



RAIL ACCESS AGREEMENT

entered into between

TRANSNET RAIL INFRASTRUCTURE MANAGER

an operating division of **TRANSNET SOC LTD**

(Registration No: 1990/000900/06)

(the "**IM**")

and

[REDACTED]

(Registration No: [REDACTED])

(the "**ACCESS SEEKER**")

TABLE OF CONTENTS

Content	Page
1. DEFINITIONS AND INTERPRETATION	4
2. RECITALS	21
3. COMMENCEMENT AND DURATION	222
4. CONDITIONS PRECEDENT	22
5. INCORPORATION OF NETWORK STATEMENT	244
6. THE TRANSPORT SERVICES.....	24
7. APPROVED CARGO AND CHANGES TO APPROVED CARGO	256
8. TRAINS.....	26
9. PERFORMANCE OF THE SERVICES	277
10. ACCESS FEE, ADDITIONAL CHARGES AND ESCALATION	27
11. INVOICING AND PAYMENT	31
12. VALUE ADDED TAX, OTHER TAXES AND SET-OFF.....	333
13. FINANCIAL ARRANGEMENTS	344
14. SECURITY PLAN	366
15. SAFETY REGULATOR AND ACCESS SEEKER COMMUNICATIONS	367
16. IM REPRESENTATIVES	377
17. ACCESS SEEKER REPRESENTATIVE.....	388
18. COMPLIANCE WITH APPLICABLE LAWS.....	388
19. GENERAL RIGHTS AND OBLIGATIONS OF THE ACCESS SEEKER	40
20. GENERAL RIGHTS AND OBLIGATIONS OF THE IM	423
21. SECTION 37(2) AGREEMENT	433
22. INSURANCE	455
23. RIGHT OF AUDIT	488
24. ACCESS SEEKER WARRANTIES AND COVENANTS	499
25. TRANSFORMATION AND COMMUNITY DEVELOPMENT	51
26. INFRASTRUCTURE MANAGER WARRANTIES	522
27. INDEMNITIES.....	533
28. DOUBLE RECOVERY AND MITIGATION	544
29. FORCE MAJEURE	544
30. BREACH.....	577
31. LIMITATION OF LIABILITY	59
32. DISPUTE RESOLUTION	60
33. GOVERNING LAW AND JURISDICTION	666
34. NOTICES AND LEGAL SERVICE	666
35. CONFIDENTIALITY	678
36. LENDER PROTECTIONS	733

37. CESSION, DELEGATION AND ASSIGNMENT	733
38. CHANGE OF CONTROL AND DISPOSALS	744
39. SEVERABILITY	744
40. NATURE OF AGREEMENT	744
41. STIPULATIO ALTERI	755
42. WHOLE AGREEMENT	755
43. AMENDMENTS	756
44. WAIVER.....	766
45. CONFLICTS.....	766
46. LANGUAGE OF THE AGREEMENT	766
47. FURTHER ASSURANCE	767
48. COUNTERPARTS.....	777
49. COSTS AND EXPENSES	777

1. DEFINITIONS AND INTERPRETATION

- 1.1. The headings of the clauses in this Agreement are for the purpose of convenience and reference only and shall not be used in the interpretation of nor modify nor amplify the terms of this Agreement nor any clause hereof.
- 1.2. Unless a contrary intention clearly appears words importing:
 - 1.2.1. any one gender includes the other gender and neuter;
 - 1.2.2. the singular includes the plural and *vice versa*; and
 - 1.2.3. natural persons include created entities (corporate or unincorporated), the Government of South Africa and *vice versa*;
- 1.3. the following terms shall have the meanings assigned to them hereunder and cognate expressions shall have corresponding meanings:
 - 1.3.1. "**Access**" has the meaning ascribed to this term in the ERT Act and the Network Statement;
 - 1.3.2. "**Access Fee**" means the fee that is payable by the Access Seeker to the IM, for the granting of Access to the IM's Network and for the provision of the Rail Network Services by the IM to the Access Seeker as set out in the most recently published version of the Network Statement. This fee is applicable for a period of 12 months, unless the regulator determines that the Access Fee shall apply for a longer period or amends the Access Fee during the 12 month period.
 - 1.3.3. "**Access Seeker**" has the meaning ascribed to this term in the ERT Act and the Network Statement;
 - 1.3.4. "**Accident**" has the meaning ascribed to this term in the Network Statement;
 - 1.3.5. "**Additional Charges**" means the following additional charges (as detailed in Annexure C (*Access Fee and Additional Charges*)) which charges shall be payable by the Access Seeker to the IM in accordance with clause 10, read with the Network Statement:

- 1.3.5.1. Electricity Charges (where applicable);
- 1.3.5.2. Overloading Charges;
- 1.3.5.3. Underloading Charges for Bulk and Break-Bulk Rail Wagons;
- 1.3.5.4. Occurrence Management Services Charges; and
- 1.3.5.5. Penalties;
- 1.3.6. **"Affiliate"** means any Person that directly or indirectly through any one or more intermediaries Controls, is Controlled by or is under common Control with any Person;
- 1.3.7. **"Agreement"** means, subject to clause 5, this Rail Access Agreement and all annexures annexed hereto, each as may be amended from time to time in accordance with clause 42 (*Amendments*);
- 1.3.8. **"Annual Average Change"** means the annual average price or index over a given period of 12 (twelve) months compared with the annual average of the said price or index over the previous corresponding 12 (twelve) month period, expressed as a percentage;
- 1.3.9. **"Annual Shutdown"** has the meaning ascribed to this term in the Network Statement;
- 1.3.10. **"Applicable Laws"** has the meaning ascribed to this term in the Network Statement, and **"Applicable Law"** shall have a corresponding meaning;
- 1.3.11. **"Application for Capacity Process"** has the meaning ascribed to this term in the Network Statement;
- 1.3.12. **"Approved Cargo"** means the type(s) of Cargo that is specified in the application by a Access Seeker and that is approved by the IM in accordance with the Application For Capacity Process, and in respect of which a Access Seeker is permitted to provide Transport Services in relation to the relevant Slot(s) to which Access is granted, and as recorded and

described more fully in **Annexure B** (Approved Cargo);

1.3.13. **"Associated Assets"** means:

1.3.13.1. in relation to the IM, the Network Crossing Loop, Rail Yard or Signalling and/or other assets of the IM, that are used or operated in connection with this Agreement; or

1.3.13.2. in relation to the Access Seeker, any Rolling Stock and/or other assets of the Access Seeker that are used or operated in connection with this Agreement;

1.3.14. **"Business Day"** means any day other than a Saturday, Sunday or statutory public holiday in South Africa;

1.3.15. **"Cancellation"** shall have the meaning ascribed to that term in the Network Statement and the terms **"Cancel"** and **"Cancelled"** shall have corresponding meanings;

1.3.16. **"Cargo"** has the meaning ascribed to this term in the Network Statement;

1.3.17. **"Change of Control"** means any change whatsoever in the direct or indirect Control of the Access Seek;

1.3.18. **"Consents"** has the meaning ascribed to that term in the Network Statement;

1.3.19. **"Containerised Cargo"** has the meaning ascribed to this term in the Network Statement;

1.3.20. **"Container"** has the meaning ascribed to this term in the Network Statement;

1.3.21. **"Contract Period"** means the period specified in clause 3.1 (and if applicable as extended in terms of clauses 3.3 and 3.5) provided that, unless otherwise determined or negotiated as envisaged in the Network Statement:

- 1.3.21.1. a period of less than 1 (one) Contract Year shall not be capable of extension in terms of clause 3.3;
 - 1.3.21.2. the maximum initial period that may be specified in clause 3.1 shall be 180 (one hundred and eighty) consecutive months and comprising 15 (fifteen) Contract Years; and
 - 1.3.21.3. except for the limitation contained in clause 1.3.21.1, the contract period specified in clause 3.1 may be extended in terms of clauses 3.3 and 3.5 for a further period equal to or less than that specified in clause 3.1, whereafter the Access Seeker shall be entitled but not required to reapply for Access in terms of the Application for Capacity Process;
- 1.3.22. **"Contract Year"** means a period of 12 (twelve) consecutive months, commencing on 1 April of a given calendar year and ending on 31 March of the following calendar year, provided that the first "Contract Year" shall commence on the Service Commencement Date and shall end on 31 of March of the following calendar year and provided further that the last Contract Year shall be extended or reduced to take account of the duration of the first Contract Year;
- 1.3.23. **"Control"** means in relation to any entity, the ability to directly direct or cause the direction of the votes attaching to the majority of its issued shares or interests carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) and/or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body);
- 1.3.24. **"Corridor"** has the meaning ascribed to this term in the Network Statement;
- 1.3.25. **"Customer Portal"** means the internet based on-line portal established and maintained by or on behalf of the IM the address of which shall be specified in the Network Statement, from time to time;

- 1.3.26. **"Dangerous Cargo"** has the meaning ascribed to this term in the Network Statement;
- 1.3.27. **"Declined Slot"** has the meaning ascribed to this term in the Network Statement;
- 1.3.28. **"Default Interest Rate"** means the Prime Rate from time to time plus 2 (two) percent;
- 1.3.29. **"Designated Private Siding"** has the meaning ascribed to this term in the Network Statement;
- 1.3.30. **"Disruption"** has the meaning ascribed to this term in the Network Statement;
- 1.3.31. **"Effective Date"** means the date on which the last of the Conditions Precedent is fulfilled or waived in writing in accordance with this Agreement.
- 1.3.32. **"Electricity Charges"** means the electricity charges which are payable by the Access Seeker to the IM in respect of usage of power supply by a Train, on or within the electrified sections of a Corridor or a Route, which formula is set out in Annexure C (*Access Fee and Additional Charges*) hereto;
- 1.3.33. **"Environmental Law"** has the meaning ascribed to that term in the Network Statement;
- 1.3.34. **"ERT Act"** means the Economic Regulation of Transport Act 6 of 2024;
- 1.3.35. **"Event of Default"** means any one or more of the following events or circumstances:
- 1.3.35.1. an arrangement, composition or compromise with or for the benefit of creditors entered into by or in relation to a Party without the prior written consent of the other Party;
 - 1.3.35.2. the Access Seeker breaches the provisions of Clause 38 (*Cession, Delegation and Assignment*) or Clause 39 (*Change*

of Control and Disposals);

- 1.3.35.3. a liquidator, judicial manager, business rescue practitioner (where the application to be placed under business rescue is unsuccessful) or the like takes possession of or is appointed over the whole or any part of the business of the Access Seeker the value of which, fairly valued on a willing buyer willing seller basis, is material (in any of these cases, where applicable, whether provisionally or finally, and whether voluntarily or compulsorily);
- 1.3.35.4. any execution, attachment or similar process is levied upon or against any of the assets or property of the Access Seeker with a value (whether individually or in aggregate) in excess of R10,000,000 (ten million Rand), (which amount shall escalate annually at the rate of 5% (five percent) on the first day of the second Contract Year and each subsequent Contract Year of the Contract Period, and if this Agreement is extended in accordance with clauses 3.2 and 3.3, on and with effect from the first day of each additional Contract Year comprising the period of extension), and which amount is not paid or discharged within 30 (thirty) days of such process or execution, unless disputed by the relevant Party in good faith and reasonable steps are being taken in regard thereto;
- 1.3.35.5. a resolution is passed, or an order is made for the administration, the judicial management, supervision by a business rescue practitioner, winding-up, liquidation or dissolution of the Access Seeker (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);
- 1.3.35.6. a Guarantor fails to effect payment in full within 14 (fourteen) days of receipt of notice to that effect from the IM, of any amount claimed by the IM in terms of a Guarantee issued by such Guarantor;

- 1.3.35.7. the Access Seeker fails to provide the IM with a Guarantee where and when such Guarantee is required in terms of clause 13.1 (*Guarantees*); and
- 1.3.35.8. the Access Seeker fails or refuses to pay any sum or sums due to the IM in terms of this Agreement by the relevant due date specified in this Agreement and such failure or refusal is not the subject of a dispute in terms of clause 33.4 (*Expert Dispute*) and continues for a period of 30 (thirty) days from receipt by the Access Seeker of a written notice of non-payment from the IM;
- 1.3.36. **"Exchange Yard"** has the meaning ascribed to this term in the Network Statement;
- 1.3.37. **"Expert Dispute"** means a dispute between the Parties (other than a dispute in respect of which a dispute resolution process is already provided or prescribed in the Network Statement or in any Applicable Law), relating to any one or more of the following matters or aspects:
 - 1.3.37.1. any Force Majeure Event (including as to the impact and duration of any such Force Majeure Event);
 - 1.3.37.2. any amount due by the Access Seeker in terms of clause 10 (*Access, Additional Charges and Escalation*); and
 - 1.3.37.3. any dispute relating to any other matter or aspect of this Agreement or in the Network Statement in respect of which provision is made for a determination by the Independent Expert in terms of clause 33 (*Dispute Resolution*) or which the Parties agree in writing should be referred to an Independent Expert;
- 1.3.38. **"Expiry Date"** means the date on which the Contract Period of this Agreement expires;

- 1.3.39. **"Finance Documents"** means any common terms agreements, facility agreements and/or other loan or funding agreements (including any related security agreements and any hedging agreements and instruments), and any other finance documents entered into between a Party and any Finance Party for the purposes of funding the design, procurement, construction, commissioning, upgrading, expansion or replacement of any Associated Assets of such Party, and the term **"Finance Document"** means any one of them, as the context may indicate;
- 1.3.40. **"Finance Party"** means any financial institution or other third party debt financier (other than a shareholder of the Access Seeker) which concludes one or more Finance Documents;
- 1.3.41. **"Force Majeure Event"** has the meaning ascribed to this term in the Network Statement;
- 1.3.42. **"General Cargo"** has the meaning ascribed to this term in the Network Statement;
- 1.3.43. **"Good Industry Practice"** means applying, in relation to the manner in which the Transport Services are performed and rendered, the standards, practices, methods and procedures conforming to Applicable Law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances;
- 1.3.44. **"Government"** means the government of the Republic of South Africa;
- 1.3.45. **"Gross Tonne Kilometres (GTK)"** means the total mass of the Train inclusive of the load of any freight inside or on top of any freight wagons, that traverses over the railway network, multiplied by the Trainkm for the Train;
- 1.3.45.1.
$$GTK = (\text{Weight of Locomotives} + \text{Tare Weight of Wagons} + \text{Load Weight}) \times \text{Distance Traveled (in km)};$$

1.3.45.2. Components Included in GTK Calculation:

- Weight of Locomotives: The total weight of all locomotives hauling the train;
- Tare Weight of Wagons: The empty (unloaded) weight of all wagons or carriages in the train;
- Load Weight: The weight of goods, commodities, or passengers carried in the wagons; and
- Return Journeys: For empty return legs, the GTK is calculated by including the weight of locomotives and the Tare Weight of the empty wagons;

1.3.46. **"Guarantee"** means a written irrevocable on demand bank guarantee which is substantially in the form annexed to this Agreement in Annexure E (*Agreed Form of the Guarantee*) and which is issued by a Guarantor to and in favour of the IM in terms of clause 13.1 (*Guarantees*);

1.3.47. **"Guarantor"** means a locally registered bank or any other registered financial institution or other Person that, in each instance, is otherwise authorised in terms of Applicable Laws to issue a valid and binding Guarantee on behalf of the Access Seeker, and that in each instance is approved by the IM;

1.3.48. **"Hazardous Substance"** has the meaning ascribed to this term in the Network Statement;

1.3.49. **"Hazardous Substances Act"** has the meaning ascribed to this term in the Network Statement;

1.3.50. **"IM Representative"** is an individual/s appointed from each region and/or in relation to each Corridor by the IM from the Commencement Date until the expiry of the Contract Period,

- 1.3.51. **"Incident"** has the meaning ascribed to this term in the Network Statement;
- 1.3.52. **"Independent Expert"** means an independent expert appointed in terms of clause 33.4 (*Dispute Resolution*);
- 1.3.53. **"Infrastructure Manager"** or **"IM"** means Transnet SOC Ltd, a company incorporated in accordance with the laws of South Africa and with registration number 1990/000900/30, acting through its operating division, the "Transnet Rail Interim Infrastructure Manager", in its capacity as the owner and operator of the Network;
- 1.3.54. **"Inland Terminal"** has the meaning ascribed to this term in the Network Statement;
- 1.3.55. **"Integrated Train Plan"** or **"ITP"** has the meaning ascribed to this term in the Network Statement;
- 1.3.56. **"Interface Agreement"** has the meaning ascribed to this term in the Network Statement;
- 1.3.57. **"Loading Site"** has the meaning ascribed to this term in the Network Statement;
- 1.3.58. **"Locomotive"** has the meaning ascribed to this term in the Network Statement;
- 1.3.59. **"Loss"** means any loss, damage, costs, charges, damages or expenses (including legal and other professional charges and expenses) but excludes all special, consequential and/or indirect damages unless stated otherwise in this Agreement;
- 1.3.60. **"Mass"** has the meaning ascribed to this term in the Network Statement;
- 1.3.61. **"Maximum Carrying Capacity"** means the maximum carrying capacity, of a Rail Wagon, as specified in the Network Statement;
- 1.3.62. **"MTS"** has the meaning ascribed to this term in the Network Statement;

- 1.3.63. **"NEMA"** means the National Environmental Management Act 107 of 1998, as amended from time to time;
- 1.3.64. **"Network"** has the meaning ascribed to this term in the Network Statement;
- 1.3.65. **"Network Services"** has the meaning ascribed to this term in the Network Statement and as described more fully in Section 5 of the Network Statement;
- 1.3.66. **"Network Statement"** means the "Network Statement" as adopted and published by the IM, from time-to-time, in respect of the Network;
- 1.3.67. **"Occurrence"** has the meaning ascribed to this term in the Network Statement;
- 1.3.68. **"Occurrence Management Services"** has the meaning ascribed to this term in the Network Statement and includes the relevant services described in Sections 5.1.5.1, 5.1.5.2 and 5.1.5.3] of the Network Statement;
- 1.3.69. **"Occurrence Management Services Charges"** means those charges which are payable by the Access Seeker to the IM in respect of the Occurrence Management Services as set out in Annexure C (Part C - Occurrence Management Services Charges) hereto;
- 1.3.70. **"OHSA"** means the Occupational Health and Safety Act 85 of 1993;
- 1.3.71. **"Operational Readiness"** means the state in which the Train Operator has completed all mobilisation and preparatory activities necessary to commence the operation of trains on the Rail Network in accordance with this Agreement.
- 1.3.72. **"Other TOCs"** means any train operating companies (other than the TOC) with whom the IM concludes a rail access agreement (on terms that are the same or similar to those contained in this Agreement) and the term **"Another TOC"** means any one of them;
- 1.3.73. **"Overloading Charges"** has the meaning ascribed to this term in Network

