

DATED:

# Regulated Track Access Agreement

between

**NETWORK RAIL**  
as Network Rail

and

**FASTLINE LIMITED**  
as the Train Operator

relating to

Non Passenger Services for the Movement of Yellow  
Plant

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**THIS AGREEMENT** is dated

2006 and made

**BETWEEN:**

- (1) **Network Rail** ("Network Rail"), a public company limited by shares registered in England under number 2904587 and having its registered office is at 40 Melton Street, London NW1 2EE; and
- (2) **Fastline Limited** (the "Train Operator"), a private company limited by shares registered in England under number 2995468 and having its registered office at Meridian House, The Crescent, York, YO24 1AW.

WHEREAS:

- (A) Network Rail is the facility owner of the Network; and
- (B) Network Rail has agreed to grant to the Train Operator permission to use the Network for the purposes of the provision of non-passenger services for Yellow Plant Movements (as defined herein) on the terms and conditions of this Agreement.

IT IS AGREED AS FOLLOWS:

## PART A: PRELIMINARY

### 1. **INTERPRETATION**

#### 1.1 *Definitions*

In this Agreement:

“the Act”	means the Railways Act 1993 as amended or superseded by the Transport Act 2000 and any regulations or orders made under it;
“Affiliate”	in relation to any company, means any holding company or subsidiary of that company or any subsidiary of a holding company of that company, in each case within the meaning of sections 736, 736A and 736B of the Companies Act 1985;
“Agreement”	means this agreement (including its schedules) and incorporating the Network Code;
“Attributable to Network Rail”	in respect of any incident, means responsibility for that incident which has been, or would be, allocated to Network Rail in accordance with the terms of Schedule 8;
“Attributable to the Train Operator”	in respect of any incident, means responsibility for that incident which has been, or would be, allocated to the Train Operator in accordance with the terms of Schedule 8;
“Business Day”	means any day (excluding Saturdays and Sundays) on which Banks, generally, are open for business in the City of London;
“Claims Allocation and Handling Agreement” or “CAHA”	means the agreement of that name to which Network Rail, amongst others, is a party providing for (inter alia) the allocation and handling of third party claims against railway industry participants;
“Commencement Date”	means the later of:  (a) the date upon which Network Rail and the Train Operator enter into this Agreement pursuant to directions issued by the Office of Rail Regulation under Section 18 of the Act; and  (b) the date upon which the conditions set out in Clause 2.2 have been satisfied;
“Contract Service”	means any of the non-passenger services described in Schedule 5;

“Contract Term”	means the period beginning on the Commencement Date and ending on the Expiry Date or, if earlier, the date of termination of this Agreement pursuant to Part C, Clause 12;
“Dangerous Goods”	has the meaning given to that term in the Carriage of Dangerous Goods by Rail Regulations 1996;
“Default Interest Rate”	means the rate which is 2 per cent above the average of the base lending rates published by Barclays Bank plc during any period in which an amount is payable under this Agreement and remains unpaid;
“Emergency Access Code”	means the Railway Industry Emergency Access Code which provides, inter alia, for access to railway facilities in emergencies;
“Event of Default”	means a Train Operator Event of Default or a Network Rail Event of Default as the context requires;
“Expiry Date”	means 31 March 2011;
“Financial Year”	means the year commencing on 01 April and ending on the following 31 March, comprising 13 consecutive Periods; “Financial Year t” means the Financial Year for the purposes of which any calculation falls to be made; “Financial Year t-1” means the Financial Year preceding Financial Year t; and similar expressions shall be construed accordingly;
“Insolvency Event”	means in relation to either of the parties, where: <ul style="list-style-type: none"> <li>(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;</li> <li>(b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986 except that in the interpretation of this paragraph: <ul style="list-style-type: none"> <li>(i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there was substituted £50,000;</li> <li>(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</li> </ul> </li> </ul>

mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiration of 21 days from such demand;

- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;
- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or issued against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed);
- (f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above;

unless, in any case, a Railways Administration Order (or application therefor) has been made or such order (or application) is made within 14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to the party in question and for so long as any such order (or application) remains in force or pending, or unless, in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely recourse to all appropriate measures and procedures;

“Liabilities”	means 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;
“Long Stop Date”	means 31 March 2006;
“National Holiday”	means any day, other than a Saturday or Sunday, on which clearing banks in the City of London are not open for business;
“Network”	means the Network of which Network Rail is the facility owner from time to time and which is situated in England, Wales and Scotland;
“Network Code”	means the document entitled “The Network Code” as varied from time to time in accordance with the procedures to amend them set out therein;
“Network Services”	has the meaning attributed to it in section 82(2) of the Act;
“Period”	means each consecutive period of 28 days during the term of this Agreement commencing at 0:00 on 1 April in each year, provided that the length of the first and last such Period in any year may be varied by up to 7 days on reasonable prior notice from Network Rail to the Train Operator;
“Possession”	means any restriction of use of all or any part of the Network notified by or on behalf of Network Rail;
“Network Rail Event of Default”	has the meaning given to that term in Part C, Clause 10;
“Railway Code Systems”	means “necessary systems” within the meaning of the Systems Code;
“Railways Administration Order”	means an order of the court made in accordance with section 60, 61 or 62 of the Act.;
“Registered”	means registered in Network Rail’s Rolling Stock Library as acceptable to run on the Network pursuant to Railway Group Standards, subject to such terms as may be set out in such registration;
“Retail Prices Index”	means the general index of retail prices published by the Office for National Statistics each month in respect of all items or:

- (a) if the index for any month in any year shall not have been published on or before the last day of the third month after such month, such index for such month or months as the Office of Rail Regulation may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances; or
- (b) if there is a material change in the basis of the index, such other index as the Office of Rail Regulation may, after consultation with Network Rail and the Train Operator, determine to be appropriate in the circumstances;

“Route Conductor”	means a suitably qualified train driver or supervisor having the route knowledge which is necessary to operate a train along the section of the Network in question;
“Safety Case”	has the meaning given to that term in the Railways (Safety Case) Regulations 2000;
“Safety Obligations”	means all applicable obligations and laws concerning health and safety (including any duty of care arising at common law, and any arising under statute, statutory instrument or mandatory codes of practice) in Great Britain;
“scheduled”	in relation to the quantum, timing or any other characteristic of a train movement, means that quantum, timing or other characteristic as included in the applicable Working Timetable;
“Security Interest”	means any mortgage, pledge, lien, hypothecation, security interest or charge or other encumbrance or any other agreement or arrangement having substantially the same economic effect, and includes any security as defined in section 248(b) of the Insolvency Act 1986;
“Service”	means a non-passenger service which is either a Contract Service, a Very Short Notice Service or a diverted service which has been agreed by the parties in accordance with Part B, Clause 7.2 or 7.3;
“Specified Equipment”	in relation to any Contract Service, means the Registered railway vehicles which may be used by the Train Operator for the provision of that Service as specified in Schedule 5;
“Stabling”	means the parking or laying up of the Specified Equipment or such other railway vehicles as the

Train Operator is permitted by this Agreement to use on the Network, such parking or laying up being necessary for giving full effect to the movements of Specified Equipment required for the provision of the Services; and “Stable” and “Stabled” shall be construed accordingly;

“Suspension Notice”	means a notice in writing served by the relevant party on the other party in accordance with Part C, Clause 11;
“Systems Code”	means the Code of Practice (as approved by the Office of Rail Regulation and made under Network Rail’s Network Licence) for the management and development of railway information systems;
“Termination Notice”	means a notice in writing served by the relevant party on the other party in accordance with Part C, Clause 12;
“Track Charges”	means the access charges payable by the Train Operator under this Agreement, more particularly described in Schedule 7;
“Train Operator Event of Default”	has the meaning given to that term in Part C, Clause 10;
“Value Added Tax”	means value added tax as provided for in the Value Added Tax Act 1994;
“Very Short Notice Service”	means a non-passenger service for a Yellow Plant Movement the subject of a Short Notice Spot Bid;
“Yellow Plant Movement”	means the movement of Specified Equipment required for provision of the Contract Services.

