

Dated

2012

- (1) [GUARANTOR]
- (2) THE SECRETARY OF STATE FOR TRANSPORT

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Guarantee

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This deed is made on

between:

- (1) [•], a company incorporated in England and Wales with company number [•], (the "**Guarantor**"); and
- (2) The Secretary of State for Transport, whose principal address is at 33 Horseferry Road, London SW1P 4DR (the "**Secretary of State**").

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this deed, the following words and phrases have the specified meanings.

"**Discharge Date**" means the date that is eighteen calendar months after the end of the Franchise Period unless the Franchisee has received on or before such date a notification from the Secretary of State of the Rectification Amount in which case the Discharge Date shall be the earlier of: (i) the date upon which the Rectification Amount as so notified is received from the Franchisee by the Secretary of State, in cleared funds, to such bank account as may be notified by the Secretary of State to the Franchisee; and (ii) the date upon which any claim brought by the Secretary of State under this Deed and in respect of such Rectification Amount is discharged in full by the Guarantor and the Secretary of State has received such Rectification Amount in cleared funds, to such bank account as may be notified by the Secretary of State to the Guarantor.

"**Franchise Agreement**" means the franchise agreement and conditions precedent agreement entered into between (1) the Secretary of State and (2) the Franchisee, pursuant to which the Franchisee will provide services for the carriage of passengers by railway and operate certain Stations, dated on or about the date hereof.

"**Franchisee**" means [•], a company incorporated in England and Wales with company number [•] which is a subsidiary of the Guarantor.

### 1.2 Interpretation

1.2.1 In this deed:

1.2.1.1 "**assets**" includes present and future property, revenue, rights and interests of every kind;

1.2.1.2 "**Capped Amount**" is fifteen million pounds (£15,000,000), provided that on and from the commencement of the second and each subsequent Franchisee Year the Capped Amount shall be adjusted in accordance with the following formula:

Capped Amount x RPI

where RPI has the meaning given to it in Schedule 8.2 (Annual Franchise Payments) of the Franchise Agreement;

1.2.1.3 "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);

- 1.2.1.4 "Rectification Amount" has the meaning given to such term in paragraph 2.2 of Schedule 6.2 (Essex Thameside Specific Provisions) of the Franchise Agreement; and
  - 1.2.1.5 "security" includes any assignment by way of security, charge, lien, mortgage, pledge or other security interest securing any obligation of any person and any other agreement or arrangement having a similar effect.
- 1.2.2 Each reference in this deed to:
- 1.2.2.1 this deed (or to any other agreement or deed) means, at any time, this deed (or, as applicable, such other agreement or deed) as amended, novated, re-stated, substituted or supplemented at that time, provided that the relevant amendment, novation, re-statement, substitution or supplement does not breach any term of this deed or the Franchise Agreement;
  - 1.2.2.2 a party to this deed includes its successors-in-title and its permitted assigns and transferees;
  - 1.2.2.3 the singular includes the plural and vice versa, as the context permits or requires; and
  - 1.2.2.4 any provision of any statute or of any subordinate legislation means, at any time, the relevant provision as in force at that time (even if it has been amended or re-enacted since the date of this deed), unless this deed expressly states otherwise or the context requires otherwise.
- 1.2.3 Words and expressions defined in the Franchise Agreement shall have the same meanings in this deed unless the context otherwise requires.

## 2. **GUARANTEE, UNDERTAKING AND INDEMNITY**

- 2.1 In consideration of the benefits made available to the Franchisee pursuant to the Franchise Agreement, the Guarantor hereby guarantees to the Secretary of State the obligation of the Franchisee under the Franchise Agreement to pay the Rectification Amount in the event that the Rectification Amount becomes payable to the Secretary of State in accordance with the terms of the Franchise Agreement (the "**Guarantee**"). The Guarantor's maximum aggregate liability to the Secretary of State under this Deed shall not exceed the Capped Amount.
- 2.2 The Guarantor's obligations under clause 2.1 are irrevocable and unconditional.
- 2.3 Subject to clause 3.2, this deed shall expire at 11:59pm (London time) on the Discharge Date.

