

Supplemental Agreement to the Franchise
Agreement dated April 2020 -
Emergency Measures Agreement ("EMA")

The Scottish Ministers

and

Serco Caledonian Sleepers Limited

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BETWEEN:

- (1) **THE SCOTTISH MINISTERS**, Victoria Quay, Edinburgh, EH6 6QQ acting through Transport Scotland, Buchanan House, 58 Port Dundas Road, Glasgow, G4 0HF or such other agency, department or other organisational unit of the Scottish Government as they may from time to time nominate (who and whose successors are referred to as the **Authority

(2) **SERCO CALEDONIAN SLEEPERS LIMITED** (company number SC477821), whose registered office is at Basement and Ground Floor Premises, 1-5 Union Street, Inverness IV1 1PP (the **"Franchisee"**),

each a **"Party"** and together, the **"Parties"**.**

RECITALS:

- (A) The Scottish Ministers and the Franchisee entered into a franchise agreement dated 23 May and 10 June in respect of certain railway passenger services designated by the Scottish Ministers as eligible for provision under franchise agreements (the "**Franchise Agreement**").
 - (B) On 11 March 2020 the World Health Organisation declared the coronavirus disease 2019 ("**COVID-19**") a pandemic. It is anticipated that COVID-19 will have a significant impact on the operation of rail services in the United Kingdom.
 - (C) The Scottish Ministers wish to amend the Franchise Agreement to address the impact of the COVID-19 outbreak by suspending or amending the operation of specific provisions, and introducing additional requirements, under the terms of the Franchise Agreement for the duration of the Term and any Extended Term (if applicable) in accordance with clause 3 of this Agreement.
 - (D) The Parties now wish to record their agreement regarding the amendments to the Franchise Agreement to address the impacts of COVID-19 by entering into this Emergency Measures Agreement ("**EMA**").
 - (E) The Franchisee acknowledges that this EMA is entered into pursuant to article 5(5) of Regulation (EC) 1370/2007.

THE PARTIES AGREE AS FOLLOWS:

1. INTERPRETATION AND CONSTRUCTION

1.1 Interpretation

In this Agreement (unless the context otherwise requires):

- (a) words and expressions defined under the Franchise Agreement, the Definitions Agreement and the Act shall have the same meanings when used in this Agreement;
 - (b) words and expressions defined in the Interpretation Act 1978 shall have the same meanings when used in this Agreement;
 - (c) the words "including", "include" and "in particular" are to be construed without limitation;
 - (d) references to a person include its successors, transferees and assignees;

- (e) references in this Agreement to clauses and schedules are to clauses and schedules of this Agreement unless expressly specified to the contrary;
- (f) headings and references to headings shall be disregarded in construing this Agreement;
- (g) references to an agreement or other document shall be construed as referring to that agreement or document as from time to time supplemented, varied, replaced, amended, assigned or novated; and
- (h) words importing the masculine gender include the feminine gender and vice versa and words in singular include the plural and vice versa.

1.2 **Construction**

- (a) This Agreement is supplemental to and shall be read and construed together with the Franchise Agreement and this Agreement and the Franchise Agreement shall together constitute one and the same document.
- (b) In the event of conflict between the terms of this Agreement and the terms of the Franchise Agreement, subject to clause 2.2, the terms of this Agreement shall prevail.
- (c) Save as expressly provided for in this Agreement the Franchise Agreement shall continue in full force and effect.
- (d) Any reference to the "term" or "duration" of the EMA (or this Agreement) shall mean the Term and any Extended Term (if applicable) in accordance with clause 3 of this Agreement.

2. **PURPOSE OF THIS AGREEMENT**

2.1 The Parties acknowledge that:

- (a) this Agreement is based on the following overriding principles:
 - (i) the Parties recognising the exceptional circumstances presented by COVID-19;
 - (ii) the Parties seeking to ensure that, as far as possible, operational performance and the provision of Passenger Services is maintained;
 - (iii) the Parties seeking to ensure the Franchisee is insulated as far as is reasonable from the severe financial impacts of COVID-19 whilst not being overcompensated; and
 - (iv) the Parties cooperating with an overall goal of acting in the national interest.

2.2 This Agreement has been prepared as an emergency measure in a circumstance of extreme emergency. To the extent that there are any anomalies or inconsistencies within this Agreement or with the terms of the Franchise Agreement as a result of the variations imposed by this Agreement, the Parties shall discuss such matters in good faith and work towards a practical and sensible solution, to further amend the Franchise Agreement to reflect the intention of this Agreement.

3. **COMMENCEMENT AND TERM**

3.1 Subject to clause 3.2, this Agreement shall take effect from the date of this Agreement and shall continue until the earlier of:

- (a) 1.59 a.m. on 20 September 2020; or
 - (b) the date the Parties mutually agree to terminate this Agreement,
(the "**Term**").
- 3.2 Notwithstanding clause 3.1, the provisions of Appendix 2 to Schedule 8.A (Payments), included in **Error! Reference source not found.** to this Agreement shall apply retrospectively from 1 March 2020.
- 3.3 Subject to clause 3.4, the Parties may, by mutual agreement, extend the variations to the Franchise Agreement imposed by this Agreement by a further period ("**Extended Term**") and upon such agreement to extend, this Agreement shall remain in full force and effect until the expiry of the Extended Term.
- 3.4 The Scottish Ministers shall have an unfettered discretion in proposing, accepting or refusing any extensions to the Term.
- 3.5 The amendments to the Franchise Agreement pursuant to this Agreement shall, unless otherwise required by the Scottish Ministers or pursuant to this Agreement, cease to have effect on the later of the expiry of the Term or the Extended Term (as applicable).
- 3.6 At the expiry of the EMA the variations imposed on the Franchise Agreement by this Agreement shall cease and the Franchise Agreement, with certain limited exceptions, shall continue on the terms and conditions operating before entry into this Agreement.
- 3.7 The limited exceptions referred to in clause 3.6 generally consist of amendments to expunge the impact of the period the EMA was in place from certain of the Franchise Agreement performance metrics and to recalibrate such metrics and amounts (the "**Recalibration Items**") to take account of their temporary suspension for the duration of the EMA (see clause 16).

4. AMENDMENTS TO THE FRANCHISE AGREEMENT

With effect from the date of this Agreement until the expiry of the Term or the Extended Term (as applicable), the Franchise Agreement shall be varied as set out in **Error! Reference source not found.** to this Agreement and by clauses 5 to 18 below.

5. COOPERATION

- 5.1 The Franchisee agrees to coordinate and cooperate with other Train Operators, Network Rail and other rail industry bodies, to ensure the continuation of Passenger Services across the network in a coordinated manner, and in line with the priorities and directions as may be set out by the Scottish Ministers from time to time, including, but not limited to:
- (a) coordinating with other Train Operators to ensure consistency of coverage to all communities across the national network, including changes to Franchise Services to assist where other Train Operators are unable to operate their own Franchise Services;
 - (b) assisting altered or additional freight services to operate on the national rail network and, where appropriate, enabling certain essential goods (such as medical equipment or other urgent items) to be carried on Passenger Services; and
 - (c) continuing where possible and appropriate to enforce any agreements with third parties to deliver quality and value for money.

6. ADDITIONAL SERVICES

- 6.1 The Franchisee acknowledges that the Scottish Ministers may require special measures, in the form of increased cooperation or additional services, to be implemented while COVID-19 subsists and the Franchisee shall use its best endeavours to accommodate such requests and act in the national interests.
- 6.2 The Franchisee, if requested by the Scottish Ministers, shall use its best endeavours to provide additional services, such as enhanced cleaning regimes to a standard reasonably proposed by the Scottish Ministers.
- 6.3 The reasonable and proper costs incurred in carrying out such additional services shall be recoverable from the Scottish Ministers as part of the 'Actual Costs' defined in Schedule 8.A (Payments)(as set out in Appendix 2 to **Error! Reference source not found.** to this Agreement).

7. MEETINGS

- 7.1 Where the Franchise Agreement refers to a "meeting" of the Parties or the Parties and other third parties, such meetings may be conducted by conference call or other remote link as mutually agreed between the Parties.

8. REMEDIAL PLANS

- 8.1 Subject to the provisions of Schedule 10.1, as amended by this Agreement, the requirement to submit a Remedial Plan shall be suspended for the duration of the EMA.
- 8.2 Any Remedial Plans or Improvement Plans that are in place at the start of the EMA will be reviewed by the Scottish Ministers within thirty (30) Weekdays and the Scottish Ministers shall determine (acting in its reasonable discretion and taking into account the reasonable representations of the Franchisee) and confirm in writing whether the Remedial Plan will be:
 - (a) continued "as is";
 - (b) delayed;
 - (c) suspended; or
 - (d) reduced in scope or application.

9. FARES

- 9.1 The Franchisee shall remain responsible for the collection of fare revenue using the same degree of skill, diligence, prudence and foresight which would be exercised by a skilled and experienced Train Operator using all reasonable endeavours to maximise revenue, whilst giving consideration to appropriate customer service in light of the prevailing circumstances and any guidance from the Scottish Ministers, NHS Health Scotland or other relevant authority in relation to public interaction.
- 9.2 To the extent a ticket is sold which relates partially to the term of the EMA and partially to the period before 1 March 2020 or after the expiry of the EMA, this shall be accounted for using the same principles that apply on the transfer of a franchise.

10. TREATMENT OF REVENUE AND PROFIT SUPPORT MECHANISM

- 10.1 The Parties acknowledge and agree that the profit support mechanism and any other relevant regimes that are prescribed in annual terms under the Franchise Agreement shall be suspended until expiry of the Term or the Extended Term, upon which date the mechanism shall be reinstated.

10.2 The Parties agree that the cost and revenue impact of commercial and financial events, agreements, discussions or disputes (including commercial settlement, liquidated damages and accrual release) relating to matters prior to commencement of the EMA, shall remain solely the responsibility and benefit of the Franchisee, unless otherwise provided for under the Franchise Agreement or by agreement between the Parties.

11. **GRANT FUNDING AGREEMENT**

- 11.1 The Grant Funding Agreement shall remain in force and shall not be amended by this Agreement.
- 11.2 The Franchisee will not pay any interest accruing in relation to any loans provided under the Inter Company Loan Facility Agreement during the term of the EMA. Such interest shall remain due at the expiry of the EMA and shall be accrued for the purposes of the profit support mechanism.
- 11.3 Subject to clause 11.4, neither shall the Franchisee, during the term of the EMA, repay any amount(s) of principal advanced or drawn down under the Inter Company Loan Facility Agreement.
- 11.4 The Franchisee shall be entitled to use a sum equivalent to the payment made by the Scottish Ministers pursuant to Appendix 2 of Schedule 8A in relation to the Reporting Period starting on 1 March 2020 (less any element of that payment which consists of Management Fee), to repay any amount(s) of principal advanced or drawn down under the Inter Company Loan Facility Agreement between 1 March 2020 and 31 March 2020, provided such repayment occurs before 30 April 2020.

12. **CHANGE**

- 12.1 Save as specified in Schedule 1 to this Agreement, the provisions of Schedule 9 (Changes) of the Franchise Agreement shall be suspended for the duration of the EMA, as specified in Schedule 1.
- 12.2 Unless otherwise specifically agreed by the Scottish Ministers, the impacts of COVID-19 shall not be considered, and such impact shall be excluded, in relation to any of the limbs of the definition of "Change" for the duration of the EMA and the Franchisee shall not raise a claim for Change that arises from the impact of COVID-19 for the duration of the EMA.
- 12.3 Any Change event that arises during the EMA not related to the impacts of COVID-19 during the EMA shall be evaluated in accordance with the provisions in Schedule 9 (Changes) of the Franchise Agreement after the expiry of the EMA.
- 12.4 In relation to Change events triggered before the EMA:
- (a) the processing of the Change shall continue and be treated on the terms of the Franchise Agreement as it existed before the entry into this Agreement, taking into account the fact that the EMA has been in place since the execution of this Agreement;
 - (b) any payments in respect of the relevant Change that are agreed or determined in accordance with that process shall be made as and when determined; and
 - (c) notwithstanding clauses 12.4(a) and (b), any Estimated Revisions which were being paid prior to the EMA shall cease to be payable for the duration of the EMA.

13. **PERFORMANCE BENCHMARKS**

- 13.1 Where the Franchisee's performance in the Reporting Periods prior to the EMA results in a breach or is at "default level", this shall be disregarded for the duration of the EMA and the

Scottish Ministers shall determine (acting in its reasonable discretion) the course of action, after the expiry of the EMA.

- 13.2 Any course of action determined by the Scottish Ministers in accordance with clause 13.1 shall in no circumstances be more advantageous to the Scottish Ministers than the position prior to the EMA.

14. **COMMITTED OBLIGATIONS**

- 14.1 Following execution of this Agreement, the Parties shall within thirty (30) Weekdays of the date of this Agreement meet and consider, acting reasonably and in good faith, whether the completion of Committed Obligations will be:

- (a) continued "as is";
- (b) delayed;
- (c) suspended;
- (d) reduced in scope or application; or
- (e) otherwise resolved in accordance with Paragraph 3, Part 3 of Schedule 1.6.

- 14.2 In the event that the Committed Obligation involves Capital Expenditure the default assumption will be that the Committed Obligation shall continue unaffected during the period of the EMA.

- 14.3 In the event the Parties are unable to agree the approach to completion of a Committed Obligation within sixty (60) Weekdays of the date of this Agreement, the Scottish Ministers shall reasonably determine the approach.

15. **COVID-19 RELATED SUPPORT**

- 15.1 The Franchisee shall use all reasonable endeavours to avail itself of, including applying for, any UK Government support that is offered in relation to the impact of COVID-19, including for example tax relief.

- 15.2 To the extent the Franchisee is successful in receiving such support, this shall be taken into account in relation to the application of the mechanisms in Schedule 8.A of the Franchise Agreement, (as set out in Appendix 2 to **Error! Reference source not found.** to this Agreement), such that the Franchisee does not benefit from double recovery.

16. **STATE AID**

- 16.1 The Franchisee acknowledges and agrees that the EMA must not result in any financial advantage being granted to Franchisee that is incompatible with the EU rules on State aid and, in particular, Articles 107 and 108 of the Treaty on the Functioning of the European Union. In that regard, it is noted in particular that the replacement Schedule 8A of the Franchise Agreement (as set out in Appendix 2 to **Error! Reference source not found.** to this Agreement) defines the parameters on the basis of which the compensation payment for discharging the public service obligations is to be calculated. In accordance with Articles 4(1) and 6(1) of Regulation (EC) № 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road, these parameters have been determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the Train Operator and a reasonable profit. At the end of the EMA, the Scottish Ministers will carry out an ex-post check to ensure that there has been no overcompensation for the discharge of the public service obligations over the duration of the EMA. The Scottish Ministers will recover – in

accordance with the EU State aid rules - any overcompensation in relation to the provision of the management role over the duration of the EMA or any other financial advantage that is identified as having been granted as a result of the EMA in violation of the EU State aid rules, whether such overcompensation or other advantage has been identified by the Authority or by the European Commission and the Franchisee agrees to repay such monies promptly.