Statement;

- 1.3.74. **"Parties"** means the parties to this Agreement being the IM and the Access Seeker, and **"Party"** means any one of them, as the context dictates;
- 1.3.75. **"Penalties"** means those amounts that shall be imposed by the IM on and payable by the Access Seeker as determined and described more fully in the Network Statement;
- 1.3.76. **"Permanent Way"** has the meaning ascribed to this term in Network Statement;
- 1.3.77. **"Person"** means a natural person, partnership, firm, corporation, joint stock company, trust, unincorporated association, joint venture, government body, limited liability company, close corporation, any sphere of government (including national, provincial, regional and local government, or organ of state) or any other legal entity which is considered a legal entity under the laws of South Africa or the country in which such an entity has been formed;
- 1.3.78. **"Planned Occupations"** has the meaning ascribed to this term in the Network Statement;
- 1.3.79. **"PPI"** means, in relation to the second Contract Year and each subsequent Contract Year, the Annual Average Change in the producer price index, as published by Statistics South Africa in Statistical release P0142.1, table C1 - Final manufactured goods, calculated:
 - 1.3.79.1. over a 12 (twelve) month period to the end of December (inclusive) immediately preceding the second Contract Year and each subsequent Contract Year, to which the escalation under clause 10.4.1 is to be applied; and
 - 1.3.79.2. from figures published by Statistics South Africa or its successor;
- 1.3.80. **"Prime Rate"** means the prime rate of interest per annum which is publicly

quoted by Rand Merchant Bank (a division of FirstRand Bank Limited) (or its successor-in-title) (the "**Bank**"), from time to time. In the event of a dispute between the Parties as to the rate so payable, the rate shall be certified by any manager or assistant manager of any branch of the Bank, whose decision, in the absence of manifest error, shall be final and binding upon the Parties, and whose appointment and authority it shall not be necessary to prove;

- 1.3.81. "**Private Siding**" has the meaning ascribed to this term in the Network Statement;
- 1.3.82. "**Quarter**" has the meaning ascribed to this term in the Network Statement and "**Quarterly**" shall have a corresponding meaning;
- 1.3.83. "**Rail Infrastructure**" has the meaning ascribed to this term in the Network Statement;
- 1.3.84. "**Railway Land**" has the meaning ascribed to this term in the Network Statement;
- 1.3.85. "**Rail Operators**" means network operators, Other TOCs, and/or station operators or any combination of these and include Persons who are rail concessionaires and/or who operate, construct, maintain and/or manage one or more railway sidings or other Rail Infrastructure for their own account or who do so on behalf of other Persons that owns the relevant Rail Infrastructure, it being agreed that for purposes of this definition such Persons shall be regarded as the network operators of the relevant Rail Infrastructure, and the term "**Rail Operator**" means any one of them;
- 1.3.86. "**Rail Wagon**" has the meaning ascribed to this term in the Network Statement;
- 1.3.87. "**Railway Safety Act**" means the Railway Safety Act 30 of 2024;
- 1.3.88. "**Rand**" or "**R**" means the lawful currency of the Republic of South Africa from time to time;

- 1.3.89. **"Relevant Authority"** has the meaning ascribed to this term in the Network Statement;
- 1.3.90. **"Rolling Stock"** has the meaning ascribed to this term in the Network Statement;
- 1.3.91. **"Route"** has the meaning ascribed to this term in the Network Statement;
- 1.3.92. **"Regulator"** means the Transport Economic Regulator established or to be established in terms of the ERT Act or, in the absence of such establishment, any other economic regulatory body established in terms of any Applicable Laws, and which has jurisdiction in respect of the IM in relation to this Agreement;
- 1.3.93. **"SABS"** means the South African Bureau of Standards or its successor in law and title;
- 1.3.94. **"Safety Permit"** has the meaning ascribed to this term in the Network Statement;
- 1.3.95. **"Safety Regulator"** has the meaning ascribed to this term in the Network Statement;
- 1.3.96. **"SANS 10228:2012"** has the meaning ascribed to this term in the Network Statement;
- 1.3.97. **"SANS 3000"** has the meaning ascribed to this term in the Network Statement;
- 1.3.98. **"Service Commencement Date"** means the date on which the Access Seeker is obligated to utilise the Train Path in terms of the Master Train Schedule on the Network in accordance with this Agreement;
- 1.3.99. **"Services"** means the services that are to be provided by or on behalf of the IM to the Access Seeker comprising the Network Services and the Occurrence Management Services;

- 1.3.100. **"Skew Loading"** means cargo loaded in wagons in a manner that is not spread uniformly over the length and width of the rail wagon as per the loading profiles contained in Annexure 22 of the Network Statement.
- 1.3.101. **"Signature Date"** means the date on which this Agreement is signed by the last Party to sign it, provided that both Parties sign this Agreement;
- 1.3.102. **"South Africa"** means the Republic of South Africa;
- 1.3.103. **"Terminal"** has the meaning ascribed to this term in the Network Statement;
- 1.3.104. **"Termination Date"** means the Expiry Date or the date on which this Agreement is terminated earlier in accordance with its terms, whichever occurs first;
- 1.3.105. **"Timetable Period"** has the meaning ascribed to this term in the Network Statement;
- 1.3.106. **"TOC"** means [■], a company incorporated in accordance with the laws of South Africa and with registration number and has the meaning ascribed to this term in the Network Statement: [■];
- 1.3.107. **"Access Seeker Insurances"** means the insurances that the Access Seeker is obliged to obtain and maintain in accordance with clause 22 (*Insurance*);
- 1.3.108. **"Access Seeker Representative"** is an individual appointed by the Access Seeker to represent it from the Signature Date until the expiry of the Contract Period
- 1.3.109. **"Tonne"** has the meaning ascribed to this term in the Network Statement, and **"Tonnage"** shall have a corresponding meaning;
- 1.3.110. **"Train"** has the meaning ascribed to this term in the Network Statement;
- 1.3.111. **"Train Kilometre (Train Km)"** means the distance that a train runs on the railway network from its Origin Point to its Destination Point. Includes

every complete or partial movement of a train, regardless of whether it is carrying passengers, freight, or running empty.

Train Km = Number of Trains × Distance Travelled (in km per train)

- 1.3.112. **"Train Path"** means the infrastructure capacity within the Network that is required to operate a Train from origin to destination, over a given period of time, referred to as a "Slot" in previous versions of the Network Statement.

- 1.3.113. **"Train Worthy"** means Rolling Stock that is technically sound, complies with the IM's operating instructions and generally meets the applicable standards of the IM Network including prescribed conditions/restrictions and vehicle loads that conform to loading specifications and Certified as such by appropriately qualified Personnel accredited by the relevant authorities such as the RSR, the SANS 3000 2-3 standards, and supplement by IM technical requirements.

- 1.3.114. **"Transfer"** means lease, sell, dispose of, transfer or alienate in any other manner, but does not include the outsourcing to any Person of part of the operations or business of the Access Seeker where ownership of such part is retained by the Access Seeker and "Transferred" shall have a corresponding meaning;

- 1.3.115. **"Transnet"** means Transnet SOC Ltd and any operating division thereof, as may be applicable from time to time;

- 1.3.116. **"Transport"** has the meaning ascribed to this term in the Network Statement, and the terms "Transported" and "Transportation" have corresponding meanings;

- 1.3.117. **"Transport Services"** has the meaning ascribed to this term in the Network Statement;

- 1.3.118. **"Underloading Charges"** has the meaning ascribed to this term in the Network Statement;

- 1.3.119. **"Value Added Tax Act"** means the Value Added Tax Act No. 89 of 1991;
 - 1.3.120. **"VAT"** means Value Added Tax as contemplated in the Value Added Tax Act and in this Agreement. All amounts and prices are exclusive of such Value Added Tax;
 - 1.3.121. **"VAT invoice"** means an invoice that complies with the requirements in terms of section 20 of the Value Added Tax Act;
 - 1.3.122. **"Writing"** means any handwritten, typewritten, or printed communication, including any e-mail transmission; and Written shall have a corresponding meaning.
- 1.4. This Agreement shall be binding on and enforceable by the permitted assigns or liquidators of the Parties as fully and effectually as if they had signed this Agreement in the first instance and reference to any Party shall be deemed to include such Party's permitted assigns or liquidators, as the case may be.
 - 1.5. If any provision in this clause 1 (*Definitions and Interpretation*) is a substantive provision conferring rights or imposing obligations on any Party, then notwithstanding that such provision is contained in such clause, effect shall be given thereto as if such provision were a substantive provision in the body of this Agreement.
 - 1.6. Where any term is defined within the context of any particular clause in this Agreement, the term so defined shall, unless it appears clearly from the clause in question that such term has limited application to the relevant clause, bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that such term has not been defined in this clause 1.
 - 1.7. Words indicating time periods in this Agreement shall be construed as follows:
 - 1.7.1. **"month"** means the period from 00h01 on the first day of a calendar month to 24h00 on the last day of such calendar month;
 - 1.7.2. **"week"** means a period commencing at midnight (24h00) each Sunday night and ending at the same time the following Sunday night; and
 - 1.7.3. **"day"** means the 24 hour period from 00h01 to 24h00 on a calendar day.

- 1.8. When any number of Business Days or days is prescribed in this Agreement, it shall be reckoned as commencing on the next Business Day which Business Day shall be included in such calculation.
- 1.9. Save for the Services and the Transport Services which shall be conducted on each day throughout the Timetable Period of each Contract Year, should the day for the performance of any obligation in terms of this Agreement fall on a day which is not a Business Day, then such obligation shall be performed on the following Business Day unless otherwise indicated.
- 1.10. Where the word "including" is used in this Agreement, it shall be construed as meaning "including, without limitation".
- 1.11. Expressions defined in this Agreement shall bear the same meanings in any schedules or annexures to this Agreement which do not contain their own conflicting definitions.
- 1.12. Any reference in this Agreement to legislation or subordinate legislation is to such legislation or subordinate legislation at the Signature Date of this Agreement and as amended, consolidated, re-enacted or replaced from time to time to the extent that such amended, consolidated, re-enacted or replacing legislation or subordinate legislation is capable of applying to this Agreement.
- 1.13. Where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail.
- 1.14. The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement which expressly provide that they shall operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.
- 1.15. The rule of interpretation that a contract shall be interpreted against the Party responsible for the drafting or preparation of the contract shall not apply to this Agreement.

2. **RECITALS**

- 2.1. The IM owns, operates and maintains the Network.
- 2.2. The Access Seeker is as defined in the ERT Act.

- 2.3. The IM and the Access Seeker wish to record the terms and conditions on which the IM shall provide the Services and the Access Seeker shall provide Transport Services, in this Agreement.
- 2.4. An Access Seeker, who is not a TOC, must identify and nominate a TOC to provide transportation services at the time of application. Further, the Access Seeker must comply with the requirement Clause 3.1 of the Network Statement.

3. **COMMENCEMENT AND DURATION**

- 3.1. This Agreement shall come into full force and effect on the Signature Date and the Parties' respective rights and obligations in respect of the Services shall, subject to the fulfilment of the Conditions Precedent, be governed by the terms and conditions of this Agreement.
- 3.2. Transport Services shall commence on and with effect from the Services Commencement Date, this date being [■].
- 3.3. The Agreement shall endure for an initial period of 15 (fifteen) Contract Years following which it shall terminate, unless renewed in terms of clauses 3.4 and 3.5 below.
- 3.4. The IM and Access Seeker shall be entitled to notify each other that it wishes to extend the Contract Period by providing each other with notice in writing at least 6 (six) months prior to the Expiry Date.
- 3.5. IM and the Access Seeker agrees that following the notice issued in terms of clause 3.4, the Parties shall meet and negotiate in good faith with the intention of agreeing on similar terms as this Agreement, but with necessary changes as circumstances dictate, which are applicable to this Agreement including any amendments required in accordance with obligations imposed by a competent regulatory authority or Applicable Laws at such time.

4. **CONDITIONS PRECEDENT**

- 4.1. Save for this clause 4 (Conditions Precedent) and clauses 1 (Definitions and Interpretation), 29 (Force Majeure), 33 (Dispute Resolution), 34 (Governing Law and Jurisdiction), 35 (Notices and Legal Service), 36 (Confidentiality), 38 (Cession, Delegation and Assignment), 39 (Changes in Control and Disposals), 43 (Whole Agreement), 44 (Amendments), 45 (Waiver), 46 (Conflicts), 49 (Counterparts), and 50 (Costs and Expenses) which shall be of immediate force and effect, this Agreement is subject to the fulfilment of the following suspensive conditions by no later than 3

calendar months prior to the stated Services Commencement Date, this date being [■].

- 4.1.1. The Access Seeker must provide the IM with proof of liability insurance;
- 4.1.2. The Access Seeker must submit all relevant annexures as required by the Network Statement version 4, including but not limited to the social development annexure, signed Interface Agreement, Security Plan, Risk Analysis and Environmental Plan.
- 4.1.3. The Access Seeker must obtain the Rail Safety Regulator permit to operate trains on the allocated route/s.
- 4.1.4. The Access Seeker must undergo the necessary credit checks with the IM finance and provide the Guarantee as set out in clause 13, dependent on credit profile.
- 4.1.5. The Access Seeker must obtain Locomotives and wagons necessary to commence operations on the allocated route/s and approved the Rail Safety Regulator.
- 4.1.6. The Access Seeker must confirm in writing that the third parties responsible for handling the cargo transported on the allocated Train Path/s have the required capacity to handle the cargo at the points of origin and destination under separate contractual arrangements.
- 4.1.7. The Access Seeker must provide concluded rail access arrangements with any other rail infrastructure manager, including access in terms of cross border train operations.
- 4.2. The Parties shall use their respective reasonable endeavours and co-operate in good faith to ensure the fulfillment of the conditions precedent, to the extent that it is within their power to do so, as expeditiously as reasonably possible, at their respective costs.
- 4.3. The date of fulfillment of the conditions precedent set out in this clause 4 can be extended at the IM's discretion.
- 4.4. Unless the suspensive conditions contained in clause 4.1 are fulfilled following the Signature Date, the provisions of clauses 1 (Definitions and Interpretation), 29 (Force Majeure), 36 (Confidentiality), 38 (Cession, Delegation and Assignment), 39 (Changes in Control and Disposals), 33 (Dispute Resolution), 35 (Notices and Legal Service), 43 (Whole Agreement), 44 (Amendments), 45 (Waiver), 46 (Conflicts), 49 (Counterparts), 34 (Governing Law and Jurisdiction), and 50 (Costs and Expenses) shall continue to be

of full force and effect, but the remainder of this Agreement shall not become operative or effective, shall have no force or effect whatsoever and neither Party shall have any liability or claim against the other whatsoever.

5. **INCORPORATION OF NETWORK STATEMENT**

- 5.1. The Parties acknowledge and agree that this Agreement hereby expressly incorporates the Network Statement (including any revision, amendment, re-issue or restatement thereof, by the IM, from time to time), which is deemed to form an integral part of this Agreement.
- 5.2. Any amendments will be in accordance with Clause 43 (Amendments) of the Agreement.

6. **THE TRANSPORT SERVICES**

- 6.1. The IM hereby grants the Access Seeker access to the Network on an "as is" basis, subject to the provisions of this Agreement (including, for the avoidance of doubt, the Network Statement), in the form of the Slot/s for the sole purpose of undertaking the Transport Services on the relevant Route(s), subject to the terms and conditions of this Agreement.
- 6.2. The Access Seeker hereby acknowledges and agrees that access to and use of the Network is provided by the IM solely and entirely on the basis that the Access Seeker accepts the condition and extent of the Network, as at the Signature Date, and that the IM is and shall be under no obligation to replace, upgrade or expand the Network including any rail infrastructure, plant and/or equipment that comprises or is associated with the Network and the [Corridor/Route] and although the IM shall use reasonable endeavours to maintain the Network it does not guarantee, warrant or undertake the availability, state of repair, condition and/or fitness for purpose of the Network and accordingly the Access Seeker expressly agrees that it shall not have any claim against the IM in this regard.
- 6.3. The Parties agree that the IM shall not be responsible for the actions and omissions of the Access Seeker, and that the Access Seeker shall operate its Trains and shall provide Transport Services at its own cost and risk.
- 6.4. The Access Seeker shall commence the Transport Services from the Services Commencement Date in accordance with the scheduling provisions of the Network Statement.
- 6.5. The Access Seeker shall undertake the Transport Services subject to and in accordance

with the terms and conditions of this Agreement (including, for the avoidance of doubt, the Network Statement), the Interface Agreements (if any), the PRASA Interface Management Agreement, and in compliance with all Applicable Laws and Consents.

- 6.6. The Parties record that the Access Seeker is granted access to the Network in terms of the Slot/s and such access is on an "as is basis" as regards the extent and condition of the Network as set out in the Network Statement.
- 6.7. The Access Seeker is authorised in terms of this Agreement, to Transport only Approved Cargo and shall not Transport cargo of any other kind, without the prior written consent of the IM in accordance with the terms of this Agreement, which consent shall not be unreasonably withheld.
- 6.8. Without derogating from any specific obligations of the Parties as set out in this Agreement (including, for the avoidance of doubt, the Network Statement):
 - 6.8.1. the Access Seeker shall undertake the Transport Services in the manner and subject to the terms and operational parameters and requirements set out in this Agreement (including, for the avoidance of doubt, the Network Statement);
 - 6.8.2. the Access Seeker's right to access the Network shall be limited only to the Train Paths as offered and accepted by the Access Seeker and reflected in the Integrated Train Plan;
 - 6.8.3. the Access Seeker shall be responsible for all costs associated with the provision of the Transport Services including raising any debt funding required;
 - 6.8.4. the Parties shall comply with the provisions of this Agreement (including, for the avoidance of doubt, the Network Statement);
 - 6.8.5. in respect of the supply of diesel required by the Access Seeker, the Access Seeker shall make all arrangements at its cost directly with the diesel supplier(s) for the provision of diesel it requires to undertake the Transport Services.

