

Dated

2015

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

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**FUNDING DEED – NORTHERN**

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***[Note to bidders: This Funding Deed assumes that the Guarantor has passed 3 out of 4 of the financial tests and that the minimum bonding of 50% is required. If 100% bonding is required (where the Guarantor cannot meet 3 out of 4 of the financial tests) consequential changes will be required to this Funding Deed.]***

# CONTENTS

Clause		Page
1	DEFINITIONS .....	3
2	UNDERTAKING IN RELATION TO SHARE CAPITAL .....	9
3	UNDERTAKING IN RELATION TO AGREED FUNDING COMMITMENTS AND THE PCS FACILITY .....	9
4	AGREED FUNDING COMMITMENT.....	10
5	AFC AMOUNT .....	10
6	PERMITTED PCS ADVANCES .....	10
7	REQUIRED PCS ADVANCES .....	11
8	FAILURE TO PAY AFC AMOUNT .....	12
9	END OF FRANCHISE PERIOD .....	12
10	COSTS AND CHARGES ASSOCIATED WITH THE PCS FACILITY.....	12
11	SECURITY AND RESTRICTIONS .....	13
12	THE BOND .....	13
13	FRANCHISEE'S UNDERTAKINGS .....	16
14	GUARANTOR'S UNDERTAKINGS.....	17
15	SUBORDINATION.....	18
16	CONTINUING LIABILITY AND INDEMNITY .....	20
17	REPRESENTATIONS AND WARRANTIES .....	21
18	CALCULATION OF ACTUAL OPERATING COSTS RATIO AND FORECAST OPERATING COSTS RATIO .....	22
19	MISCELLANEOUS .....	23
<b>Schedules</b>		
1	Secretary of State Drawdown Notice .....	27
2	Form of Bond .....	28
3	Funding Plan .....	32

**THIS DEED** is made on

[2015]

**BETWEEN**

- (1) **[GUARANTOR]** (Company No. [ • ]<sup>1</sup>) whose registered office is at [ • ]<sup>2</sup> (the "**Guarantor**");
- (2) **[FRANCHISEE]** (Company Number [ • ]), whose registered office is at [ • ] (the "**Franchisee**"); and
- (3) **THE SECRETARY OF STATE FOR TRANSPORT**, whose principal address is 33 Horseferry Road, London SW1P 4DR (the "**Secretary of State**").

**RECITALS:**

- (A) The Secretary of State and the Franchisee are proposing to enter into a franchise agreement (the "**Franchise Agreement**") contemporaneously with this Deed under which the Franchisee will provide services for the carriage of passengers by railway.
- (B) The Guarantor has agreed to enter into this Deed with the aim of ensuring that the Franchisee remains financially resilient and able to satisfy its obligations under the Franchise Agreement.

**IT IS AGREED:**

**1. Definitions**

Words and expressions defined in the Franchise Agreement shall have the same meanings in this Deed unless the context otherwise requires and the following expressions shall have the following meanings:

**"Account"** has the meaning given to it in clause 12.7.1.

**"Actual Operating Costs Ratio"** means, at the relevant time, the ratio of the Franchisee's Modified Revenue to its Actual Operating Costs during the Preceding 13 Reporting Periods (or, prior to the end of the thirteenth Reporting Period of the Franchise Period, during all preceding Reporting Periods).

**"Advance Date"** means 7 days after the date of receipt or deemed receipt (whichever is earlier) by the

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<sup>1</sup> Bidders to populate with the correct party as identified in its bid.  
<sup>2</sup> Bidders to populate.

Guarantor of a notice pursuant to clause 6.3 or 7.1, as the case may be.

<b>"Agreed Funding Commitment"</b>	means each sum specified in column [x] of the Funding Plan for the Permitted Spending Purposes. <sup>3</sup>
<b>"AFC Amount"</b>	has the meaning given to it in clause 5.1 .
<b>"Available PCS Amount"</b>	means, at the relevant time, the amount of the PCS Facility, as reduced by the PCS Facility Loan.
<b>"Bond"</b>	means the Initial Bond and any Replacement Bond which, in each case, shall comply with the requirements specified in clause 12.2.
<b>"Bond Payments"</b>	has the meaning given to it in clause 12.5.2.
<b>"Bond Provider"</b>	means any person or persons who may provide any Bond and who shall, unless the Secretary of State otherwise agrees, be: <ul style="list-style-type: none"><li>(a) a Bank; or</li><li>(b) an insurance company,</li></ul> and, in each case, with the Relevant Credit Rating.
<b>"Bond Repayments"</b>	has the meaning given to it in clause 12.5.2.
<b>"Early Repayment Amount"</b>	has the meaning given to it in clause 5.1.2.
<b>"Facility Term"</b>	means the period commencing on the date hereof and ending 6 months after the end of the Franchise Period.
<b>"Forecast Operating Costs Ratio"</b>	means, at the relevant time, the ratio of the Franchisee's Forecast Modified Revenue to its Forecast Operating Costs for the next 13 Reporting Periods (or, where there are fewer than 13 Reporting Periods remaining in the

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<sup>3</sup> To refer to the relevant section of the Funding Plan describing the Agreed Funding Commitment.

Franchise Term, for such remaining Reporting Periods).

**"Franchisee Trigger"**

has the meaning given to it in clause 6.1.

**"Funding Plan"**

means the plan specified in Schedule 3 (as the same may be amended with the prior written consent of the Secretary of State).

**"Initial Bond"**

means the bond issued or to be issued on or prior to the date of this Deed by a Bond Provider to the Secretary of State which complies with the requirements specified in clause 12.2.