17. EXPIRY OF THE EMA – RECALIBRATION ITEMS

- 17.1 The Parties shall, at least forty (40) days before the anticipated expiry of the EMA, meet (either in person or remotely) and with both Parties acting reasonably and in good faith, seek to agree the recalibration required to the Recalibration Items.
- 17.2 The sole factor to be considered in recalibrating the Recalibration Items shall be the fact that an alternative contractual regime has applied for the duration of the EMA and no other factor shall be taken into account.

18. WARRANTIES

- 18.1 The Franchisee shall, within ten 10 days of the execution of this Agreement, provide a warranty in writing, from a statutory director of the Franchisee to the Scottish Ministers confirming that:
 - (a) the budget submitted by the Franchisee prior to the date of the EMA is a true and valid reflection of the budget assumed by the Franchisee at 1 March 2020; and
 - (b) no measures have been undertaken to:
 - (i) suppress revenue and/or increase costs during the term of the EMA;
 - (ii) reallocate costs to, or revenues from the period when the EMA is in place; or
 - (iii) act in a way that is contrary to the principles of the EMA by using the existence or cessation of the EMA to increase profitability.

19. ENTIRE AGREEMENT

- 19.1 This Agreement contains all the terms which the Parties have agreed in relation to the subject matter of this Agreement and supersedes any prior written or oral agreements, representations or understandings between the Parties in relation to such subject matter.
- 19.2 The Franchisee acknowledges that this Agreement has not been entered into wholly or partly in reliance on, nor has the Franchisee been given any warranty, statement, promise or representation other than as expressly set out in this Agreement. To the extent that any such warranties, statements, promises or representations have been given the Franchisee unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to them.
- 19.3 Nothing in this clause 19 shall exclude any liability which one Party would otherwise have to the other Party in respect of any statements made fraudulently.

20. COUNTERPARTS AND DELIVERY

- 20.1 This Agreement may be executed in any number of counterparts and by each of the Parties on separate counterparts.
- 20.2 Where executed in counterparts:

- (a) this Agreement shall not take effect until both of the Counterparts have been delivered and the date of delivery shall be inserted at the top of page 1; and
- (b) delivery will only take place when the date of delivery is agreed between the Parties after execution of this Agreement.

20.3 Where not executed in Counterparts, this Agreement shall become effective on the date agreed between the Parties.

21. **COSTS**

Each Party shall bear its own legal, accountancy and other costs and expenses incurred in connection with the preparation, execution and implementation of this Agreement and all documents ancillary to it.

22. **GOVERNING LAW**

This Agreement (and any non-contractual obligations arising out of or in connection with it) shall be governed and construed in accordance with the laws of Scotland and the Parties irrevocably agree, where competent, only to prorogate the exclusive jurisdiction of the Court of Session to settle any disputes which may arise out of or in connection with this Agreement.

23. **CONTRACTS (THIRD PARTY RIGHTS) (SCOTLAND) ACT 2017**

This Agreement does not create any rights in favour of third parties under the Contracts (Third Party Rights) (Scotland) Act 2017 to enforce or otherwise enable any provision of this Agreement.

IN WITNESS whereof these presents typewritten on this and the 8 preceding pages together with the Schedule are executed as follows:

SIGNED on behalf of **THE SCOTTISH MINISTERS** by

William Joseph Reeve, Authorised Signatory at on 6 April 2020 in the presence of:

Witness:



Full Name:
Authorised Signatory

Address:

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SIGNED on behalf of **SERCO CALEDONIAN SLEEPERS LIMITED** by

John Whitehurst, Director
at London
on 6 April 2020

and

Ryan Flaherty, Director
at Glasgow
on 6 April 2020

SCHEDULE 1

**THIS IS SCHEDULE 1 REFERRED TO IN THE FOREGOING SUPPLEMENTAL AGREEMENT TO
THE FRANCHISE AGREEMENT BETWEEN THE AUTHORITY AND SERCO CALEDONIAN
SLEEPERS LIMITED**

Schedule 1

Amendments to the Franchise Agreement

The Franchise Agreement shall be amended as set out in the table below.

For the avoidance of doubt:

1. any reference to "N/A" in the table below shall mean that the existing Schedule remains unamended and continues to apply;
2. any text that appears in blue and is underlined shall be added to existing clauses / Schedules; and
3. any text that appears in blue and is struck-out shall be deleted from existing clauses / Schedules.

REFERENCE (CLAUSE / SCHEDULE)	AMENDMENT
Main Body	
1 -Interpretation and Definitions	<p>The following new definitions shall be inserted into clause 1.1:</p> <p><u>"COVID-19"</u> <i>means the coronavirus disease 2019;</i></p> <p><u>"EMA"</u> <i>means the Emergency Measures Agreement entered into by the Parties on or around 6 April 2020 to deal with the impacts of COVID-19;</i></p>
8 – Entire Agreement	Clause 8.1 shall be amended as follows:

	<p><i>"This Agreement, the Definitions Agreement, the Conditions Precedent Agreement and the SQUIRE Service Schedules Agreement comprise the entire agreement between the Parties, <u>except as amended</u>, in relation to the subject matter of this Agreement and supersede all prior agreements and arrangements among or between the parties other than any confidentiality agreements or undertakings which the Franchisee may have entered into with the Authority in connection with its proposal to secure the provision of the Passenger Services under this Agreement."</i></p>
Schedule 1: Passenger Service Obligations	
1.1 – Service Development	N/A
1.2 – Operating Obligations	<p>A new paragraph 4.4 shall be inserted as follows:</p> <p style="padding-left: 40px;">"4.4 Where the actual or proposed omission or rescheduling of Passenger Services is one which may materially prejudice the Franchisee's ability to deliver the Timetable with the Passenger Carrying Capacity stipulated in a Train Plan which satisfies the capacity requirements of paragraphs 3.1 and 3.4, the Franchisee <u>shall promptly notify the Authority and set out whether the Franchisee believes that such proposal would be likely to materially be detrimental to the interests of passengers on railway passenger services both in Scotland and/or Great Britain. The Franchisee agrees to cooperate with Network Rail in relation to such proposal, unless and until</u> the Authority specifically <u>instructs the Franchisee accordingly, in which case the Franchisee shall</u> act in the passenger's interests and exercise its rights under the Track Access Agreement (including the Network Code) and otherwise object, make representations and withhold consent in respect of any actual or proposed omission or rescheduling of Passenger Services by Network Rail. This obligation will stand notwithstanding any agreement between the Franchisee and Network Rail.</p> <p>New paragraphs 5.3A, 5.3B, 5.3C and 5.3D shall be inserted as follows:</p> <p style="padding-left: 40px;"><u>"5.3A If, in the opinion of the Franchisee (acting reasonably), it would not be reasonably practicable to obtain the Authority's consent prior to proposing any of the items referred to in paragraphs 5.1(a), 5.1(b) or 5.1(c) to Network Rail, the Franchisee shall be entitled to propose such items to Network Rail without the Authority's prior consent provided that the Franchisee shall inform the Authority of such proposals as soon as is reasonably practicable.</u></p>

5.3B The Franchisee shall ensure that any proposals to Network Rail submitted pursuant to paragraphs 5.1 or 5.3A:

- (a) take full and proper account of the likely passenger demand (including a reasonable assessment of key workers) considering any known or anticipated impacts of COVID-19 (including without limitation any guidance published by NHS Health Scotland, and any Legislation, direction or instruction issued by any relevant local, governmental or other competent authority in the United Kingdom from time to time);**
- (b) utilise an appropriate number of Franchise Employees to support the likely passenger demand (as determined having taking into consideration the matters referred to in paragraph 5.3B(a)); and**
- (c) ensure that the Train Fleet is deployed in an optimal manner taking account of all relevant circumstances, including the latest available official guidance relating to social distancing.**

5.3C The Franchisee shall use all reasonable endeavours to co-operate with other Train Operators in respect of the Franchisee's proposals to Network Rail pursuant to paragraphs 5.1 and 5.3A or any emergency timetables proposed by other Train Operators to ensure that a reasonable pattern of railway passenger service is provided on the relevant route(s) to enable passengers to make Connections (particularly where low frequency railway passenger services are operated or first trains or last trains are involved, taking account of the likely fluctuations in passenger demand as a result of COVID-19 and the time needed to make any such Connection).

5.3D The Franchisee shall use reasonable endeavours to take into account the requirements of operators of rail freight services in respect of the Franchisee's proposals to Network Rail pursuant to paragraphs 5.1 and 5.3A."

The word "and" shall be deleted where it appears at the end of paragraph 9.2 (j), the punctuation and word "and" shall be inserted at the end of paragraph 9.2 (k), and a new paragraph 9.2 (l) shall be inserted as follows:

"(l) the impact, and emerging projections relating to the likely or potential impact, from time to time, of COVID-19 on the Franchisee's ability to provide the Passenger

	<p><u>Services and/or the level of passenger demand or reasonably expected passenger demand for the Passenger Services.</u></p> <p>Paragraph 9.2 (f) shall not apply for the duration of the EMA.</p>
1.3 – Additional Service Obligations	Paragraph 1.1 (a) and paragraph 1.4 shall not apply for the duration of the EMA.
1.4 – Passenger Facing Obligations	<p>New paragraphs 3A.1 and 3A.2 shall be inserted as follows:</p> <p><u>3A Communicating Emergency Timetables</u></p> <p><u>3A.1 The Franchisee shall publish:</u></p> <p><u>(a) any amendments to the Timetable made pursuant to paragraphs 5, 6 or 8 of Schedule 1.2 as soon as reasonably practicable:</u></p> <p><u>(i) at each Station by providing to the operator of each such station the departure and arrival times of the Passenger Services that call at each such station and the principal Connections to any other transport services relevant to each such station;</u></p> <p><u>(ii) on the Franchisee's website;</u></p> <p><u>(iii) via the Franchisee's social media accounts (through which the Franchisee shall in any event publish any such amendments to the Timetable no later than 2 hours following agreement of such amendments); and</u></p> <p><u>(iv) via any other direct means of communication with passengers available to the Franchisee including but not limited to email and/or text messaging services; and</u></p> <p><u>(b) as far and as soon as is reasonably practicable, any emergency timetables of other Train Operators where the railway passenger services of such other Train Operator are scheduled to call or in respect of which Connections to</u></p>

	<p><u>such other Train Operators railway passenger services can be made from that Station:</u></p> <p><u>(i) at each Station, by providing the relevant information to the operator of each such station; and</u></p> <p><u>(ii) on the Franchisee's website.</u></p> <p><u>3A.2 To the extent that this paragraph 3A requires the Franchisee to undertake activities that it would otherwise be obliged to perform pursuant to paragraph 2.1 to 2.19 (other than paragraph 2.7) and 3, and there are any discrepancies between the timescales or other requirements relating to such activities between this paragraph 3A and paragraphs 2.1 to 2.19 (other than paragraph 2.7) or 3, the relevant requirements of this paragraph 3A shall take precedence over those in paragraphs 2.1 to 2.19 (other than paragraph 2.7) and 3 (as applicable)."</u></p>
1.5 – Information about Passengers	Paragraph 3 shall not apply for the duration of the EMA.
1.6 – Committed Obligations	N/A
1.7 – Franchise Services	<p>Paragraph 5.3 and paragraph 5.4 shall not apply for the duration of the EMA.</p> <p>A new paragraph 5A.1 shall be inserted as follows:</p> <p><u>" 5A.1 The Franchisee may, and (to the extent required in order to best serve the needs of passengers on railway passenger services within Great Britain from time to time) shall use reasonable endeavours to, carry out the following Ancillary Services:</u></p> <p><u>(a) the lending, seconding, hiring or contracting out during any Reporting Period to another person or persons (whether for a charge or not) of:</u></p> <p><u>(i) up to one per cent (1%) of the number of Franchise Employees as at the Start Date, for over ninety per cent (90%) of their normal working hours during such Reporting Period (including on a full-time basis); and</u></p> <p><u>(ii) one per cent (1%) of any other Franchise Employees as at the Start Date,</u></p>

	<p><i><u>provided that this paragraph shall not apply to any employee lent, seconded, hired or contracted out under any of paragraph 5 and paragraphs 5A.1 (b) and 5A.1(c) inclusive, or engaged in any other activity which is permitted under this Schedule 1.7;</u></i></p> <p><i><u>(b) the subleasing, hiring, licensing, lending, selling of any rolling stock vehicles or other assets of the Franchisee or the lending, hiring or contracting out of any employees of the Franchisee or the provision of any other services to Network Rail or any other Train Operator on an emergency basis; and</u></i></p> <p><i><u>(c) assisting altered or additional freight services to operate on the national rail network and, where appropriate, enabling certain essential goods (such as medical equipment or other urgent items) to be carried on Passenger Services. "</u></i></p>
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Schedule 2: Assets, Leases, Third Parties, Other Franchisees and Schemes

2.1 – Property Leases	N/A
2.2 – Security of Access Assets, Rolling Stock Leases, Station and Depot Leases	N/A
2.3 – Third Party Delivery of Passenger Services and Other Franchisees	N/A
2.4 – Other Franchise Operations	N/A
2.5 – Transport, Travel and Other Schemes	N/A

Schedule 3: Priced Options

Priced Options	N/A
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Schedule 4: Maintaining and Enhancing Stations, Depots and Trains