## 1.2 *Construction and Interpretation*

In this Agreement, except to the extent the context otherwise requires:

- (A) words and expressions defined in the Network Code shall have the same meaning in this Agreement;
- (B) rules of interpretation applying in or to the Network Code shall apply in the same way in or to this Agreement;
- (C) references to Recitals, Clauses, Parts, paragraphs, Schedules and Parts of Schedules are to Recitals, Clauses, Parts, paragraphs, Schedules and Parts of Schedules of this Agreement, unless expressly specified to the contrary, and the Schedules form part of this Agreement;
- (D) headings shall be disregarded in construing this Agreement;

- (E) references to any enactment include any subordinate legislation made from time to time under it and are to be construed as references to that enactment as for the time being amended or modified or to any enactment for the time being replacing or amending it;
- (F) references to an agreement or any other document (including the Network Code) shall be construed as referring to that agreement or document as from time to time supplemented, varied or amended;
- (G) words importing the masculine gender include the feminine and vice-versa, and words in the singular include the plural and vice-versa;
- (H) wherever provision is made for the giving or issuing of any notices, consent, approval or determination by any person, unless otherwise specified such notice, consent, approval or determination shall be in writing and the words “notify”, “consent”, “approve” or “determine” and other cognate expressions shall be construed accordingly; and
- (I) references to materials, information, data and other records shall be to materials, information, data and other records whether stored in electronic, written or other form.

### 1.3 *Schedules*

The Schedules shall have effect between the parties, and Network Rail and the Train Operator shall comply with their respective obligations under them.

## 2. **CONDITIONS PRECEDENT**

### 2.1 *Entry into effect*

The provisions of Parts A, D and E of this Agreement shall take effect and be binding immediately upon signature of this Agreement. The provisions of Parts B and C and the Schedules shall enter into effect and become binding on the Commencement Date.

### 2.2 *Conditions Precedent*

Upon signature of this Agreement, the Train Operator shall use all reasonable endeavours to procure the satisfaction as soon as reasonably practicable of the following conditions precedent:

- (A) receipt by the Train Operator of a licence granted under the Act authorising the Train Operator to be an operator of trains for the provision of the Services;
- (B) receipt by the Train Operator of an approved Safety Case, and where it is intended that the Train Operator will carry Dangerous Goods on the Network pursuant to this Agreement, that Safety Case shall make appropriate provision for their carriage; and
- (C) the Train Operator becoming a party to the Emergency Access Code and CAHA.

### 2.3 *Consequences of Non-fulfilment*

If the conditions precedent set out in Clause 2.2 have not been satisfied in full on or before the Long Stop Date, this Agreement shall lapse and neither party shall have any liability to

the other under this Agreement save only in respect of its obligations under Part D, Clause 16 and any antecedent breach of its obligations hereunder.

## PART B: TRAIN OPERATIONS

### 3. **PERMISSION**

#### 3.1 *Permission to use the Network*

Network Rail grants the Train Operator permission to use the Network to operate Yellow Plant Movements.

#### 3.2 *Meaning of Permission*

Except where the contrary is indicated, permission to use the Network shall be construed to mean permission:

(A) to have access to and to use the track comprised in the Network for the provision of the Services and for Stabling using the Specified Equipment;

and to the extent reasonably necessary to give full effect thereto and subject to Clause 3.3:

(B) for the Train Operator to enter upon the Network, with or without vehicles; and

(C) for the Train Operator to bring things on to the Network and keep them there,

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

(1) the Network Code;

(2) the applicable Rules of the Route;

(3) the applicable Rules of the Plan;

(4) a Spot Bid for a Train Slot in respect of any Service, Diverted Service, Stabling or Ancillary Movement having been made by the Train operator and accepted by Network Rail in accordance with Part D of the Network Code; and

(5) any other restriction which may from time to time be imposed by Network Rail in accordance with this Agreement.

#### 3.3 *Compliance with Network Rail instructions*

In relation to the permissions specified in Clauses 3.2(B) and 3.2(C):

(A) the Train Operator shall, wherever reasonably practicable, first obtain the consent of Network Rail, which consent shall not be unreasonably withheld or delayed;

(B) the Train Operator shall remove any vehicle or other thing so brought onto the Network when reasonably directed to do so by Network Rail; and

(C) whilst exercising any rights conferred by Clauses 3.2(B) and 3.2(C), the Train Operator shall comply with such reasonable instructions as Network Rail may issue.

### 3.4 *Bid*

Where reference is made in this Agreement to “the Train Operator may bid”, “the Train Operator is entitled to bid” or any cognate expression, such right to bid has been so described or referred to so that the Bid, once made, is not a Non-Compliant Bid, but does not give rise to any Firm Contractual Right on the part of the Train Operator.

### 3.5 *Incorporation*

The Network Code is incorporated in and shall form part of this Agreement.

## 4. **SAFETY**

The Train Operator shall comply with any reasonable request by Network Rail as respects any aspect of the Train Operator's operations which affects or is likely to affect the performance of Network Rail's health and safety duties and, in particular, shall ensure that the procedures and arrangements described in its Safety Case and any revision thereof are followed.

## 5. **TRAIN OPERATOR OBLIGATIONS**

### 5.1 *Specified Equipment*

The Train Operator shall ensure that any Specified Equipment used in the operation of a Service is of a type and composition which permits the provision of that Service as scheduled in the Working Timetable and without causing any damage to the Network (fair wear and tear excepted).

### 5.2 *Personnel*

The Train Operator shall ensure that adequate and suitably qualified personnel are engaged in the operation of the Specified Equipment and in the provision of the Services.

### 5.3 *Movements of Trains onto and off the Network*

The Train Operator shall ensure that, in respect of each location where railway vehicles under the control of the Train Operator is scheduled to move onto and off the Network, it has been granted suitable access by the third party which controls the facility connected to the Network at the relevant location so that such railway vehicles shall move promptly onto and off the Network without interfering with the proper operation of the Network.

### 5.4 *Advanced Notification of intended Yellow Plant Movements*

(A) The Train Operator shall notify Network Rail's Director, National Delivery Service (or such other person at such address as may be indicated in paragraph 2 of Part II of Schedule 1 from time to time) (“Director, NDS”) by no later than the last Business Day of each Charging Period of all Yellow Plant Movements that it intends to undertake during the next Charging Period. Such notification shall include the date, route and time of operation of each Yellow Plant Movement.

(B) The Train Operator shall notify Director, NDS of any changes to any information provided to Network Rail pursuant to clause 5.4(A) by no later than seven working days preceding the day on which the Yellow Plant Movement, to which such information pertains, is intended to operate.

- (C) If The Train Operator finds it necessary to make changes within seven working days preceding the day on which the Yellow Plant Movement, to which such change pertains, is intended to operate, it must submit a request to the Director, NDS who will consider if such a movement is acceptable and advise the Train Operator accordingly.

#### 5.5 *Bids for Yellow Plant Movements*

(A) The Train Operator shall submit its Bids for Yellow Plant Movements to Network Rail no later than seven working days before such Yellow Plant Movement is required to operate.

(B) Upon receiving notification from Network Rail under clause 5.4 (C) that a movement is acceptable, the Train Operator shall immediately submit a Bid for a Yellow Plant Movement to Network Rail.

### 6. **NETWORK RAIL OBLIGATIONS**

#### 6.1 *Maintenance of Network*

Network Rail shall ensure that the Network is maintained and operated to a standard which will permit the provision of the Services using the Specified Equipment in accordance with the terms of Schedule 5.

#### 6.2 *Personnel*

Network Rail shall ensure that adequate and suitably qualified personnel are engaged in the operation and maintenance of the Network.

#### 6.3 *Network Code*

Network Rail shall ensure that all operators of trains on the Network agree to be a party to the Network Code, except where the Office of Rail Regulation may have directed otherwise.

### 7. **JOINT OBLIGATIONS**

#### 7.1 *Route Conductors*

(A) Network Rail may from time to time request that the Train Operator provides the services of a Route Conductor to another train operator to enable Network Rail to fulfil obligations to that other train operator which are substantially in the terms of Clause 7.2. The Train Operator shall not unreasonably refuse to comply with any such request which Network Rail (acting in a reasonable and proper manner) may make.

(B) Network Rail shall pay to the Train Operator its reasonable charges in relation to the provision of the services of any Route Conductor.

(C) The Train Operator shall take all reasonable steps and use all reasonable diligence to procure that each Route Conductor provided pursuant to this Clause shall act in accordance with all lawful instructions given by or on behalf of the operator of each train in which he is present as Route Conductor.

