

COMMERCIAL AGREEMENT

between

**TRANSNET SOC LTD acting through its operating division
TRANSNET FREIGHT RAIL**

Registration number 1990/000900/30

(hereinafter referred to as "**Transnet Freight Rail**")

And

XXXX

Registration number _____

(hereinafter referred to as "**XXXX**")

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PART A - PARTIES, DEFINITIONS AND INTERPRETATION

1 PARTIES

- 1.1 Transnet SOC Ltd a state owned company duly incorporated under the laws of the Republic of South Africa, with its registered address at 2nd Floor, Waterfall Business Estate, 9 Country Estate Drive, Midrand, Johannesburg, South Africa, acting through its operating division, Transnet Freight Rail with its business address at 15 Girtton Road, Parktown, Johannesburg.
- 1.2 **XXXX**, with its registered address at _____, South Africa.

2 DEFINITIONS AND INTERPRETATION

2.1 Definitions

In this Agreement (including the recitals if any), unless the contrary intention appears, the following words and expressions shall have the following meanings when such words and expressions are used with a capitalised first letter and cognate expressions shall have corresponding meanings, except where the context otherwise requires:

- 2.1.1 **"Additional Costs"** means those costs arising additional to the railage price and charges for Transport payable by **XXXX**, some of which are included in the Rates Schedule annexed hereto marked "A" and if not, as reasonably determined by Transnet Freight Rail;
- 2.1.2 **"Agreement"** means this document (the Terms), together with its Annexures, Schedules and Service Level Agreements, if any;
- 2.1.3 **"Available Capacity"** means the availability of Transnet Freight Rail's locomotives, rail wagons of the type required by **XXXX** as set out or to be set out in a Schedule and Transnet Freight Rail's associated resources which, without limitation, includes its personnel for Transport of the Goods;
- 2.1.4 **"Best Industry Practice"** means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced supplier or professional seeking in good faith to comply with its contractual obligations, complying with all guideline documents, codes of practice and Laws and engaged in the same type of undertaking or industry and under the same or similar circumstances and conditions as those envisaged by this Agreement in accordance with industry best practices;
- 2.1.5 **"Branch Line"** means the _____;
- 2.1.6 **"Business Day"** means any Day other than a Saturday, Sunday or any Day that is a public holiday in terms of the Public Holidays Act 36 of 1994 of South Africa;
- 2.1.7 **"Claim"** means any claim, demand, proceedings or liability;
- 2.1.8 **"Combined Consignment Note & Wagon Label/ Release Pro Forma"** means the written notification from **XXXX** to Transnet Freight Rail in the form as agreed between the Parties stipulated by Transnet Freight Rail containing:
 - 2.1.8.1 the wagon number of each rail wagon identifying the rail wagon;
 - 2.1.8.2 the total number of rail wagons when loaded;
 - 2.1.8.3 the mass of each loaded rail wagon;