**Insolvent**

means that:

- (a) the Bond Provider becomes insolvent or stops or suspends making payments (whether of principal or interest) in respect of all or any class of its debts or announces an intention to do so;
- (b) a receiver, administrator or provisional liquidator is appointed in respect of the Bond Provider;
- (c) a petition is presented or any other step is taken by the Bond Provider or its directors for the purpose of the appointment of an administrator;
- (d) the Bond Provider passes a resolution for its winding-up or a notice is issued convening a meeting for the purpose of passing any such resolution or any petition is presented to the Bond Provider, the shareholders in the Bond Provider or its directors or any other step is taken for the purpose of winding-up the Bond Provider;
- (e) a winding up order is made by a court in respect of the Bond Provider;

- (f) the Bond Provider enters into any composition, compromise or arrangement with creditors;
- (g) the Bond Provider ceases to carry on business; or
- (h) any steps or actions are taken in connection with any of these procedures.

**“Liabilities”**

means all obligations or liabilities (whether past, present or future, actual or contingent, as principal, surety or otherwise) for the payment or repayment of money, including, for the avoidance of doubt, any such obligation or liability arising as a consequence of any right of subrogation, however arising incurred by the Franchisee other than the PCS Facility Loan.

**“Outstanding AFC”**

has the meaning given to it in clause 5.1.1.

**“PCS Advance”**

means each borrowing of a portion of the PCS Facility.

**“PCS Facility”**

means a subordinated loan facility of £[ • ] (pounds sterling [ • ]<sup>4</sup> million).

**“PCS Facility Loan”**

means the aggregate principal amount of all PCS Advances (and excluding any interest payable on any PCS Advances) made by the Guarantor to the Franchisee under the PCS Facility (including any Bond Payments where a demand has been made under the Bond in satisfaction of the Guarantor’s obligation to advance a PCS Advance) which has not been repaid at the relevant time.

**“Permitted Purposes”**

**Spending**

means investment in the form of investment capital, franchise investment and working capital expenditure, in each case, as specified in and in accordance with the Funding Plan.

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<sup>4</sup> Bidders to populate this with the aggregate value of the Required PCS and Additional PCS as described in the ITT and Financial Templates.

<b>"Preceding 13 Reporting Periods"</b>	has the meaning given to it in Schedule 12 of the Franchise Agreement.
<b>"Ratio"</b>	means, as the context may require, either or both of the Actual Operating Cost Ratio and/or the Forecast Operating Cost Ratio.
<b>"Ratio Trigger"</b>	means either that: <ul style="list-style-type: none"> <li>(a) the Actual Operating Costs Ratio is less than 1.070:1; or</li> <li>(b) the Forecast Operating Costs Ratio is less than 1.070:1.</li> </ul>
<b>"Relevant AFC Time"</b>	has the meaning given to it in clause 5.1.
<b>"Relevant Credit Rating"</b>	means a credit rating of: <ul style="list-style-type: none"> <li>(a) A - (or better) by Standard and Poor's Corporation or Fitch Ratings Limited in respect of long term senior debt; or</li> <li>(b) A3 (or better) by Moody's Investors Service Inc. in respect of long term senior debt; or</li> <li>(c) if any credit rating specified in paragraphs (a) or (b) ceases to be published or made available or there is a material change in the basis of any such credit rating, such other rating or standard as the Secretary of State may, after consultation with the Guarantor, determine to be appropriate in the circumstances.</li> </ul>
<b>"Replacement Bond"</b>	means any bond issued or to be issued following the issue of the Initial Bond by a Bond Provider to the Secretary of State which complies with the requirements specified in clause 12.2.

**"Required PCS Amount"**

means:

- (a) following any of:
- (i) the Secretary of State Trigger described in clause 7.1.1.1;
  - (ii) the Secretary of State Trigger described in clause 7.1.1.2; or
  - (iii) a Franchisee Trigger,

such amount as the Secretary of State notifies the Guarantor in writing as being the amount which the Secretary of State reasonably believes to be necessary to ensure that the relevant Ratio is greater than or equal to 1.070:1; or

- (b) following the Secretary of State Trigger described in clause 7.1.2, such amount as the Secretary of State notifies the Guarantor as being the amount which the Secretary of State reasonably believes to be necessary so that the aggregate amount of the Franchisee's cash and other assets exceed the Liabilities,

in each case, less any AFC Amount which is required to be paid prior to the Advance Date in accordance with clause 5.

**"Right of Set-off"**

means from time to time, in relation to the Guarantor, any right (whether conferred by law or otherwise) which the Guarantor has to combine credit balances and debit balances, directly or indirectly, being balances which belong to the Franchisee, or are owing by the Franchisee, or are deposits by the Franchisee with the Guarantor.



**"Secretary of State Trigger"** has the meaning given to it in clause 7.1.

## 2. **Undertaking in relation to Share Capital**

2.1 The Guarantor shall procure that:

2.1.1 the Franchisee's issued share capital is at least [*amount offered in Financial Model*<sup>5</sup>] and that it is fully paid up in cash by the Start Date;

2.1.2 such issued share capital is not reduced during the Franchise Period; and

2.1.3 such issued share capital is not reduced after the Franchise Period if such reduction would reduce the aggregate amount of the remaining issued share capital and the PCS Facility Loan to an amount less than the balance of the then outstanding Liabilities.

2.2 During the Franchise Period, the Guarantor shall procure that:

2.2.1 none of the cash paid to the Franchisee for the share capital referred to in clause 2.1; and

2.2.2 no asset acquired directly or indirectly with any of such cash paid to the Franchisee for the share capital referred to in clause 2.1,

is made available to any Affiliate of the Franchisee, unless it is made available in the ordinary course of business on arm's-length commercial terms, or is made available with the Secretary of State's prior written consent (which shall not be unreasonably withheld or delayed).

## 3. **Undertaking in relation to Agreed Funding Commitments and the PCS Facility**

3.1 With effect from the date of this Deed the Guarantor unconditionally and irrevocably undertakes to each of the Franchisee and the Secretary of State to:

3.1.1 ensure that each Agreed Funding Commitment is made available to the Franchisee;

3.1.2 make the PCS Facility available to the Franchisee; and

3.1.3 advance the PCS Advances where required by the Franchisee or the Secretary of State,

in accordance with this Deed.

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<sup>5</sup> Bidders to populate.