#### 7.2 *Variations to Scheduled Services – Short Notice Spot Bid*

- (A) If for any reason other than in the circumstances envisaged by Clause 7.3, it is known by Network Rail that any part of the Network will not be available at the time at which a Service (the “Original Service”) was scheduled to operate over that part of the Network, then Network Rail shall as soon as reasonably practicable notify (the “non-availability notice”) the Train Operator that the Original Service is not available and the Train Operator shall submit a Short Notice Spot Bid in respect of an alternative route and/or timing.
- (B)
  - (1) if an alternative route and/or timing is established pursuant to (A) above, the Train Operator shall make the relevant train movement in accordance with the alternative route and/or timing (the “Alternative Service”).
  - (2) if an alternative route and/or timing is not established pursuant to (A) above, the Original Service shall be treated as cancelled (for the purposes of Schedule 8) unless the part of the Network over which the Original Service was due to operate is not available for a reason Attributable to the Train Operator or the Train Operator has unreasonably refused to submit a Short Notice Spot Bid or, having made such a Bid, has unreasonably rejected an alternative route and/or timing proposed by Network Rail in response to that Bid.
- (C) If the Train Operator does not have train crew with the necessary route knowledge to make the relevant train movements over any part(s) of the alternative route established pursuant to this Clause and the part of the Network over which the Original Service was due to operate is not available for a reason Attributable to Network Rail, Network Rail shall use all reasonable endeavours to procure at its own expense the provision of the services of a Route Conductor or Route Conductors (as the circumstances may require) on behalf of the Train Operator to enable the Alternative Service to operate.
- (D) Any Route Conductor shall be under the control of the Train Operator for all purposes and Network Rail shall have no liability for any act, omission or default of the Route Conductor.
- (E) Where the Train Operator operates an Alternative Service established under this Clause, the Track Charges payable by the Train Operator and performance (for the purposes of Schedule 8) shall be calculated and measured, as the case may be, in respect of the Alternative Service.

### 7.3 *Variations to Scheduled Services – Very Short Notice Changes*

- (A) If for any reason, it is known by Network Rail that any part of the Network will not be available at the time at which a Service (the “Original Service”) was scheduled to operate over that part of the Network but such non availability is not known about in sufficient time for the Train Operator to make a Short Notice Spot Bid for an alternative Service to be scheduled into the Working Timetable, then Network Rail shall as soon as reasonably practicable notify (the “non- availability notice”) the Train Operator that the Original Service is not available and:
  - (1) if the non-availability notice is served after 21:00 hours on the day before the Original Service was scheduled to operate, the provisions of (B) below shall apply; and
  - (2) if the non-availability notice is served before 21:00 hours on the day before the Original Service was scheduled to operate but not in sufficient time to

enable the Train Operator to make a Short Notice Spot Bid, the provisions of (C) below shall apply.

- (B) If this sub-clause (B) applies:
  - (1) the Original Service shall be treated as cancelled (for the purposes of Schedule 8) unless the part of the Network over which the Original Service was due to operate is not available for a reason Attributable to the Train Operator; and
  - (2) the parties shall co-operate in seeking to agree a very short term planned schedule ("VSTP") for an alternative Service. If the parties agree on a VSTP, the Train Operator shall be entitled to operate the alternative Service in accordance with the VSTP and the provisions of Clauses 7.2(C) and 7.2(D) (subject, in the case of Schedule 8, to the terms of that Schedule) shall apply.
- (C) If this sub-clause (C) applies:
  - (1) the Original Service shall be treated as cancelled (for the purposes of Schedule 8) unless the part of the Network concerned is not available for a reason Attributable to the Train Operator; and
  - (2) to the extent there is appropriate capacity on a relevant part of the Network, Network Rail may nominate an alternative Train Slot with a different route and/or timing which the Train Operator shall promptly by notice to Network Rail either accept or reject. If the Train Operator accepts the alternative route and/or timing proposed by Network Rail, then the Train Operator shall be entitled to make the relevant train movement in accordance with the alternative route and/or timing and the provisions of Clauses 7.2(C) and 7.2(D) shall apply.

#### 7.4 *Stabling*

- (A) The Train Operator shall use all reasonable endeavours to specify in the applicable Bid any Stabling requirements to enable the train movement envisaged by any particular Train Slot to be completed without obstructing the Network.
- (B) Network Rail shall use all reasonable endeavours to provide such Stabling facilities as are necessary for the provision of the Services in accordance with the Working Timetable.
- (C) Where, due to unforeseen circumstances, the Train Operator wishes to store railway vehicles on the Network, it shall first obtain Network Rail's approval of the location and period of storage, such approval not to be unreasonably withheld. Following such approval, the Train Operator shall submit a Bid in accordance with the terms so approved. Subject thereto, the Train Operator has no entitlement to store railway vehicles on the Network.

#### 7.5 *Railway Code Systems*

- (A) The parties shall use the Railway Code Systems in their dealings with each other in connection with the subject matter of this Agreement. Each of the parties shall observe and comply with the provisions of the Systems Code.
- (B) The Train Operator consents to the use by Network Rail of any data or other information supplied by the Train Operator to Network Rail in the course of

complying with its Safety Obligations for the purpose of monitoring the Train Operator's performance of its obligations under this Agreement and calculating the amount of Track Charges.

## 8. **INDEMNITIES AND LIABILITY FOR PERFORMANCE**

### 8.1 *Train Operator Indemnity*

The Train Operator shall indemnify Network Rail (on an after tax basis) against all Liabilities sustained by Network Rail:

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

save to the extent that any such Liabilities result from Network Rail's wilful default, negligence or its breach of this Agreement, and provided that this indemnity:

- (1) shall not extend to loss of revenue or other indirect loss; and
- (2) shall be subject to any limitation provided for in CAHA.

### 8.2 *Network Rail Indemnity*

Network Rail shall indemnify the Train Operator (on an after tax basis) against all Liabilities sustained by the Train Operator:

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

save to the extent that any such Liabilities result from the Train Operator's wilful default, negligence or its breach of this Agreement, and provided that this indemnity:

- (1) shall not extend to loss of revenue or other indirect loss; and
- (2) shall be subject to any limitation provided for in CAHA.

### 8.3 *Liabilities for Late Trains*

The rights and obligations of the parties set out in Schedule 8 (Performance Regime) represent the parties' sole entitlement as between themselves to any Liabilities arising from cancellations, interruptions or delays to trains.

8.4 *Notification of Claims and Mitigation*

If either party wishes to make a claim under an indemnity in this Clause 8, it shall:

- (A) notify the other party of the relevant facts giving rise to that claim as soon as reasonably practicable (and in any event within 90 days) of its first becoming aware of those facts; and
- (B) consult with the other party as to the ways in which the circumstances giving rise to that claim and any Liabilities connected with that claim may be prevented or mitigated, and shall take all reasonable steps to prevent and mitigate the same.

8.5 *Exclusion of Claims for Indirect Loss*

Except where otherwise specifically provided for in this Agreement, neither party may recover from the other in connection with the subject matter of this Agreement any loss of revenue (including fare revenue, subsidy, Track Charges and incentive payments) or other indirect loss caused to it by the other.

## PART C: TERM AND EVENTS OF DEFAULT

### 9. **TERM**

This Agreement shall continue for the Contract Term.

### 10. **EVENTS OF DEFAULT**

#### 10.1 *Train Operator Events of Default*

The following shall be Train Operator Events of Default, and the Train Operator shall notify Network Rail promptly upon becoming aware of any Train Operator Event of Default:

- (A) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services by a licence granted under section 8 of the Act (unless it is otherwise exempt from the requirement to be so authorised);
- (B) an Insolvency Event occurs in relation to the Train Operator;
- (C) any breach by the Train Operator of this Agreement or of its Safety Obligations which constitutes or may constitute a serious threat to the safe operation of any part of the Network or which results or may result in material disruption to train operations of other train operators;
- (D) any amount (including Track Charges) due to Network Rail remains unpaid for more than 5 Business Days after its due date except where liability to pay the sum in question is being contested by the Train Operator in good faith and with timely recourse to appropriate means of redress; and
- (E) any breach of this Agreement or of CAHA by the Train Operator which, by itself or taken together with any other breach, results or may result in serious financial loss to Network Rail.

