

Dated

2015

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

Conditions Precedent Agreement

relating to the TransPennine Express Franchise Agreement

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Subject to Contract - Final Draft

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR TRANSPORT**, whose principal address is at 33 Horseferry Road, London SW1P 4DR (the "**Secretary of State**"); and
- (2) **[FRANCHISEE]** (Company number [INSERT]), whose registered office is at [INSERT] (the "**Franchisee**").

WHEREAS

- (A) The Secretary of State and the Franchisee have on the same date as this Agreement entered into a franchise agreement relating to the TransPennine Express franchise (the "**Franchise Agreement**") which sets out the terms on which the Franchisee will provide the Franchise Services (the "Transaction").
- (B) The parties wish to record in this Agreement certain conditions to be satisfied prior to the issue of the Certificate of Commencement.
- (C) The Franchisee wishes to make certain representations and warranties to the Secretary of State.

1. INTERPRETATION AND DEFINITIONS

- 1.1 This Agreement and the Franchise Agreement together constitute a single agreement, which is a "**franchise agreement**" for the purposes of the Act.
- 1.2 This Agreement shall be interpreted in accordance with the Franchise Agreement and terms defined therein shall have the same meanings where used in this Agreement, unless this Agreement expressly provides to the contrary.
- 1.3 References in this Agreement to the Franchisee satisfying any condition precedent shall, where appropriate, be read as including a reference to the Franchisee procuring satisfaction of that condition precedent.
- 1.4 If there is any conflict between the terms of this Agreement and the Franchise Agreement, the terms of this Agreement shall prevail.

2. REPRESENTATIONS AND WARRANTIES

- 2.1 The Franchisee represents and warrants to the Secretary of State, subject only to any matter fully and fairly disclosed to him in writing (and accepted by him):
 - (a) that it has not acted in breach of any of the terms of the Franchise Letting Process Agreement; and
 - (b) that all of the information, representations and other matters of fact communicated in writing to the Secretary of State and/or his advisers by the Franchisee, its officers, employees or agents in connection with or arising out of the Franchisee's proposal to secure the provision and operation of the Franchise Services were at the dates submitted to the Secretary of State or such advisers and remain as at the Start Date, in all material respects, true, accurate and not misleading.
- 2.2 The Franchisee further undertakes to the Secretary of State, subject to clause 2.3 of this Agreement, that:

- (a) the representations and warranties contained in clause 2.1 will be in all material respects, as at the Start Date, true, accurate and not misleading as if they had been given on the Start Date with reference to the facts and circumstances then subsisting; and
- (b) if after the signing of the Franchise Agreement and before the Start Date any event shall occur or matter arise which results or may result in any of the representations and warranties in clause 2.1 being unfulfilled, untrue, misleading or incorrect in any material respect at the Start Date, the Franchisee shall immediately notify the Secretary of State in writing thereof and the Franchisee shall provide such information concerning the event or matter as he may require.

2.3 No right to damages or compensation shall arise in favour of the Secretary of State under clause 2.2 in consequence only of an event occurring or matter arising after the signing of the Franchise Agreement but before:

- (a) the Start Date; or
- (b) if the Secretary of State gives notice terminating the Franchise Agreement in accordance with clause 4.2(b) or clause 4.3(b), the effective date of termination specified in such notice,

which constitutes a breach or non-fulfilment of any of the representations and warranties in clause 2.1 (whether or not the Franchise Agreement is terminated in consequence thereof) if:

- (i) the event or matter could not reasonably have been avoided or prevented by the Franchisee; and
- (ii) the event or matter was duly notified to the Secretary of State in accordance with clause 2.2(b).

3. **SATISFACTION OF CONDITIONS PRECEDENT**

3.1 On or prior to the Start Date, the Franchisee shall satisfy the conditions precedent set out in the Appendix (Conditions Precedent) to this Agreement.