4.1- Franchise Facilities	N/A
4.2 –Persons with Disabilities and Disability Discrimination	N/A
Schedule 5: Fares	
5.1 – Fares on the Franchise Services	N/A
5.2 – Franchisee's Fare Structure	N/A
5.3 – Fare Information and Monitoring	N/A
Schedule 6: Rolling Stock	
6.1 – Rolling Stock	N/A
6.1A – New Train Fleet Output Specification	N/A
6.1B – Maintenance of the Train Fleet	N/A
6.2 – Station Enhancements	N/A
6.3 – Passenger Experience and Marketing	N/A
Schedule 7: Benchmarks, KPIs, and SQUIRE	
7.1 – Benchmarks	Unless otherwise instructed by the Scottish Ministers, acting reasonably, Schedule 7.1 shall not apply for the duration of the EMA.
7.2 – KPIs	Unless otherwise instructed by the Scottish Ministers, acting reasonably, Schedule 7.2 shall not apply for the duration of the EMA.
7.3 – SQUIRE	Unless otherwise instructed by the Scottish Ministers, acting reasonably, Schedule 7.3 shall not apply for the duration of the EMA, provided that paragraph 11 (Service Quality Payments) shall continue to

	apply in respect of Service Quality Payments for Reporting Periods ending prior to commencement of the EMA.
Schedule 8: Payments	
8.1 – Franchise Payments	Schedule 8.1 shall be replaced with the new Schedule 8.A attached at Appendix 2.
8.2 – Annual Franchise Payments	Schedule 8.2 shall be replaced with the new Schedule 8.B attached at Appendix 3.
8.3 – Miscellaneous Payment Provisions	Paragraph 1 (Industrial Action) shall not apply for the duration of the EMA.
8.4 – Track Access Adjustments and Station Charge Adjustments	Schedule 8.4 shall not apply for the duration of the EMA.
8.5 – Capital Payments	N/A
8.6 – The investment Fund	Schedule 8.6 shall not apply for the duration of the EMA.
Schedule 9: Changes	
9.1 – Variations and Financial Consequences of Change	Unless otherwise instructed by the Scottish Ministers, acting reasonably, Schedule 9 shall not apply for the duration of the EMA.
9.2 – Revised Inputs: Identity of the Financial Model etc.	
9.3 – Runs of the Financial Model	
9.4 – Authority Risk Assumptions	
Schedule 10: Remedies, Termination Events	
10.1 – Remedial Plans and Remedial Agreements	Clause 1 shall be deleted and replaced with the following new clause: <i>"If:</i>

	<p>(a) <u>the Scottish Ministers is satisfied that the Franchisee is operating at a level that would, or would likely, be scored "1"; or</u></p> <p>(b) <u>the Franchisee has received a score of "1",</u></p> <p><u>in relation to any of the EMA Criteria, for two (2) consecutive EMA Performance Periods, in accordance with the EMA Review process set out in Schedule 8.B, the Scottish Ministers may serve a notice on the Franchisee requiring it to address and overcome the shortfalls or failures that have led to the Franchisee receiving, or being likely to receive, a score of "1" with respect to the relevant EMA Criterion (a "Remedial Plan Notice").</u></p> <p>Clause 2.1 shall be deleted and replaced with the following new clause:</p> <p>(a) <u>the specific EMA Criterion under the EMA Review Scorecard that the Scottish Ministers are satisfied that the Franchisee is likely to score, or has scored, "1" in ("Relevant Term"); and</u></p> <p>Clause 3.2(b) shall be amended as follows:</p> <p>"3.2 Each Remedial Plan shall set out:</p> <p>(a) <u>the Relevant Term which has caused such Remedial Plan to be required;</u></p> <p>(b) <u>an explanation of the reasons for the Franchisee receiving, or being likely to receive, a score of "1" with respect to contravention or likely contravention of the Relevant Term;</u></p> <p>(c) <u>the steps proposed for the purposes of addressing and overcoming the shortfalls or failures that have led to the Franchisee receiving, or being likely to receive, a score of "1" with respect to the Relevant Term securing or facilitating compliance with the Relevant Term; and</u></p> <p>(d) <u>the time period within which the Franchisee proposes to implement those steps. "</u></p>
10.2-Termination and Expiry	N/A

10.3 – Events of Default and Termination Event	<p>The text in paragraph 2.6 shall be deleted and replaced with "<u>not used</u>".</p> <p>The text in paragraph 2.8 shall be deleted and replaced with "<u>not used</u>".</p> <p>A new paragraph 2.16 shall be inserted as follows:</p> <p style="text-align: center;"><u>2.16 Disallowable Costs</u></p> <p style="text-align: center;"><u><i>The Franchisee's Disallowable Costs exceed the maximum value for Aggregated Costs and Revenues Liabilities as specified in paragraph 5.8A of Schedule 8.A. to this Agreement. "</i></u></p>
10.4 – Force Majeure	<p>Paragraph 1(d)(iii) shall be amended by replacing the word "and" with "or".</p> <p>Paragraph 1(d) shall be amended by inserting a new paragraph as follows:</p> <p style="text-align: center;"><u><i>(iv) for the duration of the EMA, the occurrence and impact, whether direct or indirect, of COVID-19; and</i></u></p> <p>Paragraph 1 shall be amended by inserting the following text at the end of the clause:</p> <p style="text-align: center;"><u><i>The definition of "Force Majeure Event" shall for the duration of the EMA exclude the occurrence and impact, whether direct or indirect, of COVID-19. "</i></u></p> <p>Paragraph 3 shall be amended by inserting the following new clause:</p> <p style="text-align: center;"><u><i>3.3 Notwithstanding any other provision of this Agreement, the Franchisee agrees that it shall not for the duration of the EMA be entitled to further relief from obligations pursuant to the Force Majeure provisions under this Schedule 10.4 as a direct or indirect impact of COVID-19, save to the extent that such impact of COVID-19 gives rise to the occurrence, or continuing existence of any of the specified Force Majeure Events set out in Paragraph 1 of Schedule 10.4 of the Franchise Agreement, but without double recovery under Schedule 8.A in respect of such relief. "</i></u></p>
10.5 – Liability	N/A
Schedule 11: Agreement and Service Delivery Management Provisions	

Agreement and Service Delivery Management Provision	<p>The following text shall be inserted as the second sentence in paragraph 7.2:</p> <p><u><i>Without prejudice to the preceding general obligation, the Franchisee agrees that it will provide the Authority with sufficient current financial information, including, but not limited to, periodic management cashflow analysis and daily management cashflow forecasts, to allow the ongoing monitoring of the Franchisee's cash position and the operation of the Schedules 8.A and 8.B.</i></u></p>
Schedule 12: Financial Obligations and Undertakings	
Schedule 12	<p>In paragraph 1, the word 'or' at the end of paragraph 1.4 shall be deleted, the full stop at the end of paragraph 1.5 shall be replaced with the punctuation and word"; or". A new paragraph 1.6 shall be inserted as follows :</p> <p><u><i>(e) borrow any sum, or enter into any loan or lending agreement for the purpose of borrowing from any person, unless otherwise agreed between the Parties (acting reasonably);</i></u></p> <p>The text in paragraph 2 shall be deleted and replaced with "not used". Paragraph 3.2 shall be deleted and replaced with the following new paragraph:</p> <p><u><i>"Lock-up Period" means the period commencing on the date of this EMA and expiring on the date which the Authority confirms by notice in writing to the Franchisee that:</i></u></p> <p class="list-item-l1"><u><i>(a) the Authority considers that all the obligations of the Parties to account to each other pursuant to Schedule 8.A (Franchise Payments) have been fully performed and discharged (such confirmation not to be unreasonably withheld or delayed); and</i></u></p> <p class="list-item-l1"><u><i>(b) by virtue of such notice, the Lock-Up Period has expired.</i></u></p> <p><u><i>No such notice shall constitute a waiver of any rights which the Authority may have under or in respect of Schedule 8.A.</i></u></p> <p>Paragraph 3.3 shall be deleted and replaced with "not used".</p> <p>A new paragraph 3A shall be inserted after paragraph 3.3 (Not used) as follows:</p>

"3A The Franchisee shall use reasonable endeavours to plan its business activities and working capital position such that the Forecast Closing Cash Position as does not fall below the Floor Cash Position."

A new paragraph 5.3A shall be inserted after paragraph 5.3 as follows:

"The Parties acknowledge and agree that the Franchisee shall under no circumstances be entitled to reimbursement, pursuant to Schedule 8.A (Payments) or otherwise, in respect of any additional costs or expenses incurred by the Franchisee in procuring any new Performance Bond pursuant to this paragraph 5."

Paragraph 5.5(a)(i) shall be deleted and replaced with the following:

"either terminated or expired and, in either case, in circumstances where there are liabilities or obligations outstanding from the Franchisee to the Authority including where the Franchise Period has terminated or expired but provisions of the Franchise Agreement remain in operation and effect (including Schedule 8.A (Franchise Payments)); and/or

Paragraph 5.6 shall be amended by deleting limbs (a) and (b) and inserting the following:

- "(a) early termination of the Franchise Agreement; and/or
- (b) any failure by the Franchisee to perform or comply with any of its obligations to the Authority under the Franchise Agreement or to a Successor Operator under the Supplemental Agreement; and/or
- (c) without prejudice to the forgoing generality, any of the following amounts which (i), in respect of any Performance Year, the Authority has not offset against MFPP in accordance with paragraph 11 of Schedule 8.A (Payments); or (ii) which are not taken into account in any payment received by the Authority pursuant to the Funding Deed:
 - (A) Authority Claims; and
 - (B) any other sums which the Authority has the right in accordance with Schedule 8.A (Payments) to offset against MFPP; and/or

	<p><u>(d) any amount of the Final Working Capital Repayment not paid to the Authority in accordance with paragraph 10.4 of Schedule 8.A (Payments)."</u></p> <p>A new subparagraph 5.6A shall be inserted as follows:</p> <p><u>"The Parties acknowledge and agree that the Franchisee shall under no circumstances be entitled to reimbursement, pursuant to Schedule 8.A (Payments) or otherwise, of any losses, liabilities, costs or expenses incurred by the Franchisee arising out of or in connection with any lawful demand made by the Authority under the Performance Bond pursuant to this paragraph 5."</u></p> <p>A new paragraph 9 shall be inserted as follows:</p> <p><u>"9. Survival</u></p> <p><u>For the avoidance of doubt this Schedule 12 and any other provisions of the Franchise Agreement reasonably required for the purpose of giving this Schedule full effect shall survive the termination or expiry of the Franchise Term (however arising) and continue in full force and effect in accordance with its terms."</u></p>
Schedule 13: Franchise Management and Information Obligations	
13.1 – Franchise Management	N/A
13.2 – Information	<p>The following sentence shall be added to the end of paragraph 3.1:</p> <p><i>"In particular, the Franchisee shall ensure that such accounting records are produced and maintained in a form which distinguishes between transactions which reasonably and properly relate, on the accruals basis, to the period during which the EMA is in force, and those which do not."</i></p> <p>A new paragraph 3.3(b) shall be inserted as follows:</p> <p><i>"(b) the Franchisee's available Cash Balance on the final day of the Reporting Period to which the Management Accounts relate and the Franchisee's forecast of:</i></p>

(i) the Franchisee's daily Cash Balance for the period of thirteen (13) weeks following the Reporting Period to which the Management Accounts relate;

(ii) the amount of Working Capital Payment (if any) that the Franchisee forecasts that it will require pursuant to paragraph 9 of Schedule 8.A in respect of the three (3) Reporting Periods following the Reporting Period to which the Management Accounts relate; and

(iii) payments to and from Affiliates of the Franchisee;"

In paragraph 3.3 (c), the word "financial" shall be inserted between "Franchisee's" and "performance".

At the end of paragraph 3.3 (g), the word "and" shall be deleted.

At the end of paragraph 3.3 (h), the punctuation and word ";and" shall be inserted.

New paragraphs 3.3 (h), (i) and (j) shall be inserted as follows:

"(h) a comparison on a line by line basis of Actual Costs and Actual Revenue of the Franchisee compared to the Budgeted Costs and Estimated Revenue for that Reporting Period;

(i) a detailed statement and a reasonable written explanation of any material differences between the actual payments to and from Affiliates of the Franchisee and the forecast of such payments as referred to in paragraph 3.3(b)(iii); and

(j) profit and loss, cash flow and balance sheet provided in accordance with the Initial Budget (together with a reasonable written explanation as to any changes in such forecasts from the previous such forecasts provided pursuant to the provisions of paragraph 3.3 of this Schedule 13) for each of the following thirteen (13) Reporting Periods."

Paragraph 3.4 shall be deleted and replaced with "not used".

The following text shall be inserted at the end of paragraph 3.6:

"divided between Reporting Periods within the term of the EMA and Reporting Periods not within the term of the EMA. For Reporting Periods within the term of the EMA, line items should be disaggregated between a section in relation to Actual Costs and a section in relation to Actual

Revenues, and Disallowable Costs, Revenue Foregone, Accrued Disallowable Costs and Accrued Revenue Foregone."

A new paragraph 3.9A shall be inserted as follows:

"3.9A Within two (2) Reporting Periods after the end of the last EMA Performance Period, the Franchisee shall deliver to the Authority the following information:

(a) certified true copies of its Final Reviewed Accounts for the EMA Performance Periods in aggregate, together with copies of all related reports provided by auditors or other reviewers (if any) pursuant to paragraph 16 of Schedule 8.A;

(b) a detailed reconciliation disaggregating Actual Costs and Actual Revenues, and Disallowable Costs, Revenue Foregone, Accrued Disallowable Costs and Accrued Revenue Foregone of the Final Reviewed Accounts reconciled to the Management Accounts in relation to the period of the term of the EMA, in a format to be from time to time reasonably specified by the Secretary of State (the "Final Reviewed Accounts Reconciliation"). The Final Reviewed Accounts Reconciliation shall:

(i) disaggregate the costs and revenues in the Final Reviewed Accounts so as to report against (and show in a format consistent with that used in) the Management Accounts within the EMA Performance Period(s); and

(ii) facilitate the identification of Actual Costs and Actual Revenues as reported in the Management Accounts within the EMA Performance Period(s) and easy comparison of Actual Costs with the Budget;

(iii) a statement from the Franchisee's auditors (in a format to be reasonably specified by the Authority from time to time, on the basis of providing the Authority with reasonable assurance) that the disaggregation required by the Final Reviewed Accounts Reconciliation in accordance with paragraph 3.9A(b) has been undertaken accurately; and

(iv) a statement from the Franchisee's auditors confirming that GAAP has been applied in a fair and consistent manner."

In paragraph 3.11, the words "the Adopted Accounting Principles' shall be deleted and the word "GAAP" shall be inserted.

	<p>A new paragraph 3.11A shall be inserted as follows:</p> <p><i>"3.11A The Franchisee shall not, without the express written consent of the Authority, make any alteration to its accounting policies or basis of preparation in relation to its Management Accounts, Annual Management Accounts, Annual Audited Accounts or Final Reviewed Accounts."</i></p>
13.3 – Co-operation	N/A
13.4 – Staff Obligations	N/A
13.5 –Safety and Personal Security	N/A
13.6 - Integration	N/A
13.7 – Related Parties and Open Book Accounting	N/A
Schedule 14: Preservation of Assets	
14.1 – Maintenance of Franchisee	N/A
14.2 – Maintenance of Operating Assets	N/A
14.3 – Key Contracts	N/A
14.4 – Designation of Franchise Assets	N/A
14.5 – Dealings with Franchise Assets	N/A
Schedule 15: Obligations Associated with Termination	
15.1 – Reletting Provisions	N/A
15.2 – Last 12 or 13 months of Franchise Period	<p>A new paragraph 1.3 shall be inserted as follows:</p> <p><u>1.3 EMA Period</u></p>

Notwithstanding paragraphs 1.1 and 1.2 above, the Parties agree that paragraphs 2 to 5 of this Schedule 15.2 shall apply for the duration of the EMA."