- 2.1.8.4 the Contract Number and the Consignment Number allocated to XXXX;
- 2.1.8.5 confirmation that the rail wagon has been loaded or off-loaded by XXXX, is ready for collection by Transnet Freight Rail and all requirements in terms of Best Industry Practice and of any Relevant Authority with which XXXX is obliged to comply, whether in terms of this Agreement or otherwise have been complied with;
- 2.1.9 **"Concession Agreement"** means the written agreement entered into between Transnet Freight Rail, as Concessor, and XXXX, as Concessionaire, to which this Agreement is annexed as an ancillary agreement;
- 2.1.10 **"Consignment Number"** means the system generated number allocated to a particular consignment for Transport that has been requested by XXXX and approved and confirmed by Transnet Freight Rail;
- 2.1.11 **"Confidential Information"** means information relating to the business of a Contracting Party which has been provided by such a party to the other party for the purpose of this Agreement, or any matter or thing contemplated by this Agreement or to which this Agreement relates, the disclosure of which is likely to materially compromise or otherwise prejudice the commercial interest of such Party;
- 2.1.12 **"Contract Number"** means the number that is issued by Transnet Freight Rail as being the number of this Agreement;
- 2.1.13 **"Core Network"** means that part of rail network (excluding the Branch Line and other branch lines) that is Transnet's primary rail network, designated by Transnet as such, from time to time, in its sole discretion
- 2.1.14 **"Dangerous Goods"** means Goods, including those Goods defined as Hazardous Substances, which have the potential to cause harm to persons, property or the environment or the potential to cause pollution or degradation of the environment as contemplated in the National Environmental Management Act 107 of 1998 ("NEMA") including such goods as defined by the South African Bureau of Standard 0228 and the International Maritime Dangerous Goods ("IMDG") Code;
- 2.1.15 **"Day"** means a calendar day;
- 2.1.16 **"Effective Date"** means notwithstanding Signature Date or such a later or earlier date as may be agreed by the Parties in writing, subject to the fulfilment of the condition as set out in clause 5 of this Agreement;
- 2.1.17 **"Escalation"** means an escalation in accordance with clause 10.2.3 below or as set out in the Rate Schedule to be provided by Transnet Freight Rail annually. "Escalate" and "Escalated" shall have corresponding meanings;
- 2.1.18 **"Financial year"** means Transnet's financial year for the period from 1 April to 31 March each year, or part thereof;
- 2.1.19 **"Free Time"** means the time period set out in clause 15 hereof, calculated from the time when either:
 - 2.1.19.1 the rail wagon is Placed at the Point of Placing; or
 - 2.1.19.2 from the time when the rail wagon is in a position to be Placed, but the Point of Placing cannot accommodate the rail wagon,
 - 2.1.19.3 and is calculated without taking into account Non-Working Days;
- 2.1.20 **"Force Majeure"** means, *inter alia*, any of the following events –
 - 2.1.20.1 war, civil war, armed conflicts or terrorism; or
 - 2.1.20.2 nuclear contamination

2.1.20.3 chemical or biological contamination; or,

2.1.20.4 any official or unofficial strike, lockout, go-slow or other such labour dispute(s) generally affecting the rail industry (or a significant sector of it) ; or

2.1.20.5 any other event or circumstance beyond the control of either Party which directly causes any Party to be unable to comply with all or a material part of its obligations under this Commercial Agreement."

2.1.21 **"Global Train Plan"** means Transnet Freight Rail's planned Transport annually, Quarterly, Monthly and Weekly;

2.1.22 **"Goods"** means any commodities both for domestic and export markets which Transnet Freight Rail has agreed to transport for XXXX subject to the terms set out in this Agreement;

2.1.23 **"Hand Over Point"** means an agreed place (as determined by the routes) at a siding, station, exchange yard where XXXX will place empty or loaded wagons for collection by Transnet Freight Rail;

2.1.24 **"Hazardous Substance"** any Goods that have been designated as a Group I, II, III or IV hazardous substance or a grouped hazardous substance by the relevant minister in terms of the Hazardous Substances Act 15 of 1973;

2.1.25 **"Interface Agreement"** means the agreement to be concluded between the Parties relating to interface and safety management;

2.1.26 **"Law"** means the common law; ordinances; all applicable statutes, statutory instruments, proclamations, by-laws, regulations, orders, rules and other subsidiary legislation, treaties, directives and codes of practice having the force of law in the Republic and all localities within which Transnet Freight Rail operates; all other judicial or other decisions, determinations, notifications, rulings, findings and all similar directives that are binding on or applicable to Transnet Freight Rail; and any levies, charges, surcharges, imposts, taxes, fees and the like introduced, levied or imposed by any competent authority on Transnet Freight Rail and which are wholly or partly attributable and/or which relate directly or indirectly to Transnet Freight Rail's operations whether or not in connection with general freight;

2.1.27 **"Loading Profile"** means the specifications and procedures set out in clause 14 of this Agreement , setting out the manner and the parameters within which the Goods must be loaded and off-loaded and includes the loaded profile of the Goods;

2.1.28 **"Loss"** means any loss, damage, costs, charges, damages or expenses (including legal and other professional charges and expenses) but excludes all consequential and/or indirect damages unless stated otherwise in this Agreement;

2.1.29 **"Mass Measuring Fee"** means the fee as set out in clause 16 of this Agreement;

2.1.30 **"Month"** means a calendar month;

2.1.31 **"MMMM Branch Line"** means the railway line and Rail Reserve classified as a branch line by Transnet running from and between [REDACTED] and the Branch Line termination point, comprising approximately XXXX route kilometres. The [REDACTED] Branch Line excludes any Transnet railway line (and attendant rail reserve) or portion thereof which is classified as Core Network by Transnet as at Signature Date;