### **3. RESTRICTIONS AND CONDITIONS**

#### **3.1 No interference with Secretary of State's rights**

- 3.1.1 The Guarantor undertakes that, at any time on or before the Discharge Date, except as otherwise expressly permitted by this deed (or with the prior written consent of the Secretary of State), it will not:
- 3.1.1.1 take or receive from any person (or permit to subsist) any security or any guarantee, indemnity or other financial support in respect of any liability it might incur under or in connection with this deed;
  - 3.1.1.2 take any step against the Franchisee (or any co-surety) in respect of any liability it might incur under or in connection with this deed, including (whether on the basis of subrogation or otherwise) claiming reimbursement of any payment, exercising any right of set-off, counterclaim, indemnity or contribution in respect of any payment or enforcing any security;
  - 3.1.1.3 exercise any right it might have (whether on the basis of subrogation or otherwise) to share in any security held by the Secretary of State; or
  - 3.1.1.4 in any insolvency proceedings (or analogous proceedings) affecting the Franchisee, submit any proof or other claim or rank in competition with the Secretary of State (or with any trustee or agent acting on its behalf).
- 3.1.2 If, at any time, the Secretary of State instructs the Guarantor to take any of the steps referred to in clause 3.1.1.4, the Guarantor shall do so in accordance with the instructions and at its own expense.
- 3.1.3 If (a) at any time, the Guarantor holds the benefit of any security or receives any payment or any other asset in breach of clause 3.1.1 or as a result of taking any action under clause 3.1.2 or (b) at any time after the Secretary of State makes a demand under clause 2.1, the Guarantor receives any payment or any other asset from the Franchisee, then the Guarantor shall pay the relevant amount (or, as applicable, transfer the relevant security or other asset) to the Secretary of State, for application in or towards payment of the Guarantor's liabilities under this deed. Until it makes payment (or, as the case may be, completes the transfer), the Guarantor shall hold the relevant amount (or security or other asset) on trust for the Secretary of State. If, at any time, the aggregate amount of the property required to be held on trust under this clause 3.1.3 would otherwise exceed the amount of the Guarantor's liabilities under this deed at that time, this clause 3.1.3 will not apply with regard to (but only to the extent of) the excess amount.

#### **3.2 Continuation of obligations**

If, at any time, there has been a release, settlement or discharge of the Guarantor's obligations under this deed and, as a consequence of any insolvency proceedings (or analogous proceedings) or for any other reason, (a) any payment made to the Secretary of State in respect of the amount secured by the

Guarantee is required to be repaid and/or (b) any such payment or any security (or other right) held by the Secretary of State in respect of the amount secured by the Guarantee is void, is set aside or is otherwise affected, then the Guarantor's obligations under this deed shall continue in effect as if there had been no such release, settlement or discharge and as if the relevant payment had not been made and/or (as applicable) the relevant security (or other right) had not been held by the Secretary of State.

#### **4. PAYMENTS AND ACCOUNTS**

##### **4.1 Set-off and other remedies**

4.1.1 The Guarantor shall not exercise any right of set-off or counterclaim it might have in respect of any payment due to the Secretary of State under this deed.

4.1.2 The Secretary of State may, at any time, set off any obligation owed by the Secretary of State to the Guarantor (whether or not matured at such time) against any matured obligation owed by the Guarantor under this deed. If any amount is in a different currency from the amount against which it is to be set off, the Secretary of State may convert either amount (or both) at any reasonable time and at any reasonable rate.

##### **4.2 No withholding**

The Guarantor shall not make any withholding on account of tax from any payment due to the Secretary of State under this deed, unless it is required by law to do so at that time. If it is required by law to do so at that time, it shall increase the amount of the relevant payment so that, after the withholding, the Secretary of State receives the amount it would have received if such withholding had not been required to be made. The Guarantor shall notify the Secretary of State if these circumstances arise.

