

DATED 16th April 2015

Between

ASSOCIATED BRITISH PORTS

As Facility Owner

- and -

DIRECT RAIL SERVICES LIMITED

As Train Operator

FACILITY ACCESS CONTRACT – PORT OF IMMINGHAM

TABLE OF CONTENTS

CLAUSE NO:	PAGE NO:
1. INTERPRETATION	3
1.1 Definitions	3
1.2 Interpretation	9
1.3 Schedules	9
2. EFFECTIVE DATE AND DURATION	10
2.1 Effective Date	10
2.2 Duration	10
3. STANDARD OF PERFORMANCE	10
3.1 General standard	10
3.2 Good faith	10
3.3 Compliance with laws	10
4. PERMISSION TO USE THE FACILITY	10
4.1 Permission to use	10
4.2 Meaning	10
4.3 Permission under Clauses 4.2(e) and 4.2(f)	11
4.4 Stabling	11
5. OPERATION AND MAINTENANCE	12
5.1 General	12
5.2 Safety	12
5.3 Movement of trains onto and off the Facility	12
6. ABP's OBLIGATIONS	12
7. TRAIN OPERATOR's OBLIGATIONS	13
8. GOODS	13
8.1 Risk	13
8.2 Dangerous Goods	14
8.3 Ability to reject Dangerous Goods	14
9. ACCESS CHARGES	14
9.1 Obligation on Train Operator to pay	14
9.2 Price variation	14
9.3 Unpaid sums	15
10. INDEMNITIES AND LIMITATION OF LIABILITY	16
10.1 ABP indemnity	16
10.2 Train Operator indemnity	16
10.3 Mitigation	16
10.4 Notification of claims, limitation on liability and restriction on claims	16
11. GOVERNING LAW	18
12. DISPUTE RESOLUTION	18
13. CONFIDENTIALITY	18
13.1 Confidential Information	18
13.2 Entitlement to divulge	19
13.3 Return of Confidential Information	19
13.4 Retention or destruction of Confidential Information	20
13.5 Ownership of Confidential Information	20

14. ASSIGNMENT AND SUB-CONTRACTING	20
14.1 Assignment	20
14.2 Sub-contracting	20
15. PAYMENTS, INTEREST AND VAT	20
15.1 Payment	20
15.2 Disputed amounts	21
15.3 Interest	21
15.4 VAT	22
16. FORCE MAJEURE EVENTS	22
17. MISCELLANEOUS	24
17.1 Non waiver	24
17.2 Variations	24
17.3 Entire contract and exclusive remedies	25
17.4 Notices	26
17.5 Counterparts	27
17.6 Survival	27
17.7 Contracts (Rights of Third Parties) Act 1999	27
SCHEDULE 1 - CONTACT DETAILS	28
SCHEDULE 2 – THE FACILITY, FACILITY OPERATING CONSTRAINTS, FACILITY SERVICES AND ANCILLARY SERVICES	30
Appendix 1 – The Plan	32
SCHEDULE 3 – THE SERVICES	33
Appendix 1 – Form of Specification	34
SCHEDULE 4 – EVENTS OF DEFAULT, SUSPENSION AND TERMINATION	35
SCHEDULE 5 – CHARGES	40

THIS CONTRACT is made on the 16th day of April 2015

BETWEEN:

- (1) **ASSOCIATED BRITISH PORTS**, a statutory corporation created under the Transport Act 1981 and registered in England under number ZC000195, having its principal office at Aldwych House, 71-91 Aldwych, London WC2B 4HN (“**ABP**”); and
- (2) **DIRECT RAIL SERVICES LIMITED**, a company registered in England under number 3020822, having its registered office at Herdus House, Westlakes Science and Technology Park, Moor Row, Cumbria, CA24 3HU (the “**Train Operator**”).

WHEREAS: -

- (A) ABP is the facility owner and operator of the Facility.
- (B) The Train Operator wishes to obtain permission to use the Facility in order to access Terminals.
- (C) ABP has agreed to grant the Train Operator and its associates permission to use the Facility on the terms and conditions of this contract.
- (D) This contract is entered into pursuant to an approval given by the Office of Rail Regulation in the exercise of its power under section 18 of the Act.

IT IS AGREED as follows: -

1. INTERPRETATION

1.1 Definitions

In this contract, unless the context otherwise requires:

“**ABP Event of Default**” has the meaning attributed to it in paragraph 1.3 of Schedule 4;

“**Access Sum**” is the amount set out in paragraph 1 of Schedule 5;

“**Access Dispute Resolution Rules**” means the set of rules entitled “Access Dispute Resolution Rules” annexed to the publication entitled “The Network Code”;

“**Act**” means the Railways Act 1993;

“**Adjustment Factor**” has the meaning attributed to it in Clause 9.2.7;

“**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;

“**Ancillary Charges**” are the amounts specified in paragraph 2 of Schedule 5 for provision of the Ancillary Services;

“**Ancillary Movements**” means train movements on the Facility which are not an express part of the Services but which are necessary or reasonably required for giving full effect to the Services;

“**Ancillary Services**” are those services, which are not Facility Services, which may be provided by ABP to the Train Operator on request, as more particularly described in paragraph 7 of Schedule 2;

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

“**Charges**” means the total of the Access Sums and the Ancillary Charges payable each Charging Period under this contract;

“**Charging Period**” means a calendar month save that the first period may be of less than a calendar month if the Effective Date does not coincide with the first day of a calendar month;

“**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;

“**Contract Year**” means a calendar year commencing at 0000 hours on 1 January and ending immediately before 0000 hours on the next succeeding 1 January save that the first such period shall commence on the Effective Date;

“**Dangerous Goods**” means any Goods incorporating dangerous substances listed in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 and any other substance of a similar nature or presenting a similar hazard;

“**DB Schenker**” means DB Schenker Rail (UK) Limited, incorporated in England under registered number 2938988;

“**Decision Criteria**” means the necessity or desirability of the following:

- (a) sharing the capacity, and securing the development, of the Facility and the Port Estate in the most efficient and economical manner in the interests of all users having regard, in particular, to safety, the environment, and the proper maintenance, improvement and usage of the Facility and the Port Estate;
- (b) enabling users of the Facility and the Port Estate to comply with any contracts to which they are party, in each case to the extent that ABP has been informed of such contracts;
- (c) enabling ABP to comply with any contracts to which it is a party; and
- (d) maintaining, renewing and carrying out other necessary work on or in relation to the Facility or on the Port Estate;

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

“**Dispute**” has the meaning attributed to it in Clause 12.1;