7. **APPROVED CARGO AND CHANGES TO APPROVED CARGO**

- 7.1. The Access Seeker shall only undertake Transport Services in respect of Approved Cargo.
- 7.2. The Access Seeker may apply, in writing, to the IM to alter or increase /decrease the Approved Cargo *inter alia* by removing or adding any Containerised Cargo and/or General Cargo. Such application shall specify the proposed change to the Approved Cargo including full particulars of: (i) any addition or removal of any Containerised Cargo and/or General Cargo.
- 7.3. Upon receipt of an application from the Access Seeker in terms of clause 7.1, the IM shall consider the application including any impacts which the proposed change in the Approved Cargo may have on *inter alia* the commitments given by the Access Seeker in terms of the Slot Application Process, the safe operation of the relevant Route and any associated Corridor if applicable, the rail capacity of the relevant Route and any associated Corridor, the scheduling and operation of trains (including Trains) on the Route, and the performance of the Services by the IM; and the IM shall, in its sole and absolute discretion, determine whether or not to approve the proposed change in the Approved Cargo. The IM shall notify the Access Seeker of its decision, in writing and with reasons, within a period of 90 (ninety) days of the date of receipt of the relevant application.

8. **TRAINS**

- 8.1. The Access Seeker shall, at its own cost, acquire or lease such number of Trains as it requires from time to time to provide the Transport Services in respect of each of the Train Paths that it has been granted Access to, and in accordance with the terms of this Agreement (including, for the avoidance of doubt, the Network Statement).
- 8.2. The Access Seeker shall ensure at all times that the Trains used for the provision of Transport Services are fit for the purpose for which they are used and comply with the Train specifications and other operating requirements set out in the Network Statement.
- 8.3. The Access Seeker shall for the duration of the Contract Period, ensure that the Trains used for and/or in connection with the provision of the Transport Services are maintained in good working order and in compliance with the Applicable Laws and all applicable Consents, Good Industry Practice and other operational requirements as may be required in terms of this Agreement and/or the Network Statement, as well as any Interface Agreements concluded by the Access Seeker as well as the PRASA Interface Management Agreement.

9. **PERFORMANCE OF THE SERVICES**

9.1. **The Services**

- 9.1.1. With effect from the Commencement Date, the IM shall undertake the performance of the Services in relation to the relevant Route/s in respect of which the Access Seeker has been granted Access to one or more Train Path Slots, in accordance with this Agreement.
- 9.1.2. Save for any Planned Line Occupations and Force Majeure Events, the Services shall be provided, and the Network shall be operated during the Timetable Period of each Contract Year.
- 9.1.3. The IM hereby grants the Access Seeker Access to the Network in relation to and in the form of the Slot(s), in accordance with the Network Statement (including the applicable Integrated Train Plan, the MTS and the applicable operating requirements), for the sole purpose of performing the Transport Services in respect of the Approved Cargo, on the relevant Route(s), and in respect of the allocated Train Path(s), subject to the terms and conditions of this Agreement.

10. **ACCESS FEE, ADDITIONAL CHARGES AND ESCALATION**

10.1. **Access Fee**

- 10.1.1. The Access Fee shall be payable monthly, in advance, by the Access Seeker to the IM in respect of each Slot that is allocated to the Access Seeker in terms of this Agreement and in respect of the performance of the associated Network Services by the IM and shall be invoiced by the IM in accordance with clause 11.
- 10.1.2. The Parties record that the Access Fee shall be payable by the Access Seeker, notwithstanding that:
 - 10.1.2.1. Force Majeure has occurred but shall not be liable for payment of Access Fee after the notice in terms of clause 29.2.1 has been provided;
 - 10.1.2.2. the Access Seeker has incurred one or more Declined Train

Path; and/or

- 10.1.2.3. the Access Seeker has Cancelled one or more Train Paths,
in terms of this Agreement and/or the Network Statement.

10.2. **Additional Charges**

10.2.1. **Overloading Charges**

- 10.2.1.1. If a Rail Wagon has been overloaded above the Maximum Carrying Capacity and as a result an Overloading Charge has been incurred by the Access Seeker in terms of the Network Statement, such Overloading Charge shall be payable by the Access Seeker to the IM in terms of Chapter 5 (Commercial Services and Charges) of the Network Statement.
- 10.2.1.2. All Overloading Charges incurred by the Access Seeker, together with any applicable VAT, shall be payable monthly, in arrears, by the Access Seeker, and shall be invoiced by the IM in accordance with clause 11.

10.2.2. **Underloading Charges for Bulk and Break-Bulk Cargo**

- 10.2.2.1. If a Rail Wagon has been underloaded and as a result an Underloading Charge has been incurred by the Access Seeker in terms of the Network Statement, such Underloading Charge shall be payable by the Access Seeker to the IM in terms of Chapter 5 (Commercial Services and Charges) of the Network Statement.
- 10.2.2.2. All Underloading Charges incurred by the Access Seeker, together with any applicable VAT, shall be payable monthly, in arrears, by the Access Seeker, and shall be invoiced by the IM in accordance with clause 11.

10.2.3. **Skew Loading**

- 10.2.3.1. If a Rail Wagon has been Skew Loaded and as a result a Skew Load Charge has been incurred by the Access Seeker in

terms of the Network Statement, such Skew Load Charge shall be payable by the Access Seeker to the IM in terms of Chapter 5 (Commercial Services and Charges) of the Network Statement.

- 10.2.3.2. All Skew Load Charges incurred by the Access Seeker, together with any applicable VAT, shall be payable monthly, in arrears, by the Access Seeker, and shall be invoiced by the IM in accordance with clause 11.

10.2.4. **Occurrence Management Services Charges**

- 10.2.4.1. Subject to the provisions of clause 22 (*Insurance*), in the event of an Occurrence that is caused by or is attributable to any actions or omissions of the Access Seeker or its personnel, contractors, subcontractors and/or service providers, as determined in terms of the Network Statement and/or any Interface Agreement, the Access Seeker shall be liable for the Occurrence Management Services Charges incurred by the IM in the provision of Occurrence Management Services, and such Occurrence Management Services Charges, together with any applicable VAT, shall be recoverable from and payable by the Access Seeker and shall be included in the relevant monthly invoice issued to the Access Seeker in terms of clause 11 (Invoicing and Payment) of this Agreement.

- 10.2.4.2. The Parties acknowledge that not all Occurrences are the same and that therefore the Occurrence Management Services Charges shall be determined at the time of each Occurrence with regard to the costs incurred by the Access Seeker in providing and/or procuring the Occurrence Management Services required in order to restore the operation of the Network and shall be apportioned to the relevant responsible Party at the relevant time.

10.2.5. **Electricity Charges**

- 10.2.5.1. Subject to clause 10.4.1, the Electricity Charges that are payable by the Access Seeker to the IM in respect of the variable

electricity usage by a Train (as applicable), are set out in Annexure C (*Access Fee and Additional Charges*).

- 10.2.5.2. The Electricity Charges, together with any applicable VAT, shall be invoiced monthly, in arrears, by the IM in accordance with clause 11 (*Invoicing and Payment*) and shall be payable by the Access Seeker monthly to the IM based on the Electricity Charges that were incurred during the preceding month.

10.2.6. **Penalties**

- 10.2.6.1. The Parties agree that Penalties that are incurred by the Access Seeker, as determined, imposed and calculated in accordance with the Network Statement, together with any VAT thereon, if applicable, shall be invoiced monthly, in arrears, by the IM in accordance with clause 11 (*Invoicing and Payment*).
- 10.2.6.2. The Parties agree that the IM will refund the Access Seeker the full Slot access fee for trains cancelled due to the IM's fault and in the event that the Access Seeker does not accept the replacement, Slot. The Penalty clause is subject to the Limitation of Liability (Clause 32) of this Agreement.

10.3. **General provisions regarding Additional Charges (including Incentives)**

- 10.3.1. The Parties agree that in the event that any Additional Charges (including any Penalties) are determined to be penalties in terms of the Conventional Penalties Act 1962, the IM shall be entitled to claim damages from the Access Seeker in lieu of, and in an amount equivalent to, the relevant Additional Charges (including any Penalties)).

10.4. **Escalation of Additional Charges**

- 10.4.1. The Additional Charges (including the Occurrence Management Services Charges) shall be escalated annually by a percentage equal to PPI. Such escalation shall take place on and with effect from the first day of the second Contract Year and of each subsequent Contract Year.
- 10.4.2. The Parties agree that the Access Fee shall be escalated annually by a

percentage equal to PPI unless otherwise determined by the Regulator and notified to the IM in terms of Applicable Laws. Such escalation or other revision shall come into force on and with effect from the first day of the second Contract Year and of each subsequent Contract Year.

11. INVOICING AND PAYMENT

11.1. Subject to clause 11.3 below, the Access Seeker shall be:

11.1.1. invoiced monthly in advance in respect of the Access Fee; and

11.1.2. invoiced monthly in arrears in respect of any Additional Charges including any Overloading Charges, Underloading Charges, Skew Loading Charges, Occurrence Management Services Charges, Electricity Charges (if applicable) and/or Penalties incurred by the Access Seeker in respect of the previous month.

11.2. On or before the 25th (twenty fifth) calendar day of each calendar month, the Access Seeker shall pay the IM the Access Fee (together with VAT thereon) in respect of the following month and the Additional Charges (together with any applicable VAT) that were incurred in respect of the preceding month ("**Invoice Amount**").

11.3. The Invoice Amount shall be payable in accordance with clause 11.2 read with clause 11 ("**Financial Arrangements**").

11.4. The Access Seeker's VAT number and the IM's VAT number of the IM and/or any of its divisions (as set out in Annexure D (*Parties' Bank Details*)) shall appear on each VAT invoice submitted to the Access Seeker.

11.5. All original VAT invoices and statements of account detailing the Access Seeker's VAT number [■], shall be forwarded to the following address:

Attention: [■]

Addressee: [■]

Address: [■]

11.6. Any amounts which are due and payable by the Access Seeker to the IM but unpaid shall bear interest at the Default Interest Rate, calculated daily from the day following the date on which they became due and, compounded Monthly in arrears. Any change in the

Default Interest Rate shall be applied from the first day of the next Month.

- 11.7. Subject to clause 11.8 below and clause 13 (*Financial Arrangements*), the Access Seeker may query any VAT invoice in respect only of amounts appearing on the monthly VAT invoice, in writing within 30 (thirty) days of the date of the relevant VAT invoice. If no query is received in such period, the VAT invoice shall be deemed to be correct and shall be final and binding on the Parties. In the event that a VAT invoice and/or an item thereof is queried, and the Parties are unable to resolve such query either Party may declare a dispute in relation to such invoice and/or item thereof which shall be dealt with in accordance with clause 33.4 (*Expert Dispute*). Any payment which was the subject of dispute shall become payable on the next Business Day following determination of the amount due and payable, subject to any interest which may be payable thereon in terms of clause 11.11.2.
- 11.8. For the avoidance of doubt, any itemised payment in the VAT invoice which is not the subject of a dispute in terms of clause 32 (Dispute Resolution) shall remain due and payable in accordance with clause 11.1, subject to any interest which may be payable thereon in terms of clause 11.11.2.
- 11.9. Where the Access Seeker and/or a Guarantor, as the case may be, has paid the IM any amount pursuant to this Agreement and it transpires that such amount or part thereof was not due and payable, other than as a result of a Force Majeure event, Planned Line Occupations and/or an Annual Shutdown, the IM shall credit the Access Seeker's account with the amount applicable.
- 11.10. Within 20 (twenty) Business Days of the end of each Contract Year, the IM shall provide the Access Seeker with a reconciliation of the Invoice Amounts as well as the amounts invoiced by the IM and which have been paid and which remain to be paid by the Access Seeker.
- 11.11. Any payment(s) due by one Party to the other under this Agreement are to be made:
 - 11.11.1. in Rand in South Africa; and
 - 11.11.2. by electronic funds transfer to the bank account of the receiving Party. The bank account details of each Party are set out in Annexure D (*Parties' Bank Details*).
- 11.12. Neither Party shall be entitled to:

- 11.12.1. withhold, payment of any amount due by it to the other Party in terms of this Agreement whether or not due any amount claimed by it or because it has or intends to query any VAT invoice or statement received from the other Party, except in the case and to the extent of any amount which is the subject of dispute in terms of clause 32 (Dispute Resolution), or a manifest error in any such VAT invoice or statement; or
- 11.12.2. set off or to deduct any amounts due to it by the other Party against or from any amount due to or alleged to be due to it by the other Party.

12. **VALUE ADDED TAX, OTHER TAXES AND SET-OFF**

12.1. **Value Added Tax**

Any invoice or other request for payment of monies due to by the one Party to the other under this Agreement shall comply with the requirements of the Value Added Tax Act to the extent that such payment is in respect of taxable supply made by the one Party as vendor to the other chargeable at the standard or zero rate, in terms of Value Added Tax Act.

12.2. **Other Taxes and Imposts**

- 12.2.1. Each party shall comply with all tax laws of the South Africa and any rulings and directive of a competent tax authority in South Africa. No Party shall be required to gross up any payment that may be due by one Party to the other under this Agreement, or otherwise.
- 12.2.2. All stamp duty (if any), and any other documentary, registration or other like duties, charges and/or or taxes, including any penalties, fines and/or surcharges as well as any interest relating thereto, which are imposed or chargeable on or in connection with this Agreement shall be promptly paid by the Access Seeker provided that the IM shall be entitled (but not obliged) to pay any such duties, charges, taxes, penalties, fines and/or surcharges (whether or not they are its primary responsibility), whereupon the Access Seeker shall on demand indemnify the IM against those duties or taxes and against all costs and expenses so incurred.

12.3. **Set-Off**

Save as otherwise provided in this Agreement, all sums payable by any Party under this Agreement shall be paid free and clear, and without any demur, delay, deferral, deduction, withholding, set-off or counterclaim and as per International Financial Reporting Standards, unless it is required by law or is expressly permitted or required under this Agreement.

13. **FINANCIAL ARRANGEMENTS**

13.1. **Guarantee**

13.1.1. As security for the due and proper performance of all of the obligations of the Access Seeker in terms of this Agreement including but not limited to any Additional Charges as well as the payment of any other amounts, expenses, costs, claims and/or other liabilities for which the Access Seeker may become liable in terms of this Agreement, in respect of and during the first Contract Year, the Access Seeker shall provide a Guarantee to the IM (the "**Initial Guarantee**").

13.1.2. The Initial Guarantee and each Replacement Guarantee (as defined below) which the Access Seeker is required to furnish in terms of this clause 13.1 shall:

13.1.2.1. be issued by a Guarantor; and

13.1.2.2. be issued for a guaranteed amount equal to 10% (ten percent) of the annual aggregate of the GTK's comprising the Train Paths allocated to the Access Seeker in respect of a given Contract Year, as determined with reference to the aggregate of all Train Paths in respect of which the Access Seeker is granted Access in relation to such Contract Year, multiplied by Access Fee which amount shall escalate each Contract Year as determined by the Transport Economic Regulator.

13.1.3. The Access Seeker shall maintain in an amount equal to the applicable guaranteed amount, the continuing validity and effectiveness of the Initial Guarantee and each Replacement Guarantee, as applicable.

13.1.4. In respect of the second Contract Year and each subsequent Contract Year

the Access Seeker shall furnish the IM with a replacement Guarantee at least 30 (thirty) days prior to the commencement of the 2nd (second) Contract Year or the relevant subsequent Contract Year, as applicable, (each a "**Replacement Guarantee**"). Each such Replacement Guarantee shall comply with clause 13.1.2.

- 13.1.5. The Initial Guarantee and each Replacement Guarantee which the Access Seeker is required to furnish in terms of this clause 13.1 shall be valid for the duration of the Contract Year in respect of which it is required to be furnished and shall remain valid notwithstanding any one or more claims against any Guarantee in terms of clause 13.1.8. In this regard, the Access Seeker shall maintain the Guarantee or replacement Guarantee (as applicable), in place for the duration of the relevant Contract Year and for its full amount.
- 13.1.6. The Access Seeker and the Guarantor shall not be permitted to withdraw, revoke, replace or modify the Initial Guarantee or a subsequent Replacement Guarantee that is provided to the IM in terms of this clause 13.1, without the prior written consent of the IM, which consent may be withheld by the IM.
- 13.1.7. If the Access Seeker fails to make payment of any amount due by it to the IM in terms of this Agreement, then the IM shall be entitled, but not obliged, to present the Access Seeker, as well as the applicable Guarantor, with a written notice ("**Compliance Notice**") stating full particulars of the Access Seeker's failure to effect payment in terms of this Agreement as well as the outstanding amount due by the Access Seeker, and to request the Access Seeker to remedy such non-compliance within 10 (ten) Business Days of the date of receipt or the deemed receipt of such Compliance Notice.
- 13.1.8. In addition to and without detracting from any other remedies which the IM may have in terms of this Agreement, if the Access Seeker fails to effect timeous payment of any outstanding amount due in terms of this Agreement together with any interest thereon at the Default Interest Rate (which interest shall accrue from the date the outstanding amount (or each relevant portion thereof) became due until the date on which such outstanding amount is paid in full) within a period of 10 (ten) Business Days after the receipt or deemed receipt (in terms of clause 35 (*Notices and*

Legal Service)) of the Compliance Notice, the IM shall be entitled, to present the Initial Guarantee or Replacement Guarantee held by the IM at the time, to the relevant Guarantor for payment of the outstanding amount together with interest thereon at the Default Interest Rate, which interest shall accrue from the date the outstanding amount (or each relevant portion thereof) became due until the date on which such outstanding amount is paid in full.