3.2 Any PCS Advance which is repaid under this Deed shall be available for reborrowing during the Facility Term.

#### 4. **Agreed Funding Commitment**

4.1 During the Franchise Period, the Guarantor shall make available, or procure that a third party makes available, each Agreed Funding Commitment on request by the Franchisee or where required under clause 5.1 in accordance with the Funding Plan.

4.2 The Franchisee may repay each Agreed Funding Commitment made available to it in accordance with the Funding Plan but not otherwise. The Franchisee shall be permitted to make such repayments in accordance with the Funding Plan even when the Franchisee is treated as being in a "Lock Up Period" for the purposes of paragraph 3.1 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement.

#### 5. **AFC Amount**

5.1 If, at any time during the Franchise Period, where a Franchisee Trigger and/or a Secretary of State Trigger occurs and at that time (the "**Relevant AFC Time**"):

5.1.1 the Franchisee has not requested that the Guarantor makes available, or procures that a third party makes available, any Agreed Funding Commitment or the Guarantor has not (following a request from the Franchisee) made available, or procured that a third party has made available, each Agreed Funding Commitment to the Franchisee in accordance with clause 4.1 which, in each case, is specified in the Funding Plan as being made available prior to the Relevant AFC Time (the aggregate of such outstanding amounts of Agreed Funding Commitments being the "**Outstanding AFC**"); and/or

5.1.2 the Franchisee has repaid all of any part of any Agreed Funding Commitment on or prior to the Relevant AFC Time where repayment of such Agreed Funding Commitment is scheduled in the Funding Plan to occur on a date following the Relevant AFC Time (the aggregate of such early repayments being the "**Early Repayment Amount**"),

(the aggregate of any Outstanding AFC and any Early Repayment Amount at such Relevant AFC Time being the "**AFC Amount**"),

the Guarantor shall make available, or procure that a third party makes available, to the Franchisee the AFC Amount within 7 days of the Relevant AFC Time.

#### 6. **Permitted PCS Advances**

6.1 The Franchisee may only draw on the PCS Facility during the Franchise Period and:

- 6.1.1 with the prior approval of the Secretary of State; or
  - 6.1.2 if the management accounts delivered by the Franchisee to the Secretary of State pursuant to paragraph 3.3 of Schedule 13 of the Franchise Agreement show that there is a Ratio Trigger; or
  - 6.1.3 in the circumstances described in clause 6.2,
- (each being a "**Franchisee Trigger**").

6.2 If, at any time, the Franchisee reasonably believes that a Ratio Trigger will occur in the current Reporting Period or by the end of either of the next two Reporting Periods, the Franchisee shall notify the Secretary of State as soon as reasonably practicable and provided the Secretary of State confirms that it agrees with the Franchisee's assessment, the Franchisee shall be entitled to draw on the PCS Facility.

6.3 The Franchisee may draw on the PCS Facility where it is entitled to do so under clause 6.1, by giving the Guarantor notice in writing (such notice to be copied to the Secretary of State at the same time) and the Guarantor shall advance a PCS Advance in the Required PCS Amount (subject to clause 8) by the Advance Date.

## 7. **Required PCS Advances**

7.1 If:

7.1.1 at any time during the Franchise Period:

7.1.1.1 a Ratio Trigger occurs; or

7.1.1.2 the Secretary of State reasonably believes that a Ratio Trigger will occur at the end of the then current Reporting Period or by the end of either of the next two Reporting Periods;

7.1.2 at any time during the 6 month period following the end of the Franchise Period, the aggregate of the Franchisee's cash and other current assets is less than the amount of the Liabilities,

(each being a "**Secretary of State Trigger**"),

the Secretary of State may require the Guarantor to make a PCS Advance (and the Franchisee to accept such PCS Advance) by giving the Guarantor notice in writing (in the form set out in Schedule 1), and the Guarantor shall advance a PCS Advance in the Required PCS Amount (subject to clause 8) to the Franchisee not later than the Advance Date.

7.2 Nothing in this clause 7 or clause 6 shall oblige the Guarantor to make any PCS Advance to the Franchisee under the PCS Facility if and to the extent that the making of such PCS Advance would cause the PCS Facility Loan to exceed £[ • ]<sup>6</sup> (pounds sterling [ • ]<sup>7</sup>).

**8. Failure to pay AFC Amount**

If the Guarantor fails to pay, or to procure the payment of, any or all of the AFC Amount due in relation to the Relevant AFC Time in accordance with clause 5.1, on or before the Advance Date, the Required PCS Amount which the Guarantor is required to advance in accordance with clause 6.3 or clause 7.1 shall be increased (at the Secretary of State's written request to the Guarantor) by such additional amount (up to an amount equal to the AFC Amount and subject to clause 7.2) which the Secretary of State believes to be necessary to ensure that the relevant Ratio remains at or exceeds 1.070:1 following the failure by the Guarantor to pay or procure payment of the AFC Amount on or before the Advance Date.

**9. End of Franchise Period**

The Guarantor shall procure that the Franchisee shall, during the 6 month period following the end of the Franchise Period:

9.1 provide to the Secretary of State such information as he may from time to time reasonably require in order to ascertain whether and the extent to which the aggregate of the Franchisee's cash and other current assets is more or less than the amount of the Liabilities; and

9.2 notify the Secretary of State promptly if at any time during such period the aggregate amount of the Franchisee's cash and other current assets is less than the amount of the Liabilities.

**10. Costs and Charges associated with the PCS Facility**

Interest may be payable by the Franchisee to the Guarantor at a rate not exceeding [*percentage stated in Financial Model*<sup>8</sup>]% per annum (accruing on a daily basis, assuming a 365 day year) from time to time on the PCS Facility Loan, but any such interest shall be subject to clauses 13, 14 and 15. No commitment or other fee shall be payable in respect of the PCS Facility.

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<sup>6</sup> Bidders to populate.

<sup>7</sup> Bidders to populate with the amount of the PCS Facility.

<sup>8</sup> Bidders to populate with amount stated in the Financial Model.

## 11. Security and Restrictions

### 11.1 Security

The Franchisee shall not grant, nor shall the Guarantor be permitted to create or attempt to create, any security for any amount due to the Guarantor by the Franchisee under this Deed unless otherwise agreed by the Secretary of State.

### 11.2 Restrictions

If there has been:

11.2.1 any PCS Advance pursuant to clause 6 or 7 and/or deemed borrowings pursuant to clause 18.2.2; or

11.2.2 a Bond Payment,

then until such time as:

11.2.3 the Available PCS Amount is equal to the PCS Facility (in accordance with and as permitted by clause 15.4);

11.2.4 any deemed amounts taken into account for the purpose of calculating the Forecast Operating Costs Ratio pursuant to clause 18.2.2 cease to be taken into account including in consequence of the Secretary of State exercising his rights pursuant to clause 18.3; and

11.2.5 the value of the then current Bond is equal to [*clause 12.2.3 amount*],

then (a) the Franchisee shall be treated as being in a "Lock Up Period" for the purposes of paragraph 3.1 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement and the Franchisee shall comply with paragraph 3.1 of Schedule 12 (Financial Obligations and Covenants) of the Franchise Agreement; and (b) the Guarantor shall procure compliance by the Franchisee with its obligations under this clause 11.2.

## 12. The Bond

12.1 The Guarantor shall procure that there shall be a valid and effective Bond in place:

12.1.1 with effect from the date of this Deed; and

12.1.2 throughout the Facility Term.

12.2 Each Bond shall:

12.2.1 be substantially in the form of Schedule 2;

- 12.2.2 be issued by a Bond Provider;
- 12.2.3 in the case of the Initial Bond, have a value of £[amount] (pounds sterling [amount in words])<sup>9</sup> and in the case of any Replacement Bond shall have the value calculated pursuant to clause 12.4; and
- 12.2.4 have a minimum duration of the shorter period of (i) three years and (ii) the period from the date of issue of the Bond until the end of the Facility Term.

### 12.3 **Provision of Replacement Bond**

- 12.3.1 The Guarantor may replace the then current Bond at any time.
- 12.3.2 The Guarantor shall replace each Bond at least twenty-four months prior to its scheduled expiry with a Replacement Bond.
- 12.3.3 If at any time the Secretary of State reasonably considers the Bond Provider under the then current Bond to be unacceptable for any reason (including (without limitation) because such Bond Provider no longer has the Relevant Credit Rating) or such Bond Provider becomes Insolvent, the Secretary of State may require the Guarantor to procure the execution and delivery of a Replacement Bond within 20 Business Days by a Bond Provider acceptable to the Secretary of State.

### 12.4 **Value of Replacement Bonds**

- 12.4.1 The value of a Replacement Bond shall be £[same amount as clause 12.2.3 amount for the Initial Bond] (pounds sterling [amount in words]) unless the Available PCS Amount on the date that a Bond is to be replaced is less than £[same amount as clause 12.2.3 amount] (pounds sterling [amount in words]) in which case the value of such Bond shall be equal to the aggregate of (i) the Available PCS Amount and (ii) the portion of the PCS Advances which have been made in whole or in part as a result of a failure to provide any AFC Amounts in accordance with clause 5.1.
- 12.4.2 If the Available PCS Amount is zero at the time the Guarantor is required to procure a Replacement Bond, the Guarantor shall notify the Secretary of State as soon as reasonably practicable in writing. The Secretary of State shall notify the Guarantor of the date on which it requires the Replacement Bond to be provided, which shall be no earlier than the date on which the Available PCS Amount is greater than zero, and the

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<sup>9</sup> Bidders to populate. Amount to be 50% of the amount of the PCS Facility, unless the Guarantor has not met three out of four of the financial tests in which case it shall be 100%.

value of such Replacement Bond shall be determined in accordance with clause 12.4.1.

## 12.5 Demands under the Bond

12.5.1 The Secretary of State shall be entitled to make demands under the Bond if the Guarantor fails:

12.5.1.1 to comply with its undertaking to make the PCS Facility (and any PCS Advance thereunder) available to the Franchisee pursuant to the terms of clause 6 and 7; or

12.5.1.2 to provide a Replacement Bond at least twenty-four months prior to the scheduled expiry of the existing Bond (subject to clause 12.4.2); or

12.5.1.3 to procure the execution and delivery of a Replacement Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with the provisions of clause 12.3.3.

12.5.2 Where a demand has been made under the Bond which has been paid by the Bond Provider (the "**Bond Payment**"):

12.5.2.1 to the extent that the Bond Payment is the consequence of the failure of the Guarantor to meet an obligation to advance a PCS Advance an equivalent amount shall be treated as a PCS Advance for the purpose of and in accordance with the definition of "PCS Facility Loan"; and

12.5.2.2 any payment made to the Guarantor by the Franchisee in relation to the Bond Payment (the "**Bond Repayment**") shall constitute a repayment for the purpose of the definition of "PCS Facility Loan".

## 12.6 Multiple Bonds

12.6.1 Where the value of the Bond required to be provided is (a) £20,000,000 or less, the Bond shall be provided by a single Bond Provider or (b) greater than £20,000,000, the Guarantor may meet its obligations to provide a valid and effective Bond by providing valid and effective Bonds the aggregate value of which at all times is equal to the value determined under clause 12.2.3 or clause 12.4, provided that one such Bond is for an amount of not less than £20,000,000.

12.6.2 Where multiple Bonds are provided as permitted by clause 12.6.1, the provisions of this Deed shall be deemed to apply separately in relation

to each such Bond, save in relation to the value to which clause 12.6.1 shall apply. Where more than one Bond is provided, the Secretary of State shall have a discretion as to whether to make a demand under one or more of such Bonds.

## 12.7 **Secretary of State Account**

12.7.1 Where a demand has been made under the Bond in the circumstances described in clause 12.5.1.3, the Guarantor shall procure that the Bond Payment is deposited in such account of the Secretary of State as may be notified to the Guarantor in writing by the Secretary of State (the "**Account**").

12.7.2 The Secretary of State declares that it shall, subject to the terms of this Deed and from the date of receipt of any amounts from the Bond Provider, hold the amounts standing to the credit of the Account on trust for the Franchisee.

12.7.3 Until such time as the balance of the Account is zero, the Secretary of State shall release amounts standing to the credit of the Account to the Franchisee in the following circumstances:

12.7.3.1 following receipt by the Secretary of State of a Replacement Bond;

12.7.3.2 where (A) a Secretary of State Trigger has occurred and (B) the Guarantor has failed to make a PCS Advance available in accordance with clause 7, in an amount no greater than the Required PCS Amount; or

12.7.3.3 at the Franchisee's request, on or after the date falling six months after the Franchise Period,

provided always that the Secretary of State's obligation to release amounts from the Account shall be limited to the extent of any sums standing to the credit of the Account at the relevant time.

## 13. **Franchisee's Undertakings**

The Franchisee undertakes that, except as otherwise expressly permitted by this Deed, it will not, at any time during the Facility Term:

13.1 pay any amount or make any distribution (in cash or in kind) to any person in respect of, or on account of, the PCS Facility Loan; or

13.2 discharge the PCS Facility Loan by set-off; or



13.3 make any gift to the Guarantor or enter into any other arrangement with it or for its benefit under which the Franchisee will receive no consideration or consideration the value of which to the Franchisee is significantly less than the value of the consideration provided by the Franchisee, as determined by the Secretary of State in his sole discretion; or

13.4 acquire any shares in, or securities issued by, the Guarantor; or

13.5 do anything (or omit to do something) which could prejudice any right or obligation of any party under this Deed.

#### 14. **Guarantor's Undertakings**

14.1 The Guarantor undertakes to procure that the Franchisee complies with the Franchisee's obligations under clause 13, and that, except as otherwise expressly permitted by this Deed, the Guarantor will not, at any time during the Facility Term:

14.1.1 demand or receive any payment or any distribution (in cash or in kind) from any person in respect of, or on account of, the PCS Facility Loan; or

14.1.2 accelerate the due date of any such payment or distribution, including by converting any term facility into an on-demand facility; or

14.1.3 exercise any right or remedy in connection with the enforcement or recovery of any such payment or distribution, including by exercising any right of set-off or counterclaim or any right to consolidate accounts, by making any demand under any guarantee or by taking any legal proceedings; or

14.1.4 instigate any insolvency proceedings, including the appointment of an administrator, liquidator, receiver or other similar officer in respect of the Franchisee or any of its assets; or

14.1.5 take or receive from any person (or permit to subsist) any security (other than a Bond) or any guarantee in respect of any PCS Facility Loan; or

14.1.6 do anything (or omit to do something) which could prejudice any right or obligation of any party under this Deed.

14.2 Clause 14.1.6 and clause 13.5 shall not be interpreted as an obligation of the Guarantor to procure the Franchisee's compliance with the Franchise Agreement.

15. **Subordination**

- 15.1 Subject to clause 11.2, the Guarantor agrees that the PCS Facility Loan and any interest accrued thereon shall be a contingent debt of the Franchisee that shall only be due and payable if and when all Liabilities have been paid and discharged in full, except as otherwise agreed in writing by the Secretary of State.
- 15.2 Clause 15.1 shall continue to apply if the Franchisee goes into liquidation and subject to clause 15.4, no claim in respect of the PCS Facility Loan or any interest accrued thereon shall be provable, or capable of being established against, the Franchisee in such winding-up unless and until all the Liabilities have been paid or discharged in full.
- 15.3 The Guarantor and the Franchisee jointly and severally covenant with the Secretary of State and agree and declare that, except as otherwise agreed in writing by the Secretary of State or permitted under clause 15.4:
- 15.3.1 the PCS Facility Loan and any interest accrued thereon shall be subordinated to the extent and in the manner set out in this Deed;
- 15.3.2 the Guarantor will not demand or accept repayment in whole or part of any PCS Facility Loan or any interest accrued thereon now or hereafter due to the Guarantor from the Franchisee (and the Franchisee will not make any payment of the same) or demand or accept any security in respect of the same or dispose of the same;
- 15.3.3 any payments received by the Guarantor in breach of 15.3.2 will be held by the Guarantor on trust for all creditors of the Franchisee other than the Guarantor;
- 15.3.4 if the Guarantor receives the benefit of a Right of Set Off or counterclaim and as a result the amount of the PCS Facility Loan or any interest accrued thereon is reduced at a time when the Guarantor would not (by virtue of this Deed) be entitled to receive payment, the Guarantor will hold such sum on trust for all creditors of the Franchisee other than the Guarantor; and
- 15.3.5 the Guarantor will not claim against the Franchisee or any other person liable or claim or prove in competition with the Secretary of State in the bankruptcy or liquidation of the Franchisee or any other person liable or have the benefit of, or share in, any payment from or composition with, the Franchisee or any other person liable or other security now or hereafter held by the Secretary of State in respect of the PCS Facility Loan or any interest accrued thereon but so that, if directed by the Secretary of State, the Guarantor will prove for the whole or any part of its claim in the liquidation or bankruptcy of the Franchisee on terms that

the benefit of such proof and of all money received by it in respect thereof shall be held on trust for all creditors of the Franchisee other than the Guarantor,

15.3.6 and nothing in this Deed creates or is intended to create any security over any asset of the Guarantor.

15.4 Subject to clause 3.1 and clause 12.5.2, the Guarantor shall be entitled to (i) demand repayment of and the Franchisee shall be obliged to pay all or part of the PCS Facility Loan and any interest accrued thereon, and (ii) demand payment of and the Franchisee shall be obliged to pay all or part of the Bond Repayment, in each case, on receipt of such demand:

15.4.1 at any time during the Franchise Period, if:

15.4.1.1 the Actual Operating Costs Ratio is equal to or greater than 1.070:1; and

15.4.1.2 the repayment of the PCS Facility Loan and any interest accrued thereon (or the amount requested to be repaid, if less) can be made without the Forecast Operating Costs Ratio being less than 1.070:1 (taking into account deemed drawdown pursuant to clause 18.2.2); or

15.4.2 at any time during the 6 months following the end of the Franchise Period, if:

15.4.2.1 the aggregate of the Franchisee's cash and other current assets is equal to or greater than the amount of the Liabilities; and

15.4.2.2 the repayment of the PCS Facility Loan and any interest accrued thereon (or the amount requested to be repaid if less) can be made without the aggregate of cash and other current assets being less than the aggregate of the amount of the Liabilities; or

15.4.3 at any time following 6 months after the end of the Franchise Period.

15.5 The Guarantor shall procure that:

15.5.1 the Franchisee gives the Secretary of State not less than 7 days' prior written notice of the date of any proposed repayment under clause 15.4.2; and

15.5.2 such notice is accompanied by a statement by each of the Guarantor and the Franchisee that the aggregate of the Franchisee's cash and other

current assets is (and at the proposed repayment date will be, following any such repayment under clause 15.4.2) equal to or greater than the Liabilities.

16. **Continuing Liability and Indemnity**

16.1 The undertakings in this Deed are additional to, without prejudice to and not in substitution for, any rights or security which the Secretary of State may now or hereafter have, for the performance and observance of the obligations, commitments and undertakings of the Franchisee under the Franchise Agreement.

16.2 The Guarantor's liability under this Deed shall not be affected by any event or occurrence, including, without limitation:

16.2.1 any time, indulgence, concession, waiver or consent at any time given to the Franchisee or any other person including any individual, company, corporation, firm, partnership, joint venture, undertaking, association, organisation, trust, state or agency of a state (in each case, whether or not having a separate legal personality) (a "**Person**"); or

16.2.2 the release of any other person under the terms of any composition or arrangement with any creditor of the Franchisee; or

16.2.3 any incapacity or lack of power, authority or legal personality of or dissolution or change in the name, style or constitution of the Franchisee or any other person; or

16.2.4 any change in the law or rules of any jurisdiction; or

16.2.5 any present or future action of any governmental authority or court amending, varying, reducing or otherwise affecting, or purporting to amend, vary, reduce or otherwise affect any of the obligations of the Franchisee under any applicable law; or

16.2.6 any amendment or supplement to any provision of the Franchise Agreement or to any mortgage, pledge, lien, hypothecation, security interest or other charge or encumbrance ("**Security**") or guarantee; or

16.2.7 the making or absence of any demand on the Franchisee or any other person for payment; or

16.2.8 the enforcement or absence of enforcement of the Franchise Agreement, this Deed or of any Security or guarantee; or

16.2.9 the taking, existence or release of any Security or guarantee; or

- 16.2.10 the winding-up, amalgamation, reconstruction, administration, dissolution, liquidation, merger or consolidation of the Franchisee or any other Person or any equivalent or analogous procedure under the law of any jurisdiction or any step being taken in respect of thereof ("**Winding-up**"); or
- 16.2.11 the illegality, invalidity or unenforceability of, or any defect in, any provision of the Franchise Agreement or this Deed or any guarantee or any other obligations of any of the parties under or in connection with the Franchise Agreement, this Deed or any Security or guarantee; or
- 16.2.12 any other circumstance (other than payment or performance) which might otherwise constitute a legal or equitable discharge or defence of a guarantor generally.
- 16.3 The Guarantor unconditionally and irrevocably agrees to indemnify the Secretary of State on demand against all direct losses, liabilities, costs, charges, expenses, actions, proceedings, claims and demands which the Secretary of State may suffer through or arising from any breach by the Guarantor of its obligations under this Deed. The Guarantors liability under the indemnity in this clause 16.3 shall be limited to the aggregate amount of the Agreed Funding Commitment, the PCS Facility and all costs, charges and expenses that the Secretary of State may incur in enforcing his rights against the Guarantor pursuant to this Clause 16.3 less the aggregate amount of PCS Advances and Agreed Funding Commitments paid to the Franchisee and not subsequently repaid.

## 17. **Representations and Warranties**

The Guarantor represents and warrants to the Secretary of State that:

### 17.1 **Status**

the Guarantor is a limited liability company, duly incorporated and validly existing under the laws of [Country]<sup>10</sup> with power to enter into, exercise any rights and perform its obligations under this Deed;

### 17.2 **Authorisations and Consents**

all action, conditions and things required to be taken, fulfilled and done (including the obtaining of any necessary consents, the making of registrations and the like) in order:

- 17.2.1 to enable the Guarantor lawfully to enter into, exercise any rights and perform and comply with its obligations under this Deed;

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<sup>10</sup> Bidders to populate with the name of the correct country.

17.2.2 to ensure that those obligations are valid, legally binding and enforceable; and

have been taken, fulfilled and done;

**17.3 Non-Violation etc.**

the Guarantor's entry into, exercise of any rights and/or performance of its obligations under this Deed do not, and will not, violate or exceed any guaranteeing or other power or restriction granted or imposed by:

17.3.1 any law to which it is subject; or

17.3.2 its constitutional documents; or

17.3.3 any other agreement to which Guarantor is a party or which is binding on it,

or result in the existence of, or oblige it to create, any Security over all or any part of its business, undertaking, property, assets, revenues (including any right to receive revenues) and uncalled capital, wherever situated;

**17.4 Winding-up**

no meeting has been convened or other corporate step taken for the Guarantor's Winding-up, no such step is intended by it and, so far as it is aware, no petition, application or the like is outstanding for its Winding-up; and

**17.5 Obligations Binding**

the Guarantor's obligations under this Deed are valid, binding and enforceable.

**18. Calculation of Actual Operating Costs Ratio and Forecast Operating Costs Ratio**

18.1 For the purposes of calculating the Actual Operating Costs Ratio amounts within the PCS Facility shall only be taken into account if they are actually borrowed by the Franchisee from the Guarantor and not repaid.

18.2 Subject to clause 18.3 and to the Guarantor and the Franchisee complying with their obligations pursuant to clause 18.4 for the purposes of calculating the Forecast Operating Costs Ratio amounts within the PCS Facility shall only be taken into account if:

18.2.1 they are actually borrowed from the Guarantor and not repaid; or

18.2.2 they are specified by the Franchisee and notified to the Secretary of State as deemed borrowings from amounts available to be borrowed from the PCS Facility accounted for as a movement in creditors.

18.3 The Secretary of State shall have the right by giving the Franchisee not less than seven days' notice in writing to revoke the ability of the Franchisee to take into account relevant deemed amounts for the purposes of calculating the Forecast Operating Costs Ratio pursuant to clause 18.2.2. Where such right is revoked the Secretary of State shall have the right by giving the Franchisee not less than seven days' notice in writing to both reinstate it and further revoke it.

18.4 Where required to ensure that the Actual Operating Costs Ratio remains at, or is increased to above, 1.070:1 the Franchisee shall exercise its rights under clause 6.1 to draw on the PCS Facility and accordingly the Guarantor shall make a loan of the requisite amount and the Franchisee shall accept it.

## 19. **Miscellaneous**

### 19.1 **Assignment**

This Deed shall be binding on the Guarantor and its successors and shall benefit the Secretary of State. Any reference in this Deed to the Guarantor shall be construed accordingly. The Guarantor may not transfer all or part its obligations under this Deed without the Secretary of State's prior written consent.

### 19.2 **Notices**

Any communication given under this Deed shall be delivered:

19.2.1 personally;

19.2.2 sent by recorded, special delivery or first class post; or

19.2.3 by electronic data transfer,

to the address or email address of the person who is to receive such communication as set out in this clause 19.2 or such other address or email address as may from time to time be specified in writing by that person as its address for the purpose of this clause 19.2.

The address and electronic mail address<sup>11</sup> of the Guarantor is:

Address: [Address]

Email address: [Address]

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<sup>11</sup> Bidders to populate.

For the attention of: [Title]

The address and electronic mail address<sup>12</sup> of the Franchisee is:

Address: [Address]

Email address: [Address]

For the attention of: [Title]

The address and electronic mail address of the Secretary of State is:

Address: 33 Horseferry Road, London SW1P 4DR

Email address: [Address]

For the attention of: [Title]

### 19.3 **Deemed Receipt**

Any such notice or other communication shall be deemed to have been received by the party to whom it is addressed as follows:

19.3.1 if sent by hand, recorded or special delivery, when delivered; or

19.3.2 if sent by pre-paid first class post, from and to any place within the United Kingdom, three business days after posting unless otherwise proven; or

19.3.3 if sent by electronic data transfer, upon sending, subject to receipt by the sender of a "delivered" confirmation (provided that the sender shall not be required to produce a "read" confirmation).

### 19.4 **Waivers and Remedies**

No failure by any party to this Deed to exercise, or delay by any party to this Deed in exercising, any right or remedy under this Deed will operate as a waiver thereof, nor will any single or partial exercise by any party to this Deed of any right or remedy preclude any other or further exercise of that or any other right or remedy. The rights and remedies provided for in this Deed are cumulative and not exclusive of any other rights or remedies which any party to this Deed may at any time have (whether provided by law or otherwise).

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<sup>12</sup> Bidders to populate.



## 19.5 **Amendments**

Any provision of this Deed may be amended, supplemented or waived only if the Secretary of State (and, in the case of an amendment or supplement, the Guarantor and the Franchisee) so agrees in writing. Any such waiver, and any consent by the Secretary of State under any provision of this Deed, must be in writing and may be given subject to any conditions thought fit by the Secretary of State. Any waiver or consent shall be effective only in the instance and for the purpose for which it is given.

## 19.6 **Partial Invalidity**

The illegality, invalidity or unenforceability of any provision of this Deed under the law of any jurisdiction shall not affect its legality, validity or enforceability under the law of any other jurisdiction nor the legality, validity or enforceability of any other provision of this Deed.

## 19.7 **Remedies**

Without prejudice to any other rights and remedies that the Secretary of State may have, the Guarantor agrees that damages may not be an adequate remedy for any breach by the Guarantor of this Agreement. The Guarantor agrees that the Secretary of State will be entitled without proof of special damage to the remedies of an injunction and other equitable relief for any actual or threatened breach by the Guarantor of this Agreement.

## 19.8 **Rights of Third Parties**

No term of this Deed will be enforceable under the Contracts (Rights of Third Parties) Act 1999 by any person other than the parties to this Deed.

## 19.9 **Counterparts**

This Deed may be executed in any number of counterparts, each of which will constitute an original, but which will together constitute one agreement.

## 19.10 **Governing Law And Jurisdiction**

This Deed (and any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with English law and the parties hereby irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed, except as expressly set out in this Deed.

**Executed as a Deed** the day and year first before written:

**EXECUTED as a DEED** )  
for and behalf of )  
**[GUARANTOR]** )  
by )

Director

Director/Secretary

**EXECUTED as a DEED** )  
for and behalf of )  
**[FRANCHISEE]** )  
by )

Director

Director/Secretary

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

Authenticated by authority of the Secretary  
of State for Transport

## SCHEDULE 1

### Secretary of State Drawdown Notice

Form of Secretary of State Notice (clause 7)

To [Insert name of Guarantor]

For the attention of : [ ]

[Date ]

Dear Sir,

**RE: Funding Deed dated [ ] 20[ ] between the [Guarantor], [Franchisee] and the Secretary of State (Funding Deed)**

We hereby give you notice pursuant to clause 7 of the Funding Deed that the circumstance contemplated under clause [7.1.1.1][7.1.1.2][7.1.2] has occurred and by this notice the Secretary of State hereby requires you to make a PCS Advance to the Franchisee under the PCS Facility in the amount of £[•] (as such amount may be increased pursuant to clause 8) within 7 days from receipt of this notice.