#### 10.2 *Network Rail Events of Default*

The following shall be Network Rail Events of Default, and Network Rail shall notify the Train Operator promptly upon becoming aware of any Network Rail Event of Default:

- (A) Network Rail ceases to be authorised to be the operator of the Network by a licence granted under section 8 of the Act (unless it is otherwise exempt from the requirement to be so authorised);
- (B) an Insolvency Event occurs in relation to Network Rail;
- (C) any breach by Network Rail of this Agreement or of its Safety Obligations which constitutes or may constitute a serious threat to the safe operation of the Services;
- (D) any amount due to the Train Operator remains unpaid for more than 5 Business Days after its due date except where liability to pay the sum in question is being contested by Network Rail in good faith and with timely recourse to appropriate means of redress; and
- (E) any breach of this Agreement or of CAHA by Network Rail which, by itself or taken together with any other breach, results or may result in serious financial loss to the Train Operator.

## 11. **SUSPENSION**

### 11.1 *Right to suspend*

- (A) Network Rail may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.
- (B) The Train Operator may serve a Suspension Notice where a Network Rail Event of Default has occurred and is continuing.

### 11.2 *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, those reasonable restrictions which Network Rail proposes to impose upon the Train Operator regarding its permission to use the Network;
- (D) in the case of a Suspension Notice served on Network Rail, details of any necessary suspension of the Services; and
- (E) where the Event of Default is capable of remedy:
  - (1) the steps reasonably required to remedy it; and
  - (2) a reasonable grace period for it to be remedied (where the Event of Default is a failure to pay or credit Track Charges, 5 Business Days shall be a reasonable grace period).

### 11.3 *Effect of Suspension Notice served by Network Rail*

If Network Rail serves a Suspension Notice on the Train Operator:

- (A) the Train Operator shall comply with any reasonable restriction thereby imposed on it;
- (B) the Suspension Notice shall remain in full force and effect in accordance with its terms until it is revoked (either in whole or in part) by Network Rail giving notice to the Train Operator pursuant to Clause 11.5(C);
- (C) such service shall not affect the Train Operator's continuing obligation to pay Track Charges or any other amount due under this Agreement; and
- (D) such service shall not affect the Train Operator's entitlement to participate in any Bidding process provided for in Part D of the Network Code.

### 11.4 *Effect of Suspension Notice served by the Train Operator*

If the Train Operator serves a Suspension Notice on Network Rail:

- (A) such service shall have the effect of suspending the Train Operator's permission to use the Network to the extent specified in the Suspension Notice;

- (B) in relation to Services suspended as specified in the Suspension Notice, the amount of the Annual Network Charge (as that term is defined in Schedule 7) shall be abated on a daily basis by an amount equal to the formula:

$$\frac{X}{Y} \times Z$$

where:

- X is the total Annual Network Charge payable by the Train Operator in respect of the day in question;
- Y is the total number of Contract Services to which the Train Operator is entitled on the day in question; and
- Z is the total number of Contract Services, the subject of the Suspension Notice, for the day in question.

The Train Operator shall not be entitled to any other payment (whether pursuant to Schedule 8 or otherwise) in respect of the suspended Services;

- (C) the Suspension Notice shall remain in full force and effect in accordance with its terms until it is revoked (either in whole or in part) by the Train Operator giving notice to Network Rail pursuant to Clause 11.5(C); and
- (D) such service shall not affect the Train Operator's entitlement to participate in any Bidding process provided for in Part D of the Network Code.

#### 11.5 *Suspension to be proportionate to breach*

- (A) A Suspension Notice served by Network Rail in respect of any Train Operator Event of Default or by the Train Operator in respect of any Network Rail Event of Default shall apply, so far as reasonably practicable, only to the:
- (1) railway vehicles;
  - (2) Services; or
  - (3) categories of train movements or railway vehicles
- (or (as the case may be) part or parts thereof) to which the relevant Event of Default relates and the remainder of the rights and obligations of the parties shall remain in full force and effect.
- (B) The recipient of a Suspension Notice ("recipient") which specifies an Event of Default which is capable of remedy shall, with all reasonable diligence, take such steps as shall be reasonable and necessary to remedy the Event of Default and shall keep the party which served the Suspension Notice ("server") fully informed of the progress which is being made to remedy it.
- (C) Where a recipient has complied with its obligations under Clause 11.5(B) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (whether in whole or in part), the server shall revoke the suspension to that extent. Such revocation shall take effect as soon as practicable after the remedy in question has been effected by notice to the recipient specifying the extent of the revocation and the date on which it shall have effect.

## 12. **TERMINATION**

### 12.1 *Network Rail - Right to Terminate*

Subject to Network Rail having served a Suspension Notice under Clause 11 and the procedure for suspension laid down in that clause having been followed, Network Rail 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 Event of Default specified in a Suspension Notice previously served by Network Rail is not capable of being remedied and three months have elapsed from the service of that Suspension Notice;
- (C) where the Train Operator Event of Default specified in a Suspension Notice previously served by Network Rail is capable of being remedied and the Train Operator has failed to take the steps which are reasonable and necessary to remedy that Event of Default; and
- (D) where the Train Operator ceases to be the holder of a licence to be the operator of trains for the provision of the Services (and is not otherwise exempt from the requirement to be so authorised).

### 12.2 *Train Operator - Right to Terminate*

Subject to the Train Operator having served a Suspension Notice under Clause 11 and the procedure for suspension laid down in that clause having been followed, the Train Operator may serve a Termination Notice on Network Rail:

- (A) where the Network Rail Event of Default specified in a Suspension Notice previously served by the Train Operator is not capable of being remedied and three months have elapsed from the service of that Suspension Notice;
- (B) where the Network Rail Event of Default specified in a Suspension Notice previously served by the Train Operator is capable of being remedied and Network Rail has failed to take the steps which are reasonable and necessary to remedy that Event of Default; and
- (C) where Network Rail ceases to be the holder of a licence to be the operator of the Network (and is not otherwise exempt from the requirement to be so authorised).

### 12.3 *Contents of Termination Notice*

A Termination Notice shall specify:

- (A) the nature of the relevant Event of Default;
- (B) the date and time, which shall be reasonable in the circumstances, termination is to take effect;
- (C) where the Event of Default is capable of remedy:
  - (1) the steps reasonably required to remedy it; and

- (2) a reasonable grace period for it to be remedied (where the Event of Default is a failure to pay or credit Track Charges, 5 Business Days shall be a reasonable grace period).

#### 12.4 *Effect of Termination Notice*

Where a Termination Notice has been served:

- (A) such service shall not affect the parties' continuing obligations under this Agreement up to the date of termination as specified in the Termination Notice;
- (B) the party which served the Termination Notice shall withdraw it by notice to the recipient upon being reasonably satisfied that the relevant Event of Default has been remedied by the recipient; and
- (C) subject to 12.4(B) above, this Agreement shall terminate on the later of:
  - (1) the date and time specified in the Termination Notice; and
  - (2) the date and time upon which notice of such termination is given to the Office of Rail Regulation.

#### 12.5 *Consequences of Termination*

The Train Operator shall comply with all reasonable directions given by Network Rail regarding the positioning and location of the Specified Equipment. If the Train Operator fails to comply with any such directions, Network Rail shall be entitled to remove or have removed from the Network or stable any Specified Equipment left on the Network and any reasonable costs incurred by Network Rail in taking such steps shall be paid promptly by the Train Operator. Network Rail shall provide the Train Operator with such evidence of such costs as the Train Operator shall reasonably require.

#### 12.6 *Exclusion of Common Law Termination Rights*

The suspension and termination rights set out in Clauses 11 and 12 shall be the parties' sole rights to suspend and terminate this Agreement (whether pursuant to its terms or at law).

#### 12.7 *Survival of Clauses*

Clause 12.5, Clause 22 and Part D of this Agreement shall survive termination of this Agreement irrespective of the reason for termination.

## PART D: PAYMENT TERMS AND CONFIDENTIALITY

### 13. **PAYMENTS**

#### 13.1 *Payment of Invoices*

Except where otherwise specified in Schedule 5, 7 or 8, all invoices:

- (A) shall be paid within 28 days of the date of their receipt, and
- (B) shall be reasonably itemised.

All payments shall be made such that cleared funds are received by the payee on or before the date on which such payment becomes due and payable.

#### 13.2 *Contesting an invoice*

Where either party wishes to contest any amount payable under an invoice issued to it by the other party, the first mentioned party shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute and shall pay the undisputed amount in accordance with the terms of the invoice.

#### 13.3 *Sending invoices*

All invoices shall be sent by electronic or facsimile transmission (with confirmation copy by prepaid first class post) to the address for service of the recipient referred to in Schedule 1.

#### 13.4 *Free and Clear Payments*

All sums payable by either party under this Agreement shall be paid free and clear of any deduction, withholding, set off or counter claim, save only as may be required by law or in Schedule 8.