3.2 The Secretary of State may in accordance with paragraph 6.1 of Schedule 19 (Other Provisions) of the Franchise Agreement waive the requirement to satisfy any condition precedent prior to the Start Date, attaching such conditions as he considers appropriate. If the Secretary of State so waives the requirement to satisfy any condition precedent, the Franchisee shall satisfy such condition precedent, together with any conditions attaching to such waiver, as soon as reasonably practicable thereafter, or on or prior to such other later time as the Secretary of State may stipulate.

3.3 Where agreements or deeds are required to be entered into or executed and delivered or any steps required to be taken under clause 3.1 by the Franchisee, the Parent, the Guarantor or the Bond Provider(s) (as the case may be), the Secretary of State may require, as an additional condition precedent, further documentation (including legal opinions) or evidence of the power and authorisation of the relevant person to enter into, execute or deliver any such agreement or deed or take any such steps, and the Franchisee shall promptly supply such additional evidence.

3.4 Where the Franchisee is required to enter into any agreement in satisfaction of the conditions precedent set out in the Appendix (Conditions Precedent) to this Agreement and such agreement contains a condition precedent requiring the Franchise Agreement to be unconditional, provided the Franchisee has satisfied all the other conditions precedent set out in such agreement, the requirement to enter into such agreement will be deemed to be satisfied.

3.5 If the Secretary of State is satisfied that each of the conditions precedent in this Agreement has been satisfied (except to the extent waived by him, but subject to such conditions as he shall impose in respect of any such waiver) he shall promptly issue to the Franchisee a Certificate of Commencement, which shall confirm the Start Date.

4. **REVIEW DATE**

4.1 On or prior to the Review Date, the Franchisee shall demonstrate to the Secretary of State (in a manner satisfactory to him in form and substance) that the conditions precedent are likely to be fully satisfied by the Start Date.

4.2 If the Secretary of State is not so satisfied at the Review Date, he may promptly afterwards by service of a notice on the Franchisee:

(a) waive any relevant condition precedent pursuant to clause 3.2 or set, by specifying in that notice either:

(i) a new Review Date;

(ii) a new Review Date and a new Start Date, provided that any such new Review Date shall be no more than one calendar month prior to such new Start Date; or

(iii) a new Start Date; or

(b) terminate the Franchise Agreement on the Start Date or such earlier date as the Secretary of State may specify in that notice.

4.3 If the Franchisee has not satisfied the conditions precedent or they have not been waived by the Secretary of State by the Start Date, he may promptly by service of a notice on the Franchisee either:

(a) set, by specifying in that notice, either:

(i) a new Start Date; or

(ii) a new Review Date and a new Start Date, provided that any such new Review Date shall be no more than one calendar month prior to such new Start Date; or

(b) terminate the Franchise Agreement with effect from the Start Date, or such later date as the Secretary of State may specify in such notice, which shall be no later than 14 days after that Start Date.

4.4 On service of a notice by the Secretary of State pursuant to clause 4.2(b) or 4.3(b), the Franchise Agreement shall terminate on the date specified in that notice.

- 4.5 On such termination, neither party shall have any liability to the other party, save in respect of:
- (a) their respective obligations as to confidentiality under Schedule 17 (Confidentiality and Freedom of Information) of the Franchise Agreement;
 - (b) any other obligations which either expressly or by their nature survive the termination of the Franchise Agreement; and
 - (c) any breach of their respective obligations hereunder or under the Franchise Agreement arising in respect of the period prior to (and including) the date of termination of the Franchise Agreement.

5. **COMPETITION**

5.1 In so far as the Transaction is:

- (a) notified to the European Commission under Council Regulation (EC) 139/2004 concerning the control of concentrations between undertakings as amended from time to time (the "**EU Merger Regulation**"); or
- (b) within the jurisdiction of the Competition and Markets Authority ("**CMA**") in the United Kingdom (including as a result of a referral under Article 4(4) or Article 9 of the EU Merger Regulation),

(the European Commission and the CMA in this context each being a "**Competition Authority**") the Franchisee shall use all reasonable endeavours expeditiously to progress the consideration of the Transaction by the relevant Competition Authority.