All capitalised terms shall have the meaning given to them in the Funding Deed.

Yours faithfully

For and on behalf of the Secretary of State for Transport

## SCHEDULE 2

### Form of Bond

To:

Secretary of State for Transport  
33 Horseferry Road  
London  
SW1P 4DR  
(the **Secretary of State**)

Whereas:

We are informed that you have entered into a franchise agreement dated [\_\_\_\_\_] (the **Franchise Agreement**) with [name of Franchisee] (the **Franchisee**) under which the Franchisee will provide certain railway passenger services.

We are further informed that under a funding deed dated [\_\_\_\_\_] between the Franchisee, the Secretary of State and [name of Guarantor] (the **Guarantor**) (the **Funding Deed**) entered into pursuant to the Franchise Agreement, it is a requirement that the Secretary of State receives a duly executed bond in the amount of [amount]<sup>13</sup> (the **Bond Value**) to secure the performance by the Guarantor of, and its compliance with, its obligations under the Funding Deed.

Accordingly, with effect from the occurrence of the Start Date (as defined in the Franchise Agreement):

- 1 We hereby unconditionally and irrevocably undertake to pay to the Franchisee in full in London, immediately upon receipt of your first written demand on us in the form set out in the Appendix and, without further enquiry, the sum specified therein. Such written demand shall state:
  - (a) the Call Event (as defined in clause 3 hereof) has occurred; and
  - (b) the date of occurrence of such Call Event.

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<sup>13</sup> Bidders to populate. Amount to be 50% of the amount of the PCS Facility, unless the Guarantor has not met three out of four of the financial tests in which case it shall be 100%.

You may call on us for the whole or part of the amount of our liability hereunder and you may make any number of calls on us up to the amount of our maximum liability as stated in clause 2(a) hereof. All sums payable hereunder shall be paid free of any restriction or condition and free and clear of and (except to the extent required by law) without any deduction or withholding, whether for or on account of tax, by way of set-off or otherwise.

2 The undertaking given by us above shall operate provided that:

(a) our maximum liability shall be limited to a sum or sums not exceeding in the aggregate the amount of the Bond Value, or such lesser amount as you may notify to us from time to time in writing, separately from any demand, as constituting the Bond Value of this Bond; and

(b) notwithstanding anything contained herein, our liability hereunder shall expire on the earlier of:

(i) the date falling three years after the date of this Bond; and

(ii) the last day of the Facility Term (as defined under the Funding Deed),

except in respect of any written demand for payment complying with all the requirements hereof which is received by us on or before such date for either the Bond Value, or for such lesser amount which, when aggregated with any previous demands, amounts to the Bond Value or less, after which date this undertaking shall be void whether returned to us or not.

**3 Call Event** means, in this Bond, any of:

(a) the failure by the Guarantor to comply with its undertakings to make the PCS Facility available to the Franchisee pursuant to the terms of clause 6 or 7 of the Funding Deed; or

(b) the failure by the Guarantor to provide a Replacement Bond at least twenty-four months prior to the scheduled expiry of the then current Bond; or

(c) the failure by the Guarantor to procure the execution and delivery of a Replacement Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with clause 12.3.3 of the Funding Deed.

4 This undertaking is made to you, your successors and your assigns.

5 This undertaking shall not be discharged or released by time, indulgence, waiver, alteration or release of, or in respect to, the obligations of the Guarantor or the Franchisee under the Funding Deed or the Franchisee or any other circumstances that might operate as a release of a guarantor at law or in equity.

6 You may make demand or give notice to us under this Bond in writing by hand to us as follows:

Address: [Bond Provider's address]

7 References in this Bond to the Funding Deed and the Franchise Agreement are to the Funding Deed and the Franchise Agreement as amended from time to time.

8 Where used in this Bond, capitalised terms have the same meanings as in the Funding Deed.

9 This Bond (and any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with English law and the parties hereby irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Bond.

**Executed as a deed** this [day and month] of [year].

**EXECUTED** as a **DEED** by )  
[Bond Provider] )  
acting by [one director][an attorney] )  
in the presence of: )

Signature of [director][attorney]

Witness Signature:

Witness Name:

Witness Address:

**APPENDIX TO THE BOND**  
**SPECIMEN DEMAND NOTICE**

To: [name and address of Bond Provider]  
[date of demand notice]

We refer to the bond issued by you on [*date of Bond*] (the **Bond**) in connection with a funding deed dated [*Date*] (the **Funding Deed**) and entered into between [*name of Franchisee*] (the **Franchisee**), the Secretary of State for Transport (the **Secretary of State**) and [*name of Guarantor*] (the **Guarantor**).

The Funding Deed was entered into pursuant to a franchise agreement dated [*Date*] between the Secretary of State and [●] (the **Franchisee**) on [*Date*] (the **Franchise Agreement**).

We hereby notify you that the following Call Event (as defined in the Bond) occurred on [*date of occurrence of Call Event*]: [delete as appropriate].

- (a) [The Guarantor has failed to comply with its undertakings to make the PCS Facility available to the Franchisee pursuant to the terms of clause 6 or 7 of the Funding Deed]; or
- (b) [The Guarantor has failed to provide a Replacement Bond at least twenty-four months prior to the scheduled expiry of the existing Bond]; or
- (c) [The Guarantor has failed to procure the execution and delivery of a Replacement Bond by a Bond Provider acceptable to the Secretary of State when required to do so in accordance with clause 12.3.3 of the Funding Deed.]

We hereby demand immediate payment from you of [*specify alternative amount if not Bond Value*] [*the Bond Value*][amend as appropriate].

Please arrange for immediate payment of the relevant amount as follows:

[*account details to which Bond monies are to be paid*]

Where used in this Notice, capitalised terms have the same meanings as in the Funding Deed.

For and on behalf of  
**Secretary of State for Transport**

**SCHEDULE 3**

**Funding Plan<sup>14</sup>**

Subject to Contract - Final Draft

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<sup>14</sup> To be the Funding Plan submitted with bid.