13.2. **Non-payment by Guarantor**

If a Guarantor fails to effect payment in full of the outstanding amount together with interest thereon at the Default Interest Rate in accordance with the terms of the Initial Guarantee or the relevant Replacement Guarantee, as applicable, such non-payment shall be deemed to be an Event of Default and the IM shall, without prejudice to any other rights which it may have in terms of this clause 13.1 (*Guarantees*), Applicable Law, and/or to claim damages, and/or be entitled to terminate this Agreement.

14. **SECURITY PLAN**

14.1. The Access Seeker acknowledges the importance of adhering to safety and security requirements in the performance of the Transport Services and accordingly the Access Seeker undertakes to implement and to give effect to the undertakings, commitments and obligations contained in security plan annexed hereto as **Annexure J**.

14.2. Every 6 (six months), the Access Seeker shall provide a report to the IM in respect of its compliance with its undertakings, commitments and obligations in terms of the security plan contained in **Annexure I** (*Security Plan*).

14.3. The Access Seeker hereby undertakes to notify the IM immediately upon becoming aware of any breach of any of the provisions in clauses 14.1.

14.4. The notice contemplated in clause 14.3 above must be given in writing to the IM and shall only be deemed effective upon written confirmation of receipt thereof from the IM to the Access Seeker.

15. **SAFETY REGULATOR AND ACCESS SEEKER COMMUNICATIONS**

Notwithstanding any other provision in the body of this Agreement or in the Network Statement, pertaining to the submission of records and reports by the Access Seeker to the IM, if –

- 15.1. the Access Seeker receives any notice or communication from the Safety Regulator pertaining to any suspension, revocation, or surrender of any Safety Permit as contemplated in section 26 of the Railway Safety Act;
- 15.2. the Access Seeker receives any directive, notice or communication from the Safety Regulator pertaining to any directive issued by a railway safety inspector in terms of section 36 of the Railway Safety Act;
- 15.3. the Access Seeker notifies or submits a report to the Safety Regulator, or if the Access Seeker receives any notice, directive or communication pertaining to any matter contemplated in Chapter 7 of the Railway Safety Act; and/or
- 15.4. any notice or communication from the Safety Regulator pertaining to any of the matters contemplated in Chapter 10 of the Railway Safety Act,
- 15.5. the Access Seeker shall, within 5 (five) Business Days of receipt of any such notice or communication or the submission of any report referred to in clauses 15.1 to 15.4 (inclusive), furnish the IM with a copy thereof.
- 15.6. Likewise, the IM shall communicate any communication from the Safety Regulator to directly impacted Access Seekers' within 5 (five) Business Days of receipt.

16. **IM REPRESENTATIVES**

- 16.1. The identity of the IM Representative shall be communicated to the Access Seeker through the Customer Portal. Each such IM Representative shall act as a duly authorised representative of the IM for all purposes connected with this Agreement.
- 16.2. The IM shall notify the Access Seeker, via the Customer Portal, forthwith upon the replacement, at any time, of any IM Representative and such replacement shall not be effective until notice has been given.
- 16.3. Each IM Representative shall be entitled to delegate any of his functions from time to time to a person or persons the identity of whom shall be notified by the IM to the Access

Seeker, via the Customer Portal, and references in this Agreement to the IM Representatives shall be construed to include such persons.

- 16.4. Any notice, instruction or information required to be given by or made to the IM may be given by or delivered to the relevant IM Representative.

17. ACCESS SEEKER REPRESENTATIVE

- 17.1. The identify of the Access Seeker Representative shall be communicated in writing to the IM, to act as the Access Seeker's duly authorised representative for all purposes connected with this Agreement.
- 17.2. The Access Seeker shall notify the IM in writing forthwith upon the replacement at any time of the Access Seeker Representative and such replacement shall not be effective until such notice has been given. The IM must confirm in writing that they have received such notice.
- 17.3. The Access Seeker Representative shall be entitled to delegate any of his functions from time to time to a person or persons the identity of whom shall be notified in writing by the Access Seeker to the IM and references in this Agreement to the Access Seeker Representative shall be construed to include such persons.
- 17.4. Any notice, instruction or information required to be given by or made to the Access Seeker may be given by or delivered to the Access Seeker Representative.

18. COMPLIANCE WITH APPLICABLE LAWS

18.1. General

- 18.1.1. Each Party shall comply with all Applicable Laws and requirements of all Relevant Authorities applicable to the exercise of their respective rights and the performance of their respective obligations in terms of this Agreement as well as the terms and conditions of all relevant Consents.
- 18.1.2. In undertaking the Transport Services the Access Seeker:
- 18.1.2.1. undertakes that it is familiar with the provisions of the Railway Safety Act;
- 18.1.2.2. undertakes not to act or omit to act in any manner that will result in contravening the provisions of the Railway Safety Act

in transporting cargo;

- 18.1.2.3. undertakes to comply with all requirements of any Relevant Authority and Good Industry Practice; and
- 18.1.2.4. undertakes to procure that its Affiliates, directors, employees, agents, representatives, Access Seekers' and/or subcontractors shall be bound by the undertakings above.

18.2. **The National Railway Safety Regulator and Related Legislation**

- 18.2.1. The Parties acknowledge that the Services rendered by the IM in terms of this Agreement are also regulated by the provisions of the Railway Safety Act, which provides that, to ensure that railway operations are conducted safely, the IM must adhere to strict safety requirements.
- 18.2.2. The Access Seeker:
 - 18.2.2.1. represents to the IM that it is familiar with the provisions of the Railway Safety Act;
 - 18.2.2.2. undertakes not to act or omit to act in any manner that shall result in the IM, by virtue of such act or omission itself, contravening the provisions of the Railway Safety Act;
 - 18.2.2.3. indemnifies and holds the IM harmless against any claim against the IM arising out of a breach by the Access Seeker of this clause 18.2 (*The National Railway Safety Regulator and Related Legislation*); and
 - 18.2.2.4. undertakes to apply its reasonable endeavours to assist the IM, at the IM's cost, to comply with the provisions of the Railway Safety Act, the Occupational Health and Safety Act, the Hazardous Substances Act, the National Environmental Management Act, the National Water Act and any requirement of any other Applicable Laws or Relevant Authority regarding the performance of the Transportation Services.

18.3. **Compliance with Environmental Law**

18.3.1. The Access Seeker shall comply with its obligations under Environmental Law. Without prejudice to these obligations, the Access Seeker shall provide the IM with prompt notification of any failure to comply with Environmental Law and any notices, claims or other communication from regulatory authorities or other authorities with relevant jurisdiction in relation to environmental matters (including noise and pollution).

18.3.2. The Access Seeker shall be responsible at its own expense for obtaining in a timely fashion and maintaining in full force and effect all necessary or appropriate Consents in relation to Environmental Law as may be required for provision of the Transport Services and undertaking of the Slot/s.

18.4. **Prevention of Nuisance**

In performing its obligations under this Agreement and undertaking the performance of the Transport Services, the Access Seeker shall at all times use all reasonable endeavours to prevent any unlawful nuisance (including noisy working operations), obstruction, trespass, interference with any unlawful right of light, way, air or water, or other unlawful interference within the Network and with the rights of any adjoining landowners, tenants, occupiers and/or any Relevant Authority.

19. **GENERAL RIGHTS AND OBLIGATIONS OF THE ACCESS SEEKER**

19.1. Capacity holder and contractual counterparty:

19.1.1. The Access Seeker is the signatory to this Agreement as holder of the Train Paths allocated under this Agreement and is the contractual counterparty of the IM in respect of all commercial, financial, capacity-related rights, operational requirements and obligations arising under this Agreement.

19.1.2. The Access Seeker remains responsible for all obligations imposed on it under this Agreement, the Network Statement and any applicable Annexures.

19.2. The Access Seeker shall ensure that all Trains are Train Worthy and are certified as such in accordance with all Applicable Laws and that they are compliant with all Train requirements, specifications and standards contained in Chapter 3 of the Network

Statement.

- 19.3. The Access Seeker shall comply with the specifications, requirements and standards set out in the Network Statement in respect of all Rolling Stock that is operated by the Access Seeker for purposes of or in connection with the provision of Transport Services. In the event that any such Rolling Stock does not comply with such the specifications, requirements and/or standards the Access Seeker shall first obtain a written confirmation from the IM (which the IM may at its sole discretion withhold) that the Rolling Stock in question may be operated on the Network, and where applicable, may safely traverse any bridges and railway lines that form part of the Route(s) in respect of which the Access Seeker has been granted Access to one or more Train Paths, failing which the Access Seeker shall not be permitted to operate such Rolling Stock on the Network.
- 19.4. The Access Seeker shall ensure that:
 - 19.4.1. the Personnel engaged in the provision of its Transport Services are suitably qualified and experienced having regard to the Access Seeker's duties, functions and obligations under this Agreement and under the Network Statement;
 - 19.4.2. it exercises due care and skill having regard to the Access Seeker's duties, functions and obligations under this Agreement and under the Network Statement; and
 - 19.4.3. it timeously supplies to the Safety Regulator any data, information, documents, samples or materials that may be requested from it by the Safety Regulator, from time to time.
- 19.5. The Access Seeker shall not be permitted to knowingly transport any Unlawful Cargo in any Rail Wagon, Train or otherwise, within the Network or any Terminal, under any circumstances whatsoever.
- 19.6. The Access Seeker shall be responsible for the due preparation and completion of all the necessary documentation and the obtaining of all necessary Consents, for the Transportation of Dangerous Cargo and the Access Seeker shall sign a declaration or legend on the reverse side of such documentation stating that:

"We hereby declare that the contents of this consignment are fully and accurately described by the proper shipping name and are classified, packed, marked and labelled/placarded, and are in all respects in proper condition for transportation in

accordance with Good Industry Practice and the requirements of any Relevant Authority".

19.7. The Access Seeker, in order to comply with the requirements of the Railway Safety Act, 2024, ensure that safety management system audits are conducted by it bi-annually. These audits shall be additional to any other audits that may be conducted by the Safety Regulator or the Department of Employment and Labour from time to time.

19.8. Without derogating from any of its obligations set out in this Agreement or in terms of any Applicable Law, the Access Seeker shall ensure that:

19.8.1. it complies at all times with and adheres to the standards and requirements specified in the Network Statement, the Railway Safety Act, 2024, is at all times in possession of a valid safety permit and complies with all relevant conditions of the safety permit, any directive from the RSR, the RSR Standards and all other statutes, regulations and other Applicable Laws regulating or pertaining to the performance of Transport Services, the conduct of its business operations and the discharge of its obligations in terms of this Agreement;

19.8.2. it exercises due care and skill in the provision of the Transport Services and in the conduct of its Transport related business operations, as contemplated in this Agreement;

19.8.3. It co-operates with the IM in its efforts to comply with any and all lawful directives issued by the Safety Regulator;

19.8.4. it maintains all Consents that it is required to obtain under all Applicable Laws in order to exercise its rights and/or discharge its obligations under this Agreement, as applicable; and

19.8.5. it furnishes the IM with written reports in relation to any aspects of its operations as may reasonably be requested by the IM to confirm its compliance with this Agreement, from time to time.

19.9. Any breach of the provisions of this clause 19 (*General Rights and Obligations of the Access Seeker*) by the Access Seeker, shall constitute a breach of a material provision of this Agreement for purposes of clause 30.1.

20. **GENERAL RIGHTS AND OBLIGATIONS OF THE IM**

- 20.1. Without derogating from any of its other obligations set out in this Agreement or in law, the IM shall ensure that:
- 20.1.1. it complies at all times with and adheres to the Network Statement, Railway Safety Act, any directive from the Safety Regulator, the RSR Standards and all other statutes, regulations and Applicable Laws regulating or pertaining to the performance of the Services, the conduct of its business operations and the discharge of its obligations in terms of this Agreement;
 - 20.1.2. it exercises due care and skill in the provision of the Services and in the conduct of its Services related to business operations, as contemplated in this Agreement including the Network Statement;
 - 20.1.3. it co-operates with the Access Seeker in its efforts to comply with any and all lawful directives issued by the Safety Regulator; and
 - 20.1.4. it maintains all Consents that it is required to obtain under any Applicable Laws in order to exercise its rights and/or discharge its obligations under this Agreement, as applicable.
- 20.2. The IM shall maintain the Network in a safe operating condition as required and assessed by the Safety Regulator from time to time.
- 20.3. Any breach of the provisions of this clause 20 (*General Rights and Obligations of the IM*) by the Access Seeker, shall constitute a material breach of this Agreement for purposes of clause 30.1.

21. **SECTION 37(2) AGREEMENT**

- 21.1. Notwithstanding anything to the contrary which may be contained in this Agreement, the Parties agree that the IM shall not be liable for any breach or consequential losses by the Access Seeker and/or by any of its directors, employees, representatives, agents, subcontractors, contractors, suppliers and service providers (all of whom are agreed to constitute "mandataries" (as defined and envisaged in the OHSA) and which are jointly referred to as the Access Seeker's "Employed and Contracted Persons" of the provisions of the OHSA arising from the exercise or discharge by or on behalf of the Access Seeker of its rights and/or its obligations under this Agreement and/or arising from any breach

of this Agreement by or on behalf of the Access Seeker and/or the Employed and Contracted Persons including in connection with Access by the Access Seeker and the Employed and Contracted Persons to the Network, the Transport of Cargo by or on behalf of the Access Seeker and/or the performance of the Transport Services by or on behalf of the Access Seeker.

- 21.2. Prior to obtaining Access to the Network and undertaking the performance of any Transport Services, the Access Seeker shall enter into an agreement with the IM in terms of section 37(2) of the OHSA in respect of all Employed and Contracted Persons, in the form annexed hereto as Annexure H (*Section 37(2) Agreement*).
- 21.3. The Access Seeker acknowledges and agrees that the section 37(2) agreement set out in Annexure H constitutes a valid and binding agreement in terms of section 37(2) of the OHSA in terms of which, all responsibility (both civil and criminal) for health and safety incidents, occurrences and other matters in relation to and arising from the exercise or discharge by or on behalf of the Access Seeker of its rights and/or its obligations under this Agreement and/or arising from any breach of this Agreement by or on behalf of the Access Seeker and/or the Employed and Contracted Persons including in connection with Access by the Access Seeker and the Employed and Contracted Persons to the Network, the Transport of Cargo by or on behalf of the Access Seeker and/or the performance of the Transport Services by or on behalf of the Access Seeker.
- 21.4. In addition it is recorded that the Access Seeker shall remain responsible for ensuring compliance by all Employed and Contracted Persons with the terms and conditions set out in Annexure H (*Section 37(2) Agreement*), including providing full co-operation and information if and when the IM requests same in respect of the occupational health and safety incidents and occurrences concerning any all Employed and Contracted Persons.
- 21.5. In accepting the responsibility set out in clause 21.4, the Access Seeker shall indemnify the IM and its directors, employees, agents and representatives against any claims, losses, damages, liability, costs and expenses resulting directly from the Access Seeker's negligent act or omission, which they may, at any time sustain or incur arising out of or in connection with the direct loss, damage, injury or death, however caused by a negligent act, omission or wilful misconduct of the Access Seeker and/or any Employed and Contracted Persons; provided that such claims, losses, damages, liability, costs, expenses, injury or death is not caused by the wilful actions or omissions or gross negligence of the IM.

- 21.6. The Parties agree, that nothing contained in the agreement that is envisaged (in clause 21.2) to be concluded in terms of section 37(2) of the OHSA read with **Annexure H** (*Section 37(2) Agreement*) shall detract from the Access Seeker's obligations in terms of this Agreement (excluding **Annexure H** (*Section 37(2) Agreement*)).

22. **INSURANCE**

- 22.1. Each Party shall obtain and maintain insurance as provided for in this clause 22 and shall ensure that the Access Seeker and service providers are also adequately insured in respect of the performance of their respective obligations.
- 22.2. The Parties expressly agree and record that insurance is a risk mitigation measure and that the obtaining of any insurance by a Party as well as any failure or delay by a Party to obtain or maintain any insurance for any reason whatsoever (including as a result of any repudiation and/or any insurance becoming unavailable) and any assessment, investigation, rejection, delay or deferral of or arising from or in connection with any insurance claim by a Party; shall not entitle such Party to delay or defer the performance of, or to refuse to discharge, any or all of its obligations under this Agreement (including its obligations to effect any payments and its obligations in terms in clause 27 (*Indemnities*)). Similarly, the obtaining of or any failure to obtain or maintain any insurance, by a Party, in terms of this clause 22 shall not preclude the other Party from exercising its rights under, and enforcing compliance with, this Agreement, including the bringing of any claim by such other Party.
- 22.3. Throughout the Contract Period each Party shall insure or self-insure or, at its own expense, obtain and maintain, with one or more reputable brokers or insurers registered in South Africa or abroad, adequate insurances in respect of at least the following risks which may arise from or in connection with: (i) the exercise of its rights and the discharge of its obligations under this Agreement; and (ii) any actions and omissions (whether wilful or negligent) by it and/or by its directors, officers, officials, employees, sub-contractors, agents and representatives, arising from or in connection with this Agreement; and (iii) in the case of the Access Seeker, its associated operations and activities including the provision of Transport Services. Such insurances shall include:
- 22.3.1. in the case of the Access Seeker, all risk insurance in respect of all moveable and immovable assets that are utilised, operated and/or otherwise deployed by or on behalf of the Access Seeker, in connection with, or for purposes of performing of its obligations and exercising of its rights under, this Agreement and the conduct of its associated operations and activities,

including the provision of Transport Services, which insurance shall extend to and include all events of theft, tampering, vandalism, damage, loss and/or destruction of any or all moveable and immoveable assets of the Access Seeker (including all Rolling Stock, facilities, infrastructure, plant and equipment), including as a result of riot, civil unrest, civil insurrection, civil commotion and/or protest action, as well as all other perils as are applicable and insurable in the insurance market including all Force Majeure perils, and which insurance shall be adequate to cover the cost of repair, reinstatement or replacement of such assets, as applicable;

22.3.2. all events of bodily harm, injury, illness, death of Persons (including the other Party's directors, officers, officials, employees, subcontractors, agents and representatives) and/or damage to or destruction of property of Persons (other than the other Party, but including the other Party's directors, officers, officials, employees, subcontractors, agents and representatives), including in each instance any liability ensuing under any statute or at common law; and

22.3.3. the indemnity provided by the relevant Party in terms of clause 27 (*Indemnities*).

22.4. The insurances required in clause 22.2 shall cover all claims, Occurrences, losses, liability, damages and any other amounts intended to be covered by such insurances where the cause of which occurred or the loss and/or damage arose during the duration of this Agreement.

22.5. The Access Seeker shall, three calendar months prior to the Services Commencement Date, and thereafter no later than 20 (twenty) Business Days prior to the commencement of the second and each subsequent Contract Year, deliver to the IM insurance certificates issued by the relevant insurers or insurance brokers (together with copies of the relevant insurance policies (schedules and wordings) as issued) in respect of the insurances envisaged in clause 22.2 which certificates shall confirm that the relevant insurance cover is in place and shall state the nature of the risks that are insured as well as the amounts insured.

22.6. The IM shall, at its own discretion, be entitled, at its own cost and expense, to appoint an independent insurance risk surveyor, assessor or broker from a reputable company to assess any insurance policies submitted by the Access Seeker to the IM in terms of this

clause 22 in order determine whether they comply with the requirements of this clause 22 including whether the risks and/or amounts insured are reasonable. Should such assessment determine that any such insurance policy is non-compliant or inadequate, the IM shall notify the Access Seeker accordingly (which notice shall include a copy of the assessment undertaken) and the Access Seeker shall, at its own cost, take the necessary steps to address the relevant non-compliance and/or shortcomings, including where applicable obtaining the necessary amendments to the relevant insurance policy or obtaining replacement or supplementary insurance, in order to ensure that it is appropriately insured against the risks to which it is reasonably exposed.

- 22.7. The Access Seeker shall immediately notify the IM in writing of any proposed cancellation or change to the terms or conditions of, or cover provided under, any insurances envisaged in clause 22.2. The Access Seeker shall not cancel any insurance envisaged in clause 22.2 unless and until it has obtained equivalent or more extensive replacement insurance and that complies with the requirements in clause 22.2 and shall provide the IM with an insurance certificate issued by the relevant insurer or insurance broker (together with a copy of the relevant replacement insurance policy as issued) in respect of the proposed replacement insurance which certificate shall confirm that the relevant insurance cover is in place and state the nature of the risks that are insured as well as the amounts insured.
- 22.8. The Access Seeker shall immediately notify the IM in writing of any repudiation, withdrawal or cancellation by any insurer of any insurances envisaged in clause 22.2. The Access Seeker shall obtain replacement insurance that it at least equivalent to the insurance that has been repudiated, withdrawn or cancelled and that complies with the requirements in clause 22.2, within a period of 15 (fifteen) Business Days from the date of such repudiation, withdrawal or cancellation and shall provide the IM with an insurance certificate issued by the relevant insurer or insurance broker (together with a copy of the relevant replacement insurance policy as issued) which certificate shall confirm that the relevant insurance cover is in place and state the nature of the risks that are insured as well as the amounts insured.
- 22.9. The Access Seeker shall comply with all terms, conditions, warranties, endorsements and any other requirements of the insurance policies envisaged in clause 22.2 and shall take all reasonable steps to ensure that the insurance cover under such insurance policies shall not be repudiated or voided.
- 22.10. In addition to any other obligation of the Access Seeker pursuant to this Agreement, the Access Seeker shall:

22.10.1. as soon as practicable after any Occurrence that may give rise to a claim under any insurance policy envisaged in this clause 22, notify the IM of such Occurrence in reasonable detail; and

22.10.2. thereafter keep the IM informed of subsequent developments concerning any such claim.

22.11. If the Access Seeker fails to comply with any of its obligations in terms of this clause 22 and fails to remedy such breach within a period of 5 (five) Business Days of being notified in writing by the IM, the IM shall be entitled to immediately suspend Access by the Access Seeker to the Network (including the provision of Services to and the performance of Transport Services by the Access Seeker) until the Access Seeker has remedied such breach, provided that if the Access Seeker fails to remedy the breach within a further period of 20 (twenty) Business Days after the expiry of the aforementioned period of 5 (five) Business Days, the IM shall be entitled to immediately terminate this Agreement by notifying the Access Seeker of such termination in writing.

22.12. The Parties acknowledge and agree that:

22.12.1. the insurances envisaged in this clause 22 shall not exempt, limit or reduce any liability or obligations of either Party under this Agreement irrespective of whether or not such liability and/or obligations are in excess, of any sums insured under such insurances; and

22.12.2. they shall not be exempted from any liability under this Agreement to which insurance cover does not apply (for whatsoever reason unless due to fault on the part of the other Party) or cannot be obtained or in respect of which they have failed obtain and/or maintain the required insurances.

23. **RIGHT OF AUDIT**

The IM or its representatives shall be entitled to audit compliance with any of the provisions of this Agreement on a random or periodic basis but with reasonable prior notice to the Access Seeker. Any such audit may involve the examination, inspection or testing of works, activities or assets of the Access Seeker on or off the Network. The IM shall use reasonable endeavours to implement any such audit in such a way that the ability of the Access Seeker to operate the Transport Services is not materially and adversely affected. The Access Seeker shall ensure that the representatives of the IM conducting such an audit shall be provided with all such assistance and access to facilities, records and assets (including the provision of copies of documents,

subject to appropriate confidentiality undertakings) as they may reasonably require in order to discharge their audit function in a proper manner.

24. **ACCESS SEEKER WARRANTIES AND COVENANTS**

24.1. The Access Seeker warrants to the IM that -

- 24.1.1. it is a limited liability company, duly incorporated and validly existing under the Applicable Laws and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;
- 24.1.2. its obligations under this Agreement (including, for the avoidance of doubt, the Network Statement) are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement and such other documents to which it is a party;
- 24.1.3. all Consents required for the conduct of the Transport Services are in full force and effect as at the Signature Date;
- 24.1.4. no litigation, arbitration, adjudication, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the Access Seeker as at the Signature Date having made all reasonable enquiries, threatened against it which is likely to have a material adverse effect on the ability of the Access Seeker to provide the Transport Services;
- 24.1.5. the Access Seeker has not committed a corrupt act, or is being investigated or has been found guilty after an investigation or enquiry proceeding for committing an act of corruption as at the Signature Date or, to the best of the knowledge of the Access Seeker as at the Signature Date having made all reasonable enquiries, which is likely to have a material adverse effect on the ability of the Access Seeker to provide the Transport Services and to perform any of its obligations in terms of this Agreement;
- 24.1.6. the Access Seeker is not subject to any obligation, non-compliance with which is likely to have a material adverse effect on its ability to conduct the Transport Services;
- 24.1.7. no proceedings or any other steps have been taken or, to the best of the knowledge of the Access Seeker having made all reasonable enquiries,

threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final) or deregistration of the Access Seeker or for the appointment of a liquidator, judicial manager or similar officer over it or over any of its assets;

24.1.8. it shall use reasonable care and skill in carrying out its obligations under this Agreement;

24.1.9. no material information known to any of the Access Seeker's representatives engaged in interactions concerning this transaction, with representatives of the IM has, to the best of the Access Seeker's knowledge, been withheld from the IM;

24.1.10. it has prior to the Services Commencement Date satisfied itself with the condition of the Network and has inspected it and, save as otherwise contemplated in this Agreement (including, for the avoidance of doubt, the Network Statement), satisfied itself with regard to all matters relating thereto;

24.1.11. all information disclosed by or on behalf of the Access Seeker to the IM at any time up to the Signature Date and, is true, complete and accurate in all material respects and the Access Seeker is not aware of any material facts or circumstances not disclosed to the IM which would, if disclosed, be likely to have an adverse effect on the IM's decision (acting reasonably) to award the Slot/s to the Access Seeker;

24.2. The Access Seeker covenants with the IM that for the duration of the Contract Period:

24.2.1. it shall maintain in full force and effect all Safety Permits, Consents and relevant authorisations (governmental and otherwise) necessary and shall promptly obtain any further authorisation which may become necessary to enable it to perform its obligations in terms of this Agreement (including, for the avoidance of doubt, the Network Statement);

24.2.2. it shall ensure that all operations management staff have the appropriate experience in rail operations and logistics;

24.2.3. it shall not Transfer, lease, subcontract or otherwise dispose of or cease to

exercise direct control over any or all of the Slot/s without the consent of the IM, which consent shall not be unreasonably withheld;

- 24.2.4. it shall notify the IM forthwith upon the occurrence of any event which could reasonably be expected materially and adversely to affect its ability to perform its obligations under this Agreement;
- 24.2.5. it shall not, without the prior written consent of the IM Transfer or otherwise dispose of the whole or any part (which is material in the context of the performance of the Access Seeker's obligations) of its undertakings, properties or assets by a single transaction or a number of transactions whether related or not and whether at the same time or over a period of time;
- 24.2.6. it shall (promptly upon becoming aware that the same is threatened or pending and in any case immediately after the commencement thereof) give to the IM notice in writing of any litigation, arbitration or administrative proceedings or any dispute affecting the Access Seeker or any of its assets, rights or revenues which if determined against it might have a material adverse effect on the ability of the Access Seeker to duly perform and observe its obligations under this Agreement;
- 24.2.7. the Access Seeker shall not, without the prior written consent of the IM (which the IM may at its sole discretion withhold), make application as contemplated section 4 of the Railway Safety Act for the Network or any portion thereof to be exempted from the application of the Railway Safety Act;

25. **TRANSFORMTION AND COMMUNITY DEVELOPMENT**

- 25.1. The Access Seeker may elect to support the undertaking as set out in paragraph 4.13 of the Network Statement dealing with Community and Social Development, Supplier Development and Skills Development plans.
- 25.2. If the Access Seeker elects as described in clause 25.1, the IM will supply the plans with the required contribution to the Access Seeker for consideration.
- 25.3. The Access Seeker shall determine the affordability of the plans submitted in clause 25.2. above and confirm in writing the parts of the plans and the limit of the financial exposure,

if any, that the Access Seeker will participate in.

- 25.4. The IM will confirm the acceptance of the undertaking by the Access Seeker as per clause 25.3. above.
- 25.5. Where required, the IM will ensure coordination between the activities of the IM and the Access Seeker in terms of the written confirmation as received in clause 25.3 above.
- 25.6. The Access Seeker shall endeavour to the best of its ability to comply with its undertaking in accordance with clause 25.3 above and in accordance with the process being managed by the IM in clause 25.5 above.
- 25.7. The Access Seeker shall provide on request by the IM, but not more than once per six (6) months, in respect of compliance with the plans as agreed upon in terms of clause 25.4 above, until the completion of the commitment as per clause 25.4 above.
- 25.8. The Access Seeker hereby undertakes to notify the IM in writing as soon as possible after becoming aware of any non-delivery on the commitment by either the Access Seeker or the IM on the execution of the plans as committed in clause 25.4 above.
- 25.9. In the event that the IM is in breach of the commitment as per clause 25.4 above, the Access Seeker will have the right to unilaterally withdraw from the commitment provided in clause 25.3 after providing written notice to the IM of its intention to do so and affording the IM an opportunity within 10 (ten) business days to provide reasons for the breach, if any, failing such reasons being provided, the Access Seeker withdrawal will remain but if the IM reasons are accepted, the Access Seeker will withdraw the withdrawal and Parties will agree on how to proceed in line with the objectives of this clause.

26. **INFRASTRUCTURE MANAGER WARRANTIES**

- 26.1. The IM warrants to the Access Seeker that –
 - 26.1.1. it is a limited liability company, duly incorporated and validly existing under the Applicable Law and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement;
 - 26.1.2. its obligations under this Agreement (including, for the avoidance of doubt, the Network Statement) are legal, valid, binding and enforceable against

it, in accordance with the terms of this Agreement and such other documents to which it is a party; and

26.1.3. the execution and performance of this Agreement does not and shall not contravene any obligation of the IM as at the Signature Date, or any order or other decision of any Responsible Authority, the Safety Regulator or an arbitrator, that, in each instance, is binding on the IM as at the Signature Date.

26.2. Notwithstanding anything to contrary in this Agreement the IM does not warrant to the Access Seeker –

26.2.1. the condition of the Network or any aspect thereof; and

26.2.2. the fitness for purpose of the Network for the provision of the Services or any aspect thereof.

26.3. Save as provided for in clause 27 (*Indemnities*) and save for a breach of clause 20.2 and subject to clauses 28 (*Double Recovery and Mitigation*) and 32 (*Limitation of Liability*), the IM shall not be liable to the Access Seeker for any cost, expense or matter arising out of either the condition of the Network or the suitability of the Network for the provision of the Transport Services.

27. **INDEMNITIES**

27.1. Subject to clauses 27.2 and 32 (*Limitation of Liability*), each Party (the “**Indemnifying Party**”) hereby indemnifies, defends and holds harmless the other Party (the “**Indemnified Party**”) from and against all proven direct costs, losses, damages, liabilities, expenses, claims, suits and/or proceedings, fines or penalties of any kind that are incurred or suffered by the Indemnified Party:

27.1.1. in respect of any damage to or loss of any property of the Indemnified Party;

27.1.2. in respect of any damage to or loss of any property, or any death or injury to any other Person including the directors, officers, officials, employees, agents or representatives of either Party; and/or

27.1.3. pursuant to any Applicable Law, including any clean-up and/or remedial costs resulting from or arising out of any pollution or contamination,

that is caused by, or arises from or is in any manner directly connected with the breach of this Agreement (including negligence or wilful misconduct) by the Indemnifying Party except to the extent that any such costs, losses, damages, claims, liabilities, expenses, penalties or fines, as applicable, are caused by, or arise from or in connection with negligence, fraud, wilful misconduct or breach of this Agreement by the Indemnified Party or the failure of the Indemnified Party to take reasonable steps in mitigation thereof.

- 27.2. Any amount due and payable by an Indemnifying Party to an Indemnified Party under this clause 27 in connection with any proven direct costs, losses, damages, liabilities, expenses, claims, suits and/or proceedings, fines or penalties incurred by an Indemnified Party shall be reduced by the amount of the proceeds under any policy of insurance paid to the Indemnified Party provided that this shall not in any way preclude, limit or otherwise reduce the rights of subrogation of the Indemnified Party's insurers.

28. **DOUBLE RECOVERY AND MITIGATION**

- 28.1. Without detracting from clause 28.2, neither Party to this Agreement shall be entitled to recover (whether pursuant to an indemnity or otherwise) any loss to the extent that it has already been compensated for such loss whether by way of insurance payments or otherwise, provided that this shall not in any way preclude, limit or otherwise reduce the rights of subrogation of the insured Party's insurers.
- 28.2. In particular, each Party shall be under an obligation to mitigate the consequences of any conduct in respect of which the Party may be entitled to compensation from the other Party under this Agreement (whether by way of indemnity or otherwise).

29. **FORCE MAJEURE**

- 29.1. Subject to the provisions of this clause 29 (*Force Majeure*), if a Party is delayed or is unable to perform any of its obligations under this Agreement by reason of a Force Majeure Event, such Party shall be relieved of all liability for such delay or inability as would ordinarily occasion under this Agreement, for the period of the delay or inability, provided that, if a Party is delayed or unable to perform its obligations by virtue of a Force Majeure Event, it shall immediately perform the relevant obligations as soon as it is able to do so.
- 29.2. During the continuance of a Force Majeure Event:

- 29.2.1. the Party affected by the Force Majeure Event shall as soon as practically possible but in any event not later than [5 (five) Business Days] after becoming aware of the Force Majeure Event in question, give written notice of the occurrence of such Force Majeure Event to the other Party, and such notice shall give sufficient details to identify the particular event claimed to be the Force Majeure Event; and
 - 29.2.2. the Party affected by the Force Majeure Event shall take all reasonable steps to remedy the Force Majeure Event and to minimise the effect of such circumstances upon the performance of its obligations under this Agreement, but shall not be obliged to accept or settle any industrial dispute on any terms it believes unfavourable.
- 29.3. The Party affected by the Force Majeure Event shall, within a further period of 15 (fifteen) Business Days, serve a subsequent notice setting out:
- 29.3.1. further particulars of such Force Majeure Event;
 - 29.3.2. the impact of such Force Majeure Event on its ability to perform its obligations under this Agreement;
 - 29.3.3. a reasonable estimate of the length of time by which its performance has been and, if continuing, shall be affected by such Force Majeure Event; and
 - 29.3.4. the steps which it is taking or shall take to remove, remedy and/or mitigate the adverse consequences of the Force Majeure Event on its ability to perform its obligations under this Agreement.
- 29.4. In the event that the affected Party is the Access Seeker and whilst the impact of the relevant Force Majeure Event endures, the IM shall be entitled to reallocate any affected Train Paths to other Access Seekers, or for its own use, or otherwise deal with such Train Paths, in each instance in accordance with the Network Statement. For the avoidance of doubt, such Train Paths shall revert to the Access Seeker once the Force Majeure Event in question ceases.
- 29.5. Within a period of 10 (ten) Business Days after the cessation of a Force Majeure Event in question, the Party affected by such Force Majeure Event shall notify the other Party in writing of such cessation.

- 29.6. If requested by the other Party within 10 (ten) Business Days of receiving the notification in clause 29.3, the Party affected by the Force Majeure Event shall provide the other Party with a written report, within a period of 3 (three) months after the cessation of the Force Majeure Event in question, setting out its findings to date as regards the circumstances that gave rise to the Force Majeure Event in question. This obligation shall not require the Party in question to divulge privileged information.
- 29.7. Should any Party dispute the occurrence of the Force Majeure Event or the circumstances which gave rise to it such dispute shall be dealt with in terms of the dispute resolution provisions of clause 33 (*Dispute Resolution*).