##### **4.3 Default interest**

If the Guarantor fails to pay on its due date any amount payable under this deed, it shall pay interest on that amount. Interest will be payable from the due date until the date of payment of the relevant amount (even if payment is made only after a judgment has been obtained). At any time, the interest rate applicable to late payments will be two per cent higher than the base rate at that time of any UK clearing bank selected for this purpose by the Secretary of State. Interest accrued under this clause 4.3 will be compounded monthly.

##### **4.4 General**

4.4.1 Each payment by the Guarantor under clause 2 (*Guarantee, undertaking and indemnity*) (and each related payment under clause 4.2 (*No withholding*) or clause 4.3 (*Default interest*)) shall, where applicable, be made in the currency (or currencies) in which the relevant part of the amount secured by the Guarantee is denominated. If the Guarantor pays any amount in a different currency, it must also reimburse the Secretary of State for any costs and losses incurred by the Secretary of State in converting that amount into the required currency. Each other payment by the Guarantor under this deed must be made in sterling.

- 4.4.2 On each date on which the Guarantor is required to make a payment under this deed, it shall do so in accordance with the Secretary of State's instructions (including as to time, method and place of payment).
- 4.4.3 The Secretary of State's calculation of any amount payable by the Guarantor under this deed at any time will be conclusive and binding on the Guarantor (in the absence of manifest error).

## **5. MISCELLANEOUS**

### **5.1 Secretary of State's rights, remedies and discretions**

- 5.1.1 The rights of the Secretary of State under this deed are independent of any other right which the Secretary of State has at any time in respect of the amount secured by the Guarantee.
- 5.1.2 The rights and remedies provided in this deed are in addition to (not instead of) rights or remedies under law. If the Secretary of State fails to exercise any right or remedy under this deed or delays its exercise of any right or remedy, this does not mean that it waives that right or remedy. If the Secretary of State exercises a right or remedy once, this does not mean that it cannot do so again. If the Secretary of State partly exercises a right or remedy, this does not mean that it cannot exercise that right or remedy again.
- 5.1.3 The Secretary of State may decide (a) whether and, if so, when, how and to what extent (i) to exercise its rights under this deed and (ii) to exercise any other right it might have in respect of any amount secured by the Guarantee (or otherwise) and (b) when and how to apply any payments received under this deed and any other payments received by it in respect of any amount secured by the Guarantee. The Guarantor has no right to control or restrict the Secretary of State's exercise of this discretion. In particular, the Guarantor is not permitted to insist that the Secretary of State seeks payment from any other person, exercises any other right it might have or takes any other step before exercising any right under this deed.
- 5.1.4 No provision of this deed will interfere with the Secretary of State's right to arrange its affairs as it may decide (or oblige it to disclose any information relating to its affairs), except as expressly stated.

### **5.2 Indemnity**

The Guarantor shall indemnify the Secretary of State on demand in respect of all expenses, losses and liabilities it incurs in connection with this deed.

### **5.3 Guarantor's obligations**

- 5.3.1 Each obligation of the Guarantor under this deed is independent of each other obligation under this deed.
- 5.3.2 If, at any time, the Guarantor's performance of its obligations under this deed in respect of any part of the amount secured by the Guarantee would be in breach of sections 678-680 of the Companies Act 2006, the Guarantor's obligations will not apply at that time in respect of that part of the amount secured by the Guarantee.