#### 13.5 *Deductions or withholdings*

In the event that any deduction or withholding in respect of duties, taxes or charges of a taxation nature is required by law from any sum due or payable by either party under this Agreement, the payer shall:

- (A) ensure that the deduction or withholding does not exceed the minimum amount legally required;
- (B) account to the relevant taxation authorities within the period for payment permitted by the applicable law for the full amount of the deduction or withholding; and
- (C) furnish to the payee within the period for payment permitted by the relevant law either an official receipt of the relevant taxation authorities involved in respect of all amounts so deducted or withheld or, if such receipts are not issued by the taxation authority concerned, a certificate of deduction or equivalent evidence of the relevant deduction or withholding.

13.6 *On an after tax basis*

References in this Agreement to an indemnity or other payment to be made on an after tax basis shall be taken to mean that if any amount paid or due to a party under this Agreement is a taxable receipt of that party, the amount so paid or due (the "Net Amount") shall be increased to an amount (the "Gross Amount") which, after deduction therefrom of the amount of any tax on the Gross Amount which arises, or would arise but for the availability of any relief, shall equal the Net Amount, provided that if any payment is initially made on the basis that the amount due is not taxable in the hands of the recipient and it is subsequently determined that it is, or vice versa, appropriate adjustments shall be made between the parties.

14. **DEFAULT INTEREST**

Without prejudice to any other rights or remedies which either party may have in respect of the non-payment of any amount or the failure to grant any credit such amount shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the due date until the date of actual payment or credit (as well after judgement as before).

15. **VALUE ADDED TAX**

15.1 *Taxable Supply*

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

15.2 *Reimbursement or Indemnity*

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

15.3 *Rebate or Repayment*

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

16. **CONFIDENTIALITY**

16.1 *Confidential Information*

Except as permitted by Clause 16.4, all information of a confidential nature disclosed, whether in writing, orally or by any other means (directly or indirectly) from one party to the other either before or after the Commencement Date and in respect of the subject matter of this Agreement ("Confidential Information") shall be held confidential during the continuance of this Agreement and thereafter, and shall not be divulged in any way to any third party without the prior written approval of the other party.

16.2 *Network Rail - Affiliates*

Except as permitted by Clause 16.4, Network Rail shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

16.3 *Train Operator - Affiliates*

Except as permitted by Clause 16.4, 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.

16.4 *Entitlement to Divulge*

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

- (A) to the Office of Rail Regulation;
- (B) to the SRA;
- (C) to the Health and Safety Executive;
- (D) to any Affiliate of such party;
- (E) to any officer or servant of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or expedient to enable the party in question to perform its obligations under this Agreement or to enforce its rights under this Agreement, upon obtaining an undertaking of strict confidentiality from such officer, servant or person;
- (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 lender, security trustee, bank or other financial institution from whom such party is seeking or obtaining finance, or any advisers to any such entity, upon obtaining an undertaking of strict confidentiality from the entity or advisers in question;
- (H) to the extent required by the Act, any licence under section 8 of the Act held by the party in question, any other applicable law, the rules of any stock exchange or regulatory body or any written request of any taxation authority;
- (I) to the extent that it has become available to the public other than as a result of any breach of an obligation of confidence;
- (J) pursuant to the order of any court or tribunal of competent jurisdiction (including the Access Disputes Resolution Committee or any sub-committee thereof); and
- (K) to creditors of Network Rail.

16.5 *Degree of Care*

In fulfilling its obligations under this Clause, each party shall only be required to use the same degree of care to prevent unauthorised disclosure of Confidential Information as it

would use to prevent the disclosure of its own commercial and financial information of the same or similar nature and which it considers proprietary or confidential.

16.6 *Ownership of Confidential Information*

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

## **PART E: DISPUTES AND GENERAL**

### **17. ASSIGNMENT**

#### *17.1 No assignment without consent*

The Train Operator shall not (without the prior consent of Network Rail) assign, or grant any Security Interest on or over, this Agreement (or any part) or any benefit, interest or right in or under this Agreement.

#### *17.2 Office of Rail Regulation's Approval*

Notwithstanding Clause 17.1, no assignment or grant of any Security Interest in respect of this Agreement shall have effect without the prior approval of the Office of Rail Regulation.

#### *17.3 Network Rail's power to assign*

Network Rail may at any time assign, novate or transfer all or any part of the benefit of, or its rights or obligations under, this Agreement to any third party being a transferee under a transfer made pursuant to Schedule 7 of the Railways Act 1993 (as amended from time to time) or a purchaser of the whole or any part of Network Rail's business or share capital pursuant to a sale approved by the Secretary of State.

### **18. INVALIDITY**

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

### **19. NON WAIVER**

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

### **20. ENTIRE AGREEMENT**

#### *20.1 Entire Agreement*

This Agreement, together with all documents referred to in it, constitutes the entire Agreement between the parties relating to its subject matter and supersedes and extinguishes any prior drafts, undertakings, representations, warranties and arrangements of any nature, whether in writing or oral, relating to such subject matter.

#### *20.2 No representations*

Each party acknowledges that it has not been induced to enter into this Agreement by any representation, warranty or undertaking not expressly incorporated into it.

### 20.3 *Rights and remedies*

So far as is permitted by law and except in the case of fraud, each party agrees and acknowledges that its only rights and remedies in relation to any representation, warranty or undertaking made or given in connection with this Agreement (save where made or given fraudulently) shall be for breach of the terms of this Agreement, to the exclusion of all other rights and remedies (including those in tort or arising under statute).

## 21. **MISCELLANEOUS**

### 21.1 *Variation*

No variation of this Agreement shall be effective unless in writing and signed by the parties and, where required by the Act, approved by the Office of Rail Regulation (unless the variation is made pursuant to the Network Code).

### 21.2 *Counterparts*

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

## 22. **DISPUTES**

Except as provided in the Network Code and as may otherwise be agreed between the parties, any dispute or claim arising out of or in connection with this Agreement shall be resolved by the Access Disputes Resolution Committee followed, if either party shall be dissatisfied with the decision of that Committee or the ruling of the Chairman thereof (as the case may be) by arbitration, pursuant in each case to Part C of the Access Dispute Resolution Rules. Notwithstanding that the parties may have elected to adopt the whole or any part of Part C of the Access Dispute Resolution Rules to apply in the arbitration, paragraph C 6.3 of those rules shall not apply.

## 23. **LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with the laws of England and subject to Clause 22 the parties irrevocably agree that the Courts of England are to have exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement.

## 24. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

24.1 Save as provided in Clause 24.2 or in any modifications to the Network Code having effect after 1 April 2001, no person who is not a party to this Agreement shall be entitled in his own right to enforce any term of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

24.2 The Office of Rail Regulation shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as it has been granted under this Agreement.

**IN WITNESS** whereof Network Rail and the Train Operator have entered into this Agreement on the date first above written.

## SCHEDULE 1: NOTICE PARTICULARS

### PART I: NOTICES

1. **Sending Notices**

Except where expressly provided in this Agreement, any notice given under or pursuant to this Agreement shall be in writing and shall be sent to the party on whom the notice is to be served at the address for service of that party specified in this Schedule or to such other address as that party may from time to time have notified to the other in accordance with this Schedule:

- (A) by prepaid first class post when sent from and to any place within the United Kingdom;
- (B) by hand or by recorded delivery;
- (C) by facsimile; or
- (D) by electronic data transfer.

2. **Copy Notices**

3. If there shall be specified in this Schedule any person to whom copies of notices shall also be sent, the party serving a notice in the manner required by this Schedule shall send a copy of the notice in question to such person at the address for serving copies as specified in this Schedule, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party in accordance with this Schedule. Such copy notice shall be sent immediately after the original notice.

4. **Receipt Of Notices**

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

- (A) if by prepaid first class post, from and to any place within the United Kingdom, three days after posting unless otherwise proven;
- (B) if by hand or by recorded delivery, when delivered;
- (C) if by facsimile (subject to confirmation of uninterrupted transmission by a transmission report), upon sending where such transmission occurs before 17:00 hours on the day of transmission and, in any other case, at 09.00 hours on the day following the day of transmission; and
- (D) if by electronic data transfer, upon sending.