In the event that one or more Force Majeure Events (whether occurring repeatedly or ongoing) directly or indirectly result in the IM being unable to provide the whole or a substantial part of the Services over a period longer than [6 (six) months] from the date of commencement of such Force Majeure Event/s, and subject to prior notification in terms of clause 29.2.1, the IM may notify the Access Seeker in writing that it wishes to engage the Access Seeker with a view to identifying and agreeing upon any amendments to this Agreement that will remove or substantially mitigate the impact of the relevant Force Majeure Event/s on the performance of the Services (the “**FM-related Amendments**”). Following the written notification by the IM the Parties shall meet and shall engage in good faith, within a period of 15 (fifteen) Business Days of such written notification, provided that if the Parties are unable to reach agreement on the FM-related Amendments within a period of 30 (thirty) Business Days of the commencement of such engagement, the IM shall be entitled to refer the matter to an Independent Expert, in terms of clause 33 (*Dispute Resolution*), for an expert determination of the FM-related Amendments, provided further that if the Independent Expert determines that, having regard to the nature of relevant Force Majeure Event/s, the impact of the applicable Force Majeure Event/s cannot be removed or substantially mitigated by any FM-related Amendments that are reasonable, commercially viable for the IM, and practical in the circumstances having regard to the interests of both Parties, the IM or the Access Seeker shall be entitled to terminate this Agreement on not less 60 (sixty) Business Days’ written notice to the Access Seeker.

- 29.8. The IM will endeavour to offer the IM an alternative Slot in lieu of a Slot that could not be utilised as a direct result of the Force Majeure Event affecting the IM. In the event that, due to operational constraints, it is not possible for IM to offer an alternative Train Path, or if the Access Seeker does not wish to use an alternative Train Path at the time

provided by the IM, the Train Path Fee will be refunded by the IM.

30. BREACH

Material Breach

30.1. Unless otherwise provided in this Agreement, if IM or the Access Seeker (the "**Defaulting Party**") commits a breach of any material provision or term of this Agreement (other than a provision or term that contains its own remedies or limits the remedies in the event of a breach thereof) and fails to remedy such breach within 30 (thirty) days of receipt of written notice from the other Party (the "**Aggrieved Party**") requiring the Defaulting Party to do so, or such breach is incapable of remedy, the Aggrieved Party shall be entitled, but not obliged to:

- 30.1.1. a claim specific performance;
- 30.1.2. terminate this Agreement with immediate effect on further written notice to the Defaulting Party; or
- 30.1.3. if the Defaulting Party is the Access Seeker ~~TOE~~, the IM shall be entitled, but not obliged to suspend Access by the Access Seeker to the Network and each Route in respect of which the Access Seeker has been allocated one or more Train Paths ~~Slots~~, for as long as the breach is not remedied, and during such suspension the Access Seeker shall not be permitted to perform any Transport Services;

in any event without prejudice to the Aggrieved Party's right to claim damages, which right shall be subject to the provisions of clause 32 (*Limitation of Liability*).

Non-material Breach

30.2. In addition to the provisions of clause 30.1 above, if a Party commits a breach of any non-material provision or term of this Agreement in relation to the other Party (the "**Aggrieved Party**") (other than those which contain their own remedies or limit the remedies in the event of a breach thereof) and fails to remedy such breach within 14 (fourteen) days of receipt of written notice from the Aggrieved Party requiring it to do so or if the breach in question is incapable of remedy, then the Aggrieved Party shall be entitled, but not obliged to:

- 30.2.1. give an initial written warning to the Party in breach describing that breach

in reasonable detail;

30.2.2. issue a second warning following the persistence or recurrence of that breach within a period of 60 (sixty) days after the initial written warning, stating that the breach persists or has reoccurred within the aforementioned period of 60 (sixty) days after the initial written warning;

30.2.3. if notwithstanding the second and final warning the breach re-occurs within a further period of 60 (sixty) days after the second and final written warning in terms of clause 30.2.2, then:

30.2.3.1. where the Aggrieved Party is the IM on 10 (ten) days' written notice to the Access Seeker:

30.2.3.1.1. claim specific performance; or

30.2.3.1.2. suspend Access by the Access Seeker to the Network in relation to any or all of the Train Paths for as long as the breach is not remedied, and during such suspension the Access Seeker shall not be permitted to perform any Transport Services;

in either event without prejudice to the IM's right to claim damages, which right shall be subject to the provisions of clause 32 (*Limitation of Liability*) which shall apply mutatis mutandis;

30.2.3.2. where the Aggrieved Party is the Access Seeker, on 10 (ten) days' written notice to the IM:

30.2.3.2.1. claim specific performance; and/or

30.2.3.2.2. claim damages other than where the breach by the IM relates to any failure or refusal by the IM to provide Services in terms of this Agreement, which right to claim damages shall be subject to the provisions of clause 32 (*Limitation of Liability*);

provided that no Party shall be entitled to cancel the Agreement as a result of any

non- material breach by another Party of the terms of this Agreement.

- 30.3. In addition, a Party may terminate this Agreement with immediate effect on written notice to the other Party in the event that a Party commits an Event of Default, that if the Access Seeker commits an Event Default, the IM shall be entitled, to elect whether it wishes to terminate this Agreement as envisaged above or to suspend Access by the Access Seeker to the Network and each Route in respect of which the Access Seeker has been allocated one or more Train Paths, on written notice to the Access Seeker, for as long as the Event of Default is not remedied, and during such suspension the Access Seeker shall not be permitted to perform any Transport Services. Subject to clause 32 (*Limitation of Liability*) a of termination of this Agreement in terms of this clause shall be without prejudice to the aggrieved Party's right to claim damages.
- 30.4. The termination of this Agreement in terms of this clause 30 (*Breach*) shall have the effect of terminating the respective rights and obligations of the Parties save for the rights of a Party that have already accrued prior to the event giving rise to the termination.
- 30.5. The exercise by the IM of any remedy or rights in terms of this clause 30 (*Breach*) or any other provision of this Agreement shall not restrict, diminish or detract in any other manner from the IM rights under any Guarantee or replacement Guarantee provided by the Access Seeker in terms of this Agreement.

31. **LIMITATION OF LIABILITY**

- 31.1. Notwithstanding anything to the contrary in this Agreement the IM shall not be liable under any circumstances for any loss, harm, damage or destruction, of whatsoever nature and howsoever arising, to any Approved Cargo belonging to or Transported by the Access Seeker unless such loss, harm, damage or destruction is caused by the gross negligence or willful misconduct of the IM or its directors, officers, officials, employees, agents or representatives.
- 31.2. The Parties agree that neither Party shall be liable to the other Party for any consequential, special, indirect or punitive damages and/or any economic loss of the other Party whatsoever and howsoever arising, including but not limited to any loss of turnover, loss of profit, loss of production, loss of contract, loss of anticipated saving, and/or demurrage.

32. **DISPUTE RESOLUTION**

32.1. **Referable Disputes**

The provisions of this clause 33 (*Dispute Resolution*) shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties in relation to in this clause, a “**dispute**” means any dispute, disagreement or claim arising between the Parties in connection with:

- 32.1.1. the formation or existence of;
 - 32.1.2. the implementation of;
 - 32.1.3. the interpretation or application of the provisions of;
 - 32.1.4. the Parties’ respective rights and obligations in terms of or arising out of, or the breach or termination of
 - 32.1.5. the validity, enforceability, rectification, termination or cancellation, whether in whole or in part of;
 - 32.1.6. any documents furnished by the Parties pursuant to the provisions of
- this Agreement, or which relates in any way to any matter affecting the interests of the Parties in terms of this Agreement.

32.2. **Internal Referral**

- 32.2.1. If a dispute arises in relation to any aspect of this Agreement, other than an Expert Dispute, the Parties shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process –
 - 32.2.1.1. all disputes shall first be referred to the Access Seeker Representative (or his alternate) and the relevant IM Representative (or his alternate) for resolution;
 - 32.2.1.2. if such IM Representative (or his alternate) and the Access Seeker Representative (or his alternate) are unable to resolve the dispute within 10 (ten) Business Days of the referral of

the dispute to them either Party may refer the dispute for a decision by the respective chief executive officers of the Parties.

32.2.2. In attempting to resolve the dispute in accordance with the provisions of this clause 33.2, the IM and the Access Seeker shall (and shall ensure that their employees and representatives shall) use reasonable endeavours to resolve any matter or issue without delay by negotiations or any other informal procedures which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the matter or issue without necessity of formal proceedings.

32.2.3. Any matter or issue which has not been resolved by the representatives contemplated in clause 33.2.1.2 within 5 (five) Business Days of the dispute being referred to them (or any longer period agreed between those Parties) or in respect of which either the IM or the Access Seeker has refused to participate in the informal procedures contemplated in this clause 33.2.3, shall be treated as a dispute in respect of which informal resolution has failed.

32.2.4. In the event that the informal resolution has failed either Party shall be entitled to refer the dispute to arbitration by giving the other Party, written notice of such referral and such dispute shall accordingly be determined in accordance with the provisions of clause 32.5 (read with clause 32.6).

32.3. **Performance to Continue**

No reference of any dispute to any resolution process in terms of this clause 33 (*Dispute Resolution*) shall relieve any Party from any liability for the due and punctual performance of its obligations under this Agreement.

32.4. **Expert Dispute**

32.4.1. The Parties agree that, other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction, where an Expert Dispute occurs such Expert Dispute shall be dealt with in accordance with the provisions of this clause 33.4.

32.4.2. The Independent Expert shall be a person or an entity which is

appropriately qualified, impartial, , and which has not less than 15 (fifteen) years appropriate expertise and experience in South African and/or international rail operations in relation to the operation and maintenance of a freight rail network that is similar to the Network and freight rail operations which are similar to the Transport Services.

- 32.4.3. If the Parties are unable to agree upon the identity of the Independent Expert within 10 (ten) Business Days of the Expert Dispute arising, the Independent Expert shall be nominated, at the request of either of the Parties by the Chairperson of the Johannesburg Society of Advocates, or its successor body. If the Chairperson of the Johannesburg Society of Advocates fails or refuses to make the nomination, either Party approach the Chairperson of the Legal Practice Council (or its successor body) and if the Chairperson or the Legal Practice Council fails or refuses to make the nomination, either Party may approach the High Court of South Africa to make such nomination. To the extent necessary, the court is expressly empowered to do so.
- 32.4.4. The Independent Expert shall act as an expert and not as an arbitrator. The Independent Expert's determination shall be given in writing no later than 25 (twenty five) Business Days, following the appointment of the Independent Expert in terms of clauses 33.4.2 and 33.4.3 or the submission of any written submissions in terms of clause 33.4.5 and/or any books, records, information in terms of clause 33.4.8, whichever occurs later, which determination shall be final and binding on the Parties and shall not, save in the case of manifest error (which may be corrected by the Independent Expert) be referred to arbitration or any court.
- 32.4.5. If the Independent Expert refuses to act, dies, becomes incapacitated or unfit to act, then a replacement for the initial Independent Expert shall be appointed in the same manner as set out in clause 33.4.3.
- 32.4.6. Subject to clause 33.4.8 the Independent Expert:
 - 32.4.6.1. shall have the fullest and freest discretion with regard to the determination and the method to be followed in arriving at his decision (including whether or not to have a hearing, provided that any such hearing, if held, shall be conducted in camera and informally, provided that legal representation shall be

allowed);

- 32.4.6.2. shall, where the provisions of this Agreement require a Party to act reasonably and where the adherence or otherwise of the relevant Party to such requirement forms part of the subject matter of the relevant Expert Dispute, be entitled to determine whether the relevant Party has indeed acted reasonably;
- 32.4.6.3. shall be entitled to take advice from any Person considered by him to have expert knowledge with reference to the subject matter of the Expert Dispute;
- 32.4.6.4. shall, acting reasonably, be entitled to determine the liability for his fees incurred in the determination of the Expert Dispute, in such manner and against one or both Parties as he may determine.
- 32.4.7. The Independent Expert shall be entitled to call for any books, records, information and other data deemed necessary by the Independent Expert for purposes of determining the Expert Dispute. The Parties shall comply with any such request within 10 (ten) Business Days of the date of such request by the Independent Expert, unless legal privilege applies or a court or arbitration order or contractual agreement (other than this Agreement) prevents a Party from releasing the requested books, records, information and other data to the Independent Expert.
- 32.4.8. The Independent Expert and any Person assisting or providing advice shall keep all information, documentation and other material submitted otherwise made available or Disclosed to either or both of them, strictly confidential, and to the greatest extent possible, in accordance with the provisions of clause 36 (*Confidentiality*), neither the Parties nor the Independent Expert (and any Person assisting or providing advice) shall be entitled to publish, make public any statement or otherwise Disclose any information pertaining to the determination of the Independent Expert.
- 32.4.9. In the case of an expert dispute the costs will be covered by the unsuccessful party.

32.5. Arbitration

- 32.5.1. Without detracting from the generality of the provisions of clause 33.1, the Parties agree that where the provisions of this Agreement require a Party to act reasonably and where the adherence or otherwise of the relevant Party to such requirement forms part of the subject matter of a dispute under this clause 33.5, the arbitrator shall be entitled to determine whether the relevant Party has indeed acted reasonably.
- 32.5.2. This clause 33 (*Dispute Resolution*) shall not preclude any Party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator.
- 32.5.3. Save to the extent that this clause 33 (*Dispute Resolution*) provides to the contrary, no Party shall be entitled to institute any legal proceedings against the other Party in connection with any dispute unless and until such dispute has been submitted to arbitration in terms of this clause 33.5 and such arbitration proceedings have been concluded.
- 32.5.4. The Parties hereby consent to the arbitration being dealt with on an urgent basis in terms of the prevailing Rules for the Conduct of Arbitrations of the Association of Arbitrators (Southern Africa) should either Party by written notice given to the other require the arbitration to be held on an urgent basis. In such event, the Parties agree to apply jointly to the arbitrator as required in terms of the said rules to facilitate such urgent arbitration.
- 32.5.5. The arbitrator shall be, if the matter in dispute is principally:
- 32.5.5.1. a legal matter, a practising advocate or attorney of Johannesburg of at least 15 (fifteen) years' standing;
 - 32.5.5.2. an accounting matter, a practising chartered accountant of Johannesburg of at least 15 (fifteen) years' standing;
 - 32.5.5.3. any other matter, any independent and suitably qualified and experienced rail engineer.
- 32.5.6. Should the Parties fail to agree whether the dispute is principally a legal, accounting or other matter within 5 (five) Business Days after the giving of

notice in terms of clause 33.2.4, the matter shall be deemed to be a legal matter.

- 32.5.7. Should the Parties fail to agree on an arbitrator within 5 (five) Business Days after the giving of notice in terms of clause 33.5.3, the arbitrator shall be appointed, at the request of either Party, by the Chairperson of the Johannesburg Society of Advocates in terms of the arbitration rules of the Association of Arbitrators (Southern Africa). If the Chairperson of the Johannesburg Society of Advocates fails or refuses to make the appointment, either Party may approach the Chairperson of the Legal Practice Council (or its successor body) to effect such appointment and if the Chairperson or the Legal Practice Council fails or refuses to make the appointment, either Party may approach the High Court of South Africa to make such appointment. To the extent necessary, the court is expressly empowered to do so.
- 32.5.8. The arbitration shall be held at Sandton or any place agreed to between the two parties, which shall also be the seat of the arbitration.
- 32.5.9. The award of the arbitrator shall be final and binding upon the Parties (who hereby agree to carry out the award) unless any Party wishes to take the award of the arbitrator on review, in which event such Party shall have 7 (seven) days after finalisation of the determination of the arbitrator within which to notify the other Party of its intention to take the award on review. Any review proceedings must be commenced within 30 (thirty) days of the giving of such notice. Subject to the foregoing, the Parties hereby exclude all rights of review or appeal, which might otherwise be conferred on them by law.
- 32.5.10. The Parties agree to keep the arbitration (including the subject matter of the arbitration and the evidence heard during the arbitration) confidential and not to disclose it to anyone except for purposes of obtaining an order of court as contemplated in this clause 33 (*Dispute Resolution*).

32.6. **General**

The provisions of this clause 33 (*Dispute Resolution*):

32.6.1. constitute an irrevocable consent by each Party to any proceedings in terms hereof and no Party shall be entitled to withdraw therefrom or claim at any such proceedings that it is not bound by such provisions; and

32.6.2. are severable from the rest of this Agreement and shall remain in effect despite the termination of or invalidity for any reason of this Agreement.

33. **GOVERNING LAW AND JURISDICTION**

33.1. This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa.

33.2. Subject to clause 33 (*Dispute Resolution*), the Parties hereby consent to the exclusive jurisdiction of the High Court of South Africa, Gauteng Local Division, Johannesburg for any proceedings arising out of or in connection with this Agreement.

34. **NOTICES AND LEGAL SERVICE**

34.1. Subject to clause 16 (*IM Representatives*) and clause 17 (*ACCESS SEEKER Representative*), all notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by any Party in terms of this Agreement or relating to it shall be given in writing and sent by courier, or delivered by hand, or transmitted by e-mail to the recipient Party at its relevant address set out below –

34.1.1. if to the IM, at: Transnet Rail Infrastructure Manager

Street address: [96 Rissik Street, Braamfontein, Johannesburg]

Postal address: [P.O. Box 72501, Parkview, Johannesburg, South Africa, 2122]

E-mail address: [■]

marked for the attention of the CEO, Transnet Rail Infrastructure Manager

34.1.2. if to the Access Seeker, at:

Street address: [■]

Postal address: []

E-mail address: []

marked for the attention of the Access Seeker Representative

- 34.2. Any Party may, by written notice to the other Parties, change its *domicilium* address to any other address in South Africa which is not a post office box or *post restante* and/or change the person designated for whose attention such notices or other communications are to be given.
- 34.3. Any notice given in connection with this Agreement shall, save where a particular form of notice is stipulated, be:
- 34.3.1. delivered by hand; or
 - 34.3.2. sent by courier; or
 - 34.3.3. sent by e-mail,
- to the *domicilium* chosen by the Party concerned.
- 34.4. A notice given as set out above shall be deemed to have been duly given (unless the contrary is proved):
- 34.4.1. if delivered by hand, on the date of delivery on a business day; or
 - 34.4.2. if sent by courier, on the date of delivery by the courier service concerned, where that date is a business day; or
 - 34.4.3. if sent by e-mail, on first business day after the time of transmission.
- 34.5. The provisions of this clause 35 (*Notices and Legal Services*) shall not invalidate any notice or other communication that is actually given to and received by a Party otherwise than as described in the preceding provisions of this clause 35 (*Notices and Legal Services*).
- 34.6. The Parties choose their respective physical addresses in clause 35.1 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served.