“**Disruptive Event**” means any event or circumstance which materially prevents or materially disrupts the operation of trains on any relevant part of the Facility, but which is not a Force Majeure Event;

“**Effective Date**” means the date on which the provisions of this contract take effect in accordance with Clause 2.1;

“**Emergency Weighing**” means the weighing of Goods by ABP on request in circumstances where weighing facilities operated by a third party fail or are otherwise unavailable;

“**Environmental Damage**” means any injury or damage to persons, living organisms or property (including offence to man’s senses) or any pollution or impairment of the environment resulting from the discharge, emission, escape or migration of any substance, energy, noise or vibration;

“**Event of Default**” means a Train Operator Event of Default or an ABP Event of Default as the context requires;

“**Expiry Date**” means 31 March 2020;

“**Facility**” means the railway network on the Port Estate of which ABP is the facility owner, and which is more particularly described in Schedule 2 and depicted on the Plan;

“**Facility Operating Constraints**” means the physical and operational constraints of the Facility to accommodate the operation of trains as specified in paragraph 5 of Schedule 2 or as published from time to time by ABP;

“**facility owner**” has the meaning ascribed to it under section 17(6) of the Act;

“**Facility Services**” are those services to be provided by ABP to the Train Operator and which are included in the Access Sum, as more particularly described in paragraph 6 of Schedule 2;

“**Force Majeure Event**” has the meaning attributed to it in Clause 16;

“**Goods**” means cargo of any description whatsoever, together with any package, case, pallet, container or other thing which contains, protects or supports cargo or is designed or made to do so;

“**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 expiration of 21 days from such demand;
- (c) its directors make any proposal under Section 1 of the Insolvency Act 1986, or it makes any contract 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 that party pursuant to Sections 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;

“**Liability Cap**” means the sum calculated in accordance with Clause 10.4.2;

“**Method of Work**” means an agreed statement of the procedures to be followed by ABP and the Train Operator in respect of the safe operation of the Facility and trains thereon;

“**Network**” means the mainline network in respect of which Network Rail is the facility owner and which is situated in England, Wales and Scotland and, for the purposes of Clause 5.3.1 only, any network which connects the Facility to the mainline network in respect of which DB Schenker is the facility owner;

“**Network Rail**” means Network Rail Infrastructure Limited, incorporated in England and Wales under registered number 2904587;

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

“**Operational Stabling**” means any parking or laying up of Specified Equipment for more than six hours which is not Weekend Stabling or Weekly Stabling and which is not part of the Services;

“**Plan**” means the plan of the Port Estate, including the Facility, appended to Schedule 2;

“**Port**” means ABP’s Port of Immingham;

“**Port Estate**” means the dock estate of the Port;

“**RPI**” has the meaning attributed to it in Clause 9.2.7;

“**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;

“Services” means the services for the carriage of Goods by railway listed and described by the Train Operator in a Specification, including both inward and outward movement of the Specified Equipment on the Facility and any Ancillary Movements, and “Service” shall be construed accordingly;

“Special Instruction” means an instruction issued by ABP to the Train Operator in respect of any short term operational or safety requirement not covered by a Method of Work or a Standing Instruction;

“Specification” means information provided to ABP by the Train Operator regarding the Services in accordance with Clause 7.1 and in the form appended to Schedule 3;

“Specified Equipment” means railway vehicles registered for operation on the Network, and which the Train Operator is therefore permitted to use on the track comprised in the Facility, as more particularly described in Schedule 3;

“Stabling” means any parking or laying up of Specified Equipment between the time of its delivery to the Facility and the time of its collection from the Facility which is not Operational Stabling, Weekend Stabling or Weekly Stabling, together with any marshalling, and “Stabled” and “Stable” shall be construed accordingly;

“Standing Instruction” means an instruction issued by ABP to the Train Operator to cover any permanent operational or safety requirement not covered by a Method of Work;

“Suspension Notice” means a notice served by one party on the other pursuant to paragraph 2 of Schedule 4;

“Terminal” means a terminal on the Port Estate at which Goods are loaded onto or unloaded from railway vehicles;

“Termination Notice” means a notice served by one party on the other pursuant to paragraph 3 of Schedule 4;

“Train Operator Event of Default” has the meaning attributed to it in paragraph 1.1 of Schedule 4;

“Weekend Stabling” means the parking or laying up of Specified Equipment between 0600 hours on Saturday and 0001 hours on Monday;

“Weekly Stabling” means the parking or laying up of Specified Equipment for a period of seven days commencing from a date and time agreed between the parties;

“Weekly Working Timetable” means the weekly timetable drawn up by ABP in respect of train movements on the Facility and provided to the Train Operator in accordance with Clause 6.3; and

“Working Day” means each of Monday to Friday (inclusive) excluding common law and statutory public holidays.

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 ease 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 Clause or Schedule is to a 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; and reference in a Part of a Schedule to a paragraph is to a paragraph of that part;
- (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; and
- (l) words and expressions defined in the Act shall, unless otherwise defined in this contract, have the same meanings in this contract.

1.3 Schedules

The Schedules to this contract shall have effect.

2. EFFECTIVE DATE AND DURATION

2.1 Effective Date

The provisions of this contract shall take effect when the contract has been signed by, or on behalf of, the parties.

2.2 Duration

Subject to the provisions for earlier termination in paragraph 3 of Schedule 4, this contract shall continue in force from the Effective Date until 2359 hours on the Expiry Date.

3. STANDARD OF PERFORMANCE

3.1 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) facility owner and operator (in the case of ABP); and
- (b) train operator (in the case of the Train Operator).

3.2 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.

3.3 Compliance with laws

The parties to this contract shall at all times comply with all relevant legislation, regulations and bye-laws.

4. PERMISSION TO USE THE FACILITY

4.1 Permission to use

ABP grants the Train Operator permission to use the Facility in accordance with the terms of this contract.

4.2 Meaning

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

- (a) to use the track comprised in the Facility for the provision of the Services using the Specified Equipment;

- (b) to make Ancillary Movements;
- (c) to Stable;
- (d) to load, unload and marshal the Services;
- (e) for the Train Operator and its associates to enter upon and leave the Facility with or without railway vehicles; and
- (f) for the Train Operator and its associates to bring such things onto the Facility as are required in connection with the provision of the Services and keep them there,

and such permission is subject, in each case and in all respects, to the Facility Operating Constraints.

4.3 Permission under Clauses 4.2(e) and 4.2(f)

4.3.1 Restrictions

In relation to the permissions specified in Clauses 4.2(e) and 4.2(f):

- (a) the Train Operator shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of ABP, which consent shall not be unreasonably withheld or delayed;
- (b) the Train Operator shall, and shall procure that its associates shall, remove any railway vehicle or other thing so brought onto any part of the Facility, as soon as reasonably practicable, when reasonably directed to do so by ABP; and
- (c) the Train Operator shall, and shall procure that its associates shall, whilst exercising any rights conferred by Clauses 4.2(e) and 4.2(f), comply with such reasonable restrictions or instructions as ABP shall specify.

4.3.2 Failure to comply with directions

If the Train Operator fails to comply with any directions given under Clause 4.3.1(b), ABP shall be entitled to remove from the Facility any railway vehicle or other thing or to instruct a third party to do so and any reasonable costs incurred by ABP in taking such steps shall be paid promptly by the Train Operator.

4.3.3 Evidence of costs

ABP shall provide such evidence of such costs as are referred to in paragraph 4.3.2 as the Train Operator may reasonably request.

4.4 Stabling

ABP shall use its reasonable endeavours, having regard to the Facility Operating Constraints, the Decision Criteria and its Safety Obligations, to provide such Stabling facilities as are necessary or expedient for or in connection with the provision of the Services.

5. OPERATION AND MAINTENANCE

5.1 General

Without prejudice to the other provisions of this contract:

- (a) the Train Operator shall maintain and operate the Specified Equipment used on the Facility in accordance with Clause 3.1 with a view to permitting the provision of the Services on the Facility in accordance with the permission to use under this contract; and
- (b) ABP shall maintain and operate the Facility in accordance with Clause 3.1 with a view to permitting the provision of the Services on the Facility using the Specified Equipment in accordance with the permission to use under this contract.

5.2 Safety

In relation to Safety Obligations:

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

5.3 Movements of trains onto and off the Facility

5.3.1 Suitable access

ABP shall use its reasonable endeavours to ensure that the Facility remains connected to the Network.

5.3.2 Prompt presentation

Where railway vehicles under the control of the Train Operator will move onto and off the Facility, the parties shall ensure that they facilitate (to the extent they are able) the prompt presentation of such railway vehicles onto and off the Facility.

6. ABP'S OBLIGATIONS

- 6.1 ABP shall permit the Train Operator to use the Facility at such times and for such Services as, in each case, the Train Operator may request in a Specification, except where and to the extent that ABP reasonably determines, having regard to the Facility Operating Constraints, the Decision Criteria and its Safety Obligations, or as a result of a Disruptive Event, it is unable to do so.
- 6.2 ABP shall, as soon as reasonably practicable, permit the Train Operator to use the Facility for any Service not running in accordance with a Specification, except where, and to the extent that ABP reasonably determines, having regard to the Facility

Operating Constraints, the Decision Criteria and its Safety Obligations, or as a result of a Disruptive Event, it is unable to do so.

- 6.3 ABP shall ensure that the Train Operator is provided with a copy of each Weekly Working Timetable and informed promptly of any changes to it.
- 6.4 ABP shall give the Train Operator at least 28 days' notice of planned possessions on the Facility, and shall inform the Train Operator of any Disruptive Event or emergency possessions on the Facility as soon as reasonably practicable.

7. TRAIN OPERATOR'S OBLIGATIONS

- 7.1 The Train Operator shall provide ABP with a Specification as soon as reasonably practicable after it becomes aware that Service(s) will be required. The Train Operator shall use its reasonable endeavours to ensure that any Specification provided in accordance with this Clause 7.1 conforms to the Facility Operating Constraints.
- 7.2 The Train Operator shall notify ABP promptly of any changes to a Specification and shall use its reasonable endeavours to ensure that any such changes conform to the Facility Operating Constraints.
- 7.3 The Train Operator shall inform ABP in advance of any Dangerous Goods which will or might be carried in any of the Specified Equipment comprised in the Services and of any known or suspected defects in any of the Specified Equipment or any unusual specification or characteristic of any Goods carried in any of the Specified Equipment which might materially affect the operation of the Services or the Facility or adversely affect the Facility.
- 7.4 The Train Operator shall operate the Services and manage any activity it carries out in connection with the Services at all times in such a way as to:
 - (a) minimise, by taking all reasonable steps, any nuisance to or disturbance of ABP or any other person on the Port Estate or the owners or occupiers of other land whether within or outside the Port Estate; and
 - (b) prevent the escape of any Goods or other items or substances within the possession or control of the Train Operator from the Specified Equipment.

8. GOODS

8.1 Risk

Risk in the Goods (including, without limitation, all risk of theft, loss or damage to the Goods) shall at all times whilst the Goods are loaded in the Specified Equipment of the Train Operator, remain with the Train Operator and ABP shall not be under any obligation to insure the Goods or any part thereof and shall have no liability in respect of the same unless and to the extent ABP is in breach of its obligations under this contract.

8.2 Dangerous Goods

- 8.2.1 Dangerous Goods shall not be brought onto the Facility or dealt with at any Terminal unless and until a declaration by the Train Operator in writing shall have been given to ABP of their nature and quantity, including details of special handling requirements in the event of an emergency, and ABP's consent shall have been first obtained, and then only upon such terms and conditions as ABP acting reasonably may require, or as may be prescribed in ABP's bye-laws or by or under statute.
- 8.2.2 Subject to Clause 13, ABP shall be permitted by the Train Operator to give any particulars furnished under Clause 8.2.1 to whomsoever ABP reasonably believes necessary either as a matter of law or for health and safety reasons.

8.3 Ability to reject Dangerous Goods

ABP reserves the right to refuse to accept Dangerous Goods onto the Facility where it reasonably believes that they may cause damage to the Port Estate, the Facility, the environment, harm to human health or otherwise pose a health and safety risk.

9. ACCESS CHARGES

9.1 Obligation on Train Operator to pay

In respect of each Charging Period, the Train Operator shall pay the Charges.