5.2 Without prejudice to the generality of clause 5.1, the Franchisee shall use all reasonable endeavours:

- (a) to make or cause to be made any applications, notifications or filings to any relevant Competition Authority promptly; and
- (b) to respond at the earliest date reasonably possible to any requests for additional information or documentary material made by any relevant Competition Authority.

5.3 The Franchisee undertakes to report to the Secretary of State on the progress of the consideration of the Transaction by any relevant Competition Authority either on request by the Secretary of State, in writing or otherwise, or if there is a development which materially affects the prospects of the Transaction being approved by the relevant Competition Authority.

5.4 Notwithstanding that the Franchisee may have satisfied the conditions precedent set out in the Appendix (Conditions Precedent) to this Agreement, if at any time before the Start Date the Secretary of State (acting reasonably) is not satisfied of any of the following:

- (a) the Transaction will not be referred for a second phase investigation either by the CMA (under section 22, section 33, section 45 or section 62 of the Enterprise Act 2002) or by the European Commission (under Article 6(1)(c) of the EU Merger Regulation);

- (b) the impact of any intervention by the CMA or European Commission will not prejudice the ability of:
 - (i) the Franchisee to commence operation of the Franchise on the Scheduled Start Date;
 - (ii) the Franchisee otherwise to operate the Franchise in accordance with the Franchise Agreement;
 - (iii) any Affiliate of the Franchisee to continue to operate any other Rail Franchise of which it is the franchisee,

the Secretary of State shall have the right on giving written notice to the Franchisee to:

- (A) terminate the Franchise Agreement immediately; or
- (B) specify a new Start Date by which the Secretary of State's concerns in this clause 5.4 are required to be satisfied, but if the Secretary of State's concerns are not satisfied by such date, the Secretary of State shall have the right on giving written notice to the Franchisee to terminate the Franchise Agreement immediately.

5.5 For the purposes of this paragraph 5:

"Transaction" means the entry into the Franchise Agreement by the Secretary of State and the Franchisee; and

"Rail Franchise" means any rail franchise in respect of which a franchisee has been awarded the right to operate under the Railways Act 1993 (as amended).

6. **START DATE TRANSFER SCHEME**

6.1 Subject to clause 6.2, the Secretary of State will utilise his powers under Section 12 and Schedule 2 of the Railways Act 2005 to make one or more transfer schemes (each a **"Start Date Transfer Scheme"**) to take effect on the same day so as to transfer to the Franchisee the following franchise assets of a Train Operator under a Previous Franchise Agreement, being the Train Operator's property, rights and liability in respect of the following:

- (a) Universal Licence Agreement dated 1 February 2004 between (1) BRB (Residuary) Limited and (2) the Train Operator under Previous Franchise Agreement;
- (b) Sub-Licence Deed dated 1 February 2004 between (1) BRB (Residuary) Limited and (2) the Train Operator under Previous Franchise Agreement; and
- (c) Master Software Licence dated 1 February 2004 between (1) BRB (Residuary) Limited and (2) the Train Operator under Previous Franchise Agreement.

6.2 The Secretary of State's obligation to make any Start Date Transfer Scheme will be subject to the Secretary of State being satisfied that:

- (a) all the conditions precedent set out in the Appendix (Conditions Precedent) to this Agreement will be satisfied (or waived) on or before the Start Date;
- (b) neither of the concerns in clause 5.4(a) or clause 5.4(b) exist on or prior to the Start Date.

6.3 The Secretary of State agrees to act reasonably in response to any request that is made by the Franchisee in accordance with clause 6.4 to transfer to it under the Start Date Transfer Scheme any further assets and/or liabilities of a Train Operator under a Previous Franchise Agreement which are required by the Franchisee to perform its obligations under the Franchise Agreement and cannot conveniently be transferred to it by other means.

6.4 Any request made pursuant to clause 6.3 shall be made in writing, submitted to the Secretary of State on or prior to the date falling ten Weekdays prior to the Start Date or such lesser time period as the parties may agree between them, and specify in reasonable detail:

- (a) the assets and/or liabilities to be transferred; and
- (b) the terms agreed as to the proposed transfer with any party affected by the proposed transfer.

6.5 Without limiting any other obligation it may have, the Franchisee agrees to enter into the Supplemental Agreement (as defined under the Previous Franchise Agreement) with the Train Operator under the Previous Franchise Agreement.

IN WITNESS whereof the parties hereto have executed this Agreement the day and year first before written.

SEAL REF No.

THE CORPORATE SEAL OF)
THE SECRETARY OF STATE FOR TRANSPORT)
is hereunto affixed:)

Authenticated by authority of the
Secretary of State for Transport

SIGNED FOR AND ON BEHALF OF)
[FRANCHISEE])
)

Director: -----

Director/Secretary: -----

APPENDIX

Conditions Precedent

1. LICENCES

1.1 The Secretary of State has received, on or before the Start Date, written notice from the ORR, addressed to the Secretary of State and in a form satisfactory to the Secretary of State, which confirms that:

- (a) the Franchisee has been granted or will be granted the following Licences:
 - (i) a Licence to operate passenger trains; and
 - (ii) a Licence to operate stations; and
 - (iii) a Licence to operate light maintenance depots; and
- (b) those Licences will take effect no later than the Start Date; and
- (c) the ORR is not aware of any reason why any of those Licences should be revoked.

1.2 The Secretary of State shall, in addition, where those Licences are not in existence at the date of signature of the Franchise Agreement, have received evidence on or before the Start Date in form and substance satisfactory to him, that:

- (a) none of those Licences are subject to any conditions which, if they had been known to the Secretary of State before the signature of the Franchise Agreement, would, in his reasonable opinion, have resulted in the Secretary of State not entering into the Franchise Agreement, or entering into the Franchise Agreement on materially different terms; and
- (b) any conditions imposed by the ORR on any of those Licences are reasonably likely to be satisfied.

2. SAFETY CERTIFICATE

The Secretary of State has received, on or before the Start Date, written notice from the ORR, addressed to the Secretary of State and in a form satisfactory to the Secretary of State, which confirms that:

- (a) the Franchisee's Safety Certificate has been issued;
- (b) the ORR has not directed any review of or application for an amendment to the Safety Certificate; and
- (c) no such review or application for amendment will be required as a result of the Franchise Agreement having been entered into or the commencement of the Franchise Services.

3. NETWORK AGREEMENTS

3.1 The Secretary of State has received, on or before the Start Date, a certificate signed by the Franchisee:

- (a) identifying separately the network agreements listed in paragraph 3.2 that, in each case, enable the Franchisee throughout the Franchise Term (or, where that is not appropriate, for such lesser period as is appropriate) to perform its role and responsibilities under the Franchise Agreement; and
- (b) certifying that the Franchisee is a party or will be a party to each of them with the relevant counterparties on terms that are approved by the Secretary of State.

3.2 The network agreements are:

- (a) the Track Access Agreement;
- (b) the Access Agreements (and, where relevant, the associated Collateral Agreements), in the agreed terms in respect of the Stations and Franchisee Access Stations, Depots and other depots where the Train Fleet is to be maintained during the Franchise Term and Managed Stations;
- (c) Connection Agreements in respect of Depots (if any); and
- (d) leases with Network Rail in respect of Stations (excluding, for the avoidance of doubt, leases in respect of those stations specified in paragraph 15.2(a)(i) of Schedule 6.2 (TransPennine Express Franchise Specific Provisions) of the Franchise Agreement which are to transfer to the Northern Franchisee), Depots (if any), Managed Station Areas and Shared Facilities with the intent, for the purposes of Section 31 of the Act, that the properties comprised in such leases will be used for or in connection with the provision of the Franchise Services.

4. **ROLLING STOCK RELATED CONTRACTS**

4.1 Without prejudice to paragraph 2.1 of Schedule 2.2 (Security of Access Agreements, Rolling Stock Leases, Station and Depot Leases) of the Franchise Agreement the Franchisee will, on or before the Start Date, be a party to the relevant Rolling Stock Related Contracts in respect of:

- (a) all the rolling stock vehicles specified in Table 1 (Original Rolling Stock) of Schedule 1.7 (The Train Fleet) to the Franchise Agreement;
- (b) all the rolling stock vehicles specified in Table 2 (Specified Additional Rolling Stock) of Schedule 1.7 to the Franchise Agreement; and

5. **OTHER KEY CONTRACTS**

The Franchisee is at the Start Date a party to the other Key Contracts listed in paragraphs 3 to 13 (inclusive) of the Appendix (List of Key Contracts) to Schedule 14.3 (Key Contracts) of the Franchise Agreement, to the extent that, in the reasonable opinion of the Franchisee, such Key Contracts are required by the Franchisee for the provision of the Franchise Services at the Start Date, in each case on terms approved by the Secretary of State.

6. **DIRECT AGREEMENTS**

6.1 Subject to paragraph 6.2, the counterparty to any contract which will, as at the Start Date, be a Key Contract (including any such contract to which the Franchisee

is required under this Agreement to be a party or have vested in it as at the Start Date), has entered into a Direct Agreement with the Secretary of State in respect of such Key Contract on terms acceptable to the Secretary of State.

6.2 No Direct Agreement need be entered into by the counterparty to any Key Contract referred to in paragraph 6.1 where:

- (a) such counterparty is a Train Operator; and
- (b) such Train Operator is the provider of the services under such Key Contract which the Secretary of State considers are reasonably necessary for securing the continued provision by a Successor Operator of the Franchise Services or services similar to the Franchise Services.

7. **FINANCIAL COVENANTS**

Receipt by the Secretary of State of evidence in form and substance satisfactory to him that the Franchisee will comply, on and from the Start Date, with its obligations in respect of the financial covenants set out in paragraph 2 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement.

8. **SEASON TICKET BOND**

The Secretary of State has received on or before the Start Date, the Season Ticket Bond duly executed and delivered by the relevant Bond Provider.

9. **POWER OF ATTORNEY**

The Secretary of State has received on or before the Start Date the Power of Attorney (in agreed terms marked POA) duly executed and delivered by the Franchisee.

10. **PENSIONS**

The Franchisee has at the Start Date, in respect of the employees transferring to it on the Start Date:

- (a) entered into the deeds of establishment, participation or adherence with the trustees of the Railways Pension Scheme and if any employee of the Franchisee whose employment transfers to the Franchisee from the Train Operator under the Previous Franchise Agreement is a member of either of the British Railways Superannuation Fund or the BR (1974) Pension Fund, with the trustees of those Funds; and
- (b) taken such other steps (if any),

as are required to secure compliance with the terms of Schedule 16 (Pensions) of the Franchise Agreement (such compliance to also be from the Start Date).

11. **CONTINUING REPRESENTATIONS AND WARRANTIES**

11.1 The Secretary of State is satisfied that no event has occurred which has or ought to have been notified to the Secretary of State by the Franchisee under clause 2.2(b) (including, a change in identity of any one person, or two or more persons acting by agreement, who may Control the Franchisee as at the Start Date, other than as agreed with the Secretary of State prior to the date of the Franchise Agreement) and which, if it had been known to the Secretary of State before the

signature of the Franchise Agreement, would, in his reasonable opinion, have resulted in:

- (a) his not entering into the Franchise Agreement with the Franchisee; or
- (b) his entering into a franchise agreement with the Franchisee on materially different terms from the Franchise Agreement.

12. **START DATE TRANSFER SCHEMES**

- 12.1 The Secretary of State being reasonably satisfied that where, in order to transfer any agreement under any Start Date Transfer Scheme, a waiver is required from any counterparty because the transfer would otherwise trigger an event of default, right of re-entry or other rights to terminate under that agreement, the Franchisee has procured that such waiver is obtained.
- 12.2 The Secretary of State being reasonably satisfied that, in addition to the assets and/or liabilities that are to be transferred to the Franchisee pursuant to one or more Start Date Transfer Schemes, the Franchisee has made appropriate arrangements to ensure that, on the Start Date, there are available to it, or it is responsible for, all the assets and/or liabilities that it requires in order to perform its obligations under the Franchise Agreement.