35. **CONFIDENTIALITY**

35.1. For purposes of this clause 36 (*Confidentiality*),

35.1.1. **"Confidential Information"** shall mean, in relation to the Disclosing Party, any Information of any kind or nature which is proprietary to the Disclosing Party, whether or not formally designated as confidential and includes:

- 35.1.1.1. Information regarding the any Corridors and/or Routes operated within or by the Disclosing Party but excludes information contained in the Network Statement;
- 35.1.1.2. Information regarding the Network and/or associated freight rail assets, infrastructure, Terminals, Locomotives and/or Rail Wagons that are owned and/or operated by the Disclosing Party, but excludes information contained in the Network Statement;
- 35.1.1.3. Information regarding the business and commercial operations of the Disclosing Party;
- 35.1.1.4. Information regarding the Disclosing Party's business information, models (financial and/or otherwise), systems, operations, strategic plans, strategies, projections, operating methodologies, market opportunities and information and/or documentation regarding any litigation (current, pending and/or anticipated);
- 35.1.1.5. Information regarding the Disclosing Party's contracts (whether concluded or in the process of being negotiated and concluded);
- 35.1.1.6. Information regarding the Disclosing Party's operating and maintenance records, reports, drawings, diagrams, designs, plans, and specifications, but excludes information contained in the Network Statement;
- 35.1.1.7. Information (including documentation) issued or provided by the Disclosing Party to the Receiving Party in connection with, in respect of and/or in terms of this Agreement;

- 35.1.1.8. the Disclosing Party's commercial, financial and/or technical Information (including documentation) including:
 - 35.1.1.8.1. Information (including documentation) relating to operating and management structures, employees and/or organograms; and
 - 35.1.1.8.2. Information (including documentation) relating to the identity of suppliers, service providers, manufacturers, operators, maintainers and business contacts;
- 35.1.1.9. the Disclosing Party's technical Information and documentation including but not limited to operating manuals, procedures, processes and philosophies, operating procedures and processes, operating, maintenance and repair manuals, operating and maintenance methodologies and philosophies, drawings, designs, maps, specifications, and aerial photographs; and
- 35.1.1.10. Information (including documentation) evidencing or regarding the Disclosing Party's intellectual property in whatever form, whether registered or not and whether or not capable of being registered, including but not limited to patents, designs, trademarks, know-how, specifications, data, formulae, methodologies, mining and/or manufacturing processes and trade secrets;
- 35.1.2. **"Disclose"** shall mean the direct or indirect use, dissemination, publication, communication, replication, verbalisation, transference or transmission of Confidential Information, in any manner or form whatsoever, and the terms **"Disclosing"**, **"Disclosed"** and **"Disclosure"** shall have corresponding meanings;
- 35.1.3. **"Disclosing Party"** shall mean the Party that Discloses any Confidential Information to the other Party;
- 35.1.4. **"Information"** shall mean any and all data whether of a historical, current

or future nature, irrespective of whether same is stored, recorded or embodied in handwritten, printed, visual, electronic, audible or other format or medium, and belonging to and created by or for the benefit of the Disclosing Party, whether in the possession or under the control of the Disclosing Party, or in the possession or under the control of any other Person, including, without limiting its ordinary meaning, all data, computer data, programming code, codes, letters, telefaxes, telegrams, faxes, documents, agreements, registers, specifications, formulae, maps, plans, drawings, designs, diagrams, images, photographs and any other documentation;

35.1.5. **"Receiving Party"** shall mean the Party that receives any Confidential Information to the other Party; and

35.1.6. **"Representatives"** shall mean, in relation to a Party its respective employees, officers and directors, financiers, credit rating agencies, auditors, legal advisors, agents, contractors and sub-contractors.

35.2. The Receiving Party irrevocably and unconditionally undertakes to the Disclosing Party that:

35.2.1. any Confidential Information in its possession or under its control obtained pursuant to this Agreement shall be maintained under conditions of strict confidentiality;

35.2.2. the Receiving Party shall protect all Confidential Information using the same standard of care used to safeguard its own information of a confidential nature, and undertakes that such Confidential Information shall be stored and handled in such a way as to prevent any unauthorised Disclosure thereof;

35.2.3. Confidential Information shall be made available to only those of its Representatives who need to know such Confidential Information for the purpose of that Party performing its obligations under this Agreement and/or enforcing and protecting its rights under this Agreement and/or complying with its legal obligations;

35.2.4. it shall take reasonable steps to ensure that those Representatives comply with the provisions of this clause 36 (*Confidentiality*) and shall be liable for

any non-compliance by such Representatives with the provisions of this clause;

35.2.5. Confidential Information of the Disclosing Party may only be used by the Receiving Party for the purposes of discharging its obligations in terms of this Agreement;

35.2.6. the Receiving Party shall hold and maintain and shall procure that all of its Representatives. to whom it Discloses any Confidential Information shall hold and maintain, in strictest confidence all Confidential Information; and

35.2.7. save as provided in clause 36.4, Confidential Information shall not be Disclosed by the Receiving Party, directly or indirectly, to any Person; and

35.2.8. where the Receiving Party is the IM, the IM shall ensure that none of the Access Seeker's Confidential Information is disclosed directly or indirectly to a party not entitled to such information or may use the information to the prejudice of an Access Seeker.

35.3. The Receiving Party irrevocably and unconditionally undertakes in favour of the Disclosing Party that if it becomes aware that there has been, as a result of or in the course of the performance of this Agreement, unauthorised Disclosure or use of the Confidential Information, it shall promptly bring the matter to the attention of the Disclosing Party in writing.

35.4. This clause 36 (*Confidentiality*) shall not apply to Confidential Information which:

35.4.1. is or becomes generally available to the public other than as a result of a breach of this Agreement or a breach of a confidentiality obligation owed to the Disclosing Party of which the Receiving Party should have reasonably been aware;

35.4.2. the Receiving Party can show by written record was made available by the Disclosing Party on a non-confidential basis prior to Disclosure in terms of this Agreement;

35.4.3. becomes available to the Receiving Party from a source other than the Disclosing Party and there has not been a breach of a confidentiality obligation owed to the Disclosing Party of which the Receiving Party should have reasonably been aware;

- 35.4.4. is Disclosed to a *bona fide* potential acquirer (direct or indirect) of Receiving Party or the whole or a substantial part of the Receiving Party's business as part of a confidential due diligence process;
 - 35.4.5. it is necessary for the Receiving Party to Disclose in the proper performance of its obligations under this Agreement and/or the Network Statement and/or enforcing and protecting its rights under this Agreement and/or the Network Statement, including in relation to any dispute or Expert Dispute as envisaged or provided for in clause 33 (*Dispute Resolution*);
 - 35.4.6. is, at the time of Disclosure, in the public domain or is already lawfully in the possession of the Person to whom Disclosure is made;
 - 35.4.7. is required to be Disclosed by law, by any court or arbitration order, by any regulatory body to which it is subject or by any securities stock exchange on which the shares of the Receiving Party (or its Affiliates) are listed or any other competent regulatory authority; or
 - 35.4.8. is requested by regulatory institutions such as RSR and TER according to their mandate.
- 35.5. The receipt by the Receiving Party of Confidential Information under this Agreement shall not be construed as granting to the Receiving Party any right in or to use, exploit or further develop such Confidential Information on any basis other than solely to further the purposes permitted in terms of this clause 36 (*Confidentiality*).
- 35.6. Upon the Receiving Party ceasing to have any further rights or obligations under this Agreement or upon the request of the Disclosing Party whose Confidential Information is held by the Receiving Party shall either (at the Disclosing Party's option): (i) return all tangible items of Confidential Information in the possession or control of the Receiving Party (or its Affiliates) to the Disclosing Party, or (ii) permanently destroy all such materials and certify to the Disclosing Party that such materials have been destroyed, provided that nothing in this clause shall be read as precluding the Receiving Party from retaining such Confidential Information as it is required by law to retain as part of its records.
- 35.7. Subject to the provisions of clause 36.8, the Parties agree that the disclosure of Confidential Information by the Receiving Party otherwise than in accordance with the provisions of this Agreement shall entitle the Disclosing Party to institute action for breach

of confidence against the Receiving Party as envisaged by section 65 of the Promotion of Access to Information Act, No. 2 of 2000, as amended ("**PAIA Act**"), as amended.

- 35.8. The Parties acknowledge that the provisions of clause 36.7 shall not be construed in such a manner as to exclude the applicability of any ground of refusal contained in the PAIA Act which may be applicable in the event that the Receiving Party shall receive a request for the whole or any part of the Confidential Information in terms of the PAIA Act.

36. **LENDER PROTECTIONS**

- 36.1. The IM agrees to conclude a direct agreement with the Access Seekers Finance Parties on terms that are reasonably acceptable to the IM provided that:

36.1.1. any rights of substitution that are incorporated in such direct agreement shall provide for approval by the IM of the selection and appointment of any substitute party within 30 business days;

36.1.2. any selected substitute party shall:

36.1.2.1. be required to comply with all requirements of Chapter 3 (*Access Requirements*) of the Network Statement relating to Access Seekers (as defined in the Network Statement).

- 36.2. The Access Seeker shall be entitled to conclude a cession *in securitatem debiti* with one or more Finance Parties in respect of this Agreement and as security for its obligations under its Finance Documents.

37. **CESSION, DELEGATION AND ASSIGNMENT**

- 37.1. Save as provided in clause 36.2 or as may be required to give effect to a bona fide intra-group restructuring as envisaged in clause 39.1, the Access Seeker shall not delegate, assign, transfer, alienate, encumber (in any manner including by means of pledge, mortgage, notarial bond, call option, cession *in securitatem debiti*) or otherwise dispose of any of its rights and/or obligations under this Agreement to any other Person, without the prior written approval of the IM which consent may be withheld by the IM.

- 37.2. In the event of the corporatisation of the IM, no consent will be required to transfer and rights and obligations from Transnet to IM as a corporatised entity.

38. **CHANGE OF CONTROL AND DISPOSALS**

- 38.1. The Access Seeker and any company of which the Access Seeker is a subsidiary (other than a listed company), shall not undergo a Change of Control without the prior written approval of the IM, provided that the Access Seeker shall and company of which the Access Seeker is a subsidiary shall not be precluded from undertaking or participating a bona fide intra-group restructuring if the Access Seeker's credit rating will not be negatively impacted by such intra-group restructuring, as confirmed in a written certificate issued by a reputable and independent audit firm to the IM.
- 38.2. The Access Seeker shall ensure that there no majority Transfer, assignment, cession, exchange, renunciation or other disposal of the whole or any material part of the business of the Access Seeker without the prior written approval of the IM, which approval shall not be unreasonably withheld and shall be provided by the IM within 30 (thirty) days of such request, failing which the IM shall be deemed to have approved.

39. **SEVERABILITY**

The Parties agree that each clause of this Agreement shall be severable, the one from the other, and that if any provision in this Agreement which is or becomes illegal, invalid or unenforceable in any jurisdiction affected by this Agreement shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be treated *pro non scripto* and severed from the balance of this Agreement, without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of such provision in any other jurisdiction, unless such provision is of the essence to this Agreement.

40. **NATURE OF AGREEMENT**

- 40.1. The relationship between the Parties under this Agreement is one of independent contractors only. Unless otherwise expressly provided in this Agreement, nothing in this Agreement shall be construed as giving rise to or creating a legal relationship of agency, partnership, association, trust, joint venture or employment between the Parties.
- 40.2. No party or any of its employees, agents, representatives or contractors shall be deemed or construed to be an employee, agent, contractor or representative of any other Party.
- 40.3. The Parties expressly acknowledge that no Party has any authority whatsoever to represent or to bind the other Party in any capacity or manner whatsoever. In particular

but without limiting the generality of the foregoing, and save as expressly provided for in this Agreement, no Party shall be entitled to bind or oblige or incur any liability or obligations on behalf of either or both of the other Party nor sign any document on behalf of either or both of the other Party, and no such authority is to be implied.

- 40.4. No party or any of its employees shall at any time hold itself and/or themselves out to be the employees of one or both of the other Party and no Party nor any of its employees shall be entitled to any of the benefits provided by the other Party to their employees.

41. **STIPULATIO ALTERI**

No part of this Agreement shall constitute a stipulation for the benefit of a third party in favour of any Person who is not a Party to this Agreement unless the provision in question expressly provides that it does constitute a stipulation for the benefit of a third party.

42. **WHOLE AGREEMENT**

- 42.1. This Agreement constitutes the whole agreement between the Parties relating to the subject matter hereof and neither Party shall be bound by any undertakings, representations (whether implied or tacit), warranties (whether implied or tacit), promises or the like, which are not expressly recorded herein.

- 42.2. Each of the Parties acknowledges that

42.2.1. it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly contained in or referred to in this Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this Agreement; and

42.2.2. this clause 43 (*Whole Agreement*) shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under any Law governing this Agreement.

43. **AMENDMENTS**

Save as otherwise provided in this Agreement, and subject to clause 5 (Incorporation of Network Statement), no amendment, alteration, addition to or variation, consensual cancellation or novation of this Agreement, no settlement of any disputes arising under this Agreement, and no waiver of any right arising from this Agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by both Parties.

44. **WAIVER**

No latitude, relaxation, extension of time or other indulgence which may be given or allowed by any Party to the other Party in respect of the performance of any obligation herein, and no delay or forbearance in the enforcement of any right of any Party arising from this Agreement, and no single or partial exercise of any right by any Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by such Party or operate as a waiver or a novation of or otherwise affect any of the Party's rights in terms of or arising from this Agreement or estop or preclude any such Party from enforcing at any time and without notice, strict and punctual compliance with each and every provision or term of this Agreement.

45. **CONFLICTS**

The Parties agree that in the event of any conflict, contradiction, inconsistency or incongruence between the provisions of the Network Statement and the other provisions of this Agreement, the terms of the Network Statement shall prevail and any other conflicting, contradicting, inconsistent or incongruent provisions of this Agreement shall be deemed to have been amended accordingly.

46. **LANGUAGE OF THE AGREEMENT**

The language of this Agreement is the English language.

47. **FURTHER ASSURANCE**

Each Party agrees that it shall now or at any time during the subsistence of this Agreement do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the other Party as the other Party may reasonably require for giving full effect to and obtaining the full benefit of the rights power and remedies conferred upon such other Party by this Agreement.

48. **COUNTERPARTS**

This Agreement may be signed in one or more counterparts all of which shall be considered one and the same agreement. Electronic signatures of this Agreement shall not be permitted nor valid.

49. **COSTS AND EXPENSES**

- 49.1. Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.
- 49.2. The Access Seeker hereby indemnifies the IM against all costs and expenses (including legal fees and costs on an attorney and client scale as may be awarded to the IM) together with any VAT incurred in or in connection with the preservation and/or enforcement of its rights under this Agreement *vis-a-vis* the Access Seeker.

THUS SIGNED BY THE PARTIES AS FOLLOWS:

Transnet SOC Ltd acting through the Interim IM

Signature:

who warrants that he / she is duly authorised thereto

Name: Date:

Place:

Witness:

Witness:

[COMPANY NAME]

Signature:

who warrants that he / she is duly authorised thereto

Name: Date:

Place:

Witness:

Witness:

Annexure A – Allocated Slot/s

Annexure B - Approved Cargo

Approved Cargo

Categories
OreCore (Iron Ore)
OreCor (Manganese Ore)
Coal Exports NorthCor
Intermodal & Motor Vehicles*
Mineral Exports
Grain & Tankers
Other General Traffic
Metro Trains & Passenger < 12 Wagons
Passenger Trains > 12 Wagons
Loose Locomotives

SECTION TO BE FULLY UPDATED WITH FINALISED CHARGES

Annexure C – Rail Access Fee, Additional Charges and Occurrence Management Services Charges

A. Rail Access Fee

Categories	Tariff per Trainkm (Rand)	Tariff per GTK (cents)
OreCor (Iron Ore)	680	3.54
OreCor (Manganese Ore)	680	5.53
Coal Exports NorthCor	260	6.03
Intermodal & Motor Vehicles*	30	4.41
Mineral Exports	30.75	9.00
Grain & Tankers	30	6.96
Other General Traffic	30	9.50
Metro Trains & Passenger < 12 Wagons	50	0.0
Passenger Trains > 12 Wagons	60	0.0
Loose Locomotives	12	0.0

- This includes Empty wagon movements to and from workshops.

The Rail Access Fee **excludes** the following:

- Traction Electricity: This will be a pass-through cost to users of Traction Electricity

B. Traction Electricity

Item	Charging Principles	Charge
Traction Electricity usage charge	The costs of electricity traction shall be recovered from those Users/Customers that utilise electrical traction only, therefore this charge shall be excluded from the costs that are shared among all Users/Customers	Electricity traction costs is a pass-through cost to the Access Seekers that use electricity traction in accordance with their usage.

C. Application Fees

Item	Charging Principles	Charge
Application Admin Fee	1. Upon application This fee covers the administrative and operational activities associated with processing an individual Train Path application, notably Site visits and inspections, technological integration,	1. Upon application If the rail capacity is intended for freight transport, the application fee is R125 000 <i>per Train Path</i>, subject to annual

	specialised due diligence, regulatory compliance and office overheads. This covers the evaluation process up until the capacity allocation stage.	escalation. The application fee is not refundable. ii. If the rail capacity is intended for passenger transport (long distance, metropolitan and tourism), the application fee is R42 000 <i>per Train Path</i> , subject to annual escalation. The application fee is not refundable.
	2. Upon approval of Capacity Allocation If an Access Seeker advances to the capacity allocation stage, additional expenses incurred will be recovered from those Access Seekers based on a prudent itemised cost statement.	2. Upon approval of Capacity Allocation Costs as incurred.