9.2 Price variation

- 9.2.1 The Access Sum and the Ancillary Charges shall remain in force until the day preceding 1 January 2016.
- 9.2.2 The Access Sum and the Ancillary Charges for the forthcoming Contract Year shall be revised by the parties if there is a material change in the cost to ABP of fulfilling its obligations under this contract. On or before 1 December in each contract year, ABP shall give notice that either it wishes to revise the Access Sum and the Ancillary Charges, or that no such revision is required. For the avoidance of doubt, a revision may not be made more than once in any Contract Year.
- 9.2.3 For the purposes of revising the Access Sum:
- (a) a material change in the cost to ABP shall be defined as a forecast increase or decrease of 10 percent or more in the Access Sum for the relevant year $t+1$ compared to the Access Sum for the then current year t (after taking into account the Adjustment Factor) where "relevant year $t+1$ " means the Contract Year for the purposes of which any calculation falls to be made and "relevant year t " means the then current Contract Year preceding relevant year $t+1$; and

- (b) the Access Sum for the relevant year $t+1$ equals the forecast cost to ABP of fulfilling its obligations under this contract for the relevant year $t+1$ divided by the forecast number of trains for the relevant year $t+1$.
- 9.2.4 Following a notice being given in accordance with Clause 9.2.2 above, ABP shall provide such evidence in support of the material change or in support of its contention that there has been no material change in the cost (as the case may be) as the Train Operator may reasonably request.
- 9.2.5 The figure(s) agreed by the parties for the purpose of Clause 9.2.2 above shall replace those set out in Schedule 5 on and from the start of the relevant year $t+1$ (which, for the avoidance of doubt, shall not be before 1 January 2016).
- 9.2.6 If the parties fail to agree Access Sum and Ancillary Charges figure(s) for the relevant year $t+1$ within 28 days of a notice being given in accordance with Clause 9.2.2 above, either party shall be entitled to refer the determination of the Access Sum and Ancillary Charges either to arbitration in accordance with the Access Dispute Resolution Rules or to ORR for determination. ABP shall notify ORR of the revised figure(s) within 28 days of them being agreed or determined.
- 9.2.7 On 1 January in each Contract Year, commencing 1 January 2016, the Access Sum and the Ancillary Charges shall be adjusted by multiplying each of them by the Adjustment Factor (rounded to three decimal places) which shall have been calculated in accordance with the following formula:

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

where:

RPI_{t-1} means the average value of the monthly figures of the General Index of Retail Prices All Items measured by CHAW (“RPI”) for the 12 months up to and including the month of December immediately preceding the relevant 1 January; and

RPI_{t-2} means the average value of the monthly figures of RPI for the 12 months up to and including the month of December which is 12 months before the relevant 1 January.

- 9.2.8 If RPI for the month of December shall not have been published, or there is a material change in the base composition of RPI, then the parties may agree to such other index as they deem appropriate with the object of placing both parties in the position in which they would have been had there been no change in the base composition of RPI.

9.3 Unpaid sums

If either party fails to pay:

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

then, subject to Clause 15.1.1:

- (i) the amount invoiced or sum due, as referred to in Clause 9.3(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 Charges or other sum due);
- (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and
- (iii) unless both parties to this contract agree otherwise, the dispute resolution procedures in Clause 12 shall not apply to proceedings commenced under this Clause 9.3.

10 INDEMNITIES AND LIMITATION OF LIABILITY

10.1 ABP indemnity

ABP shall (on an after tax basis) indemnify the Train Operator, and keep it indemnified, against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by it as a result of any breach by ABP of any of its obligations under this contract.

10.2 Train Operator indemnity

The Train Operator shall (on an after tax basis) indemnify ABP, and keep it indemnified, against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by it as a result of any breach by the Train Operator of any of its obligations under this contract.

10.3 Mitigation

A party wishing to claim under any indemnity provided for in this contract shall take all reasonable steps to prevent, mitigate and restrict the circumstances giving rise to that claim and any losses connected with that claim.

10.4 Notification of claims, limitation on liability and restriction on claims

10.4.1 Notification of claims and limitation on liability

Save as otherwise expressly provided in this contract, neither party shall be liable

in respect of any breach of this contract:

- a) unless notice of such breach is given by or on behalf of the claimant to the respondent, setting out detailed particulars of the grounds on which the relevant claim is based, within six months after the facts giving rise to the claim first became known by the claimant or could, with reasonable diligence, have become so known; and
- b) arising from any single occurrence or circumstance (or connected series of occurrences or circumstances), if the amount of the relevant claim exceeds the Liability Cap, to the extent it so exceeds this amount.

10.4.2 *Liability Cap*

The Liability Cap for the first Contract Year shall mean the sum of £1,000,000 and in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

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

where:

- (i) C_1 is the sum of £1,000,000;
- (ii) C_n is the Liability Cap in the n th subsequent Contract Year;
- (iii) RPI_n is the Retail Prices Index (defined as RPI in Clause 9.2.7) published or determined with respect to the first month of the subsequent Contract Year n ; and
- (iv) RPI_1 is the Retail Prices Index (defined as RPI in Clause 9.2.7) published or determined with respect to the first month of the first Contract Year.

10.4.3 *Applicable Contract Year for indexation*

For the purposes of determining the Liability Cap under Clause 10.4.2, the applicable Contract Year shall be the Contract Year in which the relevant incident, event or circumstance begins to occur.

10.4.4 *Exclusion of Environmental Damage*

The Liability Cap shall not limit the liabilities of the parties to one another in respect of any breach of this contract or otherwise for Environmental Damage arising directly from their acts or omissions.

10.4.5 *Restriction on claims*

Save as otherwise expressly provided in this contract, neither party may recover or seek to recover from the other party any amount in respect of any loss of revenue, loss of profits, goodwill, reputation or other consequential, indirect or special damages in connection with the subject matter of this contract, which is or is alleged to be caused to it by the other party, save in respect of death or

injury to persons or physical damage to property.

11 GOVERNING LAW

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

12 DISPUTE RESOLUTION

- 12.1 All disputes or matters in difference between the parties of whatever nature arising out of or in connection with this contract (“**Disputes**”) shall, except when otherwise expressly provided in this contract, be resolved in accordance with the terms of this Clause 12.
- 12.2 Any Dispute shall be notified by either party to the other promptly and then, in the first instance, be the subject of an extraordinary meeting between the parties. Such extraordinary meeting shall be held as soon as practicable after notification of a Dispute (and, in any event, within seven days of such notification being received). Each party agrees to procure that an authorised representative shall attend an extraordinary meeting called in accordance with this Clause 12.2, and those representatives of the parties attending the extraordinary meeting shall use all reasonable endeavours to resolve the Dispute.
- 12.3 If the Dispute cannot be resolved at the extraordinary meeting, it shall be referred by the parties to a person of director level at each of ABP and the Train Operator who shall co-operate in good faith to resolve the Dispute as amicably as possible within seven days of its referral (or such longer period as the parties may agree).
- 12.4 Any Disputes not resolved under Clause 12.3 may be referred by either party to arbitration in accordance with the Access Dispute Resolution Rules or may, if appropriate and ORR consents, be referred by either party to ORR for determination.
- 12.5 Each party shall bear its own costs in relation to the proceedings described in Clauses 12.2 and 12.3.