## PART II: NETWORK RAIL

### 1. **Network Rail Details**

Network Rail's address for the service of notices is:

Network Rail  
40 Melton Street  
Euston Square  
London  
NW1 2EE

Tel: 020 7557 8000

Fax: 020 7557 9000

All written notices to be marked:

“URGENT: ATTENTION THE SOLICITOR AND COMPANY SECRETARY”

### 2. **Copy Notices**

All notices shall be copied to:

Director, NDS  
Network Rail Infrastructure Limited  
3<sup>rd</sup> Floor  
Prudential House  
28 – 40 Blossom Street  
York  
Y024 1GJ

Tel: 01904 521 433

Fax: 01904 525 676

## PART III: TRAIN OPERATOR

### 1. **Train Operator Details**

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

Fastline Limited,  
Meridian House,  
The Crescent,  
York  
YO24 1AW.

All written notices to be marked

"URGENT: FOR THE ATTENTION OF THE COMPANY SECRETARY"

Tel: 01904 712008  
Fax: 01904 712001

### 2. **Copy Notices**

All notices shall be copied to:

Fastline Limited

All written notices to be marked

"URGENT: FOR THE ATTENTION OF THE Company Secretary"

Tel: 01904 712008  
Fax: 01904 712001

**SCHEDULE 2: NOT USED**

**SCHEDULE 3: NOT USED**

#### **SCHEDULE 4: POSSESSIONS REGIME**

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

## SCHEDULE 5: SERVICES AND SPECIFIED EQUIPMENT

### 1. **Services and Specified Equipment**

#### 1.1 *The Services*

The Train Operator shall be entitled to Spot Bid for Train Slots for the movement of self propelled railway vehicles of a type specified in paragraph 1.2 which are Registered railway vehicles:

- (a) provided the Train Operator's rights to Train Slots under this Agreement are subject to such modifications or variations Network Rail may make to the Network from time to time. For the avoidance of doubt the Train Operator waives:
  - (i) any right to be consulted or to compensation in respect of any Network Change made pursuant to Part G of the Network Code;
  - (ii) any right to be consulted in respect of any proposed train regulation statement under Part H of the Network Code; and
  - (iii) any right to be consulted in respect of any proposed amendment to the Rules of the Route or the Rules of the Plan.
- (b) provided that the Train Operator shall surrender a Train Slot in respect of which a Bid has been accepted if Network Rail notifies it that a third party has made a Bid to run a train in a manner which conflicts with a Train Slot which Network Rail has accepted a Bid from the Train Operator for;
- (c) provided the composition of the train which is to use the Train Slot is made up of no more than four self propelled railway vehicles of a type listed in paragraph 1.2 coupled together, hauling not more than five vehicles;
- (d) provided the Train Slot may not be used for the provision of Network Services or the carriage of goods or passengers; and
- (e) provided the Train Slot does not involve movement of Yellow Plant on the section of Network contained within Network Rail's London North Western Territory south of Willesden Junction between the hours of 06:30 to 10:00 and 16:00 to 19:00.

#### 1.2 *Specified Equipment*

##### (A) **Locomotives**

Class 37

Class 47

Class 56

Class 57

Class 66

Class 08

**(B) Train Operator Owned Maintained and Operated Equipment**

Unimat 4x4 Tamper

Regulator

Dynamic Track Stabiliser

Plasser 07 Tampers

Plasser 08 Tampers

Plasser 09 Tampers

Regulators

Ballast Cleaners

Plasser Tracklayer

GP Crane

Dynamic Track Stabiliser

Plasser TRAMMS

Geismar TRAMMS

TASC

TUM

Cowans Sheldon TRM

Single Line Gantry

Rail Recover/Delivery Trains

Sleeper Delivery Trains (Slinger)

Welfare Coach (modified Mark 3 Sleeper Coach)

(C) Network Rail Owned/Train Operator Maintained and Operated Equipment

Nil

(D) Network Rail Owned and Maintained/Train Operator Operated Equipment

Nil

**SCHEDULE 6: NOT USED**

## SCHEDULE 7: AMOUNTS PAYABLE

### Part I: Definitions

In this Schedule, unless the context otherwise requires:

“Annual Network Charge” means, in respect of each Financial Year or part thereof the sum of £8,868.

### Part II: Annual Network Charge

The Train Operator shall pay or procure payment of the Annual Network Charge to Network Rail at the commencement of each Financial Year, save that in relation to the period from the Commencement Date to 31 March 2006 the Annual Network Charge shall be due and payable on the Commencement Date.

### Part III: Payment Procedures and Invoice Frequency

Network Rail shall issue to the Train Operator an invoice as soon as practicable following the expiry of each Period in respect of all amounts that have become payable under this Agreement to Network Rail during that Period (the first such Period to commence on the Commencement Date).

### Part IV: Other Amounts Payable

1. Network Rail

Network Rail shall pay to the Train Operator any amount payable in accordance with the terms of this Agreement.

2. Train Operator

The Train Operator shall pay to Network Rail any amount payable in accordance with the terms of this Agreement.

## SCHEDULE 8: PERFORMANCE REGIME

### PART I: INTRODUCTION

#### 1. **Definitions and Interpretation**

##### 1.1 *Definitions*

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

“Access Charge Supplement”	means the Access Charge Supplement specified in Table 2 to this Schedule 8, as adjusted in accordance with paragraph 9;
“Commercial Freight Service”	means a service for the carriage of goods other than for the maintenance, renewal, construction, upgrading, dismantling and removal of the Network Rail Network.
“Joint Disruption”	means an incident (other than a Planned Incident) in respect of which Network Rail and the Train Operator are allocated joint responsibility in accordance with the principles set out in Part VI.
“Minutes Delay”	means the number of minutes of delay in respect of a Trigger of a Recording Point calculated in accordance with Part V.
“Operator Disruption”	means an incident (other than a Planned Incident) in respect of which the Train Operator is allocated responsibility in accordance with the principles set out in Part VI.
“Planned Incident”	means an incident described as such in paragraph 6.6.
“Network Rail Disruption”	means an incident (other than a Planned Incident) in respect of which Network Rail is allocated responsibility in accordance with the principles set out in Part VI.
“Network Rail’s Representative”	means any employee of Network Rail as may be notified in writing from time to time by Network Rail to the Train Operator for the purposes of this Schedule.
“Rate”	has the value attributed to it in Table 1 of this Schedule, subject to any adjustment pursuant to paragraph 9 hereof.
“Recording Point”	means:

	(a) a location at which Network Rail using the Performance Monitoring System records the times at which trains arrive, pass or depart; or
	(b) a location not on the Network at which the Train Operator using the Performance Monitoring System records the times at which TOC Services arrive, pass or depart.
“Recovery Time”	means additional time incorporated in the Applicable Timetable to allow for a train to regain time lost in delay during an earlier part of its journey.
“Senior Officer”	means:
	(a) for Network Rail, the Network Rail Head of National Logistics or his nominee; and
	(b) for the Train Operator, the Production Director or his nominee.
“Third Party Train”	means any railway passenger service or Commercial Freight Service (including any Ancillary Movement associated with such railway services), other than:
	(a) a TOC Service; or
	(b) a Third Party Yellow Plant Movement.
“Third Party Train Cancellation”	in respect of any Third Party Train, means a train which fails to operate at all due to Operator Disruption.
“Third Party Yellow Plant Movement”	means the movement, by a third party not the subject of this Agreement, of equipment necessary for the carrying out of works on the Network including (without limitation) the maintenance, renewal, construction, upgrading, dismantling and removal of the Network.
“TOC Service”	means a service the subject of this Agreement.
“TPT Cancellation Minutes”	in respect of any Third Party Train Cancellation, means the number of minutes in Column 3 of Table 1 of this Schedule pertaining to the relevant Train Group in Column 1 of Table 1.
“Train Operator’s Representative”	means any employee of the Train Operator as may be notified in writing from time to time by the Train Operator to Network Rail for the purposes of this Schedule.
“Trigger”	means the act of a train arriving at, passing or departing from a Recording Point.

“working day” means each of Monday to Friday (inclusive) excluding common law and National Holidays.

1.2 *Interpretation*

- (A) For the purposes of this Schedule, events in respect of a train shall be treated as occurring on the day on which they occur and not on the day on which the train was scheduled to depart from its point of origin.
- (B) Unless otherwise stated:
  - (1) any reference to a Table is a reference to a Table forming part of this Schedule; and
  - (2) where in this Schedule a period is expressed to be between two specific times, that period shall be inclusive of both such times.
- (C) Cognate words and expressions deriving from the definitions given in paragraph 1.1 shall be construed accordingly.

