having regard to the procedures for allocation of responsibility for incidents set out in Part B of the Metro Network Code; and
- (bb) ignoring any delay or cancellation under paragraph (d) of the definition of "Attributable to Nexus (MSN)";

"Cancellation" has the meaning ascribed to it in paragraph 8.1;

"Enhanced Planned Disruption Sum" has the meaning ascribed to it in Schedule 4;

"Metro Railway Operational Code" has the meaning ascribed to it in Part H of the Metro Network Code;

"Minutes Delay" means, in respect of a Trigger of a Recording Point, the number of minutes delay in respect of that Trigger;

"Normal Planned Disruption Sum" has the meaning ascribed to it in Schedule 4;

"Other Train Operator Train" means any train operated pursuant to a permission to use granted to the Train Operator by an agreement other than this contract;

"Performance Sum" means an amount for which Nexus is liable under paragraph 6 following a Charging Period in relation to Minutes Delay in that Charging Period and the preceding Charging Periods;

"Planned Incident" means an incident in connection with a Restriction of Use to the extent that there is Recovery Time in respect of that Restriction of Use incorporated in the Working Timetable;

"Prolonged Disruption" means the operation of Services in accordance with the Working Timetable on any part of the Metro Shared Network (for which there is no reasonably practicable diversionary route) being prevented for more than one Week as a result of any event or circumstance Attributable to Nexus, but excluding from such events and circumstances

Restrictions of Use, strikes, any kind of industrial action (on the part of any person) and the direct effects of the weather;

"Prolonged Disruption Amount" means [REDACTED], as adjusted under paragraphs and 2.7.1 and 2.7.2 of Schedule 7;

"Prolonged Disruption Sum" means the Prolonged Disruption Sum calculated in accordance with paragraph 7;

"Recording Point" means a location at which Nexus records the times at which trains arrive at, pass or depart from that location;

"Recovery Time" means additional time incorporated in the Working Timetable to allow a train to regain time lost in delay during an earlier part of its journey;

"Service Variation" has the meaning ascribed to it in Schedule 4;

"Third Party Train" means a train other than a train operated by the Train Operator under this contract;

"Train Operator Omission" means any failure of or defect in or damage to the Metro Shared Network (excluding fair wear and tear) arising from:

- (a) the improper operation of trains under this contract;
- (b) a breach of the Train Operator's Safety Obligations or of the terms of this contract; or
- (c) any act or omission of the Train Operator's staff or agents, contractors or sub-contractors in breach of this contract; and

"Trigger" means the act of a train arriving at, passing or departing from a Recording Point.

2. **General**

2.1 ***Performance monitoring system recordings***

For the purposes of this Schedule 8, Nexus shall use recordings made using the Performance Monitoring System.

2.2 ***Liability for Short Notice Service***

Nexus shall, notwithstanding that it shall have accepted a Train Operator Variation Request for a Train Slot which is a Short Notice Service, have no liability under any provision of this Schedule 8 to the Train Operator in respect of delays to any Short Notice Service where such delay arises as a result of Nexus meeting its commitments in terms of train regulation as set out in any relevant train regulation policies established pursuant to the Metro Railway Operational Code.

2.3 ***Mitigation of delays***

The parties shall take reasonable steps to avoid and mitigate the effects of any incidents which cause delay to or cancellation of any trains, and any failure to take such steps shall be regarded as a separate incident.

2.4 ***Not used***

3. **Diagnosis of delays**

3.1 ***Attributing delays***

Nexus shall, using the information recorded under paragraph 2.1, identify whether each minute of delay included in Minutes Delay in respect of a Service or Third Party Train is:

- (a) Attributable to the Train Operator (MSN);
- (b) Attributable to Nexus (MSN); or
- (c) Attributable to both the Train Operator and Nexus (MSN).

3.2 ***Delays Attributable to both the Train Operator and Nexus (MSN)***

If a delay is Attributable to both the Train Operator and Nexus (MSN), the associated Minutes Delay shall be allocated equally to the Train Operator and to Nexus.

3.3 ***Unexplained delays Attributable to Nexus (MSN)***

If the cause of the delay to or cancellation of a Service which occurs on the Metro Shared Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to Nexus (MSN).

3.4 ***Unexplained delays Attributable to the Train Operator (MSN)***

If the cause of the delay to or cancellation of a Service which occurs off the Metro Shared Network cannot be explained, the responsibility for such delay or cancellation shall be deemed to be Attributable to the Train Operator (MSN).

3.5 ***Identifying delaying incidents***

The parties shall co-operate with each other by providing all such information to one another as is reasonably practicable regarding the identification of the incidents which cause delay to or cancellation of any Service or Third Party Train.

3.6 ***Performance statements***

Appendix 3 (Performance statements) shall have effect.

4. **Minutes Delay in respect of Train Operator performance**

Not used.

5. **Cancellations of or delays to Restrictions of Use Attributable to the Train Operator (MSN)**

Not used.

6. **Minutes Delay in respect of Nexus performance**

6.1 ***Cancellations***

For the purposes of this paragraph 6, in respect of any Service which is a Cancellation:

- (a) if the Service is a Cancellation as defined in paragraph 8.1(a), there shall not be any Minutes Delay in respect of the Service Attributable to Nexus (MSN);

- (b) if the Service is a Cancellation as defined in paragraph 8.1(b), there shall be disregarded any Minutes Delay in respect of the Service after the first 12 hours aggregate of Minutes Delay; and
- (c) if the Service is a Cancellation as defined in paragraph 8.1(c), there shall be disregarded any Minutes Delay in respect of the Service after the time at which the Service arrives at the point on or off the Metro Shared Network where it subsequently becomes a Cancellation.

6.2 **Nexus performance**

- (a) In the event that, in any Charging Period, there are Minutes Delay under this contract which are either:
 - (i) Attributable to Nexus (MSN); or
 - (ii) Attributable to both the Train Operator and Nexus (MSN) and which are allocated to Nexus,

(the total being the "**Combined Nexus Minutes Delay**") and, in consequence of the Combined Nexus Minutes Delay, the Train Operator causes 'Minutes Delay' to any 'Third Party Train' (each such term as defined in the Network Rail Track Access Agreement) which are attributable to the Train Operator or allocated to the Train Operator under the Network Rail Track Access Agreement (which for the purposes of this contract is the "**Consequential Third Party Delay**"), then Nexus shall be liable to the Train Operator in respect of any Performance Sums (as defined in the Network Rail Track Access Agreement) relating to that Consequential Third Party Delay (any such sum being a Performance Sum for the purposes of this contract, as calculated in accordance with this paragraph 6.2 of Schedule 8). Nexus is not liable to the Train Operator for any Performance Sum to the extent that the Consequential Third Party Delay is due to Minutes Delay under this contract which are either:

- (iii) Attributable to the Train Operator (MSN); or
- (iv) Attributable to both the Train Operator and Nexus (MSN) and which are allocated to the Train Operator,

(the total being the "**Combined Train Operator Minutes Delay**"). In the event that there is any increase to the length of delay to a Service from the point at which a Service enters the Network Rail network, such increase shall be allocated in the same proportions as between the underlying Combined Nexus Minutes Delay and Combined Train Operator Minutes Delay.

- (b) It is agreed by the parties that the liability of Nexus for a Performance Sum shall not include any sums that are due to 'Minutes Delay' attributed to any 'Third Party Train' (each such term as defined in the Network Rail Track Access Agreement) other than the Combined Nexus Minutes Delay.
- (c) In the event that the Train Operator seeks to recover a Performance Sum from Nexus, the Train Operator shall notify Nexus in writing the amount of any Performance Sum that is due to the Train Operator, as soon as reasonably practicable, together with:
 - (i) the relevant information concerning the Consequential Third Party Delay (including any applicable statements prepared pursuant to Appendix 3 (Performance Statements) of the Network Rail Track Access Agreement); and
 - (ii) the statements prepared pursuant to Appendix 3 (Performance Statements) of this contract that correspond to the delays described in paragraph (c)(i).

- (d) Within two Working Days of receipt of a notice under paragraph 6.2(c), Nexus shall notify the Train Operator in writing of any reason why it disputes the amount of any Performance Sum.
- (e) Within the next five Working Days after notification of any dispute under paragraph 6.2(d), nominated representatives of the parties shall meet and attempt to resolve that dispute.
- (f) If any matter is still in dispute ten Working Days after the meeting held under paragraph 6.2(e), either party may refer such matter for resolution under paragraph 9.3.1.
- (g) Except to the extent that Nexus has, within two Working Days of receipt, notified the Train Operator that it disputes the amount of any Performance Sum, Nexus shall be deemed to have agreed the amount of such Performance Sum.
- (h) Other than as set out in this paragraph 6.2, neither party shall have any liability to the other party for Minutes Delay and their impact.

7. Prolonged Disruption

7.1 Prolonged Disruption Sum calculation

In respect of each Week during which any Prolonged Disruption continues, the Prolonged Disruption Sum shall be calculated in accordance with the following formula:

$$\text{Prolonged Disruption Sum} = \text{PDA} \times \text{S} \times \text{M}$$

where:

- PDA is the Prolonged Disruption Amount;
- S is one quarter of the number of Services operated during the four Weeks immediately before the first Week of the Prolonged Disruption over that part of the Metro Shared Network subject to the Prolonged Disruption; and
- M is the multiplier set out in the table below in respect of that Week of the Prolonged Disruption:

Week	Multiplier
Week 1	1
Week 2	1
Week 3	2
Week 4	3
Week 5 to 13	2
Week 14 to 26	1.5

7.2 Subsequent Prolonged Disruption

No Prolonged Disruption Sum shall be payable in respect of Week 27 or any subsequent Week of a Prolonged Disruption.

7.3 *Nexus liability*

7.3.1 Subject to paragraph 7.3.2 below, Nexus shall be liable in any Charging Period for the Prolonged Disruption Sum in respect of each Prolonged Disruption of a Service Planned to depart its Origin in that Charging Period.

7.3.2 Nexus shall not be liable under this paragraph 7 for any Prolonged Disruption Sum in respect of any Service which is an Empty Service (save that, for the purpose of this paragraph 7, a service, pursuant to a contract with a third party, conveying empty wagons and/or coaching stock will not be an Empty Service), a Short Notice Service or an Ancillary Movement

8. **Cancellation**

8.1 **Cancellation**

"Cancellation" means any Service:

- (a) which does not depart from its Origin within 12 hours after the time at which it is Planned to depart;
- (b) which departs from its Origin within 12 hours after the time at which it is Planned to depart and arrives at its Destination more than 12 hours after the time at which it is Planned to arrive and in respect of which no Diverted Service has been agreed; or
- (c) which departs from its Origin within 12 hours after the time at which it is Planned to depart but does not arrive at its Destination and in respect of which no Diverted Service has been agreed;

in each case where at least 6 hours of the delay to the Service is Attributable to Nexus (MSN);
or

- (d) in respect of which Nexus:
 - (i) nominates an Alternative Train Slot for a reason which is Attributable to Nexus (MSN) under paragraphs 4 or 5 of Schedule 4 and the Train Operator reasonably rejects such Train Slot and:
 - (A) does not propose a different Alternative Train Slot; or
 - (B) proposes a different Alternative Train Slot and this is not accommodated by Nexus as a Train Operator Variation; or
 - (ii) is not able to nominate an Alternative Train Slot under paragraphs 4 or 5 of Schedule 4.

8.2 **Nexus liability**

8.2.1 Subject to paragraph 8.3 below, and paragraphs 4.5, 5.6 and 7.4 of Schedule 4, Nexus shall be liable in any Charging Period for the sum payable by the Train Operator to Network Rail pursuant to paragraph 5 of Schedule 8 of the Network Rail Track Access Agreement in respect of each Cancellation of a Service Planned to depart its Origin in that Charging Period.

8.3 **Late presentation of Service**

Nexus shall have no liability to the Train Operator under the terms of this Schedule 8 where a Service is presented to Nexus after the time at which it is Planned to depart its Origin to the extent such late presentation leads to:

- (a) a Cancellation as a result of Nexus meeting its commitments in terms of train regulation as set out in any relevant train regulation policies established pursuant to the Metro Railway Operational Code; or
- (b) a conflict with any restrictions on the use of the Metro Shared Network contained in the Metro Timetable Planning Rules.

9. **Payment**

9.1 **Not used**

9.2 **Issue of invoice or credit note**

9.2.1 In respect of each Charging Period, Nexus or its nominee shall:

- (a) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 7 of Appendix 3 within 28 days after the provision of such period final statement;
- (b) issue an invoice or credit note as appropriate in respect of the balance, if any, shown on the period final statement provided in accordance with paragraph 8 of Appendix 3, within 28 days after the provision of such period final statement;
- (c) issue a credit note in respect of the aggregate of all Normal Planned Disruption Sums and Enhanced Planned Disruption Sums for which Nexus is liable in accordance with Schedule 4, if any, within 28 days after agreement of such liability; and
- (d) within 28 days of either:
 - (i) the deemed acceptance of the amount of any Performance Sum in accordance with paragraph 6.2(h) of this Schedule 8; or
 - (ii) the determination of the amount of any Performance Sum in accordance with paragraph 6.2(g) of this Schedule 8,

(as applicable) Nexus shall pay such sum to the Train Operator.

9.2.2 In the event that (i) any of the period final statements referred to in sub-paragraphs 9.2.1(a) and 9.2.1(b) have not been provided within 28 days after the end of the Charging Period to which they relate or (ii) agreement referred to in sub-paragraph 9.2.1(c) has not been reached within those same 28 days, in both cases Nexus may agree with the Train Operator that an interim payment be made. If such agreement is reached then the invoice or credit note (as appropriate) issued shall detail which of the relevant sums are thus settled and which remain outstanding; and any subsequent invoice or credit note (as appropriate) issued in respect of the same Charging Period under sub-paragraphs 9.2.1(a), 9.2.1(b) or 9.2.1(c) shall take account of the interim payments.

9.3 **Resolution of disputes**

9.3.1 Without prejudice to Clause 13, Part B of the Metro Network Code shall apply to any dispute under this Schedule 8 in relation to the attribution of delay or cancellation.

9.3.2 The Train Operator shall not dispute any matter which it has agreed or is deemed to have agreed under Appendix 3.

10. ***Not used***

11. ***Not used***

12. **Performance Improvement**

12.1 Nexus and the Train Operator agree that they shall meet quarterly to discuss performance of the Train Operator's Services on the Metro Shared Network. The parties shall identify any issues and discuss what steps may be taken (by either party) to improve performance over time.

Appendix 1

Not used

Appendix 2: Calculation of Minutes Delay

1. Subject to paragraph 2 below, the Minutes Delay for a train in respect of the Trigger of a Recording Point shall be equal to:
 - (a) in respect of the first recorded Trigger, the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train Triggers the Recording Point is later than the time at which the train is Planned to Trigger the Recording Point; and
 - (b) in respect of each other recorded Trigger, the lesser of:
 - (i) the number of minutes in respect of the first recorded Trigger calculated in accordance with paragraph 1(a); and
 - (ii) the greater of $((A1-A2) + B)$ and zero,where:
 - A1 is the number of minutes between the time at which the relevant train Triggers the Recording Point (rounded down to the nearest whole minute) and the time of that train's last recorded Trigger of a Recording Point (rounded down to the nearest whole minute);
 - A2 is the Planned time between the Triggers mentioned in A1 above; and
 - B is any Recovery Time between such Triggers.
2. The Minutes Delay calculated in accordance with paragraph 1 above shall be allocated to the incidents causing those Minutes Delay as described in paragraph 3 of this Schedule 8. Any minutes of delay which are caused by the same incident or series of related incidents and which are less than three minutes in aggregate shall be deemed to be zero and for the purposes of this Schedule 8 shall not be included in the Minutes Delay.

Appendix 3

Performance Statements

Interim statements provided by Nexus

1. Nexus shall as soon as reasonably practicable following the end of each Week, and using all reasonable endeavours to provide within two Working Days after the end of each Week, provide to the Train Operator an interim statement listing all incidents which are in connection with Services which were Planned to depart from their Origin during that Week, indicating:
 - (a) which incidents are Attributable to the Train Operator (MSN);
 - (b) which incidents are Attributable to Nexus (MSN) and, in respect of such incidents, the Minutes Delay to Services;
 - (c) which incidents are Attributable to both the Train Operator and Nexus (MSN), and in respect of such incidents that portion of Minutes Delay to Services which is allocated to Nexus;
 - (d) which incidents in categories (a) to (c) above remain, at the time of production of the interim statement, under further investigation following a referral by the Train Operator under Condition B2.3.2 of the Metro Network Code; and
 - (e) all Cancellations during that Week.
2. As soon as reasonably practicable after the end of each Charging Period, and using all reasonable endeavours to provide such interim statement within six Working Days after the end of each Charging Period, Nexus shall provide to the Train Operator an interim statement listing the total number of Services, operated by the Train Operator during that Charging Period.

Dispute of interim statement

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

Deemed agreement

6. Except to the extent that the Train Operator has, within two Working Days of receipt, notified Nexus that it disputes the contents of such interim statement, the Train Operator shall be deemed to have agreed the contents of that statement.

Period final statements

7. After the resolution of any investigations listed in an interim statement in accordance with paragraph 1(d) above, and of any disputes notified under paragraph 5 above, Nexus shall provide to the Train Operator a final statement in respect of each Charging Period, listing:
 - (a) the total Cancellations; and
 - (b) the total Service Variations and the aggregate of the Service Variation Sums payable under Schedule 4,

in each case applicable to Services Planned to depart from their Origin during that Charging Period.

8. After the resolution of any incidents referred for further investigation under Condition B2.3.2 of the Metro Network Code, Nexus shall provide to the Train Operator a final statement in respect of each Charging Period, listing the total Performance Sum for which Nexus is liable under Schedule 8, including such relevant calculations as the parties shall agree from time to time.

Schedule 9

(Limitation on liability)

1. Definitions

In this Schedule 9:

"Liability Cap" means:

- (a) in relation to the first Contract Year, the sum of:
 - (i) in the case of Nexus, [REDACTED]; and
 - (ii) in the case of the Train Operator, [REDACTED]; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \left[\frac{CPI_n}{CPI_1} \right]$$

where:

- (i) C_1 is the sum of:
 - (A) in the case of Nexus, [REDACTED]; and
 - (B) in the case of the Train Operator, [REDACTED];
- (ii) C_n is the Liability Cap in the nth subsequent Contract Year;
- (iii) CPI_n is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n;
- (iv) CPI_1 is the Consumer Prices Index (defined as CPI in Schedule 7) published or determined with respect to the month in which this contract became effective under Clause 3.1.

2. Application

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

3. Limitation on Nexus's liability

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

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

4. Limitation on Train Operator's liability

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

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

5. Disapplication of limitation

To the extent that any Relevant Losses:

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

such Relevant Losses:

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

6. Exclusion of legal and other costs

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

7. Exclusion of certain Relevant Losses

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

8. Continuing breaches

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

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

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

9. **Final determination of claims**

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

Schedule 10

(Metro Network Code)

1. Automatic effect

1.1 General

This contract shall have effect:

- (a) with the modifications; and
- (b) from the date,

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

1.2 Retrospective effect

No relevant notice may have retrospective effect.

2. Modification notice

2.1 Meaning

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

2.2 Contents of modification notice

A modification notice shall state:

- (a) the modifications which are to be made to this contract;
- (b) the date from which specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification; and
- (c) which of the specified modifications are to be subject to adaptation and the backstop date for the requisite adaptations in question.

3. Adaptation procedure

3.1 Application

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

3.2 Negotiation of Adaptations

In respect of the modifications in each modification notice:

- (a) within 14 days of the date of service of the relevant modification notice, the parties shall meet and in good faith negotiate and attempt to agree the requisite adaptations;

- (b) each party shall ensure that:
 - (i) such negotiations are conducted in good faith in a timely, efficient and economical manner, with appropriate recourse to professional advice; and
 - (ii) ORR's criteria are applied in the negotiations; and
- (c) the negotiations shall not continue after the backstop date.

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

If the parties have agreed the requisite adaptations on or before the backstop date, not later than 7 days after the backstop date the agreed requisite adaptations shall be sent by the parties to ORR for its consent, together with a statement, signed by or on behalf of both parties:

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

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

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

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

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

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

3.6 *Requisite adaptations - failure to agree or submit*

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

3.7 *Notice of determined requisite adaptations*

A notice of determined requisite adaptations is a notice:

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

3.8 ***Effect of requisite adaptations***

Requisite adaptations established either:

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

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

4. **Procedural matters**

4.1 ***More than one notice***

More than one modification notice may be given.

4.2 ***Differences etc as to requisite adaptations***

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

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

4.3 ***Co-operation and information***

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

- (a) the party of whom the request is made shall provide the requested information promptly and to the standard required by ORR; and
- (b) if that party fails timeously to do so, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

4.4 ***Office of Rail and Road's criteria***

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

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

4.5 ***Procedural modifications***

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

- (a) such procedure may be modified by ORR by a notice of procedural modification given by it to the parties; but

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

4.6 **Dates**

In this Schedule 10:

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

4.7 **Requirement for prior consultation**

No relevant notice shall have effect unless:

- (a) ORR has first consulted the parties and the Secretary of State in relation to the proposed relevant notice in question;
- (b) in the consultations referred to in paragraph 4.7(a), ORR has made available to the parties and the Secretary of State such drafts of the proposed relevant notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each party and the Secretary of State the opportunity to make representations in relation to the proposed relevant notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the relevant notice to be given;
- (d) ORR has notified the parties and the Secretary of State as to its conclusions in relation to the relevant notice in question (including by providing to each such person a copy of the text of the proposed relevant notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.7(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

4.8 **Consolidated contract**

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

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

Nexus shall prepare and send to the Train Operator, ORR and the Joint Transport Committee a copy of this contract as so modified.

4.9 **Saving**

Nothing in this Schedule 10 affects:

- (a) the right of either party to approach and obtain from ORR guidance in relation to the requisite adaptations; or

- (b) the right of ORR at any time to effect modifications to the Metro Network Code under Condition C8 of that code, pursuant to the provisions contained therein.

5. Definitions

In this Schedule 10 unless the context otherwise requires:

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

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

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

"notice of determined requisite adaptations" has the meaning ascribed to it in paragraph 3.7;