13. CONFIDENTIALITY

13.1 Confidential Information

13.1.1 General obligation

Except as permitted by Clause 13.2, 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.

13.1.2 *Affiliates*

Except as permitted by Clause 13.2, each party 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.

13.2 **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;
- (c) to any Affiliate of either party;
- (d) to any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
- (e) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;
- (f) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance, upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;
- (g) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
- (h) to the extent strictly required by the Act, any licence under section 8 of the Act or regulation 6 of the Railway (Licensing of Railway Undertakings) Regulations 2005 held by the party in question, any other applicable law, the rules of any recognised stock exchange or regulatory body;
- (i) to the extent that it has become available to the public other than as a result of a breach of confidence; or
- (j) under the order of any court or tribunal of competent jurisdiction.

13.3 Return of Confidential Information

Each of ABP 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 two months after the Expiry Date or, if this contract is terminated earlier, is made within two months after the date on which this contract 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.

13.4 Retention or destruction of Confidential Information

If ABP 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 13.3, it may destroy or retain such Confidential Information provided that such information shall remain subject to the confidentiality obligations in Clause 13.2.

13.5 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. ASSIGNMENT AND SUB-CONTRACTING

14.1 Assignment

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.

14.2 Sub-contracting

14.2.1 Either party may sub-contract the performance of any of its obligations under this contract with the prior written agreement of the other party (such agreement not to be unreasonably withheld or delayed) without thereby relieving it of any such obligations to the other party.

14.2.2 Where a party has sub-contracted its rights or obligations under this contract to any third party in accordance with Clause 14.2.1, references to that party in this contract shall, with the exception of Clause 10 and without prejudice to Clause 14.2.1, include references to any sub-contractor so appointed.

15. PAYMENTS, INTEREST AND VAT

15.1 Payment

15.1.1 *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.

15.1.2 *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 facsimile transmission (with confirmation copy by prepaid first class post) to, the appropriate 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 17.4.3.

15.1.3 *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 so as to enable the person to whom it is given to understand and check it.

15.1.4 *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.

15.1.5 *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.

15.2 Disputed amounts

Except as otherwise provided in this contract, within 21 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, and shall pay the undisputed amount in accordance with the terms of the invoice. Except to the extent that disputes are so notified, the recipient shall be deemed to have agreed the contents of the invoice or statement.

15.3 Interest

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 15.1.2 or Clause 15.1.3(b).

15.4 VAT

15.4.1 *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.

15.4.2 *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.

15.4.3 *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.

16. FORCE MAJEURE EVENTS

16.1 A “**Force Majeure Event**” shall be deemed to occur if and to the extent that there occurs, at the Facility or affecting the Facility, any event or circumstance or any combination of events or circumstances beyond the reasonable control of either party to this contract which is either unforeseeable or, if foreseeable, could not have been avoided by any reasonable means, and which prevents, materially impedes or materially delays that party from performing any of its obligations under this contract.

16.2 Without prejudice to the generality of Clause 16.1, a “**Force Majeure Event**” shall include the following events (and any circumstances 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 theft, vandalism, wilful damage 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;
 - (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 or port industries;
 - (h) acts, restrictions, bye-laws, prohibitions or measures of any kind on the part of any governmental, parliamentary or local authority; and
 - (i) any act of ABP, its servants or agents which, though deliberate, is reasonably necessary for the safety or preservation of persons, the Port Estate, the Facility, Terminals or Goods.
- 16.3 Neither party to this contract shall be responsible for any failure to fulfil an obligation under this contract if and to the extent that such failure shall be caused by, or directly or indirectly is by reason of, a Force Majeure Event which makes it impossible or impracticable for that party to comply with such obligation, and if the affected party complies with Clauses 16.4 to 16.6 below.
- 16.4 A party affected by a Force Majeure Event shall promptly upon becoming aware of the occurrence of a Force Majeure Event use all reasonable endeavours to:
- (a) minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform its obligations under this contract; and
 - (b) minimise the duration of the Force Majeure Event.
- 16.5 As soon as reasonably practicable after the commencement of the Force Majeure Event (and, in any event, within 72 hours of becoming aware of it), the affected party shall notify the other party of the Force Majeure Event and its consequences, the effects of the Force Majeure Event on its ability to perform any obligation(s) under this contract, the likely duration of such consequences and effects, and the remedial measures it proposes to avoid or remove the Force Majeure Event or to mitigate its consequences and effects.
- 16.6 The affected party shall promptly give the other party all other information concerning the Force Majeure Event and the steps which could reasonably be taken, and which the affected party proposes to take, to avoid or remove the Force Majeure Event or to mitigate its consequences and effects as may reasonably be requested by the other party from time to time, and promptly inform the other party of any material developments in relation to the Force Majeure Event.
- 16.7 The right of a party affected by a Force Majeure Event to relief under Clause 16.3 shall

cease on the earlier of:

- (a) the date on which its performance of any obligation(s) under this contract is no longer prevented, materially impeded or materially delayed by the Force Majeure Event; and
- (b) the date on which such performance would no longer have been prevented, materially impeded or materially delayed if that party had complied with its obligations under Clause 16.4.

16.8 Neither party to this contract shall be entitled to claim that a Force Majeure Event has prevented it from paying any monies which it would otherwise be liable to pay under this contract.

17. MISCELLANEOUS

17.1 Non waiver

17.1.1 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.

17.1.2 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.

17.2 Variations

17.2.1 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;
- (b) such amendment is signed by, or on behalf of, the parties; and either
- (c) if it is an amendment which:
 - (i) requires ORR's approval under section 22 of the Act; or
 - (ii) is made under section 22A or 22C of the Act or Schedule 4A to the Act, the amendment has been so approved or directed by ORR as applicable; or
- (d) if it is an amendment made by virtue of a general approval issued by ORR under section 22 of the Act, a signed copy of the amendment has been sent by ABP to ORR within 14 days of its signature.

17.2.2 *Exception to Clauses 17.2.1(b), (c) and (d)*

Clauses 17.2.1(b), (c) and (d) do not apply to a modification made by virtue of Clause 17.4.2.

17.2.3 *Conformed copy of contract*

ABP 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 (not including amendments to the Access Sum and the Ancillary Charges in accordance with Clause 9.2).