Paragraph 2.1(a) shall be amended as follows:

"(a) takes effect *during the term of the EMA or* in the last twelve months of the Franchise Period unless it is in the ordinary course of business and, when aggregated with any other variation or addition which takes effect during such period, represents an increase in the remuneration of a Franchise Employee of no more than the amount determined in accordance with the following formula:"

Paragraph 2.5 shall be amended as follows:

*"Subject to and excluding any increase in the remuneration of Franchise Employees permitted under paragraph 2.1, the Franchisee shall not, and shall secure that each other relevant employer shall not, without the prior written consent of the Authority (which shall not be unreasonably withheld or delayed) increase or decrease *during the term of the EMA or* in the last 12 months of the Franchise Period the number of Franchise Employees such that:*

(a) the total number of Franchise Employees or the total cost per annum to the Franchisee and each other relevant employer of employing all Franchise Employees is increased; or

(b) the total number of Franchise Employees is decreased,

*in each case, by more than 5 per cent. during *the term of the EMA or* such period of 12 months *(as applicable).*"*

Paragraph 3.1(a) shall be amended as follows:

*"3.1(a) Without in any way limiting the rights of the Authority in terms of Schedule 5 (Fares), during *the term of the EMA or* the last 13 months of the Franchise Period the Franchisee shall not, without the prior written consent of the Authority (not to be unreasonably withheld), set the Price or Child Price of or sell (except to the extent required to do so under the terms of the Ticketing and Settlement Agreement as a result of the Price or Child Price of a Fare being set by another person) any Fare which would entitle the purchaser of such Fare to travel on all or any of the Passenger Services after the Franchise Period for an amount which is less than the Price or the Child Price of that Fare immediately before the commencement of *the term of the EMA or* such*

13 month period (as applicable) or, in the case of a new Fare, the Price of its nearest equivalent immediately before the commencement of such period.

(b) Paragraph 3.1(a) shall not prevent the Franchisee from giving any discount or reduction to which the purchaser of a Fare may be entitled by virtue of:

(i) presenting a Discount Card (or any equivalent replacement thereof) issued by the Franchisee before the commencement of the term of the EMA or such 13 month period (as applicable) and to which the purchaser would have been entitled before the commencement of such period;

(ii) presenting a Discount Card issued by another train operator;

(iii) the Passenger's Charter or the passenger's charter of any other train operator; or

(iv) any relevant conditions of carriage."

Paragraph 3.2 shall be amended as follows:

"3.2(a) Except to the extent that the Authority may consent from time to time (such consent not to be unreasonably withheld), the Franchisee shall not, during the term of the EMA or in the last 13 Reporting Periods of the Franchise Period, take any action or step which may result in its Percentage Allocation (as defined in the Ticketing and Settlement Agreement) in respect of any Rail Product (as defined in the Ticketing and Settlement Agreement) being reduced.

(b) The Franchisee shall notify the Authority before taking any such action or step during the term of the EMA or in the last 13 Reporting Periods of the Franchise Period and upon becoming aware of any other person proposing to take any action or step which may have the same effect. The Franchisee shall take such action as the Authority may reasonably request in order to prevent any such reduction, including submitting any dispute to any relevant dispute resolution procedures.

Paragraph 4.1 shall be amended by inserting the words "the term of the EMA or," before the words "the last twelve months of the Franchise Period".

Paragraph 5 shall be amended by inserting the words "the term of the EMA or," before the words "the last twelve months of the Franchise Period".

15.3 – Handover Package	N/A
15.4 – Provisions applying on and After Termination	N/A
Schedule 16: Pensions	
Pensions	N/A
Schedule 17: Confidentiality, FOISA and Data Protection	
All provisions in this Schedule	N/A
Schedule 18: Franchise Term Modification	
All provisions in this Schedule	N/A
Schedule 19: Other Provisions	
All provisions in this Schedule	N/A

Appendix 1 to Schedule 1

NOT USED

Appendix 2 to Schedule 1

Schedule 8.A (Payments)

1. Definitions

For the purposes of this Schedule 8.A (Franchise Payments) only, the following words and expressions shall have the following meanings:

"Accrued Claims"	has the meaning given in paragraph 5.7 of Schedule 8.A (Franchise Payments);
"Accrued Disallowable Costs"	has the meaning given in paragraph 5.7 of Schedule 8.A (Franchise Payments);
"Accrued Revenue Foregone"	has the meaning given in paragraph 5.7 of Schedule 8.A (Franchise Payments);
"Actual Capex"	means the actual Capital Expenditure of the Franchisee in the relevant period;
"Actual Costs"	means the actual Costs of the Franchisee in the relevant period;
"Actual Revenue"	means the actual Revenue of the Franchise in the relevant period;
"Aggregated Costs and Revenues Liabilities"	has the meaning given in paragraph 5.8 of Schedule 8.A (Franchise Payments);
"Base Cash Position"	means [REDACTED] or such other value as the Authority may reasonably determine in accordance with paragraph 9.8 of Schedule 8.A (Franchise Payments);
"Budget"	means together: (a) the periodic cost and revenues budget; and (b) the periodic capex budget, as such budget may be updated from time to time in accordance with paragraph 4 of Schedule 8.A (Franchise Payments);
"Budgeted Capex"	means the Capital Expenditure budgeted to be incurred by the Franchisee in a Reporting Period and specified in the then current Budget as agreed or determined pursuant to paragraph 4 of this Schedule 8.A (Franchise Payments);
"Budgeted Costs"	means the Costs budgeted to be incurred by the Franchisee in each Reporting Period and specified in the then current Budget as agreed or determined pursuant to paragraph 4 of this Schedule 8.A (Franchise Payments);
"Capital Expenditure"	means costs of creating non-current or fixed assets which are not Costs (as defined in this Schedule 8.A) and which are properly accrued during the term of the EMA and relate to the Franchisee's performance of the EMA;

"Contingent Claim"	Authority has the meaning given in paragraph 5.9 of Schedule 8.A (Franchise Payments);
"Costs"	means costs and expenses properly accrued during the term of the EMA and relate to the Franchisee's performance of the EMA and stated in the Franchisee's profit and loss account but excluding:-
	<ul style="list-style-type: none"> (a) Franchise Payments (which shall include (for the avoidance of doubt) the value of any Management Fee and Performance Payment); (b) corporation tax and deferred tax charge in the Franchisee's profit and loss account; (c) any accounting transaction which does not require the Franchisee to make a cash payment including notional pensions accounting adjustments and the accounting impact of financial instrument revaluations, other than depreciation where that depreciation is not a Disallowable Cost; (d) Capital Expenditure;
	provided that:
	<ul style="list-style-type: none"> (i) if the Franchisee's profit and loss account includes any cost(s) in respect of right of use assets treated in accordance with IFRS16 (the "IFRS16 Cost"), then for the purpose of this definition the amount for each IFRS16 Cost shall be deemed to be replaced (for the purposes of this definition and all related consequential purposes under this Agreement) with the amount which would have applied if the cost had been treated on a cash basis, as such cost is incurred in accordance with the relevant contractual arrangements, rather than in accordance with IFRS16; and (ii) for the avoidance of doubt, any liability of the Franchisee to the Authority arising under or in connection with the Franchise Agreement prior to the EMA Start Date shall not be treated as or give rise to a cost or expense for the purpose of the Franchisee's profit and loss account;
"Ceiling Cash Position"	means [REDACTED] or such other value as the Authority may reasonably determine in accordance with paragraph 9.8 of Schedule 8.A (Franchise Payments);
"Disallowable Costs"	means any Costs or Capital Expenditure which are described within Appendix 1 (Disallowable Costs) to this Schedule 8.A (Franchise Payments);
"EMA"	means the emergency measures agreement entered into between the Authority and the Franchisee in response to COVID-19;

"EMA Start Date"	means the last date of execution of the EMA;
"Emergency Working Capital Payment"	has the meaning given in paragraph 9.6 of Schedule 8.A (Franchise Payments);
"Estimated Revenue"	means the Revenue reasonably determined by the Authority using available resources as is practicable at the time of the determination;
"Extended Performance Period"	means, in the event that the Term is extended in accordance with clause 3.3 of the EMA, each further period following the end of the preceding Performance Period, comprising six (6) additional Reporting Periods (or less in the event that the EMA is terminated prior to the expiry of the relevant Extended EMA Performance Period);
"Final Reviewed Accounts"	means the audited accounts provided pursuant to paragraph 16 of Schedule 8.A (Franchise Payments);
"Floor Cash Position"	means [REDACTED] or such other value as the Authority may reasonably determine in accordance with paragraph 9.8 of Schedule 8.A (Franchise Payments);
"Forecast Closing Cash Position"	means, with respect to a Reporting Period, the Franchisee's forecast working capital position (excluding the aggregate of the Periodic Franchise Payment and Periodic Budgeted Capex Payment made in the following Reporting Period) as at the last day of that Reporting Period and taking into account the Franchisee's latest Management Accounts;
"Franchise Component"	Payment means: <ul style="list-style-type: none"> (a) each of the components of "FP" as described in paragraph 2.1 of this Schedule 8.A (Franchise Payments); and (b) any component or element, described in the relevant provisions of this Schedule 8.A (Franchise Payments) and Schedule 8.B (Performance Payment), as the case may be, which is used in determining or calculating the value of those components described in paragraph (a) above;
"Good and Efficient Operator"	Efficient means in the context of all other relevant provisions of this Agreement, a notional train operator, having the same commercial, regulatory and operational arrangements as the Franchisee and being subject to the same operational circumstances (which, for the avoidance of doubt, shall recognise the extraordinary impact of COVID-19, the existence of the EMA and the requirement for operators to act in the national interest in response to COVID-19), which is a party to a franchise agreement in equivalent terms to the Franchise Agreement, with performance targets and standards equivalent to those set out in Schedule 8.B (Performance Payment) of the Franchise Agreement, which complies with its obligations under such franchise agreement and the Licences in a timely, efficient and economical manner

	and with the degree of skill, diligence, prudence and foresight which can be expected from a skilled and experienced train operator so that in this context costs and revenues are optimised in combination to the greatest extent reasonably practicable, adopting a reasonable balance in respect of short, medium and longer term consequences for the relevant franchise;
"Initial Authority Claim Amount"	has the meaning given in paragraph 5.9 of Schedule 8.A (Franchise Payments);
"Management Fee and Performance Payment" or "MFPP"	means the Franchise Payment Component calculated in accordance with paragraph 11 of this Schedule 8.A (Franchise Payments);
"Payment Date"	has the meaning given in paragraph 3.3 of Schedule 8.A (Franchise Payments);
"Performance Period"	means each of: <ul style="list-style-type: none"> (a) the period commencing on the EMA Start Date and ending at 1.59 a.m. on 20 September 2020, or such earlier date of termination of the EMA; and (b) where the Term is extended in accordance with clause 3.3 of the EMA, each Extended Performance Period;
"Periodic Adjustment"	has the meaning given in paragraph 6.2 of Schedule 8.A (Franchise Payments);
"Periodic Budgeted Capex Payment" or "PBCP"	means the Franchise Payment Component calculated in accordance with paragraph 2.1 of this Schedule 8.A (Franchise Payments);
"Periodic Franchise Payment" or "PFP"	means the Franchise Payment Component calculated in accordance with paragraph 2.1 of this Schedule 8.A (Franchise Payments);
"Periodic Finance Review Meeting"	has the meaning given in paragraph 5.1 of Schedule 8.A (Franchise Payments);
"Reporting Period Budget Forecast Review Meeting"	has the meaning given in paragraph 4.1 of Schedule 8.A (Franchise Payments);
"Revenue"	means the gross total revenue of the Franchisee received or receivable and properly accrued during the term of the EMA and in relation to the EMA as stated in the Franchisee's profit and loss account but excluding: <ul style="list-style-type: none"> (a) Franchise Payments (which shall include (for the avoidance of doubt) the value of any Performance Payment and/or Management Fees); and

- (b) any accounting transaction included in the Management Accounts, Annual Management Accounts or Annual Audited Accounts but which does not result in the Franchisee receiving a cash payment including notional pensions accounting adjustments and the accounting impact of financial instruments revaluations;

"Revenue Foregone"

means an amount equal to the amount of revenue or other value which was not received or receivable by the Franchisee including:

- (a) the:
 - (i) debts or other receivables waived, not collected or written off; and/or
 - (ii) value of any other asset not realised in whole or in part,

but which would have been receivable and received or otherwise realised by the Franchisee if it had acted as a Good and Efficient Operator; and

- (b) subject always to paragraph 3.8 (No Double Recovery) of Schedule 8.A (Franchise Payments), the amount by which the Purchase Price (as defined in Clause 2.1 of the Supplemental Agreement) receivable by the Franchisee is lower than it would have been but for the Franchisee:
 - (i) incurring Disallowable Costs; and/or
 - (ii) otherwise acting other than as Good and Efficient Operator;

save where, in respect of both (a) and (b) above, such revenue is not received or receivable as a result of the Franchisee acting in accordance with the instructions of the Authority;

"Authority Claim"

means all losses, liabilities, costs, damages and expenses that the Authority does or will incur or suffer (including any such losses, liabilities, costs, damages and expenses that are unliquidated or which are contingent):-

- (a) as a consequence of any breach, negligence or other default of the Franchisee under or in connection with the Franchise Agreement and/or any agreement ancillary to this Agreement, including the Supplemental Agreement, and/or
- (b) in respect of any matter for which the Franchisee is to indemnify the Authority pursuant to this Agreement or any agreement ancillary to this Agreement, including the Supplemental Agreement

"Supporting Materials"	means any materials explaining or supporting the Budget which have been produced by the Franchisee and serve as a Supporting Materials;
"Working Payment"	Capital means the Franchise Payment Component calculated in accordance with paragraph 9.3 of this Schedule 8.A (Franchise Payments); and
"Working Repayment"	Capital means the Franchise Payment Component calculated in accordance with paragraph 10.2 of this Schedule 8.A (Franchise Payments).

2. Franchise Payments

2.1 The Franchise Payment for any Reporting Period shall be an amount equal to:

£FP =	PFP + PBCP + PADJ + WCP – WCR + FADJ + MFPP – FWCR
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where:

PFP (Periodic Franchise Payment)	means an amount equal to: $PFP_n = BC_n - ER_{n-1}$ Where: BC_n means the Budgeted Costs for the current Reporting Period (if any). BC may only be a positive number. ER_{n-1} means the Estimated Revenue for Reporting Period _(n-1) (if any) provided such Reporting Period occurs after the EMA Start Date. ER may only be a positive number. PFP may be a positive or negative number.
PBCP (Periodic Budgeted Capex Payment)	means an amount equal to the Budgeted Capex for the current Reporting Period (if any). PBCP may only be a positive number.
PADJ	means any Periodic Adjustment, determined in accordance with paragraph 6 of Schedule 8.A (Franchise Payments), to be made on that Reporting Period's Payment Date. PADJ may be a positive or negative number.
WCP	means any Working Capital Payment to be made on that Reporting Period's Payment Date. WCP may only be a positive number.
WCR	means any Working Capital Repayment to be made on that Reporting Period's Payment Date. WCR may only be a positive number.
FADJ	means any Final Adjustment, determined in accordance with paragraph 7 of Schedule 8.A (Franchise Payments), to be made on that Reporting Period's Payment Date. FADJ may be a positive or negative number.
MFPP	means the Management Fee and Performance Payment for the term of the EMA, determined in accordance with paragraph 11.1 of Schedule 8.A (Franchise Payments) and to be paid on the first Payment Date following the determination of the Management Fee and Performance Payment in accordance with Paragraph 11 of Schedule 8.A (Franchise Payments) which the Parties acknowledge will be after the expiry of the term of the EMA. Subject to paragraph 11.2, MFPP may only be a positive number.

FWCR	means the Final Working Capital Repayment, determined in accordance with paragraph 10.3 of Schedule 8.A (Franchise Payments), to be made on that Reporting Period's Payment Date. FWCR may only be a positive number.
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- 2.2 Not Used.
- 2.3 Not Used.
- 2.4 The Parties agree that:
- (a) where **EFP is a positive number**, the Authority shall pay that amount to the Franchisee on the Payment Date for that Reporting Period;
 - (b) where **EFP is a negative number**, the Franchisee shall pay the corresponding positive amount to the Authority on the Payment Date for that Reporting Period.

3. Payment of Franchise Payments

- 3.1 The Authority shall notify the Franchisee, no less than seven (7) days prior to the start of each Reporting Period (or, in the case of the first Reporting Period following the EMA Start Date, as soon as reasonably practicable), of the amount of the Franchise Payment payable in respect of that Reporting Period.
- 3.2 Each such notification shall set out in reasonable detail how the Franchise Payment has been calculated.
- 3.3 The Payment Date for a Reporting Period shall be the first Weekday of that Reporting Period (or, in the case of the first Reporting Period following the EMA Start Date shall be 2nd May 2020).
- 3.4 Each Franchise Payment shall be payable by the Franchisee or, as the case may be, the Authority in the amount notified by the Authority in accordance with paragraph 3.1 on the Payment Date of the Reporting Period to which it relates.
- 3.5 Each Franchise Payment shall be made:
- (a) by automatic electronic funds transfer in pounds sterling to such bank account in the United Kingdom as the payee of such payment may have previously specified to the payer in writing; and
 - (b) so that cleared funds are received in that account on or before the due date for payment.

Interest

- 3.6 If:
- (a) the Franchisee fails to pay any amount to the Authority on its due date; or
 - (b) the Authority fails to pay to the Franchisee the Franchise Payment on its due date, that Party which has failed to pay shall in addition pay interest on such amount at the Interest Rate, calculated on a daily basis, from the due date for payment to the date on which payment is made.

Disputes under Schedule 8

3.7 If either the Franchisee or the Authority disputes the amount of a Franchise Payment, the dispute shall, unless the Franchisee and the Authority otherwise agree, be resolved in accordance with the provisions of paragraph 2 of Schedule 19 of the Franchise Agreement. Any such dispute shall not affect the obligation of either party to pay a Franchise Payment notified in accordance with this Schedule 8.A.

No Double Recovery

3.8 Neither Party shall be entitled to recover (by way of an adjustment to Franchise Payments or otherwise) more than once in respect of the same amount. In particular, no amount shall be categorised as both Capital Expenditure and as a Cost for the purpose of this Schedule 8.A, or inconsistently with the accounting treatment assumed for the same capital expenditure in calculating the Franchise Payments under the Franchise Agreement prior to the implementation of the EMA.

3.8A In the event that the Franchisee is successful in obtaining any UK Government support that is offered in relation to the impact of COVID-19, this shall be taken into account in relation to the relevant payment and adjustments in this Schedule 8A such that the Franchisee does not benefit from double recovery or double counting.

Force Majeure and Payments

3.9 Following the occurrence of a Force Majeure Event, the payment of Franchise Payments shall continue to be calculated in accordance with this Schedule 8.A (Franchise Payments) and the payment of such Franchise Payments shall continue unaffected.

4. Revisions to the Budget

4.1 Without limiting the requirement for any other meeting, the Parties shall, subject to paragraph 5.10, hold a forecast Budget review meeting in each Reporting Period (a "**Reporting Period Budget Forecast Review Meeting**") at a time and location notified to the Franchisee by the Authority following provision of the information referred to in paragraph 4.2. The purpose of the meeting shall be to review and seek to agree:

- (a) revisions (if any) to the then current Budget for the remaining Reporting Periods of the Budget;
- (b) the content of any necessary or desirable corresponding addendum to the Supporting Materials; and
- (c) any new contracts which the Franchisee proposes to enter into with an Affiliate.

The Franchisee shall ensure that the representatives of the Franchisee at the Reporting Period Budget Forecast Review Meeting shall include the Finance Director of the Franchisee or a suitable representative of the Finance Director as may reasonably be approved for this purpose by the Authority.

4.2 The Franchisee shall, prior to the date of each Reporting Period Budget Forecast Review Meeting have provided to the Authority the relevant information required pursuant to paragraph 3 of Schedule 13.2 together with a draft periodic budget prepared using the cost and revenue categories within P&L2 of the Financial Model, updated to reflect Actual Costs and Actual Revenues as reflected in the latest Management Accounts and revised Budgeted Costs for the remainder of the term of the EMA, in accordance with the timescales set out therein, and shall provide the Authority with all further information as the Authority may request from time to time for the purposes of the operation of this paragraph 4, within such time as the Authority may reasonably specify for that purpose (and this paragraph shall continue to apply such that the number of requests which the Authority may make is not limited).

- 4.3 If the Parties fail to agree the matters referred to in paragraphs 4.1(a) to 4.1(c) at the relevant Reporting Period Budget Forecast Review Meeting, the Authority shall reasonably determine such matters.
- 4.4 Such revisions to the Budget and addenda to the Supporting Materials as agreed or reasonably determined shall take effect from the first day of the Reporting Period immediately following the date on which the Reporting Period Budget Forecast Review Meeting (at which such matters were discussed) took place provided that, if such revisions or addenda are not agreed by the first day of that Reporting Period, the relevant revisions and addenda shall take effect from the first day of the Reporting Period which falls at least 10 Weekdays after those revisions and addenda are agreed or reasonably determined.
- 4.5 Each revision to the Budget and/or addendum to the Supporting Materials shall (unless the Parties otherwise agree):
- (a) adopt the same format and structure as the original version in agreed terms (or where the preceding version has included any changes from that format and structure expressly agreed by the Parties for this purpose) from the preceding version;
 - (b) make no assumptions or include any costs, revenue or other adjustments which are not consistent with the definitions of Costs, Capital Expenditure and Revenue or which represent Disallowable Costs or Revenue Foregone or liabilities in respect of Authority Claims (except as may be otherwise expressly agreed by the Parties for that purpose);
 - (c) adopt the same accounting principles and standards as the original version (as these may be expressly varied by agreement between the Parties for this purpose or, in the case of accounting standards, as these may be reasonably revised by the Authority to take account of changes to GAAP in the United Kingdom); and
 - (d) otherwise facilitate easy comparison with the definitions of Costs, Capital Expenditure, Revenue, Disallowable Costs and Revenue Foregone and with the information reported in the Management Accounts, Annual Management Accounts and the Audited Annual Accounts.
- 4.6 Each time it is agreed or reasonably determined that the Budget is to be revised and/or an addendum is to be added to the Supporting Materials, the Authority shall be entitled to:-
- (a) make the agreed or reasonably determined revisions to the Budget and/or Supporting Materials himself (or procure this is done on his behalf) and provide copies of those revised documents to the Franchisee; or
 - (b) require the Franchisee to provide the agreed or reasonably determined revisions to the Budget and/or Supporting Materials for approval by the Authority, which the Franchisee shall do and provide revised versions to the Authority within such time as the Authority shall specify for this purpose.
- 4.7 The Franchisee shall not enter into any contract with an Affiliate unless the Authority has, in his discretion (acting reasonably) (and for this purpose paragraph 2.1 of Schedule 13.7 of the Franchise Agreement shall not apply) first consented to the terms of such contract and to it being entered into on those terms, whether at or following a Reporting Period Budget Forecast Review Meeting (where such contract forms part of the agenda for that meeting) or otherwise.
- 4.8 For the purpose of this paragraph 4, the Authority shall be entitled to consider any information provided to the Authority by the Franchisee and any other sources of information which the Authority consider to be relevant and the Authority shall be entitled to request such information from the Franchisee as the Authority requires in connection with the matters referred to in this paragraph 4. Without prejudice to the generality of the foregoing, in considering any revisions to the Budget, regard shall be had to the definitions of Costs, Revenue, Capital Expenditure,

Good and Efficient Operator, Disallowable Costs and Revenue Foregone, so as to ensure that the revisions to the Budget are consistent with those definitions.

4.9 Subject to the Authority's rights set out in paragraph 4.7, the Parties shall at all times act in good faith, reasonably and in a timely manner in the interpretation and application of the provisions for agreeing revisions to the Budget and any addendum to the Supporting Materials.

5. **Review of Franchisee's performance against Budget**

Finance Review Meeting

5.1 Without limiting the requirement for any other meeting, the Parties shall, subject to paragraph 5.10, hold a finance review meeting in every Reporting Period ("Periodic Finance Review Meeting") (other than the first Reporting Period of the term of the EMA) at such time(s) and location(s) notified to the Franchisee by the Authority following provision of the information referred to in paragraph 5.2 and:

- (a) the purpose of the Periodic Finance Review Meeting shall be to review the financial performance of the Franchisee. This shall include:
 - (ii) a review and discussion of variances arising in the preceding Reporting Period between Actual Costs, Actual Revenues and Actual Capex and Budgeted Costs and Budgeted Capex respectively and confirmation of the value of the Periodic Adjustment to be applied to the Franchise Payment to be paid in the Reporting Period following the Reporting Period in which the Periodic Finance Review Meeting is taking place;
 - (iii) a review and discussion regarding any Actual Costs with respect to payments made by the Franchisee under affiliated contracts which exceed either the Budgeted Costs stated in the then current Budget or the level of payments made under the affiliate contracts for equivalent periods prior to the EMA Start Date;
 - (iv) a review of fees and payments (including bonuses) actually paid by the Franchisee to its directors and officers during the preceding Reporting Period as against the Budgeted Costs for such fees and payments as stated in the then current Budget;
 - (v) a review and discussion of the Franchisee's management of its working capital and the Franchisee's Forecast Closing Cash Position for that Reporting Period in which the Periodic Finance Review Meeting is taking place and any Working Capital Payment or Working Capital Repayment to be applied to the Franchise Payment to be paid in the Reporting Period following the Reporting Period in which the Periodic Finance Review Meeting is taking place;
 - (vi) actions to be taken in respect of the Franchisee's financial performance;
 - (vii) identification of any potential Disallowable Costs, Revenue Foregone and Authority Claims that may have been incurred within the preceding or current Reporting Period; and
 - (viii) confirmation and valuation of any Disallowable Costs, Revenue Foregone and Authority Claims (and/or in accordance with paragraph 5.9, relevant Initial Authority Claim Amounts, as applicable) which have been identified pursuant to (vi) above in previous Report Period Finance Review Meetings.

- (b) the Franchisee shall ensure that the representatives of the Franchisee at the meeting shall include the Finance Director of the Franchisee or a suitable representative of the Finance Director as may reasonably be approved for this purpose by the Authority.
 - (c) the Authority shall ensure that the representatives of the Authority shall include a senior civil servant where the confirmation and valuation of any Disallowable Costs, Revenue Foregone and/or Authority Claims (and/or in accordance with paragraph 5.9, relevant Initial Authority Claim Amounts, as applicable) are to be considered as part of any Reporting Period Finance Review Meeting
- 5.2 The Franchisee shall, prior to the date of each Periodic Financial Review Meeting have provided to the Authority the relevant information required pursuant to paragraph 3 of Schedule 13.2 together with a statement of the Franchisee's Forecast Closing Cash Position applicable to that Reporting Period, in accordance with the timescales set out therein, and shall provide the Authority with all further information as the Authority may request from time to time for the purposes of the operation of paragraph 5.1, within such time as the Authority may reasonably specify for that purpose (and this paragraph shall continue to apply such that the number of requests which the Authority may make is not limited).
- 5.3 [Not used]
- 5.4 The Authority shall be entitled to consider any information provided to them by the Franchisee and any other sources of information which the Authority consider to be relevant and the Authority shall be entitled to request such information from the Franchisee as the Authority require for the purposes of the operation of this paragraph 5. The Franchisee shall provide the information within such time as the Authority may reasonably specify for the purpose (and this paragraph shall continue to apply such that the number of requests which the Authority may make is not limited).
- 5.4A If, within 10 Weekdays following the relevant Reporting Period Finance Review Meeting:
- (a) the Parties have failed to agree the matters referred to in paragraph 5.1(a)(vii); and
 - (b) such matters either individually or in the aggregate exceed **[REDACTED]**; then each Party will respectively procure that such matter or matters (as the case may be) will be escalated to any senior civil servant within the Transport Scotland's rail group on behalf of the Authority and any statutory director of any Affiliate of the Franchisee on behalf of the Franchisee. Those representatives will meet at the earliest convenient time and in any event within 20 Weekdays of the date of the relevant Reporting Period Finance Review Meeting and negotiate in good faith and attempt to agree the relevant matters.
- 5.5 If:
- (a) the Parties fail to agree the matters referred to in paragraph 5.1(a) at the relevant Reporting Period Finance Review Meeting, in circumstances where paragraph 5.4A does not apply;
 - (b) the representatives of the Parties fail to agree the matters referred to in paragraph 5.1(a)(vii) within 10 Weekdays of first meeting to agree such matters in accordance with paragraph 5.4A, in circumstances where that paragraph applies; or
 - (c) the Franchisee fails to provide the relevant information required pursuant to Schedule 13.2 (Information), in accordance with the timescales set out therein, or otherwise in accordance with this paragraph 5,
- the Authority shall (without prejudice to its other rights) be entitled (but not obliged) to determine (acting reasonably) the relevant matters in accordance with this paragraph 5 and all

other applicable provisions of this Schedule 8.A but by reference to the relevant information available to the Authority at the time of such determination.

Accrued Disallowable Costs, Accrued Revenue Foregone and Accrued Authority Claims

5.6 Without prejudice to paragraphs 5.4 to 5.5, if subsequent to any Reporting Period Finance Review Meeting the Authority later identifies any item (applicable to that period to which the relevant Reporting Period Finance Review Meeting relates) which the Authority considers is or may be a Disallowable Cost or an instance of Revenue Foregone or any Authority Claims (whether following a review of the Franchisee's Annual Audited Accounts or otherwise) the Authority shall within 28 days of identifying such item be entitled to:-

- (a) notify the Franchisee in writing, identifying the item concerned; and
- (b) request further information from the Franchisee in connection with the item for the purposes of the operation of this paragraph 5.6 and paragraphs 5.6A to 5.6C. The Franchisee shall provide the information within such time as the Authority may reasonably specify for the purpose.

5.6A The parties shall seek to agree the value of any Disallowable Costs and/or Revenue Foregone and/or any Authority Claims (and/or in accordance with paragraph 5.9, relevant Initial Authority Claim Amounts, as applicable) identified by the Authority pursuant to paragraph 5.6 within 20 Weekdays of the later of the Authority' notice referred to in paragraph 5.6(a) and the date specified by the Authority for the delivery of further information in accordance with paragraph 5.6(b) (the "**Escalation Trigger Date**").

5.6B If:

- (a) the parties fail to agree the matters referred to in paragraph 5.6A; and
- (b) such matters either individually or in the aggregate exceed **[REDACTED]**; then

each Party will respectively procure that such matter or matters (as the case may be) will be escalated to any senior civil servant within Transport Scotland's rail group on behalf of the Authority and any statutory director of Serco Caledonian Sleepers Limited or Serco Limited on behalf of the Franchisee. Those representatives will meet at the earliest convenient time and in any event within 20 Weekdays of the Escalation Trigger Date and negotiate in good faith and attempt to agree the relevant matters.

5.6C If:

- (a) the Parties fail to agree the matters referred to in paragraph 5.6A in circumstances where paragraph 5.6B does not apply;
- (b) the representatives of the Parties fail to agree the matters referred to in paragraph 5.6A within 10 Weekdays of first meeting to agree such matters in accordance with paragraph 5.6B, in circumstances where that paragraph applies; or
- (c) the Franchisee fails to provide the relevant information required pursuant to paragraph 5.6(b) in accordance with the specified timescales, then

the Authority shall reasonably determine the value of any Disallowable Costs and/or Revenue Foregone and/or any Authority Claims (and/or in accordance with paragraph 5.9, relevant Initial Authority Claim Amounts, as applicable).

5.7 The value of any Disallowable Costs and/or Revenue Foregone and/or any Authority Claims (and/or in accordance with paragraph 5.9, relevant Initial Authority Claim Amounts as applicable) as agreed or determined whether pursuant to paragraph 5.4A, paragraph 5.5,

paragraph 5.6A, paragraph 5.6B, paragraph 5.6C or paragraph 5.9 shall be referred to as "**Accrued Disallowable Costs**" and "**Accrued Revenue Foregone**" and "**Accrued Claims**" (as applicable).

5.8 Subject to paragraph 5.8A, the value of any Accrued Disallowable Costs and/or Accrued Revenue Foregone and/or Accrued Claims on each occasion accumulated pursuant to paragraph 5.7 shall be aggregated with the total of all Disallowable Costs, Revenue Foregone and Authority Claims which have been previously accumulated, such aggregated value from time to time being the "**Aggregated Costs and Revenues Liabilities**".

5.8A The value of all Accrued Disallowable Costs shall be limited to:

- (a) in the event that there has been no extension to the term of the EMA, the maximum potential Management Fee payable for the term of the EMA (which, for the avoidance of doubt, shall take account of any early expiry or termination of the EMA) calculated pursuant to paragraph 11.1; or
- (b) in the event that there has been an extension to the term of the EMA, the maximum potential Management Fee payable for the term of the EMA (which, for the avoidance of doubt, shall take account of any early expiry or termination of the EMA) calculated pursuant to paragraph 11.1.

5.9 To the extent that any Authority Claim is a contingent or unliquidated claim (a "**Contingent Authority Claim**"), the parties shall, pursuant to paragraph 5.4A, paragraph 5.6A or paragraph 5.6B (as applicable) seek to agree (or in the absence of agreement, the Authority may for the purposes of paragraph 5.5 and shall for the purposes of paragraph 5.6C, reasonably determine) an initial value for such Contingent Authority Claim (the "**Initial Authority Claim Amount**") and the Initial Authority Claim Amount shall be deemed to be an Accrued Claim for the purposes of paragraph 5.7. If the value of Contingent Authority Claim once fully liquidated (that is, being agreed or determined through dispute resolution) is:

- (a) in excess of the Initial Authority Claim Amount the Authority shall be entitled to claim such amount in excess of the Initial Authority Claim Amount from the Franchisee:
 - (i) as an adjustment to the Aggregated Costs and Revenues Liabilities to be applied against the calculation of MFPP, where Franchise Payments in favour of the Authority remain to be paid after the date on which the Contingent Authority Claim has become fully liquidated; and/or
 - (ii) as an adjustment to the Franchise Payment payable after the expiry of the term of the EMA;
 - (iii) as a debt from the Franchisee which the Authority shall be entitled to claim in accordance with the Funding Deed or from the Performance Bond on expiry or termination of this Franchise Agreement; or
- (b) is less than the Initial Authority Claim Amount the Authority shall repay to the Franchisee the difference between the actual liquidated value of the relevant Authority Claim and the Initial Authority Claim Amount either:
 - (i) as an adjustment to the Aggregated Costs and Revenues Liabilities to be applied against the calculation of MFPP, where Franchise Payments remain to be paid after the date on which the Contingent Authority Claim has become fully liquidated; or
 - (ii) where no Franchise Payment is payable after the date on which the Contingent Authority Claim becomes fully liquidated as a payment to the Franchisee.

5.10 The Authority shall have the discretion (acting reasonably) to decrease (and subsequently increase) the required frequency of the Reporting Period Budget Forecast Review Meetings and/or the Periodic Finance Review Meetings, provided they shall be no more frequent than once a Reporting Period.

5.11 Any Reporting Period Budget Forecast Review Meeting or Period Finance Review Meeting (or part thereof) may be held remotely with the prior agreement of the Parties.

6. **Periodic Adjustments**

6.1 The value of PADJ for the current Reporting Period (n) shall be equal to the following

PADJ for Reporting Period(n) =	$(ACRP_{n-2} - BCRP_{n-2}) + (ACAP_{n-2} - BCAP_{n-2}) - (ARRP_{n-2} - ERRP_{n-2})$
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Where:

ACRP_{n-2}	means the total Actual Costs in the second preceding Reporting Period (n-2) as set out in the Management Accounts for that preceding Reporting Period. ACRP _{n-2} may only be a positive number
BCRP_{n-2}	means the total Budgeted Costs in respect of the second preceding Reporting Period (n-2) based on the version of the Budget which applied for the purpose of the calculation of the Franchise Payment for that preceding Reporting Period (n-2). BCRP _{n-2} may only be a positive number.
ACAP_{n-2}	means the total Actual Capex for the second preceding Reporting Period (n-2). ACAP _{n-2} may only be a positive number
BCAP_{n-2}	means the Budgeted Capex in respect of the second preceding Reporting Period (based on the version of the Budget which applied for the purpose of the calculation of the Franchise Payment for that preceding Reporting Period (n-2)). BCAP _{n-2} may only be a positive number
ARRP_{n-2}	means the total Actual Revenue for the second preceding Reporting Period (n-2). ARRP may only be a positive number.
ERRP_{n-2}	means the total Estimated Revenue in respect of the second preceding Reporting Period (n-2) ERRP may only be a positive number.

6.2 The value of PADJ in respect of a Reporting Period shall be made as an adjustment to the next Franchise Payment payable after that calculation of PADJ is determined ("Periodic Adjustment"). For the avoidance of doubt a Periodic Adjustment shall be calculated on the basis that no interest is due pursuant to paragraph 3.6 of this Schedule 8.A.

6.3 The Authority agrees that, provided the Management Accounts (in a form consistent with the obligations of the Franchisee under Schedule 13.2 (Information)) are received from the Franchisee within the timescale specified in paragraph 3 of Schedule 13.2 (Information), the Authority will provide the Franchisee with the value of PADJ in sufficient time for the Periodic Adjustment to be included in the Franchise Payment for the Reporting Period immediately following the Reporting Period to which the Periodic Adjustment relates.

- 6.4 If the Franchisee fails to provide the Management Accounts in accordance with its obligations under Schedule 13.2 (Information), the Authority shall (without prejudice to his other rights) be entitled (but not obliged) to reasonably determine the amount of any Periodic Adjustment in accordance with this paragraph 6 but by reference to the relevant information available to the Authority at the time of such determination.

7. Final Adjustments

- 7.1 FADJ shall be equal to the following:

FADJ for the EMA =	(TotalAC – TotalAR) + TotalACAP – (TotalPFP + TotalPBCP) - TotalPADJ
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Where:

TotalAC	means the total Actual Costs of the Franchisee for the term of the EMA as set out in the Final Reviewed Accounts for the term of the EMA. TotalAC may only be a positive number.
TotalAR	means the total Actual Revenue for the term of the EMA as set out in the Final Reviewed Accounts for the term of the EMA. TotalAR may only be a positive number.
TotalACAP	means the total Actual Capex for the term of the EMA as set out in the Final Reviewed Accounts for the term of the EMA. TotalACAP may only be a positive number.
TotalPFP	means the aggregate value of all of the Periodic Franchise Payments paid to the Franchisee during the term of the EMA. TotalPFP may be positive or negative.
TotalPBCP	means the aggregate value of all of the Periodic Budgeted Capex Payments paid to the Franchisee during the term of the EMA. TotalPBCP may only be a positive number.
TotalPADJ	means the total net value of PADJ paid in respect of each Reporting Period during the term of the EMA. TotalPADJ may be positive or negative.

- 7.2 The value of FADJ in respect of the term of the EMA (whether negative or positive) shall be made as an adjustment to the next Franchise Payment payable after the calculation of FADJ is determined (the "**Final Adjustment**") and the Parties acknowledge this will be payable as part of the Franchise Payments following the completion of the term of the EMA. For the avoidance of doubt the Final Adjustment shall be calculated on the basis that no interest is due pursuant to paragraph 3.6 of this Schedule 8.A.
- 7.3 If the Franchisee fails to provide the information required by paragraph 3 of Schedule 13.2 (Information) including Annual Audited Accounts, Final Verified Accounts and a reconciliation to the Management Accounts by the date specified in that paragraph the Authority shall (without prejudice to his other rights) be entitled (but not obliged) to reasonably determine the amount of any Final Adjustment in accordance with this paragraph 7 but by reference to the relevant information available to the Authority at the time of such determination, including any information contained in the latest cumulative, year to date Management Accounts or in the Annual Management Accounts.

8. NOT USED

9. Working Capital Payments

- 9.1 A Working Capital Payment shall become payable to the Franchisee as part of a Reporting Period's Franchise Payment where the Forecast Closing Cash Position for the preceding Reporting Period is less than the Floor Cash Position. The value of the Working Capital Payment shall be calculated in accordance with paragraph 9.3.
- 9.2 The Franchisee shall provide the Authority with a statement of the Franchisee's Forecast Closing Cash Position prior to each Periodic Finance Review Meeting in accordance with paragraph 5.2.
- 9.3 The Working Capital Payment, if payable in any Reporting Period, shall be equal to the following:

WCP =	BCP – FCCP
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Where:

BCP	the Base Cash Position.
FCCP	the Forecast Closing Cash Position applicable to the preceding Reporting Period.

- 9.4 If during a Reporting Period, the Franchisee becomes aware that in its reasonable opinion prior to the payment of the Franchise Payment in respect of the following Reporting Period the Franchisee's available cash balance will be insufficient to meet its liabilities that will fall due prior to the payment of the Franchise Payment applicable to that Reporting Period (the "**Working Capital Shortfall**"), the Franchisee shall immediately:
- (a) notify the Authority that a Working Capital Shortfall is likely to occur during that Reporting Period; and
 - (b) provide in or with that notice supporting information (including relevant accounts and calculations) evidencing the likely Working Capital Shortfall and the amount of additional working capital that the Franchisee considers it will require to ensure that the Working Capital Shortfall is remedied; and
 - (c) provide such further supporting information as the Authority shall reasonably require.
- 9.5 The Parties shall agree or where the parties fail to agree, the Authority shall reasonably determine the amount required to remedy the Working Capital Shortfall (an "**Emergency Working Capital Payment**") and when such Emergency Working Capital Payments are required to be paid for that purpose.
- 9.6 The Authority shall pay to the Franchisee any Emergency Working Capital Payment in accordance with the timescales agreed or determined in accordance with paragraph 9.5.
- 9.7 If the Franchisee fails to provide any information required by this paragraph 9, or any information in accordance with its obligations in Schedule 13.2 (Information) to enable the Authority to calculate the amount of any Working Capital Payment or Emergency Working Capital Payment the Authority shall (without prejudice to the Authority's other rights) be entitled (but not obliged) to reasonably determine the amount of WCP in accordance with this paragraph 9 but by reference to the relevant information available to the Authority at the time of such determination.
- 9.8 The Authority shall at any time on reasonable prior notice to the Franchisee be entitled to adjust the value of the Ceiling Cash Position, the Base Cash Position and/or the Floor Cash Position provided that the Authority shall have first consulted the Franchisee as to any such adjustments as the Authority is considering making.

10. **Working Capital Repayment**

10.1 Subject to paragraph 10.4, a Working Capital Repayment shall become payable by the Franchisee as part of a Reporting Period's Franchise Payment where the Franchisee's Closing Cash Position in the preceding Reporting Period is greater than the Ceiling Cash Position. The value of the Working Capital Repayment shall be calculated in accordance with paragraph 10.2.

10.2 A Working Capital Repayment, if payable in any Reporting Period, shall be equal to the following:

WCR =	FCCP – BCP
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Where:

FCCP	the Forecast Closing Cash Position applicable to the preceding Reporting Period.
BCP	the Base Cash Position.

Final Working Capital Repayment

10.3 The value of FWCR shall equal:

FWCR =	TotalWCP – TotalWCR
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Where:

TotalWCP	the aggregate of all Working Capital Payments and all Emergency Working Capital Payments paid to the Franchisee during the term of the EMA
TotalWCR	the aggregate of all Working Capital Repayments paid by the Franchisee during the term of the EMA

10.4 The value of FWCR shall be payable as an adjustment to the Franchise Payment payable in the Reporting Period immediately following the expiry of the term of the EMA.

10.5 If the Franchisee fails to provide any information in accordance with its obligations in Schedule 13.2 (Information) to enable the Authority to calculate any Working Capital Repayment or the Final Working Capital Repayment the Authority shall (without prejudice to its other rights) be entitled (but not obliged) to reasonably determine the amount of WCR or FWCR (as the case may be) in accordance with this paragraph 10 but by reference to the relevant information available to the Authority at the time of such determination.

11. Management Fee and Performance Payment

11.1 Subject to paragraphs 11.2 to 11.5 (inclusive), the value of MFPP shall equal:

MFPP =	MF+PP – PPADC
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Where:

MF	means the Management Fee for the term of the EMA which shall be [REDACTED] multiplied by the number of Reporting Periods in the term of the EMA.
PP	means the sum of all of the Performance Payments for the term of the EMA calculated in accordance with Schedule 8.B (Performance Payment). PP may only be a positive number.
PPADC	<p>means the sum of the total value of the Aggregated Costs and Revenues Liabilities:</p> <p>(a) calculated on the basis of the Franchisee's Final Reviewed Accounts; and</p> <p>(b) as agreed or reasonably determined (in accordance with paragraphs 5.4 to 5.6 of Schedule 8.A (Franchise Payments)) at the Payment Date for MFPP pursuant to paragraph 11.3.</p> <p>Without limiting paragraph 11.2 of Schedule 8.A (Franchise Payments), PPADC may only be a positive number.</p>

- 11.2 If the value of MFPP is a negative amount:
- (a) for the purposes of paragraph 2.1, MFPP shall be deemed to equal zero; and
 - (b) the Authority shall be entitled to claim the value of MFPP (expressed as a positive value) from the Franchisee as an adjustment to the Franchise Payments in the period following expiry of the Performance Period.
- 11.3 Subject to paragraph 11.4, the value of MFPP shall be made as an adjustment to the next Franchise Payment payable after:
- (a) the value of the Performance Payment has been finally calculated pursuant to Schedule 8.B (Performance Payment); and
 - (b) the value of the Aggregate Costs and Revenue Liabilities have been agreed or determined for the purposes of this paragraph 11.

For the avoidance of doubt MFPP shall be calculated on the basis that no interest is due pursuant to paragraph 3.6 of this Schedule 8.A.

The Parties acknowledge that the adjustment referred to in this paragraph 11.3 will occur following the expiry of the Performance Period and may occur after the expiry of the EMA.

- 11.4 Nothing in this paragraph 11 shall limit the rights and remedies of the Authority in respect of any Disallowable Costs, Revenue Foregone and/or Authority Claims not taken into account in the calculation of PPADC.

12. **Further Authority rights in relation to accounting matters**

- 12.1 Where the Authority reasonably considers that in calculating any matter which impacts the calculation of a Franchise Payment Component, any particular item or transaction has not been accounted for on a reasonable basis (including where the accounting treatment looks to the form rather than the substance, of the item or transaction) and having regard to all circumstances, including GAAP (as may be amended from time to time), the Authority shall be entitled to require it to be accounted for on such other basis as the Authority may reasonably determine and notify to the Franchisee provided that the Authority shall not be entitled pursuant to this paragraph to

alter the accounting policies of the Franchisee from those set out in the Supporting Materials and applied through the Financial Model.

12.2 Where the Final Reviewed Accounts are subject to adjustment or restatement the Authority shall have a discretion (acting reasonably) to require the recalculation of any affected Franchise Payment Component for the relevant Franchisee Year and to require that the Franchisee shall pay to the Authority the amount which is the difference between:

- (a) any amount actually paid to the Authority or adjusted in favour of the Authority and the amount that would have been paid or adjusted had the affected Franchise Payment Component been originally calculated on the basis that such adjustment or revision was included in the Final Reviewed Accounts; and/or
- (b) any amount actually paid by the Authority or adjusted in favour of the Franchisee and the amount that would have been paid or adjusted had the affected Franchise Payment Component been originally calculated on the basis that such adjustment or revision was included in the Final Reviewed Accounts.

12.3 Any payment due to the Authority shall be paid by the Franchisee within thirty (30) days of the Authority notifying the Franchisee that the Authority requires a payment to be made pursuant to this paragraph.

13. Indexation

For the avoidance of doubt, it is agreed that the Franchise Payments and any sum shown in any Budget for any given Franchisee Year (or other period) shall not be subject to automatic indexation or adjustment to take into account the effect of inflation provided that this paragraph 13 is without prejudice to the adjustment of the Budget in accordance with paragraph 4 and/or the adjustment of the Franchise Payments in accordance with paragraphs 6 and 7 of this Schedule 8.A.

14. Further obligations of the Franchisee

14.1 Except to the extent otherwise agreed by the Authority, the Franchisee will act as a Good and Efficient Operator in all respects in connection with the operation of this Schedule 8.A (Franchise Payments) and shall not act in a way that is contrary to the principles of the EMA by using the existence or cessation of the EMA to increase the profitability of the Franchisee.

14.2 The Franchisee warrants on a continuing basis and shall, if requested at any time by the Authority, provide written confirmation from a statutory director of the Franchisee confirming that that Franchisee is not party to any arrangement of any kind whatsoever under which:

- (a) any amounts which the Franchisee might otherwise have received from a third party are reduced, waived or otherwise suppressed; and/or
- (b) any amounts which the Franchisee might otherwise be properly obliged to pay or be liable are increased; and/or
- (c) any amounts required to be paid or accounted for by the Franchisee become or are recorded as paid or accounted for during the term of the EMA, which might otherwise be paid or accounted for in the periods preceding or following the term of the EMA;
- (d) any amounts which the Franchisee might otherwise have received from a third party during the term of the EMA are recovered or accounted for in the periods preceding or following the term of the EMA; and/or
- (e) Revenue is accounted for in the periods preceding or following the term of the EMA.

- 14.3 Without limiting any other constraints which operate by virtue of any other part of the Franchise Agreement or otherwise, no application shall be made or other step taken by or on behalf of the Franchisee in respect of the winding up or striking off of the Franchisee (or any similar or analogous process) and nor shall the Franchisee permit or facilitate the same:
- (a) until all the adjustments and payments for which this Schedule 8.A provides have been made and discharged in full; and/or
 - (b) without the prior written consent of the Authority.
- 14.4 The Authority shall be entitled to notify the Franchisee of any future initiatives or proposals that the Authority considers may have the potential to reduce certain Actual Costs below the applicable Budgeted Costs and the Franchisee shall, acting reasonably and in good faith, discuss with the Authority all such matters as are relevant to the possible implementation of such initiatives.

15. **Survival**

For the avoidance of doubt this Schedule 8.A (Franchise Payments) and Schedule 8.B (Performance Payment) and any other provisions of the Franchise Agreement reasonably required for the purpose of giving such Schedules full effect shall survive the termination or expiry of the EMA and the Franchise Term (however arising) and continue in full force and effect in accordance with their terms.

16. **Review and Audit**

Following the expiry of the term of the EMA, the Franchisee will commission an exercise to review audit of the FR Accounts, to a standard equivalent to a statutory audit to the extent that statutory audit procedures would reasonably be applied to a profit and loss account, balance sheet and cash flow statement, and will:

- (a) if required by the Authority, use an external auditor;
- (b) if required by the Authority, allow full access by their officials and/or representatives on an "open book" basis; and
- (c) if required by the Authority, allow full access by the National Audit Office or other equivalent body on an "open book" basis,
(the "**Final Reviewed Accounts**").

For the purposes of this clause 16 the FR Accounts are a set of financial statements prepared in accordance with GAAP which comprise, as a minimum, a profit and loss account, balance sheet and a cashflow statement containing only transactions properly accounted for which relate to the term of the EMA, to a level of disaggregation which the Authority may reasonably require.

APPENDIX 1 TO SCHEDULE 8.A

Disallowable Costs

Any references in this Appendix 1 to Schedule 8.A to costs, payments, expenses, fees, liabilities or other amounts shall be deemed to refer to Costs and/or Capital Expenditure as the context may require.

- (a) Any costs that were incurred otherwise than in accordance with those expected to be incurred by a Good and Efficient Operator. Variations between Actual Costs and Budgeted Costs and/or Actual Capex and Budgeted Capex (as the case may be) likely to be considered to be inconsistent with those expected of a Good and Efficient Operator include but are not limited to:-
 - (i) staff, director or officer costs in excess of the Budget (except where evidenced by the Franchisee as appropriate for delivery of the Franchise or of reasonable scale given the requirement for delivery of the Franchise provided that any costs referred in to in paragraph (b) or paragraph (c) of this Appendix shall not in any circumstance be considered appropriate for the delivery of the Franchise or of a reasonable scale given the requirement for delivery of the Franchise);
 - (ii) costs that do not reflect the contracted position under existing contracts as at the EMA Start Date unless such change has been agreed by the Authority (such agreement not to be unreasonably withheld or delayed);
 - (iii) new contracts entered in to by the Franchisee which have not been procured in compliance with the Franchisee's usual procurement procedures; or
 - (iv) variations to existing contracts which have not been made in accordance with the Franchisee's usual procurement procedures;
- (b) Any bonuses, rewards or discretionary benefits paid to any staff, directors or officers under any schemes which have not previously been approved by the Authority (in its discretion, acting reasonably) in writing;
- (c) Any expenses, disbursements or equivalent costs (to which the Franchisee's Expenses Policy would apply) which are incurred other than in compliance with the Franchisee's expenses policy;
- (d) Costs incurred or to be incurred by the Franchisee:
 - (i) in relation to any Remedial Plan or Remedial Agreement or Improvement Plan unless specifically permitted in writing by the Authority;
 - (ii) in removing branding or Marks under paragraph 2.2 of Schedule 14.2 (Maintenance of Operating Assets) except for branding or Marks whose removal from particular assets the Authority has explicitly agreed for the purpose of this provision should be an allowable cost;
 - (iii) in relation to the inspection costs referred to in paragraph 6.4 of Schedule 10.1 (Remedial Plans and Remedial Agreements);

- (iv) in meeting Serco Group audit requirements to the extent these are additional to audit costs which would otherwise be incurred by the Franchisee;
- (v) in relation to any reasonable enforcement costs incurred by the Authority pursuant to paragraph 7 of Schedule 19;
- (e) Any cost that the Franchisee may incur as a result of:
 - (i) it failing to comply with its obligations under or in connection with the Franchise Agreement (including the grant thereof) save in respect of any failures which result from the Franchisee acting as a Good and Efficient Operator;
 - (ii) it failing to comply with its obligations under or in connection with any agreements which are ancillary to the Franchise Agreement save in respect of any failures which result from the Franchisee acting as a Good and Efficient Operator;
 - (iii) it failing to comply with any applicable Laws, to the extent this gives rise to a criminal liability. Paragraph (a) above shall apply in respect of any other consequence of a failure by the Franchisee to comply with any applicable Laws; or
 - (iv) indemnifying the Authority for any matter which the Franchisee is obliged to indemnify the Authority pursuant to the Franchise Agreement or any agreements which are ancillary to the Franchise Agreement;
- (f) not used;
- (g) Any costs incurred by the Franchisee arising out of or in connection with a lawful demand by the Authority under the Performance Bond or under the Grant Funding Agreement or under the New Train Fleet Performance Bond;
- (h) Any payments, costs or other liabilities owed to Affiliates save in respect of such payments costs or other liabilities which have been incurred by the Franchisee acting as a Good and Efficient Operator;
- (i) Costs of developing and protecting any intellectual property rights which are not owned by the Authority or the Franchisee or are so owned, but where the costs are not ancillary to an activity included in the Budget;
- (j) Marketing or advertising costs incurred substantially to the benefit of wider group products or group brand recognition and which are not primarily for the benefit of Franchise Services;
- (k) Fines from government or regulatory bodies;
- (l) Costs of financial hedging, or gains/losses from hedging activity except with prior agreement from the Authority or where such costs or gains/losses arise from the Franchisee's participation in an industry recognised hedging scheme or activity which has been agreed by the Authority or which the Authority reasonably considers have been made in good faith on an arm's length basis to any Affiliate in connection with fuel hedging instruments to help manage the exposure of the Franchisee to diesel fuel costs;

- (m) The amount by which the Purchase Price under the Supplemental Agreement at the end of the Franchise Period is higher than it would have been but for the Franchisee:
 - (i) incurring Disallowable Costs; or
 - (ii) otherwise acting other than as Good and Efficient Operator;
- (n) The costs incurred by the Franchisee which are associated with preparing plans to remedy performance shortfalls, including preparing and developing any remedial, improvement or action plans required by this Agreement;
- (o) The amount of any interest payable by the Franchisee to the Authority in accordance with paragraph 3.6 of Schedule 8.A (Franchise Payments);
- (p) Any costs incurred by the Franchisee in pursuing or defending any claim against the Authority in respect of or in connection with the Franchise Agreement or otherwise;
- (q) Any costs incurred in relation to the period prior to the EMA Start Date which a Good and Efficient Operator would have usually have discharged in the period prior to the EMA Start Date;
- (r) Any costs incurred in relation to the period prior expiry of the term of the EMA which a Good and Efficient Operator would have usually have discharged in the period following the expiry of the term of the EMA;
- (s) Any costs incurred in relation to the discharge of Committed Obligations which are in excess of the amounts a Good and Efficient Operator would ordinarily have expended on discharging the Committed Obligation in accordance with the contractual programme and to minimum specification contractually required;
- (t) Where costs are incurred during the term of the EMA as the result of an obligation to incur expenditure from a fund required to be maintained pursuant to the Franchise Agreement (including, but not limited to, Minor Works) such expenditure shall be a Disallowable Cost except and to the extent that it relates to expenditure required to be incurred in relation to Franchisee Years beginning after 31st March 2020;

After the expiry of the EMA, the Parties shall agree or the Authority shall reasonably determine the remaining amounts in such funds with reference to the amounts available to be expended in the funds and the aggregate amount of expenditure incurred since the EMA Start Date in relation to obligations related to those funds;
- (u) Interest paid or payable on amounts drawn under the Funding Deed;
- (v) Except with the prior agreement of the Authority (not to be unreasonably withheld), any costs, charges, penalties, compensation or similar payments that the Franchisee may incur as a result of the termination of any contract or other arrangement;
- (w) Except with the prior agreement of the Authority, losses on disposals of fixed or non-current assets;
- (x) Maintenance costs where the maintenance activity was previously scheduled to be undertaken prior to or after the term of the EMA or where (and to the extent

- that) it would have been reasonable and/or prudent for the maintenance to have been carried out prior to or after the term of the EMA;
- (y) Depreciation or Capital Expenditure to the extent that the capital cost of acquisition of the relevant assets was (or was assumed in the Financial Model) to be funded by a third party;
 - (z) Costs of any audit pursuant to paragraph 3 of Schedule 13.2 (Information); and
 - (aa) Legal, accountancy and other costs and expenses incurred in connection with the preparation and implementation of the EMA and its associated heads of terms.