D. Occurrence Management Services

Occurrence Management Services Charges	Charging Principles	Service Charge
In addition to the Occurrence Management Services set out in section 6.5.6, the operation of the Access Seekers' Locomotives with the guidance of a Pilot, and any other action required to be taken by or on behalf of the IM in order to resolve an Occurrence and restore the operation of the Network.	The IM shall procure these services, and the costs shall be recovered from the relevant Access Seeker.	These shall be determined from time to time, and the IM reserves the right to add to the list of chargeable costs as these are identified.

E. Penalties

i. IM Penalties

Penalty item	Procedure for evaluating penalties	Charging principles	Charge
Deviation on contractual Train Path allocation agreement	Contract / SLA / Agreement	IM will offer the Access Seeker a replacement Train Path and in an event that the Access Seeker doesn't accept the replacement Train Path; IM will process a credit note in favour of the Access Seeker.	Full Train Path fee will be refunded in case the Access Seeker doesn't accept the replacement Train Path, subject to limitation of liability clause in the rail access agreement
Train Path cancellations caused by the IM	Handshake and Clearing house Forum	IM will offer the Access Seeker a replacement Train Path and in an event that the Access Seeker doesn't accept the replacement, Train Path; IM will process a credit note in favour of the Access Seeker.	Full Train Path fee will be refunded in case the Access Seeker doesn't accept the replacement Train Path, subject to limitation of liability clause in the rail access agreement

ii. ACCESS SEEKER Penalties

Penalty item	Charging principles	Charge
Cancellations	Cancellations must be managed in accordance with Section 6.5.7 of the Network Statement. Determination of Penalties: i. Cancellations before the weekly Do-ability, the IM will pass credit for Train Paths paid in advance if the IM is able to reallocate the Train Path to another Access Seeker. ii. Full Cancellations 72 hours before departure, the IM will pass credit for Train Paths in advance if the Train Path is reallocated. iii. Full Cancellation within 72 hours up to scheduled departure time, where the cancellation is not due to a Force Majeure Event, the Access Seeker will forfeit the access fees paid in advance.	Full Train Path Access Fee for Full Cancellations 72 hours or less before departure.

F. Additional Charges Applicable to Access Seekers

1. Additional charges shall be incurred by the Access Seekers upon occurrence of the following actions or events:
 - a. Yard usage time exceeded;
 - b. Rail wagons standing (loaded or empty) in a Rail Yard exceeding yard usage time;
 - c. Locomotives staged between Trains in a Rail Yard;
 - d. Delayed arrival or departure of a Train at or from a Rail Yard, passing loop, Loading, or Off-loading Site;
 - e. Cancellation of slot;
 - f. Overloading of rail wagons;
 - g. Underloading of bulk and break-bulk rail wagons; and
 - h. Skew loading of Trains.
2. Additional charges shall be incurred by Access Seekers, for each instance in which an event delays, hinders or otherwise negatively impacts operations within any Rail Yard, or which negatively impacts, hinders or prevents adherence by the IM to the ITP and/or the MTS or which negatively impacts the rail operations of other Access Seekers, whether or not such actions or events result in any Cancellations of Slot(s) by the IM.
3. If and to the extent that the occurrence of any of the actions or events described in this section are caused by a Force Majeure Event and/or the actions or omissions of the IM, the Access Seeker shall not be liable for the associated charges that have been incurred.
4. If and to the extent that the occurrence of any of the actions or events described in this section are caused by a Force Majeure Event and/or the actions or omissions of the Access Seeker, the IM shall not be liable for the associated charges that have been incurred.

Item	Charging Principles
Yard Usage Time in Yard Exceeded (Applies to all Rolling Stock)	Where an Access Seeker exceeds the standard Yard Usage Time allocation as per service design for any unplanned reason other than force majeure, such as NTG wagons, port delays, breakdowns etc., the Access Seeker will incur penalties for every minute exceeded in the yard. Applicable penalty charges per yard will be calculated at the time of contracting and will form part of the final Service Level Agreement (SLA) between the IM and the Access Seeker as an annexure to be attached to the Rail Access Agreement. The Access Seeker will not be permitted to exceed the Yard Usage Time. Should the Access Seeker exceed the Yard Usage Time by more than 30 (thirty) minutes the train shall be deemed to have been Cancelled by the Access Seeker at the IM's reasonable discretion. The train shall thereafter depart on the next available slot, as determined by IM in its sole and absolute discretion. The Access Seeker shall be liable for the lost revenue associated with the cancelled slot. A penalty will be charged for every minute that the Yard Usage Time in the Yard is exceeded. Charges for Yard Usage Time in Rail Yards will be calculated as follows: Yard Usage time Exceeded charge = (Total Dwell time – Designed Dwell time in yard) Greater than 30 minutes, the Access Seeker will pay charges as determined above plus the opportunity costs of the next slot based on the next Train scheduled on the ITP. This principle will also cover any departure delays (loaded and empty wagons).
Overloading of a Rail Wagon in excess of its Maximum Carrying Capacity	Should a Rail Wagon be loaded in excess of its Maximum Carrying Capacity be detected during or after cargo delivery, the charges calculated on the actual Mass conveyed in the Rail Wagon as determined, shall furthermore be subject to an Overloading Charge as stated below. The Overloading Charge shall be calculated using the Access Seeker Declared Mass on execution or net Mass if overloading is detected in-transit. The overloading penalty charge will be calculated as follows: • The Access Seeker's access fee will be used as basis for computing overloading charges. On top of the normal rate (based on actual mass), additional overloading charges will be levied. • Overloaded wagons will be charged at different rates for different levels of overloading (higher charge rates will apply for larger levels of overloading) • Wagons that are overloaded by more than 3 tons shall not be allowed to proceed to its destination due to safety considerations. • Any rail wagon or train that is not accepted by the IM due to incorrect loading (skew loading or not in accordance with the loading profile) must be removed and, unless corrected by the Access Seeker before the scheduled departure time, all costs associated with such delay shall be for the account of the Access Seeker.
Underloading bulk and break-bulk rail wagons	Underloading can be a safety hazard depending on the load profile. It can cause derailments on the line. Rail wagons that are underloaded by 10 tons and more should be carded off. The IM's objective is to maximise rail usage and migrate traffic from road to rail (measured in tonne kilometre). Access Seekers who underload their trains will pay the full slot fee, but the IM reserves the right to reallocate the slot to other Access Seekers who will fully utilise the slot capacity after identifying a trend of under-loading during its quarterly reviews.
Skew Loading	Cargo loaded in wagons in a manner that is not spread uniformly over the length and width of the rail wagon as per loading profiles in Annexure 22 will be liable to charges. It is the responsibility of the Access Seeker to ensure that skew-loaded wagons are corrected before the train proceeds with its journey. Delays caused by the process of correcting skew loading will be treated the same as stated in the Yard Usage time exceeded principles.

Annexure D - Parties' Bank Details**IM bank details:**

Account name:	
Bank:	
Branch:	
Branch code:	
Account number:	
Account type:	

ACCESS SEEKER bank details:

Account name:	
Bank:	
Branch:	
Branch code:	
Account number:	
Account type:	

Annexure E - Agreed Form of the Guarantee

IRREVOCABLE ON DEMAND GUARANTEE (No)

At the request of: (Registration Number:)

(hereinafter referred to as "the **Debtor**")

We the undersigned,

..... duly authorised hereto in our

capacity(ies) as

..... of

..... (hereinafter referred to as "the

Guarantor")

do hereby bind the Guarantor as guarantor unto and in favour of

TRANSNET SOC LIMITED, a state-owned company with limited liability duly

incorporated in terms of the company laws

of the Republic of South Africa (Registration Number 1990/000900/30) (hereinafter

referred to as "**Transnet**")

for the due payment of every sum of money of any nature whatsoever which may now or at any time hereafter be or become owing by the Debtor to Transnet, its successors in title, orders and/or assigns in respect of any and all obligations of the Debtor of any nature whatsoever including, without limitation, payment of all amounts of any nature whatsoever (whether in respect of interest, principal, costs, fees or otherwise and whether contingent liabilities or otherwise) now or from time to time in the future owing by the Debtor to Transnet, its successors in title, orders and/or assigns ("the **Guaranteed Obligations**"), provided that, notwithstanding anything to the contrary contained in this payment demand guarantee ("the **Guarantee**"), the total amount recoverable by Transnet from the Guarantor hereunder shall not exceed the sum of R ("the **Guaranteed Amount**").

We, on behalf of the Guarantor, hereby agree irrevocably and unconditionally that:

1. We guarantee to Transnet, as a principal and primary obligation and not merely as an ancillary obligation, the due, proper and punctual payment, observance and performance by the Debtor of the Guaranteed Obligations. This Guarantee is accordingly not a suretyship but an on-demand guarantee and payment hereunder shall not be refused or delayed by the existence of any dispute between Transnet and the Debtor;
2. This Guarantee shall be binding on the Guarantor in favour of Transnet and shall establish a continuing covering liability and shall remain of full force and effect notwithstanding any fluctuation in the indebtedness of the Debtor to Transnet or even the temporary extinction thereof;
3. The Guarantor may withdraw from this Guarantee at the close of business 30 (thirty) days after receipt by Transnet of written notice of such withdrawal sent by prepaid registered post addressed to the **Credit Manager, Credit Management, Table 2/4A, Inyanda House 2, 15 Girton Road, Parktown, Johannesburg** provided that the Guarantor shall remain liable hereunder for whatever sum(s) of money the Debtor may be owing to Transnet at that time, including any claims received at the Guarantor's address mentioned herein before the expiry of the notice period. Any claims received after expiry of such notice period shall not be considered by the Guarantor and the Guarantor shall then automatically be released of all liabilities under this Guarantee;
4. The Guarantor's liability hereunder shall not be limited to the principal sum of any indebtedness of the Debtor to Transnet, but shall also cover all other amounts making up the indebtedness, including in particular interest, commissions, legal costs and collection fees, but limited to the Guarantee Amount in aggregate;
5. The Guarantor promises to pay to Transnet, on first written demand by Transnet on the Guarantor in writing, all amounts from time to time due and payable (but unpaid) by the Debtor arising out of or in connection with the Guaranteed Obligations;

6. It shall at all times be at the discretion of Transnet to determine the extent, nature, duration and terms of any facilities to be allowed to the Debtor;
7. All admissions of acknowledgments of indebtedness by the Debtor shall be binding on the Guarantor and neither the Guarantor nor any person acting on behalf of the Guarantor shall contend, for whatsoever reason, that the Guarantor is not lawfully bound to Transnet in terms hereof;
8. The Guarantor shall not be entitled to claim that any payments made by the Guarantor on behalf of or to the account of the Debtor shall reduce the extent of or extinguish the Guarantor's liability hereunder unless;
9. Such payment is made to Transnet in response to a written request for payment in terms of this Guarantee stating that the Guaranteed Amount (or lesser amount) is due and payable, and received by the Guarantor at the Guarantor's address mentioned herein;
10. At the time of making payment, Transnet is given notice in writing that such payment is to have the effect of reducing or extinguishing the Guarantor's liability under this Guarantee and Transnet accepts payment on such condition;
11. Any claims by the Debtor for loss of or damage to goods or for alleged overcharges, or for any other cause whatsoever, shall not defer, postpone or otherwise interfere with the Guarantor's liability for prompt payment to Transnet of any claim made under this Guarantee;
12. No extension of time or indulgence, or whole or partial release from any liability, or compromise or other arrangement allowed by Transnet to the Debtor shall discharge the Guarantor from liability under this Guarantee. By entering into this Guarantee, the Guarantor is not contravening any provisions of the Companies Act, 71 of 2008, as amended from time to time;
13. This Guarantee is not contrary to any provision contained in the Guarantor's constitutional documents; and
14. This Guarantee is neither negotiable nor transferable and shall be governed by and construed with the laws of the Republic of South Africa provided, however, that the courts in Johannesburg shall have exclusive jurisdiction over any dispute arising out of or in connection with this Guarantee.

The Guarantor hereby chooses *domicilium citandi et executandi* for all purposes arising out of this Guarantee as follows:

.....

.....

.....

Thus done and signed at on this theday

1. _____

2. _____

Annexure F – Access Seeker Safety Permits

Annexure G – Access Seeker Consents

Annexure H – Standard Form Section S37(2) Agreement

SECTION 37(2) OHSA Agreement

ARRANGEMENTS AND PROCEDURES FOR CONTRACTORS ON THE PREMISES

INTRODUCTION

1. The parties to this Section 37(2) OHSA Agreement are Transnet Rail Infrastructure Manager (an operating division of Transnet SOC Ltd (hereinafter referred to as "**the IM**") and [■] (Pty) Ltd (hereinafter referred to as the "**Access Seeker** ") and the parties are jointly referred to hereinafter as the "**Parties**" and individually as a "**Party**".
2. The Parties have concluded a Rail Access Agreement and in this Section 37(2) OHSA Agreement those terms which are not separately defined herein and which appear in initial upper case (title case) shall have the meanings ascribed to them in the Rail Access Agreement read with the Network Statement. For purposes of this Section 37(2) OHSA Agreement the Network comprises and shall constitute the "**premises**".
3. The Parties expressly agree that, in terms of Section 37(2) of the Occupational Health and Safety Act 85 of 1993 and its regulations, (hereinafter referred to as the "**OHS Act**"), the provisions of Section 37(1) of the OHS act apply to the Access Seeker and as such the IM shall not be responsible or liable for any actions and/or omissions of the Access Seeker's directors, employees, representatives, agents, subcontractors, contractors, suppliers and service providers (jointly referred to as the Access Seeker's "**Employed and Contracted Persons**"), directly or indirectly arising from, in relation to and/or in connection with the Rail Access Agreement including the granting, use and exercise of, Access by the Access Seeker, the Transport of Cargo and/or the performance of Transport Services by or on behalf of the Access Seeker, and the exercise of any rights and the discharge of any obligations by or on behalf of either Party under or in terms of the Rail Access Agreement.
4. As an **employer in its own right**, the Access Seeker shall at all times comply with the OHS Act and with the IM's prevailing operating conditions and safety procedures, in each instance while on the premises, and shall ensure such compliance by the Employed and Contracted Persons.
5. The IM hereby reserves the right to require or cause that any or all activities, tasks or other actions or omissions by or on behalf of the Access Seeker and/or the Employed and Contracted Persons, that are in contravention of the OHS Act and that come to the attention of the IM, to cease or to be suspended, until the IM is satisfied that each such contravention has been rectified. Non-compliance with the operating conditions and/or safety procedures of the IM shall be a material breach of this Section 37(2) OHSA Agreement and of the Rail Access Agreement.

REQUIREMENTS, ARRANGEMENTS AND PROCEDURES FOR CONTRACTORS

6. The Access Seeker shall ensure that all Employed and Contracted Persons are covered by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended. Written proof of good standing with the Compensation Commissioner shall be provided by the Access Seeker to the IM on request. Furthermore, the Access Seeker warrants and undertakes that such cover shall not expire during the execution of the duration of the Rail Access Agreement nor will the Access Seeker and the Employed and Contracted Persons be in arrears with any payments due to the Compensation Commissioner or be in default of other documentation required by the Compensation Commissioner.
7. The Access Seeker furthermore agrees to the following health and safety rules of the IM:
 - 7.1. The Access Seeker shall have available a copy of the OHS Act on request.
 - 7.2. Any Access Seeker with more than five employees at any time on the premises shall have available a first aid box for prompt first aid.
 - 7.3. Any Access Seeker with ten or more employees shall have at least one competent and valid first aider on the premises at their workplace. Should there be fifty or more employees on the premises a further first aider for every fifty employees or part thereof shall be available.
 - 7.4. Any Access Seeker with less than ten employees on the premises shall ensure that such employees are made conversant with the first-aider at their workplace.
 - 7.5. The Access Seeker shall keep up to date and available for inspection all applicable legally required registers.
 - 7.6. The Access Seeker shall make himself and his employees conversant with the IM's emergency and evacuation procedures.
 - 7.7. The Access Seeker shall not misuse anything, which is supplied in the interest of health and safety.
 - 7.8. The Access Seeker shall adhere, and shall ensure that the Employed and Contracted Persons adhere, to all prevailing safe working procedures of the IM.
 - 7.9. The Access Seeker and all Employed and Contracted Persons shall be subject to the prevailing health and safety and security rules of the IM.
 - 7.10. No intoxicating drugs or liquor will be consumed on or brought onto the premises and no person under the influence or who appears to be under the influence will be permitted to come onto or remain on the premises or at a workplace.
 - 7.11. The Access Seeker shall report all health and safety incidents involving any Employed and Contracted Persons to the IM immediately.
 - 7.12. The Access Seeker shall conduct joint investigations with the IM of any health and safety incidents involving the Employed and Contracted Persons.
 - 7.13. The Access Seeker shall provide the IM with medical certificates indicating that the Employed and Contracted Persons are fit for work.

INDEMNIFICATION

8. The Access Seeker hereby certifies that all employed and contracted workmen (including all of the Employed and Contracted Persons) recognize the inherent hazards that exist on the premises and that the Access Seeker and all of the Employed and Contracted Persons:

- 8.1. enter the premises entirely at their own risk and the Access Seeker hereby expressly and irrevocably waives any and all claims of whatsoever nature against the IM and its shareholders, directors, employees, agents, representatives, contractors, suppliers and service providers and/or mandataries (as defined in the OHS Act) in respect of any loss, damage, injury or death howsoever arising provided that such claims are not caused by the wilful actions or omissions or gross negligence of the IM; and
- 8.2. hereby expressly and irrevocably indemnifies the IM and its shareholders, directors, employees, agents, representatives, and/or mandataries (as defined in the OHS Act) against any claims of whatsoever in respect of any loss, damage, injury or death of the Access Seeker and/or any Employed and Contracted Persons howsoever arising provided that such claims are not caused by the wilful actions or omissions or gross negligence of the IM.

I, () on behalf of the Access Seeker, do hereby warrant and declare that the Access Seeker acknowledges having read and understood the terms and conditions contained in this Section 37(2) OHS Act Agreement and furthermore, that the Access Seeker shall procure that the Employed and Contracted Persons shall abide by these terms and conditions.

Annexure I – Security Plan