- 2.1.32 **"Non-Working Days"** means any Day or Days that XXXX and Transnet Freight Rail have agreed on (in writing) as a non-working day (a day on which XXXX will not require Transnet Freight Rail's services);
- 2.1.33 **"Parties"** or **"Contracting Parties"** means XXXX and Transnet Freight Rail and "Party" or "Contracting Party" shall mean either of them as the context requires;
- 2.1.34 **"Placed"** means that rail wagons, empty or loaded, have been placed at the Point of Placing for loading, or off-loading and the locomotive hauling them has been uncoupled;
- 2.1.35 **"Point of Placing"** means an agreed place (as determined by the routes) at a siding, station, exchange yard where Transnet Freight Rail will Place empty or loaded wagons for XXXX to load or off-load rail wagons;
- 2.1.36 **"Port"** means the land, designated as such, at a South African Harbour;
- 2.1.37 **"Prime Rate"** means the nominal, compounded monthly in arrear prime overdraft rate of interest from time to time publicly quoted as such by Standard Bank of South Africa Limited calculated on a 365 Day factor, irrespective of whether or not the year is a leap year. If such rate quoted by the Standard Bank of South Africa Limited is at any time exceeded by the inter-bank re-purchase rate as quoted by the South African Reserve Bank (**"the Repo Rate"**) then the Prime Rate shall for so long as it is at any time exceeded by the Repo Rate, be deemed to be equal to the Repo Rate. A certificate issued under the hand of any manager (whose authority and appointment it shall not be necessary to prove) of the Standard Bank of South Africa Limited as to the Prime Rate or the Repo Rate from time to time shall, in the absence of manifest error, be final and binding on the Parties;
- 2.1.38 **"Quarter"** means a period of 3 (three) consecutive months;
- 2.1.39 **"Rand"** or **"R"** means the lawful currency of the Republic of South Africa from time to time;
- 2.1.40 **"Rate Schedule"** means the schedule annexed as annexure "A" hereto containing the railage prices, charges (and Additional Costs where applicable and determined) payable by XXXX to Transnet Freight Rail for the haulage of Goods during the period of validity of this Agreement.
- 2.1.41 **"Relevant Authority"** means the Republic, any ministry, department, agency, authority or body of the Republic or any other public authority, body, entity or person having jurisdiction under the Laws of the Republic over any matter arising from or in any way connected with the Transport of the Goods;
- 2.1.42 **"Republic"** means the Republic of South Africa;
- 2.1.43 **"Rolling Forecast"** means the annual, Quarterly, Monthly or Weekly forecast of tonnes required to be transported by XXXX and which is updated by XXXX Quarterly, Monthly or Weekly as the case may be;
- 2.1.44 **"Safety Permit"** means a permit required in terms of section 22 of the National Railway Safety Regulator Act as issued by the chief executive officer of the Regulator in terms of sections 23 and 24 of the Act;
- 2.1.45 **"Stations"** means collectively the [REDACTED] Stations and "Station" means either one of them;
- 2.1.46 **"Rolling Stock"** means a vehicle that operates on or uses the Permanent Way and includes a locomotive, coach, wagon, rail laying car, ballast wagon, rail grinder, rail motor, rail carriage, light rail vehicle, light inspection vehicle, road/rail vehicle, trolley;
- 2.1.47 **"Schedule"** means a schedule or annexure to this Agreement which is governed by this Agreement;
- 2.1.48 **"Signature Date"** means the date of signature of this agreement by the party who signs it last in time;