Appendix 3 to Schedule 1

Schedule 8.B (Performance Payment)

1. DEFINITIONS

For the purposes of this Schedule 8.B (Performance Payment) only, the following words and expressions shall have the following meanings unless otherwise specified:

"EMA Criterion"	means each of the criteria set out in Appendix 3 of this Schedule 8.B, in respect of which the Franchisee's performance shall be measured in an EMA Review and for which a score shall be awarded in the EMA Review Scorecard (and " EMA Criteria " means the plural of EMA Criterion);
"EMA Performance Period"	means:
	(a) the period commencing on 1 April 2020 and ending at 1.59 a.m. on 20 September 2020, or such earlier date of termination of the EMA; and
	(b) where the term of the EMA is extended in accordance with clause 3.3 of the EMA, each Extended EMA Performance Period;
"EMA Review"	means a review carried out (or to be carried out) in accordance with Appendix 1 of this Schedule 8.B;
"EMA Review Report"	means, in respect of an EMA Review, a report prepared in accordance with paragraphs 3.3 and 3.4 of this Schedule 8B;
"EMA Review Meeting"	means, in respect of the EMA Review, a meeting held between the Parties to discuss the performance of the Franchisee during the relevant EMA Performance Period;
"EMA Review Scorecard"	means, in respect of an EMA Review, a scorecard completed (or, as the case may be, to be completed) by the Authority in accordance with paragraph 5 of Appendix 1 of this Schedule 8.B;
"EMA Scoring Standard"	means each standard set out with respect to each EMA Criterion as set out in Appendix 3 of this Schedule 8.B; and;

"Extended EMA Performance Period"

means, in the event that the term of the EMA is extended in accordance with clause 3.3 of the EMA, each further period following the end of the preceding EMA Performance Period, comprising six (6) additional Reporting Periods (or less in the event that the EMA is terminated prior to the expiry of the relevant Extended EMA Performance Period).

2. CALCULATION OF THE PERFORMANCE PAYMENT (PP)

- 2.1 The Performance Payment (PP) shall be the sum of the three amounts corresponding to the Franchisee's EMA Review score for the EMA Criteria as set out below:

EMA Criterion	EMA Review Scorecard score for relevant EMA Criterion	PP £
Operational performance	3	[Redacted]
	2	[Redacted]
	1	[Redacted]
Customer experience	3	[Redacted]
	2	[Redacted]
	1	[Redacted]
Acting as a Good and Efficient Operator	3	[Redacted]
	2	[Redacted]
	1	[Redacted]

- 2.2 The Performance Payment for each EMA Performance Period assumes an EMA Performance Period of six (6) Reporting Periods. If the actual duration of an EMA Performance Period is less than six (6) Reporting Periods, the Performance Payment with respect to such EMA Performance Period shall be calculated on a pro rata basis.

APPENDIX 1 TO SCHEDULE 8.B

EMA Review

1. PURPOSE OF THE EMA REVIEW

- 1.1 The purpose of an EMA Review is for the Authority to undertake a review of the Franchisee's performance in relation to the Franchise Services over the course of the relevant EMA Performance Period.
- 1.2 The Parties agree that more than one EMA Review may be undertaken by the Authority where the variations to the Franchise Agreement imposed pursuant to the EMA are extended in accordance with clause 3.3 of the EMA.
- 1.3 The Authority will carry out an EMA Review with respect to each EMA Performance Period. At each periodic Franchise Performance Meeting, progress against the three EMA Criteria shall be discussed and reviewed by the Parties.
- 1.4 Each EMA Review shall be carried out in accordance with the process set out in this Schedule 8.B.

2. NOTICE OF EMA REVIEW MEETING

- 2.1 The Authority shall notify the Franchisee of the date, time and location for the relevant EMA Review Meeting by no later than the end of the relevant EMA Performance Period, provided always that the EMA Review Meeting shall take place no earlier than the last day in the relevant EMA Performance Period and no later than 60 days after the end of the relevant EMA Performance Period.
- 2.2 For the avoidance of doubt, nothing in this Schedule 8.B shall prevent the Parties from discussing any matter relevant to an EMA Review outside of the relevant EMA Review Meeting.

3. EMA REVIEW REPORT

- 3.1 Not less than 30 days prior to the end of the relevant EMA Performance Period, the Authority, acting reasonably, shall notify the Franchisee in writing of any additional information that the Franchisee shall be required to submit at the same time as the completed EMA Review Report.
- 3.2 Not less than fifteen (15) days prior to end of the EMA Performance Period, the Franchisee shall notify the Authority in writing of any matters in addition to those set out in the EMA Review Report or the information notified to the Franchisee by the Authority in accordance with paragraph 3.1 of this Schedule 8.B, which the Franchisee considers to be relevant for the EMA Review. The Authority shall, within ten (10) days of receiving such notice, provide written confirmation to the Franchisee of whether the Authority considers such matters to be relevant to the EMA Review.
- 3.3 As soon as reasonably practicable after the end of an EMA Performance Period, and in any event no later than 10 days after the end of an EMA Performance Period, the Franchisee shall deliver to the Authority a duly completed EMA Review Report in respect of the EMA Performance Period.
- 3.4 The EMA Review Report delivered by the Franchisee in accordance with paragraph 3.3 of this Schedule 8.B shall include information, evidence and written commentary from the Franchisee in respect of the EMA Performance Period covering:
 - (a) each of the matters described in Appendix 2 to this Schedule 8B;

- (b) any other such matter notified by the Authority to the Franchisee in accordance with paragraph 3.1 of this Schedule 8.B; and
 - (c) any other matter which the Authority has confirmed as relevant for the EMA Review in accordance with paragraph 3.2 of this Schedule 8.B.
- 3.5 The Authority shall provide the Franchisee with:
- (a) written commentary on the completed EMA Review Report; and
 - (b) any information additional to that contained in the EMA Review Report which the Authority has used or intends to use to assess the Franchisee's performance,
- in each case, no later than ten (10) days prior to the EMA Review Meeting.

4. EMA REVIEW MEETING

- 4.1 The EMA Review Meeting shall take place at the date, time and location notified by the Authority in accordance with paragraph 2.1 of this Schedule 8.B and shall be attended by representatives of each of the Authority and the Franchisee.
- 4.2 The Franchisee shall ensure that the representatives of the Franchisee at the EMA Review Meeting include such:
- (a) appropriate and qualified personnel of the Franchisee;
 - (b) directors and/or senior managers of the Franchisee; and
 - (c) directors and/or senior managers of the Parent,
- as the Authority may reasonably require.
- 4.3 At the EMA Review Meeting the Parties shall discuss the Franchisee's performance by reference to the EMA Review Report, together with any supporting commentary, documents or evidence submitted by the Franchisee to the Authority in accordance with paragraphs 3.3 and 3.4 of this Schedule 8.B and any commentary and/or information provided by the Authority to the Franchisee in accordance with paragraph 3.5 of this Schedule 8.B.

5. EMA REVIEW SCORING

- 5.1 The Authority shall provide to the Franchisee, no later than ten (10) days following the EMA Review Meeting, a duly completed EMA Review Scorecard setting out the Franchisee's performance in each of the EMA Criteria for the EMA Performance Period.
- 5.2 The Franchisee shall be scored 3, 2 or 1 in relation to each EMA Criterion.
- 5.3 The EMA Review shall be complete once the Authority has sent a duly completed EMA Review Scorecard to the Franchisee in accordance with paragraph 5.1 of this Schedule 8.B.
- 5.4 Scores in the EMA Review Scorecard shall be awarded by the Authority having regard to the EMA Scoring Standards. One single, integer, overall score shall be awarded in relation to each EMA Criterion based on the Authority's assessment of the Franchisee's performance in respect of that EMA Criterion against the EMA Scoring Standards and taking into account:
- (a) the EMA Review Report provided to the Authority by the Franchisee in accordance with paragraphs 3.3 and 3.4 of this Schedule 8.B;
 - (b) any commentary provided to the Franchisee by the Authority in accordance with paragraph 3.5 of this Schedule 8.B; and

- (c) any discussions between the Franchisee and the Authority at the EMA Review Meeting.
- 5.5 The Franchisee shall receive a Performance Payment, in accordance with Schedule 8.A (Franchise Payments), if the Franchisee scores 2 or above with respect to one or more of the EMA Criteria.
- 5.6 The Franchisee shall not receive a Performance Payment if the Franchisee scores 1 in relation to all three of the EMA Criteria.
- 5.7 If the Franchisee:
 - (a) is operating at a level that would, or would likely, be scored "1"; or
 - (b) has received a score of "1",in relation to any of the EMA Criteria during an EMA Performance Period, then the Authority may require a Remedial Plan and the provisions of Schedule 10.1 of the Franchise Agreement shall apply.

APPENDIX 2 TO SCHEDULE 8.B

EMA Review Report

1. OPERATIONAL PERFORMANCE

A report on the Franchisee's operational performance, by reference to the Plan of the Day, including:

- (a) the level of performance achieved against the Plan of the Day, and an explanation of the level of performance achieved relative to the Plan of the Day;
- (b) an explanatory note setting out, if relevant, any act, omission or failure of a third party which has impacted performance and the extent of that impact, along with supporting evidence (except for where the impact exclusively relates to COVID-19); and
- (c) details and supporting evidence of any actions undertaken to mitigate any impacts on performance, including work with Network Rail regarding infrastructure.

2. CUSTOMER EXPERIENCE

A report on the customer experience delivered by the Franchisee, including:

- (a) evidence of train cleaning schedules;
- (b) details of complaints received relating to quality of service including cleanliness and upkeep of the trains, staff presence/helpfulness, accessibility and information provision; and
- (c) details of staff presence, including evidence of staffing rosters having been adhered to as far as possible.

3. GOOD AND EFFICIENT OPERATOR

A report detailing the extent to which the Franchisee has acted as a Good and Efficient Operator, including:

- (a) evidence of any ways in which the Franchisee has sought to identify and implement ways to run the Franchise more efficiently and avoid nugatory costs, acting as a Good and Efficient Operator, including details and supporting evidence of the Franchisee's actions;
- (b) evidence of appropriate revenue protection being applied in the interests of the taxpayer and/or otherwise evidence that the Franchisee has followed government guidance prevailing at the time regarding revenue collection; and
- (c) evidence of plans in place to return the operations and business to pre-COVID-19 levels of operation, including encouraging the public to travel on public transport where appropriate.

APPENDIX 3 TO SCHEDULE 8.B

EMA Review Scorecard

EMA Score	EMA Scoring Standards for each EMA Criterion		
	EMA Criterion: Operational Performance	EMA Criterion: Customer Experience	EMA Criterion: Good and Efficient Operator
3: Good	<p>The Franchisee has delivered the Passenger Services in accordance with the applicable Plan of the Day (with minor exceptions only).</p>	<p>The Franchisee has provided high levels of cleanliness on trains.</p> <p>The Franchisee has ensured that all platforms and trains have been staffed as required to enable service to continue at a good or very good standard.</p> <p>Trains have been maintained as appropriate.</p> <p>The Franchisee has provided a high quality journey experience for all passengers including providing information at all Stations and trains at all times, where possible.</p>	<p>The Franchisee has made every appropriate effort to return the business to its prior strength (for example, ensuring those who have a legitimate need to travel are encouraged to use the train where it is appropriate to do so), in so far as appropriate for circumstances applying from time to time under the EMA.</p> <p>The Franchisee has worked collaboratively with other Train Operators and/other rail industry bodies (including Network Rail) to provide an appropriate service to passengers, ensuring that passengers have as much choice as desirable, whilst taking into account demand.</p> <p>The Franchisee has proactively made suggestions and developed plans for restoring service, operations and business to pre-COVID-19 levels as soon as possible after the expiry of the EMA.</p> <p>The Franchisee has been responsive to the Authority's requests and fully cooperated in</p>

			dealing with national emergencies.
2: Acceptable	<p>The Franchisee has delivered the Passenger Services in accordance with the applicable Plan of the Day (with some exceptions).</p>	<p>The Franchisee has ensured that trains have continued to be cleaned to an acceptable standard.</p> <p>The Franchisee has deployed staff on the same or similar basis as usual, with an emphasis on provision of customer service throughout the period.</p> <p>Trains have been maintained to an acceptable level.</p> <p>The Franchisee has provided an acceptable level of journey experience for passengers including providing information at Stations and trains at all times, where possible.</p>	<p>The Franchisee has sought to operate the Franchise as far as possible as if they were still on revenue/cost risk, avoiding nugatory costs including ensuring revenue is protected throughout the duration of the EMA in accordance with the prevailing advice from the Authority.</p>
1: Below acceptable standard	<p>The Franchisee has materially failed to deliver the Passenger Services in accordance with the applicable Plan of the Day.</p>	<p>The Franchisee has failed to maintain cleanliness of trains to an acceptable level.</p> <p>The Franchisee has failed to deploy staff in a way to enable services to be maintained for passengers.</p> <p>The Franchisee has failed to maintain the trains at an acceptable level.</p> <p>The Franchisee has failed to provide an acceptable level of journey experience for passengers and/or has failed to provide information at Stations and trains.</p>	<p>The Franchisee has failed to mitigate nugatory costs or manage revenue loss throughout the term of the EMA in accordance with the prevailing advice from the Authority.</p> <p>The Franchisee has failed to respond to the Authority's requests and/or failed to cooperate in dealing with national emergencies.</p>