17.3 Entire contract and exclusive remedies

17.3.1 *Entire contract*

Subject to Clause 17.3.3:

- (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.

17.3.2 *Exclusive remedies*

Subject to Clause 17.3.3 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.

17.3.3 *Fraud, death and personal injury*

Without prejudice to the generality of this Clause 17.3, nothing in this contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

- (a) any liability which either party would otherwise have to the other party, or any right which either party may have to rescind this contract, in respect of any statement made fraudulently by the other party before the execution of this contract;

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

17.4 Notices

17.4.1 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 or by facsimile transmission (with confirmation copy by prepaid first class post) to, the relevant address or facsimile number set out in Schedule 1.

For the purposes of this Clause 17.4 and Clause 15.1.2, delivery by hand shall include delivery by a reputable firm of couriers.

17.4.2 Right to modify contact details

A party shall be entitled to modify in any respect the contact details 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.

17.4.3 Deemed receipt

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

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

17.4.4 Copies

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 17.4 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 17.4; and
- (b) such copy notice shall be sent immediately after the original notice.

17.5 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.

17.6 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 9.3 (Unpaid Sums), 10 (Indemnities and Limitation of Liability), 11 (Governing Law), 13 (Confidentiality), 15 (Payments, Interest and VAT), 16 (Force Majeure Events), paragraph 4 of Schedule 4 (Consequence of Termination)) 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.

17.7 Contracts (Rights of Third Parties) Act 1999

17.7.1 Application to third parties

Save as provided in this Clause 17.7, 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.

17.7.2 Application to ORR

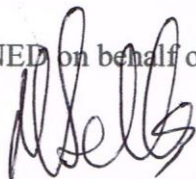
ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under this contract.

17.7.3 Contract amendments

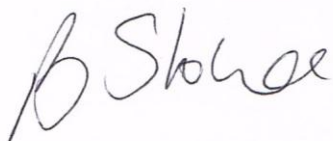
Subject to Clause 17.2, ABP and the Train Operator shall not enter into any agreement with a third party that requires the consent of any third party in order to amend this contract.

IN WITNESS whereof this contract has been duly executed.

SIGNED on behalf of ABP



SIGNED on behalf of the Train Operator



SCHEDULE 1 – CONTACT DETAILS

1. Addresses for Service

The parties shall use the following addresses for service for notification to The Train Operator or ABP, as appropriate, of the following issues:

1.1 For all matters except those of a financial accounting or day-to-day operational nature:

Facility Owner: Associated British Ports
Port Office
Cleethorpe Road
Grimsby DN31 3LL

Attention: Port Director

Tel: 01472 359181

Fax: 01472 242488

Beneficiary: Direct Rail Services
Kingmoor Depot
Etterby Road
Carlisle CA3 9NZ

Attention: Commercial & Procurement Director

Tel: 01228 406 600

Fax: 01228 406 601

And copied to: Associated British Ports
Aldwych House
71-91 Aldwych
London WC2B 4HN

Attention: General Counsel

Tel: 020 7406 7854

Fax: 020 7406 7897

Direct Rail Services
Kingmoor Depot
Etterby Road
Carlisle CA3 9NZ

Attention: Commercial Development Manager

Tel: 01228 406 525

Fax: 01228 406 585

1.2 For matters of a financial accounting nature:

Facility Owner: Associated British Ports
Port House
Northern Gateway
Hull HU12 0QP

Attention: Head of Finance Humber

Tel: 01482 327171

Fax: 01482 608434

Beneficiary: Direct Rail Services
Kingmoor Depot
Etterby Road
Carlisle CA3 9NZ

Attention: Finance Manager

Tel: 01228 406 631

Fax: 01228 406 601

1.3 For matters of a day-to-day operating nature:

Facility Owner: Associated British Ports
Humber International Terminal
Immingham Dock
Immingham DN40 2YD

Attention: Rail Manager

Tel: 01469 576803

Fax: 01469 576238

Beneficiary: Direct Rail Services
Kingmoor Depot
Etterby Road
Carlisle CA3 9NZ

Attention: John McGuinness, Terminal Manager

Tel: 01228 406 632

Fax: 01228 406 601

SCHEDULE 2 – THE FACILITY, FACILITY OPERATING CONSTRAINTS, FACILITY SERVICES AND ANCILLARY SERVICES

1. The Facility

The Facility is the railway network on the Port Estate of which ABP is the facility owner, including (but not limited to):

- the track between the boundary with the Network at mile post 104 near Humber Road Junction, and mile post 105 (Up and Down Main);
- the track between the boundary with the Network at mile post 104 near Humber Road Junction, and a point at 105 miles 10 chains (Up and Down Killingholme) near Immingham West Junction;
- Immingham East Storage Sidings (boundary with the Network at 106 miles 43 chains near Immingham East Junction) and limit of operation thereof; and
- the following connected sidings and Terminals:

Immingham Reception Sidings;
Immingham Sorting Sidings;
Immingham Humber International Terminal;
Immingham Bulk Terminal;
Immingham Stora Paper Terminal;
Immingham Exxtor Intermodal Terminal;
Immingham DFDS Intermodal Terminal;
Immingham Mineral Quay Sidings;
Immingham Henderson Quay Sidings;
Immingham DFDS Steel Terminal;
Immingham Coal Loading Terminal (“NCB” pads 1 and 2);
Immingham Ridley Sidings;
Immingham Simon Storage West Sidings;
Immingham Simon Storage East Sidings; and
Immingham Transit Quays 1 and 2.

2. The Plan

The Plan is appended to this Schedule 2.

3. Exchange point

The relevant boundary between the Network and the Facility as depicted on the Plan.

4. Opening hours

The Facility is open continuously from 0000 hours on Monday to 2359 hours on Sunday.

5. Facility Operating Constraints

The Facility has the capacity to accommodate approximately 400 trains per week.

Other Facility Operating Constraints will be specified in the relevant Method of Work, Standing Instructions and Special Instructions as amended from time to time, or otherwise published by ABP from time to time.

The Facility has 5 Stabling lines which can be used for Stabling, Operational Stabling, and Weekend Stabling.

6. Facility Services

ABP shall provide the following Facility Services to The Train Operator:

- the development and provision of Methods of Work;
- the development and provision of Standing and Special Instructions;
- the consideration of Specifications, the allocation of capacity and the preparation and provision of a Weekly Working Timetable;
- the control of train movements on the Facility;
- the provision of Stabling in accordance with Clause 4.4;
- the provision of driver messing facilities; and
- maintenance of the Facility.