#### 5.4 **This deed**

- 5.4.1 The provisions of this deed will apply at all times (a) regardless of the date on which any amount secured by the Guarantee is or was incurred and (b) in respect of the full amount secured by the Guarantee at the relevant time.
- 5.4.2 The provisions of this deed will not be affected by the occurrence or existence at any time of any of the following events or circumstances or by any person's knowledge or lack of knowledge as to any such matter: (a) any person's insolvency or lack of capacity, power or authority; (b) any unenforceability, illegality or invalidity of any obligation of any person; (c) any change in the constitution, membership, ownership, legal form, name or status of any person; (d) the making or termination of any other deed or agreement; (e) any amendment, novation, re-statement or substitution of, or any supplement to, any other deed or agreement; (f) any increase or reduction in the amount of any person's indebtedness or any alteration of any term or condition in respect of any person's indebtedness; (g) any person taking or omitting to take any step in relation to (i) the Franchisee, the Guarantor or any other person, (ii) any amount secured by the Guarantee, (iii) any security, guarantee, indemnity or other financial support in respect of any indebtedness and/or (iv) any other asset; or (h) anything else which, although it could affect the liability of a surety, would not affect the liability of a principal debtor.
- 5.4.3 If, at any time, any provision of this deed is or is found to have been illegal, invalid or unenforceable in any respect under any law of any jurisdiction, this does not affect the legality, validity or enforceability of the other provisions of this deed or the legality, validity or enforceability of the affected provision under any law of any other jurisdiction.
- 5.4.4 Any person (other than the Secretary of State) who is not party to this deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this deed, except to the extent that this deed expressly provides for it to do so. The Secretary of State and the Guarantor do not require the consent of any such person before rescinding or varying this deed.
- 5.4.5 This deed is the Secretary of State's property.

#### 5.5 **Representations and warranties**

The Guarantor makes the following representations and warranties.

- 5.5.1 It is a limited liability company, duly incorporated and validly existing under the law of England and Wales, with power to own its assets and to carry on its business (and other activities) as they are being conducted.
- 5.5.2 It has the power and authority to enter into this deed and to perform its obligations and exercise its rights under it.
- 5.5.3 The obligations expressed to be assumed by it in this deed are legal, valid, binding and enforceable obligations (subject to the principle that equitable remedies are discretionary).



5.5.4 Entering into this deed and performing its obligations and exercising its rights do not conflict with any law applicable to it, its memorandum and articles of association or any agreement binding upon it (or its assets).

## 6. ASSIGNMENT

### 6.1 No assignment by Guarantor

The Guarantor shall not assign, novate or otherwise deal with any rights, interests or obligations under this deed.

### 6.2 Assignment by Secretary of State

6.2.1 The Secretary of State may, at any time, assign, novate and otherwise deal with any rights, interests or obligations under this deed.

6.2.2 The Secretary of State may disclose any information it sees fit to any person (a) to which it proposes to assign or novate (or has assigned or novated) any rights, interests or obligations under this deed and/or (b) with which it proposes to enter into (or has entered into) any other dealings in relation to any such rights, interests or obligations.

## 7. COMMUNICATIONS

7.1 Each notice, consent and other communication in respect of this deed will be effective only if made by letter or fax, delivered to the relevant address or fax number specified below (or to any substitute address or fax number notified in writing by the relevant party for this purpose) and marked for the attention of the specified department/individual, if applicable. Each communication by letter will be effective only if delivered by hand, sent by first class post (if sent from and to an address in the UK) or sent by airmail (if sent from or to an address elsewhere). In this clause 7, "**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are open for general business in the principal financial centre in the jurisdiction in which the relevant communication is delivered and references to times are to times in the place of delivery.

7.2 Each communication to the Guarantor will become effective as follows:

7.2.1 a hand-delivered letter will be effective as soon as it is delivered (or, if it is delivered after 5 pm or on a day that is not a Business Day, it will be effective at 9 am on the next Business Day);

7.2.2 a letter sent by post from and to an address in the UK will be effective at 9 am on the second Business Day after it is posted and a letter sent by airmail from or to an address elsewhere will be effective at 9 am on the tenth Business Day after it is posted; and

7.2.3 a fax will be effective one hour after the sending fax machine (or other system) generates a confirmation that the communication has been sent in full (or, if this occurs after 5 pm or on a day that is not a Business Day, it will be effective at 9 am on the next Business Day).

7.3 Each communication to the Secretary of State will become effective only when actually received by the Secretary of State.

7.4 The specified contact details are as follows.

**Guarantor**

Address:

Fax number:

Attention:

**Secretary of State**

Address:

Fax number:

Attention:

**8. GOVERNING LAW**

This Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.

## EXECUTION

### The Guarantor

Executed as a deed by [*Guarantor*],  
acting by a director

### Director

in the presence of:

Witness Signature:

Witness Name:

Witness Address:

Witness Occupation:

### Communications to be delivered to:

Address:

Fax number:

Attention: