

**TO BE EXECUTED AS A DEED**

**AGENCY AGREEMENT NUMBER 2**

**Pursuant to section 83(1) of the Government of Wales Act 2006  
authorising the Welsh Ministers to exercise certain functions of the  
Secretary of State for Transport under Section 26(3) of the Railways  
Act 1993 (as amended)**

**SECRETARY OF STATE FOR TRANSPORT (1)**

and

**WELSH MINISTERS (2)**

THIS AGENCY AGREEMENT is dated

28 September

2017

**BETWEEN**

- (1) **THE SECRETARY OF STATE FOR TRANSPORT** whose principal address is Great Minster House, 33 Horseferry Road, London SW1P 4DR (the "**Secretary of State**"); and
- (2) **WELSH MINISTERS** whose principal place of business is Crown Buildings, Cathays Park, Cardiff, CF10 3NQ ("**Welsh Ministers**") (including, as appropriate, Affiliates or subsidiaries of Welsh Ministers acting on its behalf).

**WHEREAS:**

- (A) Pursuant to Section 108 of the Government of Wales Act 2006 ("**GOWA**") the National Assembly for Wales may not legislate in areas regarding the provision and regulation of railway services except for specified forms of financial assistance.
- (B) It is proposed that a Transfer of Functions Order under section 58(1) of GOWA ("**TFO**") will be made to transfer certain Secretary of State franchising functions under the Railways Act 1993 (as amended) and the Railways Act 2005 (the "**Railways Acts**") to the Welsh Ministers in order for the Welsh Ministers to be the franchising authority in respect of the Welsh Component of the Welsh Services. The TFO will transfer franchising functions to Welsh Ministers only insofar as they relate to the Welsh Component of a Welsh Service. The Secretary of State shall remain the franchising authority over English Services insofar as they are specified in the Replacement Franchise Agreement.
- (C) In advance of that TFO coming into force, Welsh Ministers are acting with the consent and, as legally necessary, as agent for the Secretary of State, as principle, to commence and conduct a procurement process under the Railways Act 1993 (the "**Act**") to procure a new Franchisee for the Replacement Franchise Agreement. Following the TFO coming into force, the Welsh Ministers will continue to act as agent of the Secretary of State in respect of the English Services to the extent that they are specified in the Replacement Franchise Agreement.
- (D) By virtue of Section 83 of the GOWA, arrangements may be made between Welsh Ministers and the Secretary of State for the Secretary of State's franchising procurement functions to be exercised by Welsh Ministers.
- (E) Accordingly the parties have already entered into a first Agency Agreement dated 11 October 2016 ("**Agency Agreement no.1**") made under Section 83 of GOWA to enable Welsh Ministers to down select bidders for the Replacement Franchise Agreement.
- (F) The parties have already made good progress in agreeing devolved responsibilities in England and Wales including the exchange of correspondence and entry into Agency Agreement no. 1 covering the roles and responsibilities for the operation of devolved rail services, Valley Lines electrification and the funding and principles of a Core Valley Lines asset transfer proposition.
- (G) This Agreement ("**Agency Agreement no. 2**" or "**Agreement**") records the scope of the agency arrangements which the parties have agreed between them including confirmation from the Secretary of State that Welsh Ministers may issue to down-selected Bidders an Invitation to Tender (ITT).

- (H) This Agreement must be agreed prior to Welsh Ministers issuing the ITT and it is proposed that this Agreement, or any subsequent agency agreement, will be provided to the United Kingdom Parliament when laying the draft TFO.
- (I) If the TFO is not laid prior to the date on which Welsh Ministers propose to enter into the Replacement Franchise Agreement, a third agency agreement or alternative contractual arrangement will be necessary to give Welsh Ministers contractual authority to execute and manage the Replacement Franchise Agreement for, and on behalf of, the Secretary of State (**Agency Agreement no.3**).

**NOW IT IS AGREED** as follows:

## **1. DEFINITIONS AND INTERPRETATION**

- 1.1. In this Agreement, unless the context requires otherwise,
  - 1.1.1. the definitions set out in Schedule 5 (Definitions) shall apply; and
  - 1.1.2. words and expressions defined in the Baseline Franchise Agreement have the same meanings when used in this Agreement.
- 1.2. Words expressed in the singular shall include the plural and vice versa. Words referring to a particular gender include every gender.
- 1.3. References to any statute or statutory provision shall include: (i) any subordinate legislation made under it; (ii) any provision which it has modified or re-enacted (whether with or without modification); and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification), whether made before or after the date of this Agreement.
- 1.4. All references in this Agreement to Clauses and Schedules are to the Clauses and Schedules to this Agreement unless otherwise stated.
- 1.5. References to any relevant franchising authority, franchisee, franchise agreement or invitation to tender in this agreement are used as they are the terms used in the Railways Acts.
- 1.6. It is noted however that Welsh Ministers have their own terminology for their procurement documentation, including Invitation to Submit Final Tenders (ITSFT) for ITT, ODP Grant Agreement for Franchise Agreement and Operator Development Partner for Franchisee. The references in this Agreement to the ITT, Franchise Agreement and Franchisee shall be deemed to include the ITSFT, ODP Grant Agreement and Operator Development Partner (respectively).

## **2. COMMENCEMENT**

- 2.1. The provisions of this Agency Agreement no. 2 shall commence, take effect and be binding on each of the Secretary of State and Welsh Ministers on and from the Effective Date.
- 2.2. From the Effective Date, the terms of this Agreement supersede and replace Agency Agreement no. 1.

## **3. CONFIDENTIALITY AND FREEDOM OF INFORMATION**

- 3.1. Subject to Clause 3.4, each party undertakes that it shall not at any time during this Agreement disclose to any person any confidential information concerning the

activities, business, affairs or suppliers of the other party, except as permitted by this Clause 3.

- 3.2. Each party may disclose the other party's confidential information:
  - 3.2.1. to its employees, officers, representatives or advisers who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with this Agreement and under the Act provided that it ensures that the employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this Clause 3;
  - 3.2.2. as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority; or
  - 3.2.3. where at the time of its disclosure, the confidential information is already in the public domain other than by a breach of this Agreement.
- 3.3. No party shall use any other party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with this Agreement.
- 3.4. Nothing in this Agreement shall prevent the Secretary of State or the Welsh Ministers from disclosing and/or publishing under the provisions of the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 any term or condition or information contained in or relating to this Agreement.
- 3.5. Each party shall co-operate with the other party and supply all necessary information and documentation required in connection with any request received under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 and/or the Secretary of State's publication scheme requirements under the Freedom of Information Act 2000.

#### **4. CO-OPERATION**

- 4.1. It is recognised by both parties that the need for partnership working is paramount. The parties shall, subject to the proper performance by each of them of their respective legal and statutory duties, co-operate with the other party and act reasonably in the exercise of its rights pursuant to this Agreement. Where the Secretary of State's consent is required under this Agreement such consent shall not be unreasonably withheld or delayed.
- 4.2. The Secretary of State shall use his reasonable endeavours to support Welsh Ministers in procuring a Franchisee for the Replacement Franchise Agreement, including to secure co-operation from the Current Franchise Operator in the letting of the Replacement Franchise Agreement.
- 4.3. Schedule 3 to this Agreement sets out the principles of collaboration and co-operation between the parties. The Secretary of State and Welsh Ministers shall use reasonable endeavours to develop and agree a legally binding Co-Operation and Collaboration Agreement to give effect to the principles set out in Schedule 3 prior to Welsh Government executing the Replacement Franchise Agreement or as soon as reasonably practicable thereafter.
- 4.4. Welsh Ministers shall provide assurance to the Secretary of State that the terms of the ITT and the proposed Replacement Franchise Agreement reflect the Secretary of State's instructions as contained in this Agreement prior to the issue of the ITT.

## **5. PROCESS AND TIMING**

- 5.1. The parties acknowledge that Welsh Ministers, or Transport for Wales on behalf of Welsh Ministers, are engaged in carrying out a single procurement process to appoint a Franchisee to:
- 5.1.1. operate the Replacement Franchise, including the proposed Core Valley Lines services;
  - 5.1.2. co-operate and facilitate the proposed transfer of ownership of the Core Valley Line assets;
  - 5.1.3. design and manage the development and implementation of capital works to deliver a metro style service on the Core Valley Lines;
  - 5.1.4. perform subsequent infrastructure management of the Core Valley Lines; and
  - 5.1.5. design and develop further schemes to improve rail travel in the Wales & Borders Franchise Area in accordance with European Union and domestic legislation (to the extent applicable).
- 5.2. Welsh Ministers agree that the Secretary of State shall not incur liability towards Welsh Ministers for the accuracy of any information or advice which the Current Franchise Operator or any third party may provide to the Secretary of State and which is subsequently passed to Welsh Ministers.

## **6. STATUTORY INSTRUMENT**

- 6.1. The Secretary of State confirms that it is his intention to procure the making of a TFO and all such other relevant orders as are, in the reasonable opinion of the Secretary of State, necessary to make Welsh Ministers the relevant franchising authority for the Welsh Component of Welsh Services.
- 6.2. In advance of making the TFO, and included in any future Agency Agreement will be a detailed specification of the Secretary of State's Railways Acts powers that Welsh Ministers will be able to exercise on behalf of the Secretary of State in order to specify, procure and manage the English Services, and any associated conditions.

## **7. SECRETARY OF STATE'S CONSENT**

- 7.1. Subject to the following:
- 7.1.1. undertakings and positive obligations given by Welsh Ministers set out in Schedules 1 and 4 to this Agreement;
  - 7.1.2. the parties having agreed in principle to the terms set out in Schedules 2 and 3 to this Agreement which are proposed to be contracted in Agency Agreement no. 3; and
  - 7.1.3. the parties agreeing in principle to the terms of a separate Funding and Outputs Agreement,

the Secretary of State agrees that Welsh Ministers may exercise, on his behalf and as his agent, the Secretary of State's power to issue an ITT and any related procurement documentation.

## 8. SECRETARY OF STATE DUTIES

Welsh Ministers:

- 8.1. agree that this Agreement, the agreed principles underpinning a Funding and Outputs Agreement and any agreements Welsh Ministers come to with Network Rail regarding the transfer and operation of the Core Valley Lines set out the agreed cost and risk allocation between the parties and Welsh Ministers accordingly agree that they shall not act in a manner that directly or indirectly alters or amends such agreed risk allocation;
- 8.2. acknowledge and agree that they shall not act in a manner that directly or indirectly unfairly prejudices the interests of passengers using English Services in favour of the interests of passengers using the Welsh Component of a Welsh Service; and
- 8.3. acknowledge:
  - 8.3.1. the constitutional duties of the Secretary of State arising out of his office including under the Railways Acts;
  - 8.3.2. the duties of the Secretary of State in relation to the proper expenditure of public monies; and
  - 8.3.3. the duties of the Secretary of State as the funder and specifier of the railway network in England and Wales subject to the transfer of functions under Section 26(3) of the Act pursuant to Section 83(1) of the Government of Wales Act 2006,

(the "**Secretary of State Duties**"),

and Welsh Ministers agree that they shall generally act in a manner that is fully consistent with and supportive of the proper carrying out by the Secretary of State of the Secretary of State Duties.

## 9. PARTIES UNDERTAKINGS AND POSITIVE OBLIGATIONS

- 9.1. Schedule 1 sets out Welsh Ministers obligations in respect of the procurement of the Franchisee.
- 9.2. Schedule 2 sets out the terms agreed in principle by both parties which are proposed to be contracted in Agency Agreement no. 3 in respect of Welsh Ministers' management of the Franchisee.
- 9.3. Schedule 3 sets out the collaboration and co-operation principles agreed by both parties and which are proposed to be contracted in a Collaboration and Co-operation Agreement by the parties.
- 9.4. Schedule 4 sets out the Secretary of State's Planning Guidance Assumptions for services outside of the Wales & Borders Franchise Area.
- 9.5. Schedule 5 sets out defined terms used in this Agreement.

## 10. DISPUTE RESOLUTION PROCEDURE

- 10.1. Where this Agreement provides that the Secretary of State may reasonably determine any matter (including whether the Secretary of State's consent is required), Welsh Ministers may, unless this Agreement expressly provides

otherwise, dispute whether a determination made by the Secretary of State is reasonable, but the Secretary of State's determination shall prevail unless or until it is agreed or determined to have been unreasonable in accordance with the dispute resolution procedure set out in Clause 10.2 or pursuant to a reference to the Courts of England and Wales. Any dispute relating to matters specified in this Clause 10.1 may be referred to the High Court of England.

- 10.2. Subject to Clause 10.3, where a Dispute arises, either party may refer that Dispute for resolution or determination in accordance with the Dispute Resolution Rules, following such referral such Dispute shall, unless the Parties otherwise agree, be resolved or determined pursuant to the Dispute Resolution Rules.
- 10.3. The mediator in any dispute referred for resolution or determination under the RIDR Rules in accordance with Clause 10.2, shall be a suitably qualified person chosen by agreement between parties, or in default of agreement, selected on the application of either party by the President of the Law Society or the President of the Institute of Chartered Accountants in England and Wales from time to time (or such other person to whom they may delegate such selection).
- 10.4. Notwithstanding Clauses 10.1 to 10.3 above, either party may raise and attempt to resolve any Dispute at some other forum at which the parties participate, for example the Joint Ministerial Committee.

## **11. DURATION, VARIATION AND TERMINATION**

- 11.1. This Agreement shall continue until the Welsh Ministers and the Secretary of State enter into Agency Agreement no. 3 or similar contractual arrangement.
- 11.2. Either party may terminate this Agreement at any time in writing prior to the entry into Agency Agreement no.3 or subsequently by agreement.
- 11.3. The parties shall be entitled to review and amend this Agreement, provided that any such amendment shall be in writing and agreed by both parties.

## **12. GOVERNING LAW AND JURISDICTION**

- 12.1. This Agreement, and any non-contractual obligations arising out of or in connection with it, its subject matter and formation, shall be governed by and construed in accordance with the laws of England and Wales and, subject to the use of the Dispute Resolution Procedure set out in Clause 10, the parties irrevocably agree that the courts of England and Wales are to have exclusive jurisdiction to settle any Disputes (including any non-contractual Disputes) which may arise out of or in connection with this Agreement.

## **13. THIRD PARTY RIGHTS**

- 13.1. A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

## **14. COUNTERPARTS**

- 14.1. This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original and such counterparts or duplicates shall together constitute one and the same Agreement.

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

SEAL REF No.  
DFT/8400



**The Secretary of State**

The corporate seal of the  
**SECRETARY OF STATE FOR TRANSPORT**  
hereto affixed is authenticated by:

A handwritten signature in black ink, appearing to read 'S. White'.

.....  
Authenticated by authority of the  
Secretary of State for Transport

**Welsh Ministers**

Executed as a deed by applying the seal of the Welsh Ministers.

The application of the seal of the Welsh Ministers is AUTHENTICATED by Michael Clarke who is duly authorised for that purpose by the Director of Legal Services by authority of the Welsh Ministers under section 90(2) of the Government of Wales Act 2006

Authenticated by authority of the  
Director of Legal Services



## SCHEDULE 1

### WELSH MINISTERIAL UNDERTAKINGS AND POSITIVE OBLIGATIONS IN RESPECT OF THE SPECIFICATION AND PROCUREMENT OF THE REPLACEMENT FRANCHISE AGREEMENT

#### PROCUREMENT PRACTICES AND PROCESSES

1. Welsh Ministers shall consult with the Secretary of State on the terms of the proposed ITT and related procurement documentation.
2. Welsh Ministers shall comply with all relevant procurement and railway sector legislation, including the Fourth Railway Package.
3. Welsh Ministers shall:
  - 3.1. keep the Secretary of State informed about their progress in relation to the exercise of the functions exercise-able under this Agreement; and
  - 3.2. facilitate regular discussions between appropriate members of their personnel and those of the Secretary of State in relation to the exercise of the functions exercise-able by them under this Agreement, including in relation to:
    - 3.2.1. procurement processes, timings and deadlines, governance and approvals;
    - 3.2.2. resource requirements;
    - 3.2.3. issues of concern;
    - 3.2.4. the specification of Welsh Services and English Services (as consented to by the Secretary of State); and
    - 3.2.5. such other matters as may be agreed by the parties from time to time.
4. Subject to the restrictions and obligations on Welsh Ministers set out in Schedules 1 and 4 to this Agreement, Welsh Ministers shall have authority (as agent of the Secretary of State) to specify and procure the Welsh Component of the Welsh Service and the English Services.
5. Welsh Ministers agree that the Secretary of State will have a right (but not an obligation) to appoint a representative to:
  - 5.1. participate in the Replacement Franchise procurement process and/or be a member of Welsh Ministers' relevant boards/decision making bodies; and
  - 5.2. be part of the evaluation team that assesses the bidders' proposals.

#### INDEMNITY

6. Subject to paragraph 7, Welsh Ministers shall indemnify the Secretary of State against all liabilities, costs, expenses, damages and losses and all other reasonable professional costs and expenses suffered or incurred by the Secretary of State arising out of or in connection with:
  - 6.1. any claim by a third party made against either party arising out of the Welsh Ministers' performance of the functions exercisable by virtue of this Agreement;
  - 6.2. the enforcement of this Agreement by the Secretary of State;

- 6.3. the termination of the procurement exercise by Welsh Ministers to procure a Franchisee in respect of the Replacement Franchise Agreement; or
- 6.4. the exercise by the Secretary of State of his powers under Section 30 of the Railways Act 1993 (as amended) in the event that Welsh Ministers are unable to execute a Replacement Franchise Agreement.
7. Welsh Ministers' indemnity in paragraph 6 shall not apply in the event that the Secretary of State acts unreasonably in the following events:
  - 7.1. a failure by the Secretary of State to grant his consent under this Agreement;
  - 7.2. a failure by the Secretary of State to enter into Agency Agreement no. 3 or agree alternative contractual arrangements in order to permit Welsh Ministers to execute the Replacement Franchise Agreement; or
  - 7.3. the Secretary of State acts in such a way as to lead to Welsh Ministers committing a breach of procurement and/or any applicable law.
8. Notwithstanding the provisions of paragraphs 6 or 7 above, Welsh Ministers' indemnity shall not apply to any liabilities, costs, expenses, damages or losses the Secretary of State may incur should Welsh Ministers' procurement of a Franchisee for the Wales & Border Franchise be unsuccessful, no Replacement Franchise Agreement is executed and the Secretary of State is obliged to exercise his franchising authority powers under Section 26 of the Railways Act 1993 (as amended) or Regulation (EC) no. 1370/2007 to appoint an operator for the Wales & Borders Franchise.
9. If any third party makes a claim, or notifies an intention to make a claim, against either party which may reasonably be considered likely to give rise to a liability under this indemnity (a **Claim**), that party shall:
  - 9.1. as soon as reasonably practicable, give written notice of the claim to the other party, specifying the nature of the Claim in reasonable detail;
  - 9.2. not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the other party (such consent not to be unreasonably conditioned, withheld or delayed); and
  - 9.3. give the other party such assistance and information as they may reasonably require for the purpose of assessing the Claim.
10. The parties agree that Welsh Ministers shall be entitled to control all proceedings, actions or challenges in relation to any Claim. The Secretary of State agrees to act in accordance with Welsh Ministers reasonable requests in respect of the conduct of any such Claim including its resolution or settlement, and agrees to provide reasonable information and support to Welsh Ministers in connection with such Claim.

## **ENGLISH SERVICES**

11. Subject to a materiality threshold to be agreed by the parties, in respect of any English Services, Welsh Ministers shall not, without the consent of the Secretary of State:

### Service Specification:

- 11.1. issue the TSR, or propose to contract a TSR, with fewer services than those operated by the Current Franchise Operator pursuant to the Current Wales & Borders Franchise Agreement as at the date of this Agreement;

- 11.2. allow Bidders to propose English Services that expand or contract the geographic scope of the Wales and Borders Franchise Areas beyond those listed in Schedule 4 to this Agreement;
- 11.3. set the level of future performance benchmarks that Bidders must deliver below those currently being achieved (where such equivalent measure exists);

#### Fares and Ticketing.

- 11.4. instruct Bidders that in any Fares Basket that includes English Services, regulated fares between English Stations shall be subject to an annual permitted increase of RPI+0% to 2020 and RPI +1% thereafter, and there shall be no fares flex in respect of the regulated fares between English Stations;

#### Passenger Compensation

- 11.5. allow Bidders to propose any passenger compensation regime that is worse than any passenger compensation regime mandated by the Secretary of State and operating by any Other Franchisees;

#### Quality

- 11.6. set the level of any future National Rail Passenger Survey (or any similar 'soft quality' regime) benchmarks that the Bidders must deliver below those currently being achieved (where such equivalent measure exists);

#### Rolling Stock and Fleet

- 11.7. permit Bidders to include in their proposals rolling stock currently in use by another franchise (the 'donor' franchise) unless the Bidder can demonstrate that the donor franchise (including a successor operator when the franchise is close to its end) has sufficient time to credibly lease alternative replacement stock to continue to fulfil their franchise obligations (this provision applies whether the donor franchisee operates in Wales, England or Scotland); or

#### Licencing

- 11.8. require or permit the Bidders not to enter into or comply with all appropriate passenger, depot and station licences and the Statement of National Regulatory Provisions (**SNRPs**) as determined by the Office of Rail and Road (**ORR**).

### **WELSH MINISTERS POSITIVE OBLIGATIONS**

12. In respect of any English Services, Welsh Ministers shall:
  - 12.1. oblige Bidders to include separate customer quality targets for stations served by English Services;
  - 12.2. ensure Bidders are aware of the need to provide disaggregated operational performance and customer service quality data for all the Welsh Components of a Welsh Service (excluding any services operating on Core Valley Lines) English Services and Stations;
  - 12.3. instruct Bidders to create and maintain throughout the Replacement Franchise Agreement a 'Borders Business Unit' which has a distinct management structure and senior representation within the Franchisee whose purpose is to ensure that stations in England and English Services have distinct management attention and also act as a focal point for liaison with affected sub-national transport bodies, local authorities

and user groups in England. Bidders should develop as part of their ITT submitted solution, their own most appropriate response to meet these requirements;

- 12.4. instruct Bidders to include a statement in their Bid to confirm equality of treatment regarding passenger services, facilities, performance and quality standards as between the Welsh Component of Welsh Services and English Services;
- 12.5. advise Bidders that with the exception of Cardiff metro services and stations the Replacement Franchise trading name should include the words 'Wales & Borders';
- 12.6. advise Bidders that they will be obliged to ensure that at any station at which the Franchisee is the Station Facility Owner, and at which Other Franchisees call, to:
  - 12.6.1. provide timetabling for any Other Franchisees or open access operators and share timetabling information;
  - 12.6.2. maintain connections with Other Franchised Services;
  - 12.6.3. display line diagrams to show Other Franchised Services and interchanges;
  - 12.6.4. include reference to Other Franchise Services calling at stations in the Replacement Franchise in passenger information;
  - 12.6.5. include reference to all other services when making passenger service announcements; and
  - 12.6.6. work co-operatively with Other Franchisees;
- 12.7. include a statement in the Replacement Franchise Agreement that where the Franchisee provides services and/or assets to an Other Franchisee pursuant to a key contract, the Replacement Franchise Agreement operates as a direct agreement with the Franchisee for the benefit of the Secretary of State in respect of those key contracts;
- 12.8. enter into Direct Agreements with the third party suppliers of any Key Contracts;
- 12.9. advise Bidders that the Primary Franchise Assets set out in the Current Wales & Borders Franchise Agreement will transfer to the Franchisee at nil value unless otherwise specified in the Supplemental Agreement appended to the Current Wales & Borders Franchise Agreement;
- 12.10. issue assumptions to Bidders in respect of services operated by Other Franchisees and freight operators around which they must frame their proposals;
- 12.11. require the Franchisee to enter into Station Leases in respect of stations in relation to which the Current Franchise Operator is the Station Facility Owner;
- 12.12. require the Franchisee to be the Designated Employer of the Arriva Trains Wales Shared Cost Section of the Railway Pension Scheme (the "**Franchise Section**");
- 12.13. ensure that any smart ticketing hardware or software proposals can be compatible with smart ticketing initiatives currently operated by any Other Franchisees; and
- 12.14. oblige the Franchisee to enter into a Trade Mark licence with the Secretary of State to require the Franchisee to:
  - 12.14.1. display the 'Wales & Borders' brand on all rolling stock which serve the English Services; and

- 12.14.2. otherwise use the Trade Marks as described in the Trade Mark licence during the term of the Replacement Franchise Agreement.

**OPERATOR OF LAST RESORT**

13. The Welsh Ministers shall as soon as reasonably practicable after the Effective Date put in place contractual arrangements to discharge the Secretary of State's duties under section 30 of the Railways Act in respect of the Replacement Franchise Agreement.

## SCHEDULE 2

### WELSH MINISTERIAL UNDERTAKINGS AND POSITIVE OBLIGATIONS IN RESPECT OF THE MANAGEMENT OF THE REPLACEMENT FRANCHISE AGREEMENT

This schedule sets out the terms agreed in principle which are proposed to be contracted in Agency Agreement no. 3 in respect of Welsh Ministers' management of the Franchisee.

1. Subject to a materiality threshold, in respect of any English Services, Welsh Ministers shall not, without the consent of the Secretary of State:

#### Service Specification:

- 1.1. amend the contracted TSR so as to offer a worsening in the quality or quantum of services to passengers;
- 1.2. amend the Replacement Franchise Agreement to allow the Franchisee to expand or contract the geographic scope of the Wales and Borders Franchise Areas beyond those listed in Schedule 4 to this Agreement;
- 1.3. seek amendments to the TSR to the detriment of Other Franchised Services operated by Other Franchisees and freight operators, including their successors;
- 1.4. relax any contracted operational Performance Benchmarks;
- 1.5. propose the designation of new passenger services under Section 23 of the Act;

#### Passenger Compensation

- 1.6. introduce or amend any passenger compensation regime that is worse than any passenger compensation regime mandated by the Secretary of State and operated by any Other Franchisees;

#### Quality

- 1.7. relax any contracted National Rail Passenger Survey (or any similar 'soft quality' regime) benchmarks;
- 1.8. require or permit the Franchisee to act in such a way as to introduce or operate service or station quality regimes that distinguish between any of Welsh, English Services and Stations;

#### Rolling Stock and Fleet

- 1.9. permit the Franchisee to bid for, or lease rolling stock from Other Franchisees (the donor franchisee). Consent may be granted if it can be demonstrated that the donor franchisee can lease alternative replacement stock to continue to operate their TSR (this provision applies whether the donor franchisee operates in Wales, England or Scotland);

#### Licencing

- 1.10. require or permit the Franchisee to amend or not to comply with all appropriate passenger and station licences and the Statement of National Regulatory Provisions (SNRPs) as determined by the Office of Rail and Road;

#### Pensions

- 1.11. provide their consent (whether written or oral) to any matter for which Welsh Ministers are required to give their consent to the Franchisee pursuant to Schedule 16 (Pensions and TUPE) of the Replacement Franchise Agreement;
- 1.12. take any act or omission which:
  - 1.12.1. could affect the funding of the Franchise Section; or
  - 1.12.2. impact (whether positively, detrimentally or otherwise) on the benefits provided to the members of the Franchise Section;

#### Miscellaneous Provisions

- 1.13. amend the Replacement Franchise Agreement;
- 1.14. enter into any agreements with Passenger Transport Executives, other devolved transport bodies including combined authorities, and bodies such as Rail North and the future Transport for the North which impact on English Services; or
- 1.15. propose a Change under the Replacement Franchise Agreement.

#### **WELSH MINISTERS POSITIVE OBLIGATIONS**

2. In respect of any English Services, Welsh Ministers shall:
  - 2.1. oblige the Franchisee to maintain separate customer quality targets for English Stations;
  - 2.2. provide disaggregated performance and soft quality data for all Welsh Services English Services and Stations and supply this data to the Secretary of State;
  - 2.3. ensure that any branding and publicity for the Replacement Franchise shall recognise and demonstrate the joint nature of the Franchise and continue to comply with any licencing requirements regarding the use of trademarks licenced by the Secretary of State to Welsh Ministers;
  - 2.4. oblige the Franchisee at any Station at which the Franchisee is the Station Facility Owner, and at which Other Franchisee's call, to:
    - 2.4.1. provide timetabling for other operators (who may include open access operators) and share timetabling information;
    - 2.4.2. maintain connections with Other Franchised Services;
    - 2.4.3. display line diagrams to show Other Franchised Services and interchanges;
    - 2.4.4. include reference to all Franchised Services in passenger information;
    - 2.4.5. include reference to all other services when making passenger service announcements;
    - 2.4.6. work co-operatively with Other Franchisees;
  - 2.5. provide an electronic copy of the most recent version of the Replacement Franchise Agreement and ancillary documents (e.g. the Train Service Requirement) on request;

- 2.6. subject to paragraph 2.7, permit the Secretary of State to initiate a Variation and Welsh Ministers shall implement such Variation under the Replacement Franchise Agreement, provided that in advance of the Welsh Ministers implementing such Variation under the Replacement Franchise Agreement:
  - 2.6.1. the Secretary of State shall discuss the proposed Variation with the Welsh Ministers including any relevant timescales for agreeing the Variation and for the Franchisee implementing the Variation; and
  - 2.6.2. both parties shall agree (acting reasonably) the impact of the proposed Variation including any costs that may arise as a result of such Variation;
- 2.7. the Secretary of State acknowledges and agrees that all Welsh Ministers' reasonable costs incurred in respect of the Variation under paragraph 2.6 shall be met by the Secretary of State and Welsh Ministers shall be held harmless regardless of whether or not the Variation is instructed;
- 2.8. ensure that any breaches by the Franchisee of the pensions provisions in the Replacement Franchise Agreement are notified to the Secretary of State within 30 days of the notification of the breach, or within 30 days of becoming aware of such breach (whichever is the earlier);
- 2.9. with the consent of the Secretary of State, take enforcement action under Sections 55 and/or 58 or issue a Penalty under Section 57A of the Act;
- 2.10. create and maintain throughout the Replacement Franchise Agreement a 'Borders Business Unit' which has a distinct management structure and senior representation within the Franchisee whose purpose is to ensure that stations in England and English Services have distinct management attention and also act as a focal point for liaison with affected sub-national transport bodies, local authorities and user groups in England; and
- 2.11. ensure that any smart ticketing hardware or software proposals can be compatible with smart ticketing initiatives currently operated by any Other Franchisees.

#### **FARES AND TICKETING**

3. If the Secretary of State proposes that the regulated fares between English Stations will be subject to fares regulation which is not in accordance with the bidding assumptions set out in paragraph 11.4 of Schedule 1, then the Secretary of State shall instruct Welsh Government to implement the Secretary of State's revised fares regulation in respect of regulated fares between English Stations and the Secretary of State shall indemnify Welsh Ministers for the direct costs of implementing the Secretary of State's instructions.

#### **OPERATOR OF LAST RESORT**

4. The Welsh Ministers shall:
  - 4.1. act as the Secretary of State's agent and perform on his behalf his duties under section 30 of the Railways Act; and
  - 4.2. ensure that contractual arrangements are in place at all times during the term of the Replacement Franchise Agreement to discharge the Secretary of State's duties under section 30 of the Railways Act in respect of the Replacement Franchise Agreement.

#### **INDEMNITY**



5. Subject to paragraph 6, Welsh Ministers shall indemnify the Secretary of State against all liabilities, costs, expenses, damages and losses and all other reasonable professional costs and expenses suffered or incurred by the Secretary of State arising out of or in connection with:
  - 5.1. any claim by a third party made against either party arising out of the Welsh Ministers' performance of the functions exercisable by virtue of this Agreement;
  - 5.2. the enforcement of this Agreement by the Secretary of State;
  - 5.3. the exercise by Welsh Ministers of all agency and any other devolved powers exercisable by virtue of this Agreement;
  - 5.4. Welsh Ministers' non-compliance with all relevant EU legislation (including the Fourth Railway Package) in the performance of the functions exercisable by virtue of any Agency Agreement, and including costs incurred by the Secretary of State in any legal proceedings resulting from non-compliance;
  - 5.5. the termination of the procurement exercise by Welsh Ministers to procure a Franchisee in respect of the Replacement Franchise Agreement; or
  - 5.6. the exercise by the Secretary of State of his powers under Section 30 of the Railways Act 1993 (as amended) in the event that Welsh Ministers are unable to execute a Replacement Franchise Agreement.
6. Welsh Ministers' indemnity in paragraph 5 shall not apply in the event that the Secretary of State acts unreasonably in the following events:
  - 6.1. a failure by the Secretary of State to grant his consent under this Agreement;
  - 6.2. a failure by the Secretary of State to enter into Agency Agreement no. 3 and the TFO or agree alternative contractual arrangements in order to permit Welsh Ministers to manage the Replacement Franchise Agreement; or
  - 6.3. the Secretary of State acts in such a way as to lead to Welsh Ministers committing a breach of procurement and/or any applicable law.
7. Notwithstanding the provisions of paragraphs 5 or 6 above, Welsh Ministers' indemnity shall not apply to any liabilities, costs, expenses, damages or losses the Secretary of State may incur should Welsh Ministers' procurement of a Franchisee for the Wales & Border Franchise be unsuccessful, no Replacement Franchise Agreement is executed and the Secretary of State is obliged to exercise his franchising authority powers under Section 26 of the Railways Act 1993 (as amended) or Regulation (EC) no. 1370/2007 to appoint an operator for the Wales & Borders Franchise.
8. For the avoidance of doubt, it shall be reasonable for the Secretary of State not to enter into a Funding and Outputs Agreement if the terms of the Funding & Outputs Agreement are not:
  - 8.1. based on the principles set out in the Funding & Outputs Heads of Terms Letter proposed to be entered into by the parties;
  - 8.2. affordable; and/or
  - 8.3. acceptable to the Chief Secretary to the Treasury.
9. If any third party makes a claim, or notifies an intention to make a claim, against either party which may reasonably be considered likely to give rise to a liability under this indemnity (a **Claim**), that party shall:

- 9.1. as soon as reasonably practicable, give written notice of the claim to the other party, specifying the nature of the Claim in reasonable detail;
  - 9.2. not make any admission of liability, agreement or compromise in relation to the Claim without the prior written consent of the other party (such consent not to be unreasonably conditioned, withheld or delayed); and
  - 9.3. give the other party such assistance and information as they may reasonably require for the purpose of assessing the Claim.
10. The parties agree that Welsh Ministers shall be entitled to control all proceedings, actions or challenges in relation to any Claim. The Secretary of State agrees to act in accordance with Welsh Ministers reasonable requests in respect of the conduct of any such Claim including its resolution or settlement, and agrees to provide reasonable information and support to Welsh Ministers in connection with such Claim.

## SCHEDULE 3

### COLLABORATION AND CO-OPERATION PRINCIPLES

#### 1. BACKGROUND

- 1.1. It is recognised by the parties that the need for partnership working is paramount. Accordingly the parties have agreed to work constructively and collaboratively in respect of the Wales & Borders Franchise, and in respect of any Other Franchisees.
- 1.2. The parties shall enter into a Collaboration and Co-operation Agreement (**C&C Agreement**) and establish a Joint Board for the purpose of discussing compliance with the terms of the Agency Agreements and the management of the Replacement Franchise Agreement. The Terms of Reference for the Joint Board shall be agreed by both parties.
- 1.3. The Joint Board shall contract the collaboration and co-operation principles set out in this Schedule 3 and set a framework to enable the parties to comply with both their statutory obligations and their obligations under the Agency Agreements.
- 1.4. The parties agree that in furtherance of these partnership working aspirations, the parties wish to set out some of the principles that shall be included in the C&C Agreement.

#### 2. AIMS

- 2.1. While not an exhaustive list, the following matters are proposed to be included in the C&C Agreement:
  - 2.1.1. the parties' responsibilities and the practical working arrangements between the parties associated with:
    - 2.1.1.1. Welsh Ministers' devolved responsibility for specifying, procuring and managing the Welsh Component of a Welsh Service within the Replacement Franchise Agreement; and
    - 2.1.1.2. Welsh Ministers acting as agent for the Secretary of State to specify, procure and manage the English Services within the Replacement Franchise Agreement;
  - 2.1.2. effective working and co-operation practices to enable compliance by both parties with the Agency Agreements including the definition of the materiality threshold for the purposes of the Agency Agreements and the means by which Secretary of State consent is granted under such agreements;
  - 2.1.3. a process for identifying, considering, and if possible supporting, the development of new rail services which may be in the interests of the users of Welsh Services;
  - 2.1.4. a commitment by the Secretary of State to keep Welsh Ministers informed and to consult on passenger rail services operating by any Other Franchisees or which impact on the operation of English Services, and any consultation by Scottish Ministers on any passenger rail service which is proposed to make a scheduled call or calls in Wales and which is proposed to be included in a franchise agreement to which Scottish Ministers are party;
  - 2.1.5. an appropriate stakeholder structure, building on the Cross Border Forum, for appropriate channels for passenger and MP issues to be addressed; and

2.1.6. strike or other industrial action is a Force Majeure Event (FME) under the Replacement Franchise Agreement. If strike or other industrial action is indicated, or on the occurrence of any strike or other industrial action by any or all of the employees of the Franchisee, Network Rail or the operator of any other railway facility (including the CVL), Welsh Ministers shall:

2.1.6.1. inform the Secretary of State immediately;

2.1.6.2. keep the SoS informed as to any Franchisee proposals and/or Welsh Ministers communications with or directions to the Franchisee; and

2.1.6.3. if strike or any other industrial action results, advise what reasonable endeavours the Franchisee is taking to avert and prevent the occurrence of the Force Majeure Event and/or to mitigate and minimise the effect of such FME on the Franchisee's performance of its obligations under the Replacement Franchise Agreement and to restore the provision of passenger services as soon as reasonably practicable.

### **3. ROLES AND RESPONSIBILITIES IN RESPECT OF THE SPECIFICATION AND PROCUREMENT OF OTHER FRANCHISEES**

3.1. Where the Secretary of State is considering the specification of a franchise which operates passenger rail services in Wales, or is proposing to make an amendment to any Other Franchisee's franchise agreement, the Secretary of State shall inform, consult and take full account of the views and formal proposals of Welsh Ministers and provide a written response on whether Welsh Ministers' proposals will be taken forward. Welsh Ministers may propose amendments to the Secretary of State where any such specification or proposal may have a material effect on the rail network in Wales.

3.2. The Secretary of State's consultation with Welsh Ministers regarding the services described in paragraph 3.1 above shall include consultation in respect of:

3.2.1. procurement processes, timings, deadlines, governance and approvals;

3.2.2. resource requirements;

3.2.3. risk allocation;

3.2.4. performance, quality of service, monitoring, fares and ticketing and rolling stock; and

3.2.5. any such other matters as may be agreed by the parties from time to time.

## SCHEDULE 4

### ENGLISH SERVICES – SECRETARY OF STATE CONDITIONS

As at the Effective Date, the Secretary of State will not support service proposals in respect of the English Services other than those listed in the table below and subject to the conditions as indicated. The only exceptions to this would be retention of existing parliamentary services at the current level (e.g. Chester - Stafford – Birmingham). For any service proposals that meet the conditions described below, the Franchisee shall obtain the agreement of Network Rail and the Office of Rail and Road.

Newport	Bristol Temple Meads	No paths for Welsh Government specified services until all outstanding upgrade work completed in Bristol area including Bristol East Jn. This is currently projected as mid to late CP6 and so may not be completed until 2024. At this stage there is no indication of the number of paths per hour that will become available following completion. The Secretary of State advises that for the purposes of this franchise competition no cross-border paths to Bristol may be proposed.
Newport	Cheltenham Spa	Up to 1tph, with up to 2 tph permissible between Newport and Gloucester
Newport	Shrewsbury	Up to 3tph
Shrewsbury	Birmingham Intl	Up to 1tph – all services (including on Sundays) to call at Smethwick Galton Bridge
Shrewsbury	Crewe	Up to 2tph*
Crewe	Manchester	Up to 1tph*
Shrewsbury	Chester	No restrictions required by the Secretary of State
Chester	Crewe	Up to 2tph*
Chester	Manchester via Warrington Bank Quay	Up to 1tph (plus one extra peak working) from Chester via Warrington Bank Quay to Stalybridge (via Manchester Victoria) or Manchester Airport (via Manchester Piccadilly) or Wilmslow (via Manchester Piccadilly and Styal). Services and stock will need to be able to achieve a maximum of one minute dwell time at Manchester Oxford Road and at Manchester Piccadilly if so routed.
Chester	Liverpool via Halton Curve	Up to 1tph

Wrexham	Bidston (For Liverpool)	Up to 2tph
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\*Bidders/the Franchisee are encouraged to minimise dwell times at Crewe to assist with station platforming in the long term.

The Welsh Ministers may make service proposals to the Secretary of State in respect of the English Services during the term of the Replacement Franchise Agreement and shall obtain the Secretary of State's prior written consent before implementing any such service proposal.

## SCHEDULE 5

### DEFINITIONS

Affiliate	means any associated entity including subsidiaries, group companies, individuals representing or employed by the party, wholly owned entities or joint venture parties
Agency Agreements	means Agency Agreement no. 2, Agency Agreement no. 3 and any subsequent agency agreements between the parties (as applicable)
Baseline Franchise Agreement	means the Complete Green Baseline Franchise Agreement held by the Secretary of State
Bidder	means those persons who have been prequalified to receive an ITT and who are proposing to prepare a tender response to the ITT
C&C Agreement	has the meaning given to that term in paragraph 1.2 of Schedule 3 to this Agreement
Change	has the meaning given to that term in the Replacement Franchise Agreement
Core Valley Lines	means the infrastructure in and around Cardiff which is proposed to be transferred from Network Rail to Welsh Ministers
Cross Border Forum	means the meetings established by Secretary of State and Welsh Ministers to discuss issues relating to rail services in Wales with key stakeholders including MPs, combined authorities and local authorities
Current Franchise Operator	means Arriva Trains Wales/Trenau Arriva Cymru Limited
Current Wales & Borders Franchise Agreement	means the Franchise Agreement between the Strategic Rail Authority, Arriva Trains Limited and Arriva Trains Wales/Trenau Arriva Cymru Limited (the Current Franchise Operator) dated 18 October 2003
Dispute	means any dispute arising out of or in connection with this Agreement
Dispute Resolution Rules	means the procedures for the resolution of disputes known as "The Railway Industry Dispute Resolution Rules", as amended from time to time in accordance with the terms thereof. The rules are available at:  <a href="http://accessdisputesrail.org/RIDR/RIDR%20Rules.pdf">http://accessdisputesrail.org/RIDR/RIDR%20Rules.pdf</a>  (or such other applicable web address that is

	adopted from time to time)
Effective Date	means the date on which this Agreement is executed and delivered by the Secretary of State and Welsh Ministers
England-only Service	means a railway passenger service which is procured as part of the Replacement Franchise Agreement but which operates solely in England and does not make any scheduled calls in Wales
English Service	means <ul style="list-style-type: none"> <li>(a) a Welsh Service so far as it involves the carriage of passengers between the last scheduled call in Wales and scheduled calls in England; and</li> <li>(b) is specified in the Train Service Requirement in the Replacement Franchise Agreement.</li> </ul> <p>English Services includes England-only Services.</p>
English Station	means a Station in England at which the Franchisee calls as part of the Train Service Requirement specified in the Replacement Franchise Agreement
Fourth Railway Package	means: <ul style="list-style-type: none"> <li>(a) Regulation (EU) 2016/796 on the European Union Agency for Railways and repealing Regulation (EC) 881/2004;</li> <li>(b) Directive (EU) 2016/797 on the interoperability of the rail system within the European Union (Recast of Directive 2008/57/EC);</li> <li>(c) Directive (EU) 2016/798 on railway safety (Recast of Directive 2004/49/EC);</li> <li>(d) Regulation (EU) 1370/2007 as amended by Regulation (EU) 2016/2338, which deals with the award of public service contracts for domestic passenger transport services by rail;</li> <li>(e) Directive 2012/34/EU (Recast) as amended by Directive 2016/2370/EU, which deals with the opening of the market of domestic passenger transport services by rail and the governance of railway infrastructure; and</li> <li>(f) Regulation (EU) 2016/2337 repealing Regulation (EEC) 1192/69 on the normalisation of the accounts of railway undertakings</li> </ul>



Franchise Section	has the meaning given to that term in paragraph 12.12 of Schedule 1 to this Agreement
Franchisee	means the party Welsh Ministers propose to contract with to operate the Wales & Borders Franchise pursuant to the Replacement Franchise Agreement
ITT	means an Invitation to Tender and relates to Welsh Minister's planned procurement of the Franchisee to be a party to the Replacement Franchise Agreement
Joint Board	means the board established by the Secretary of State and Welsh Ministers pursuant to paragraph 1.2 of Schedule 3 to this Agreement for the purposes of carrying out the activities described in paragraph 1.3 of Schedule 3 to this Agreement
Joint Ministerial Committee	means a consultative body established by a memorandum of understanding between the UK Government and the devolved administrations in Wales, Scotland and Northern Ireland. The Joint Ministerial Committee seeks to act as a focus for the co-ordination of the relationships between these administrations
Network Rail	means Network Rail Infrastructure Limited
Other Franchised Services and Other Franchisees	means franchised passenger rail services and the operators of those franchised passenger rail services which operate in England and Wales under a franchise agreement to which the Secretary of State is party
Performance Benchmark	means any of the Cancellations Benchmarks, Capacity Benchmarks and TOC Minute Delay Benchmark as defined in the Replacement Franchise Agreement
Replacement Franchise Agreement	means the Franchise Agreement proposed to be entered into by Welsh Ministers and the Franchisee following the expiry of the Current Wales & Borders Franchise Agreement
Station Facility Owner	means the "facility owner" (as defined in section 17(6) of the Railways Act 1993) of the applicable station
Train Service Requirement or TSR	means the quantity and quality of, and other specifications and requirements for, the passenger rail services described in paragraph 9 of Part 2 of Schedule 1.1 of the proposed Replacement Franchise Agreement
Variation	means a change to the terms of the Replacement Franchise Agreement proposed by the Secretary of State in respect of the English Services pursuant to

	paragraph 2.8 of Schedule 2 to this Agreement
Wales & Borders Franchise	means those services which were designated on 5 February 2002 under Section 23 of the Railways Act 1993 as eligible for franchising
Wales & Borders Franchise Area	means the passenger rail services provided within the geographic scope of the Wales & Borders Franchise
Wales only Service	means a railway passenger service which starts and ends in Wales but not make any scheduled calls outside Wales
Welsh Component of a Welsh Service	<p>means</p> <ul style="list-style-type: none"> <li>(a) a Welsh Service so far as it involves the carriage of passengers between scheduled calls in Wales;</li> <li>(b) does not make any scheduled calls outside Wales; and</li> <li>(c) is specified in the Train Service Requirement in the Replacement Franchise Agreement.</li> </ul> <p>A Welsh Component of a Welsh Service includes a Wales only Service.</p>
Welsh Service	<p>means</p> <ul style="list-style-type: none"> <li>(a) a railway passenger service which starts in Wales, ends in Wales or otherwise makes at least one scheduled call in Wales; and</li> <li>(b) makes scheduled calls in England; and</li> <li>(c) is specified in the Train Service Requirement in the Replacement Franchise Agreement.</li> </ul>