## PART II: GENERAL

### 2. **General Principles and Performance Information**

#### 2.1 *Information*

Network Rail and the Train Operator shall each use all reasonable endeavours to keep the other informed of any known or anticipated delay to or cancellation of TOC Services.

#### 2.2 *Mitigation*

Network Rail and the Train Operator shall each take reasonable steps to avoid and mitigate the effects of any incidents upon the TOC Services and Third Party Trains, whilst taking into account the requirements, including contractual requirements (where known), of other operators.

#### 2.3 *Network Rail recording of performance*

Network Rail shall use reasonable endeavours to record, for each day, in the Performance Monitoring System:

- (A) the times at which TOC Services and the Third Party Trains delayed by the Services Trigger Recording Points; and
- (B) Minutes Delay to Third Party Trains, together with, in each case, the incident(s) causing them and the allocation of responsibility for those incidents made under Part VI.

#### 2.4 *Train Operator recording of performance*

The Train Operator shall participate in the Performance Monitoring process and shall notify to Network Rail the time of each Trigger by a TOC Service of a Recording Point which is not on the Network and in respect of each such Trigger advise Network Rail as to the incident(s) causing delay to any such Trigger.

#### 2.5 *Unallocated delay*

In respect of each Trigger by a TOC Service of a Recording Point, Network Rail shall use reasonable endeavours to record separately, as unallocated delay, those minutes of delay of three minutes or more included in Minutes Delay for which it is unable to identify the incident(s) which caused that delay. The Train Operator shall co-operate with Network Rail on request by providing all such information as it has in its possession regarding the identification of the incident(s) which caused that delay.

#### 2.6 *Performance Data Accuracy Code*

The Performance Data Accuracy Code shall apply to the recording of train performance and the provision of information regarding train performance under this Schedule, and the rights and remedies of the Train Operator in respect of the same shall be subject to and interpreted in accordance with the provisions of the Code.

#### 2.7 *Notification*

- (A) As soon as reasonably practicable, and in any event no later than the following working day, Network Rail shall provide to the Train Operator through the Performance Monitoring System the information recorded under paragraphs 2.3, 2.4 and 2.5 (the "Train Performance Information").

- (B) For the purposes of this Agreement, the Train Operator shall be treated as having agreed all of the information so recorded and provided by Network Rail except to the extent that, within two clear working days of the information being provided, it has notified (the "TOC Notification") Network Rail of those items of information (if any) which it disputes, giving reasons for any disputes.
- (C) The parties shall use their respective reasonable endeavours to resolve each such dispute within two working days of the TOC Notification. Following any such resolution, Network Rail shall provide the Train Operator with a final statement for the day in question setting out the Train Performance Information.

## 2.8 *Coding of Services*

The eight character code applied to trains in the Performance Monitoring System will be agreed by the parties for each TOC Service to facilitate monitoring of the TOC Service.

## PART III: NETWORK RAIL

### 3. **Network Rail Performance**

Network Rail shall have no liability to the Train Operator under this Schedule in respect of delays to or cancellations of any TOC Service for which it is attributed responsibility under Part VI.

## PART IV: TRAIN OPERATOR

### 4. **Train Operator Performance**

#### 4.1 *Minutes attributed to Train Operator*

For each Period there shall be calculated

- (A) the number of Minutes Delay to Third Party Trains,
  - (B) the number of TPT Cancellation Minutes for Third Party Train Cancellations,
- in each case, resulting from incidents due to Operator Disruption.

#### 4.2 *Calculation of amount payable by Train Operator*

In respect of incidents attributable to the Train Operator in accordance with paragraph 6, in each Period, the Train Operator shall be liable to Network Rail for

- (A) an amount equal to the Minutes Delay in such Period as calculated accordance to paragraph 5 multiplied by the Rate; and
- (B) an amount equal to the sum of the TPT Cancellation Minutes for the Third Party Train Cancellations in such Period multiplied by the Rate.

#### 4.3 *TOC Performance Statement*

- (A) Within five working days after the end of each Period, Network Rail shall provide the Train Operator with a statement (the "TOC Performance Statement"):
  - (1) showing the Minutes Delay and TPT Cancellation Minutes for that Period; and
  - (2) showing the amount payable by the Train Operator to Network Rail under this Schedule in respect of the Period.

Any unresolved dispute under paragraph 2.7 in relation to any incident occurring during that Period shall be indicated as such on the TOC Performance Statement.

- (B) Within seven working days of receipt of the TOC Performance Statement the Train Operator shall sign and return a copy to Network Rail and indicate on the copy any aspects of the TOC Performance Statement which it disputes, giving reasons for any dispute. Save to the extent that any disputes are so notified or if the Train Operator fails to sign and return to Network Rail a copy of the TOC Performance Statement, the Train Operator shall be deemed to have agreed the contents of the TOC Performance Statement.

#### 4.4 *Resolution of Disputes*

Any dispute concerning a TOC Performance Statement shall be dealt with in accordance with Part VII.

## PART V: MINUTES DELAY

### 5. **Calculation of Minutes Delay**

#### 5.1 *Calculation of Minutes Delay*

Subject to paragraph 5.2, the Minutes Delay for a Third Party Train in respect of a 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 so Triggers the Recording Point is later than the time at which the train is scheduled so to Trigger the Recording Point; and
- (B) in respect of each subsequent recorded Trigger by a train, the lesser of:
  - (1) the number of minutes (rounded down to the nearest whole minute), if any, by which the time at which the relevant train so Triggers the Recording Point is later than the time at which the train is scheduled so to Trigger the Recording Point; and
  - (2)  $[(A_1 - A_2) + B]$ , provided that if the product of the formula is a negative amount it shall be deemed to be zero,

where:

$A_1$  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);

$A_2$  is the scheduled time between such Triggers; and

$B$  is any Recovery Time between such Triggers.

#### 5.2 *Allocation*

The Minutes Delay calculated in accordance with paragraph 5.1 shall be allocated to the incident(s) causing those Minutes Delay as described in Part VI. Any minutes of delay which are included in any Minutes Delay and which are caused by the same incident or series of related incidents and which are less than 3 minutes in aggregate shall for the purposes of this Schedule 8 be deemed to be zero.

## PART VI: RESPONSIBILITY

### 6. Allocation of Responsibility

#### 6.1 *Responsibility for minutes delay, cancellations and curtailments*

For the purposes of this Schedule responsibility for each minute of delay included in Minutes Delay and for each Third Party Train Cancellation shall be allocated according to the responsibility for the incident which caused such Minutes Delay or Third Party Train Cancellation as established in accordance with this Part VI.

#### 6.2 *Incidents*

In assessing the causes of any Minutes Delay, there shall be taken into account all incidents contributing thereto including:

- (A) the extent to which each party has taken reasonable steps to avoid and/or mitigate the effects of the incidents contributing thereto, having regard to the responses of that party to similar types of incidents occurring prior to the Commencement Date; and
- (B) where a train is affected by the cancellation of or delay to an Ancillary Movement, the incident(s) giving rise to that cancellation or delay.

#### 6.3 *Network Rail Responsibility*

Subject to paragraph 6.5, Network Rail shall be allocated responsibility for an incident other than a Planned Incident if that incident is wholly or mainly:

- (A) caused by breach by Network Rail of any of its obligations under this Agreement; or
- (B) caused by circumstances within the control of Network Rail (whether or not Network Rail is at fault) in its capacity as operator of the Network; or
- (C) caused by acts or omissions of Network Rail's staff or contractors in relation to the Network; or
- (D) subject to paragraph 6.7, caused by any incident in connection with rolling stock on the Network for which any train operator (other than the Train Operator) would be allocated responsibility if it were the Train Operator under this Agreement; or
- (E) caused by the failure of a Network Rail owned and maintained vehicle unless such failure is caused by circumstances within the control of the Train Operator in its capacity as operator of the vehicle.

#### 6.4 *Train Operator Responsibility*

Subject to paragraph 6.5, the Train Operator shall be allocated responsibility for an incident other than a Planned Incident if that incident is wholly or mainly:

- (A) caused by breach by the Train Operator of any of its obligations under this Agreement or the Train Operator's Safety Case; or
- (B) caused by circumstances within the control of the Train Operator (whether or not the Train Operator is at fault) in its capacity as an operator of the TOC Services associated with the TOC Services; or

- (C) caused (whether or not the Train Operator is at fault) by or in connection with any rolling stock operated by or on behalf of the Train Operator for the purpose of providing or in connection with the provision of the TOC Services or any act, omission or circumstance in connection with such rolling stock, including:
  - (1) the operation of such rolling stock; or
  - (2) any act, omission or circumstance in connection with such rolling stock originating in connection with any station (other than in connection with signalling under the control of Network Rail at that station); or
- (D) caused by circumstances arising off the Network in relation to the TOC Services other than those which are caused by Network Rail in its capacity as operator of the Network; or
- (E) caused by acts or omissions of the Train Operator's staff, customers or contractors; or
- (F) caused by a TOC Service not being promptly accepted off the Network for reasons not caused by Network Rail in its capacity as operator of the Network.