Provision of the Facility Services is included in the Access Sum set out in paragraph 1 of Schedule 5.

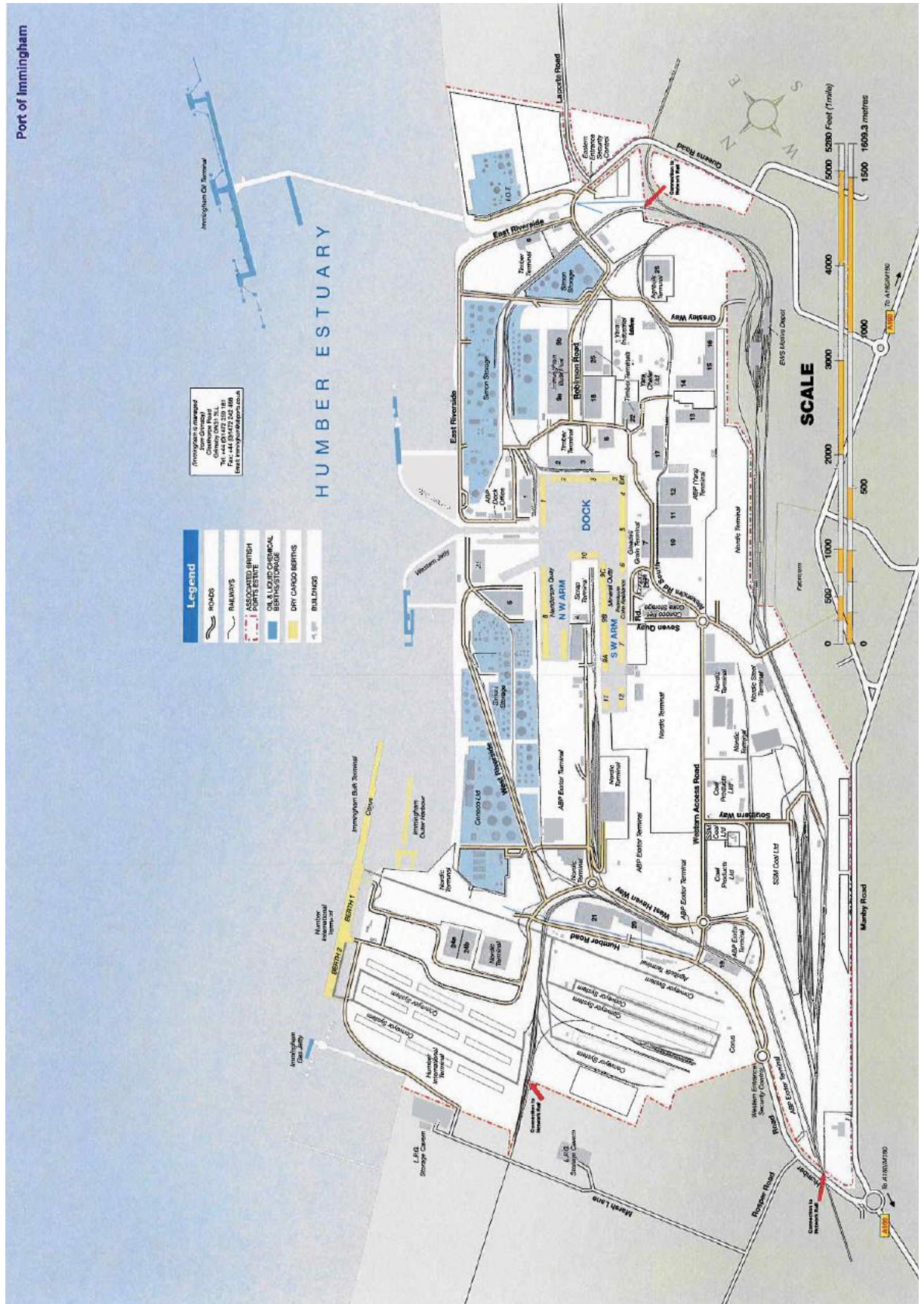
7. Ancillary Services

If requested, ABP may provide the following Ancillary Services to The Train Operator:

- the provision of Operational Stabling;
- the provision of Weekend Stabling and
- the provision of Emergency Weighing.

Provision of these Ancillary Services will incur the Ancillary Charges set out in paragraph 2 of Schedule 5.

Appendix 1 – The Plan



SCHEDULE 3 – THE SERVICES

1. Services

The Services shall be listed and described by The Train Operator in a Specification in the form appended to this Schedule 3.

2. Specified Equipment

The Specified Equipment will include:

- diesel-powered locomotives suitable for haulage of the Services; and
- wagon types suitable for the carriage of Goods (including but not limited to coal, ore, bulk liquids, steel, containers, paper and pallets).

The Train Operator shall, for the purposes of systems configuration, notify ABP in advance of the type and specification of wagons to be loaded at the Immingham Humber International Terminal.

3. Input and information

The Train Operator shall also provide the following input and information to ABP:

- consultation during the development of Methods of Work;
- consultation during the development of Standing and Special Instructions;
- the provision of forward planning information for the purpose of compiling the Weekly Working Timetable;
- attendance at Facility operations meetings; and
- attendance of authorised personnel at specified incidents.

Appendix 1 – Form of Specification

Part A: Specification to be completed by the Train Operator (*Direct Rail Services*)

1. Applicant Name: _____
2. Applicant Signature: _____
3. Applicant's contact details:
 - Telephone / Mobile _____
 - Fax number _____
 - Email address: _____
4. Date of Application: _____
5. The following Access and Facility Services are required for the following train services:

ARRIVALS

Head Code	Origin	Arrival Time	Locomotive & Wagon type	Other Information

DEPARTURES

Head Code	Destination	Departure Time	Locomotive & Wagon type	Other Information

FACILITY SERVICES

Part B: Response from ABP to Direct Rail Services

1. Date / Time of Response: _____
2. On Behalf of ABP: (Name): _____
3. Signature: _____
4. Accept above Request: YES / NO
5. IF NO:
 - a. Alternative Date / Time: _____
 - b. Other information: _____

SCHEDULE 4 - 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 by a Non-Passenger Train Operator's Licence granted under section 8 of the Act or a European Freight Licence and a valid Statement of National Regulatory Provisions granted under regulations 6 and 10 respectively of the Railway (Licensing of Railway Undertakings) Regulations 2005, unless it is exempt from the requirement to be so authorised;
- (b) an Insolvency Event occurs in relation to the Train Operator;
- (c) (i) any breach by the Train Operator of this contract or its Safety Obligations; 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, ABP reasonably considers constitutes a threat to the safe operation of any part of the Facility or the Port Estate;
- (d) any undisputed Charges or other amount due by the Train Operator to ABP under this contract remain unpaid for more than fourteen days after their due date;
- (e) any breach of this contract 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 ABP; and
- (f) any breach of this contract 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 the operation of the Facility or the Port Estate.

1.2 *Notification*

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

1.3 *ABP Events of Default*

The following are ABP Events of Default:

- (a) ABP ceases to be authorised to be the operator of the Facility by a Network Licence granted under section 8 of the Act, unless exempt from the requirement to be so authorised;
- (b) an Insolvency Event occurs in relation to ABP;
- (c) (i) any breach by ABP of this contract or its Safety Obligations; 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; and

- (d) any breach of this contract by ABP 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*

ABP shall notify the Train Operator promptly on becoming aware of the occurrence of an ABP Event of Default.

2. Suspension

2.1 *Right to suspend*

Either party may serve a Suspension Notice on the other if an Event of Default has occurred and is continuing, provided the relevant Event of Default is reasonably capable of remedy.

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 on the permission to use the Facility or any parts of it while the Suspension Notice is in force;
- (d) in the case of a Suspension Notice served on ABP, details of any necessary suspension of the Services while the Suspension Notice is in force;
- (e) the steps reasonably required to remedy the Event of Default; and
- (f) a reasonable grace period for the defaulting party to remedy it (where the Event of Default is a failure by the Train Operator to pay any part of the Charges or other amounts due under this contract, seven days shall be a reasonable grace period).

2.3 *Effect of a Suspension Notice served by ABP*

Where ABP 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 ABP to the Train Operator under paragraph 2.5.4; and
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Charges.

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

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

- (a) it shall have the effect of suspending the Train Operator's permission to use the Facility to operate the Services to the extent specified in the Suspension Notice; and
- (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 ABP under paragraph 2.5.4.

2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.1 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) Specified Equipment; and
- (b) Services,

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

2.5.2 A Suspension Notice served under paragraph 2.1 in respect of any of the ABP Events of Default specified in paragraphs 1.3 (a), (c) and (d) shall, so far as reasonably practicable, apply only to the part or parts of the Facility to which the relevant ABP Event of Default relates.

2.5.3 The party served with a Suspension Notice shall, with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default and keep the party which served the Suspension Notice fully informed of its progress.

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 *ABP's right to terminate*

ABP may serve a Termination Notice on the Train Operator:

- (a) where, except during the period of a Suspension Notice relating to it, a Train Operator Event of Default has occurred and is continuing;
- (b) where DB Schenker fails to comply with any material restriction in a Suspension Notice provided that the relevant Train Operator Event of Default is continuing;
- (c) where the Train Operator fails to comply with its obligations under paragraph 2.5.3, provided that the relevant Train Operator Event of Default is continuing;
or
- (d) where ABP is serving three months' notice of its intention to terminate.

3.2 *The Train Operator's right to terminate*

The Train Operator may serve a Termination Notice on ABP:

- (a) where, except during the period of a Suspension Notice relating to it, an ABP Event of Default has occurred and is continuing;
- (b) where ABP fails to comply with its obligations under paragraph 2.5.3, provided that the relevant ABP Event of Default is continuing; or
- (c) where the Train Operator is serving three months' notice of its intention to terminate.

3.3 *Contents of Termination Notice*

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default or other matter entitling termination under paragraphs 3.1 or 3.2 as the case may be;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) 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 within which such steps may be taken (and where the Event of Default is a failure by the Train Operator to pay any part of the Charges or other amounts due under this contract, seven days shall be a reasonable grace period).

3.4 *Effect of Termination Notice*

Where ABP 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.

4. Consequence of termination

4.1 Directions regarding location of Specified Equipment etc

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 ABP concerning the location of the Specified Equipment and other things left on the Facility.

4.2 Failure to comply with directions

If the Train Operator fails to comply with any directions given under paragraph 4.1, ABP shall be entitled to remove from the Facility any Specified Equipment and other things left on the Facility or to instruct a third party to do so and any reasonable costs incurred by ABP in taking such steps shall be paid promptly by the Train Operator.

4.3 Evidence of costs

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

SCHEDULE 5 – CHARGES

1. Access Sum

- 1.1 The Access Sum is £111.64 per Service, and includes provision of the Facility Services identified in paragraph 6 of Schedule 2.
- 1.2 The Access Sum is chargeable for each Service where both the inward and outward movements of the Specified Equipment:
- (i) operate to and from the same Terminal; or
 - (ii) convey Goods that are not handled at a Terminal.

The Access Sum (multiplied by two) is chargeable for a Service where both the inward and outward movements of the Specified Equipment convey Goods which are destined to, or originate from, different Terminals.

No Access Sum is chargeable for Ancillary Movements (including light locomotives)

2. Prior Year Adjustment to the Access Sum

- 2.1 The Access Sum for each forthcoming Contract Year (t+1) shall also be revised by the parties to reflect any prior year surplus or deficit in the cost to ABP of fulfilling its obligations under this contract. On or before 1 December in each Contract Year (t), ABP shall give notice that it wishes to revise the Access Sum through the application of the prior year adjustment factor.
- 2.2 For the purposes of revising the Access Sum using the prior year adjustment factor:
- (a) ABP will advise parties of its costs and revenues in fulfilling its obligations under this contract for the Current Year. For the avoidance of doubt this will include the cost and revenue to date for the current Contract Year added to the forecast of cost and revenue for the remaining period of the current Contract Year;
 - (b) The difference between the annual cost and revenue (+ or -) to ABP in fulfilling its obligations under this contract in the Current Year shall form the sum to be used in determining the prior year adjustment factor;
 - (c) The forecast number of trains for the forthcoming Contract Year is as determined in Clause 9.2.3 (b);
 - (d) The prior year adjustment factor shall be the sum as defined in 2.2 (b) above divided by the forecast number of trains for the forthcoming Contract Year;
 - (e) The prior year adjustment factor shall be added to, or deducted from the Access Sum for the forthcoming Contract Year.

3. Ancillary Charges

The Ancillary Charges for provision by ABP of the Ancillary Services specified in paragraph 7 of Schedule 2 are as follows:

Weekend Stabling	<u>£14,000 per annum per Stabling line</u>
Operational Stabling (where not provided on a Weekend Stabling line)	<u>£16.98 per hour per Stabling line</u>
Emergency Weighing	<u>£40 per train</u>