- 2.1.49 **"Termination Date"** means the date on which this Agreement is terminated through any of the provisions of this Agreement and as contemplated in clause 4 of this Agreement;
- 2.1.50 **"Terminal"** means either the [REDACTED] or any other terminal which the Parties may agree to use for off-loading cargo;
- 2.1.51 **"Transport"** means the conveyance of Goods by rail from the Point of Placing/ place of origin to the Hand over Point / final destination and vice versa;
- 2.1.52 **"Transnet Freight Rail"** means Transnet Freight Rail, a division of Transnet SOC Limited, Registration Number: 1990/00900/30, a State Owned Company registered under the Company Laws of the Republic of South Africa;
- 2.1.53 **"Turnout"** means the place or places where the Private Siding and any siding extension branches off from Transnet Freight Rail's railway line;
- 2.1.54 **"Value Added Tax"** or **"VAT"** means Value Added Tax in terms of the Value Added Tax Act 89 of 1999. All amounts and prices are exclusive of such Value Added Tax;
- 2.1.55 **"Verified Mass Measuring Device"** means a mass measuring device that has been verified and approved by an SABS certificate Officer or Inspector in accordance with the provisions of the Legal Metrology Act 09 of 2014 (the Legal Metrology Act);
- 2.1.56 **"Writing"** means any handwritten, typewritten, or printed communication, including any facsimile transmission; and Written shall have a corresponding meaning; and
- 2.1.57 **"Wagon Delay Charges"** means the charges set out in the Rates Schedule annexed hereto as Annexure "A", which will be raised by Transnet Freight Rail and calculated from the expiry of the Free Time until the time of collection of the rail wagons by Transnet Freight Rail or the time that Transnet Freight Rail are notified by XXXX that the rail wagons are ready to be collected.

2.2 Interpretation

- 2.2.1 Unless the contrary intention appears, words importing:
- 2.2.1.1 the singular shall also include the plural and vice versa;
 - 2.2.1.2 one gender shall also include the other; and
 - 2.2.1.3 natural persons shall include artificial persons whether incorporated or not.
- 2.2.2 Headings of the clauses of this Agreement are for convenience only and shall not affect the interpretation or construction of this Agreement nor be deemed to be a part of this Agreement.
- 2.2.3 Except where the context requires otherwise, references to clauses, sub-clauses, sections, paragraphs, Schedules and annexures are references to clauses, sections, paragraphs, Schedules and annexures of this Agreement.
- 2.2.4 Reference to any person shall include the legal successors and permitted assigns of such person irrespective of whether such succession or assignment occurred before or after the coming into effect of this Agreement.

- 2.2.5 Reference in this Agreement to one of the Parties in respect of any obligations or liabilities of that Party, shall, unless expressly otherwise provided, include agents, employees and authorised representatives of that Party and its permitted subcontractors.
- 2.2.6 References to agreements, documents or other instruments include (subject to any relevant approvals) a reference to that agreement, document or instrument as amended, supplemented, substituted, ceded or assigned.
- 2.2.7 References to any statute, statutory instrument or accounting standard or any of their provisions is to be construed as a reference to that statute, statutory instrument or accounting standard or such provision as the same may have been or may from time to time after this Agreement comes into effect be amended, replaced or re-enacted, unless specified otherwise.
- 2.2.8 References to any amount of money to be paid by one of the Parties shall be deemed to be exclusive of VAT and VAT is payable in respect of the goods or services to which the payment relates unless expressly stated to the contrary in this Agreement. The Party obliged to make the payment shall add the amount of any applicable VAT to the payment.
- 2.2.9 Terms such as **"including"**, **"includes"** and **"included"** when following a general statement or terms mean "including but not limited to".
- 2.2.10 If any provision in a definition is a substantive provision conferring rights or imposing obligations on one of the Parties, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the agreement.
- 2.2.11 Expressions defined in this Agreement shall bear the same meanings in the Schedules and annexures to this Agreement where such Schedules and annexures do not contain their own definitions.
- 2.2.12 Where any term is defined within the context of any particular clause in this Agreement the term so defined, unless it is clear from the clause in question that the term so defined has limited application to the relevant clause, shall bear the meaning ascribed to it for all purposes in terms of this Agreement, notwithstanding that that term has not been defined in this interpretation clause.
- 2.2.13 Terms, acronyms abbreviations and phrases not defined in this Agreement but known or used in the railway industry shall be given the meaning given to them in that industry.
- 2.2.14 When any number of Days is prescribed in this Agreement the same shall be calculated by excluding the first Day and including the last Day, unless the last Day is not a Business Day. Where the last Day is not a Business Day, the time shall be calculated by excluding the first Day, excluding the Day that is not a Business Day and including the next Business Day.
- 2.3 **Notices, consents, approvals, certificates and determinations**
- 2.3.1 Wherever in this Agreement provision is made for the giving or issuing of any notice, consent, permission, approval, certificate or determination by any person, then, unless otherwise specified, such notice, consent, approval, certificate or determination shall be in writing and the words "notify", "certify", "consent", "permit", "approve" "certify" or "determine" shall be construed accordingly.
- 2.3.2 Save where this Agreement expressly provides otherwise any such notice, consent, permission, approval, certificate or determination shall not be unreasonably withheld or delayed. Save where this Agreement

expressly provides otherwise Transnet Freight Rail shall exercise its rights to give, grant or refuse any notice, consent, permission, approval, certificate or determination fairly and reasonably.