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

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

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

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

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

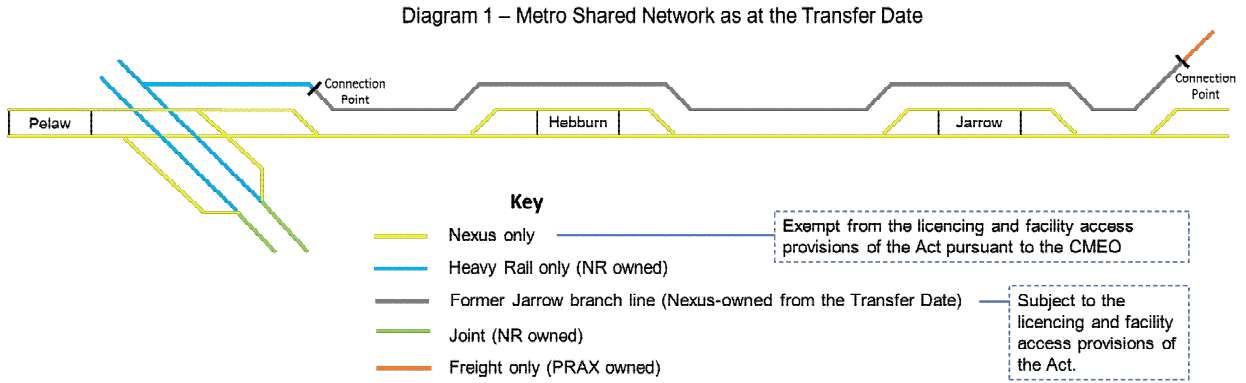
Schedule 11

(Schematic Diagrams of the Metro Shared Network)

1. Diagram 1

1.1 The following diagram (diagram 1) is a schematic diagram of the Metro Shared Network as at the Transfer Date. It identifies which parts of the Metro Shared Network are subject to the licensing and facility access provisions of the Act (and those parts which are not, pursuant to the CMEO).

1.2 Diagram 1:



2. Diagram 2

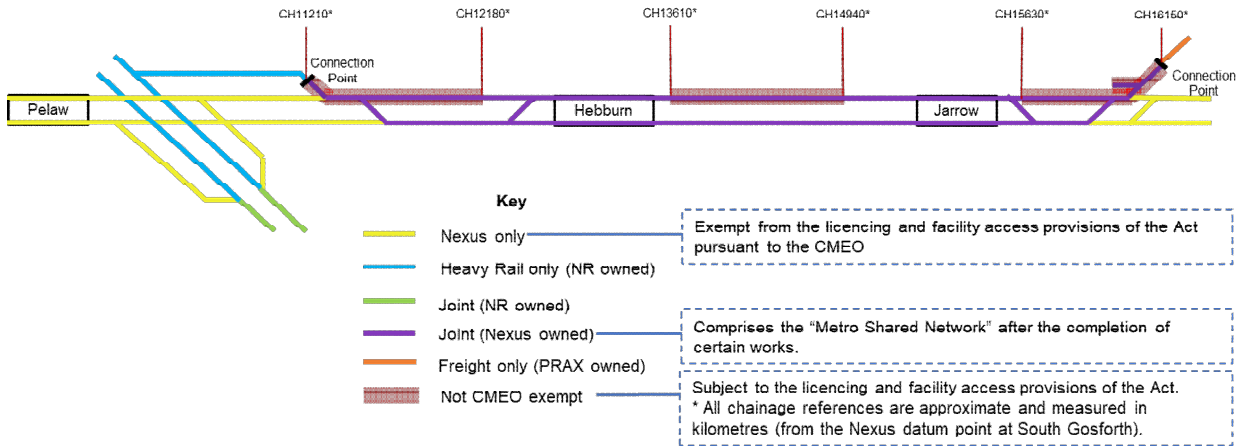
2.1 The following diagram (diagram 2) is a schematic diagram of the Metro Shared Network as it is anticipated to be following the completion of certain works following the Transfer Date.

2.2 This diagram:

- (a) identifies which parts of the Metro Shared Network are subject to the licensing and facility access provisions of the Act (and those parts which are not, pursuant to the CMEO);
- (b) includes chainage references; and
- (c) is subject to updating to reflect the final layout of the Metro Shared Network following completion of the works described in paragraph 2.1 (such updates to be agreed between the parties, acting reasonably, in accordance with Clause 18.2).

2.3 Diagram 2:

Diagram 2 – Metro Shared Network (as anticipated following completion of works)



In witness whereof the duly authorised representatives of Nexus and the Train Operator have executed this contract on the day first above written.

Signed by

Print name

Duly authorised for and on behalf of
Tyne and Wear Passenger Transport Executive

Signed by ..

Print name ..

Duly authorised for and on behalf of
Freightliner Limited

LST/LST/334208/10/UKM/120741493.1