#### 6.5 *Joint Responsibility*

- (A) Network Rail and the Train Operator shall be allocated joint responsibility for any identified incident in respect of which Network Rail and the Train Operator are equally responsible and for which neither Network Rail nor the Train Operator is allocated responsibility under paragraph 6.3 or 6.4.
- (B) The number of Minutes Delay arising from an incident due to Joint Disruption shall be divided equally between Network Rail and the Train Operator. For the purposes of Parts III and IV of this Schedule, the number of such minutes so allocated to Network Rail shall be deemed to be minutes arising from Network Rail Disruption and the number of minutes so allocated to the Train Operator shall be deemed to be minutes arising from Operator Disruption.

#### 6.6 *Planned Incidents*

An incident shall be treated as a Planned Incident to the extent that there is Recovery Time in respect of that incident.

#### 6.7 *Depot/Terminal Incidents*

- (A) For the purposes of paragraph 6.3(D), where rolling stock operated by or on behalf of another train operator is delayed in entering or leaving the Network due to any act, omission or circumstance originating in connection with a depot, terminal or network (other than the Network) and any rolling stock referred to in paragraph 6.4(C) which is scheduled to leave or enter the Network at the connection with that depot, terminal or network (other than the Network) is then delayed behind the first mentioned rolling stock, such delay to the first mentioned rolling stock shall not be an incident for which Network Rail is allocated responsibility but such delay to the rolling stock referred to in paragraph 6.4(C) shall be an incident for which the Train Operator is allocated responsibility.
- (B) For the purposes of paragraphs 6.3 and 6.4, any delay of rolling stock in entering or leaving the Network at a connection with a depot or terminal which is due to any breach by Network Rail of its obligations under a connection agreement in relation

to such depot or terminal shall be deemed to be an act, omission or circumstance in connection with such rolling stock and, save as provided in paragraph 6.3(D), shall be an incident for which the Train Operator is allocated responsibility and shall not be an incident for which Network Rail is allocated responsibility.

6.8 *Unallocated Delay*

- (A) Any minutes of delay, included in Minutes Delay, of 3 minutes or more which occur on the Network and are recorded as “unallocated” under paragraph 2.5 shall be allocated to Network Rail.
- (B) Any minutes of delay, included in Minutes Delay, of 3 minutes or more which occur off the Network and are recorded as “unallocated” under paragraph 2.5 shall be allocated to the Train Operator.

## PART VII: PAYMENTS, DISPUTES AND ADJUSTMENTS

### 7. **Payments**

- 7.1 Within ten working days after the end of each Period, Network Rail's Representative and the Train Operator's Representative shall meet (the "Resolution Meeting") with a view to resolving any outstanding disputes notified under paragraph 2.7 or 4.4 in relation to that Period, and to agree the sums payable under this Schedule in respect of that Period.
- 7.2 Where any amount which is the subject of this Schedule is in dispute the disputed balance shall carry interest (accruing daily and compounded monthly) at the Default Interest Rate from the date on which the disputed balance would but for such dispute have been due to be so accounted for until the date of such account.

### 8. **Disputes**

- 8.1 If the parties are unable to resolve any matter in dispute at a Resolution Meeting, each party shall promptly, and in any event within seven days after the Resolution Meeting in question, prepare a written summary of the matter(s) in dispute and the reasons for each such dispute and shall submit the summary to its Senior Officer and to the Senior Officer of the other party. Within 28 days after the Resolution Meeting, the Senior Officers from each party shall meet or speak on the telephone with a view to resolving all such disputes.
- 8.2 If the Senior Officers fail to resolve any such disputes at, or within 14 days after, their meeting or telephone conference, then either party may require that the matter(s) in dispute be resolved by the Access Disputes Resolution Committee and if either party is dissatisfied with the decision of that Committee or the ruling of the Chairman thereof (as the case may be) that party shall be entitled to refer the matter for arbitration, pursuant in each case to Part C of the Access Dispute Resolution Rules. Notwithstanding that the parties may have elected to adopt the whole or any part of Part C of the Access Dispute Resolution Rules to apply in the arbitration paragraph C6.3 of those rules shall not apply.

### 9. **Adjustments to monetary amounts**

Each of the monetary amounts (each a "value") set out in Tables 1 and 2 shall be adjusted (to the nearest penny) in respect of payments made relating to Periods in Financial Year t in accordance with the following formula:

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

where:

$R_t$  is the relevant value in the Financial Year t,

$R_{t-1}$  is the relevant value in the Financial Year t-1, and

$RPI_{t-1}$  means the percentage change (whether of a positive or negative value and calculated to two decimal places) in the monthly figures of the General Index of Retail Prices All Items as published in Monthly Digest of Statistics issued by the Office for National Statistics (Table 18.1 reference CHAW) with respect to November in the Financial Year t-1 and the index published or determined with respect to November in the Financial Year t-2

but so that in relation to the Financial Year commencing on 1 April 2002,  $R_t$  shall have the relevant value specified in Tables 1 and 2 at the date of incorporation of this Schedule 8 into this Agreement and in relation to the next following Financial Year  $R_{t-1}$  shall have the same relevant value.

**TABLE 1**  
**TRAIN OPERATOR PERFORMANCE**

<u>COLUMN 1</u>	<u>COLUMN 2</u>	<u>COLUMN 3</u>
<u>Train Group</u>	<u>Minutes Delay Value</u>	<u>Cancellation Minutes</u>
	(£ / min)	
South East Non-Rural Category 1	32	20
South East Non-Rural Category 2	72	20
South East Non-Rural Category 3	327	30
South East - Off-Peak	16	30
Network Rural	7	40
InterCity	105	60
Regional Express	14	45
Freight etc	7.09	30
Regional & South East Rural	6	40
 <u>Explanation of Train Groups</u>		
South East Non-Rural Category 1	Chiltern Railway Company Limited peak Silverlink Train Services Limited (non-express) peak One (West Anglia Inners Peak) Selected Thameslink, SWT, One, Southern & WAGN off-peak services	
South East Non-Rural Category 2	Thames Trains Limited peak South West Trains Limited peak One – peak Great Eastern & West Anglia services Connex South Eastern Limited peak c2c Rail Limited peak New Southern Railway Limited peak Silverlink Train Services Limited (express) peak Gatwick Express Limited peak & off-peak Thameslink Rail Limited (South London) peak West Anglia Great Northern Railway Limited peak	
South East Non-Rural Category 3	Thameslink Rail Limited (Brighton Main Line and Bedford Main Line) peak Eurostar	
South East - Off-Peak (excl high value & rural services)	Services to/from London which do not fall into the categories 1-3 above	
Intercity	Great North Eastern Railway Limited West Coast Trains Limited (Virgin West Coast) Great Western Trains Company Limited (First Great Western) Midland Main Line Limited One – Anglia InterCity	

Regional Express	CrossCountry Trains Ltd (Virgin CrossCountry) Transpennine
Regional & South East Rural	North Western Trains Company Limited (First North Western) Central Trains Limited Arriva Trains Northern Limited First Scotrail Limited Wales and West Passenger Trains Ltd (Wessex Trains) Cardiff Railway Company Ltd (Wales and Borders Trains) Arriva Trains Merseyside Limited One – Anglia Locals (former Anglia Railways Train Services Limited - local)
Freight etc	All non passenger carrying services with performance regimes

Reference in this Table 1 to any train operating company shall be deemed to include any successor franchise operator to that train operating company.

**TABLE 2**

**Train Operator Performance**

<b>Incident Cap:</b>	<b>£5,000</b>
<b>Access Charge Supplement (per annum):</b>	<b>£8,613</b>

**SIGNED BY** )  
 )  
on behalf of )  
**NETWORK RAIL INFRASTRUCTURE LIMITED** )

**SIGNED BY** )  
 )  
on behalf of )  
**FASTLINE LIMITED** )