2.4 English language

All notices, correspondence, documentation or communications of whatsoever nature, drawings, reports, certificates and specifications which are to be given, submitted or prepared under or in connection with this Agreement shall be in the English language.

2.5 Entire Agreement

2.5.1 The Parties acknowledge that they have had or, as the case may be, are deemed to have had, full opportunity to include in this Agreement any representation or warranty (if any) made by either Party to the other leading up to this Agreement.

2.5.2 It is agreed that this Agreement constitutes the entire and sole record of this Agreement, to the extent of any inconsistency between the provisions of this Agreement and the Concession Agreement the provisions of the Concession Agreement shall prevail between the Parties as to the subject matter of this Agreement. No express or implied term, representation, warranty, promise or the like not recorded in this Agreement shall bind either of the Parties.

2.6 Amendments

No addition to, variation of or agreed cancellation of this Agreement including any addition to, variation of or agreed cancellation of this clause shall be of any force or effect unless in Writing and signed by the duly authorised representative of each of the Parties named in a Schedule and then such addition, variation or agreed cancellation shall be effective only in the specific instance and only for the purpose and to the extent for which made or given.

2.7 Contract Number

On signature of this Agreement, XXXX will be allocated the Contract Number. The Contract Number must be quoted by Transnet Freight Rail and by XXXX on all Schedules, invoices, notices, consents, approvals, certificates and determinations for the duration of this Agreement.

PART B - INTRODUCTION

3 INTRODUCTION

- 3.1 The [REDACTED] Branch Line is located in the Eastern Cape Province the total length of which is [REDACTED] route kilometres and connects with the Core Network at [REDACTED].
- 3.2 Transnet Freight Rail owns the Branch Line and is able to provide rail transport services for the conveyance of freight.
- 3.3 XXXX has been granted by Transnet, a concession, resulting in XXXX being the network operator of the [REDACTED] Branch line in order to operate rail freight services on the branch line.
- 3.4 The [REDACTED] Branch Line concession forms part of the resuscitation project which is a development opportunity and the Parties are aligned on the objectives of the Branch Line concessioning being to:-
 - 3.4.1 promote the inter-modal shift of freight from road to rail;
 - 3.4.2 lower the social and commercial costs of freight transportation;
 - 3.4.3 access private capital to prioritise investment in rail revitalisation in rural development;
 - 3.4.4 stimulate employment and other economic opportunities in rural areas; and
 - 3.4.5 to promote and advance the participation of black people in the undertaking of a concession.
- 3.5 The resuscitation project referred to in clause 3.4 above shall require an investment by the Parties on terms to be agreed in writing between the Parties and in particular in the following areas:-
 - 3.5.1 Rail Transport;
 - 3.5.2 Property/Real Estate Development;
 - 3.5.3 (ICT) Information and Communication and Telecommunication;
 - 3.5.4 Green Energy Opportunities (Renewable Energy Opportunities)
 - 3.5.5 Other related matters/development;
 - 3.5.6 Terminal Development in relation to some of the Stations along the Branch Line.
- 3.6 The Parties enter into this agreement in order to govern the haulage of cargo to and from the Branch Line over the main line, and record that this Agreement is an ancillary agreement to the Concession Agreement.

4 COMMENCEMENT AND DURATION OF THE AGREEMENT

- 4.1 Notwithstanding the Signature Date of this Agreement, this Agreement shall commence upon the Effective Date and shall endure until terminated in accordance with the provisions of this Agreement.
- 4.2 The duration of this Agreement shall be for a period of 20 (twenty) years, coinciding with the term of the Concession Agreement.
- 4.3 The Parties will, within 60 (sixty) Business Days of the 18th (eighteenth) anniversary of the Effective Date, consult with each other on a no-obligation basis to decide,
 - 4.3.1 whether or not there should be an extension of this Agreement through an agreed variation to the duration of the Agreement; and

- 4.3.2 such other amendments to the this Agreement, together with Schedules as the Parties may agree; Transnet may, following such consultation with XXXX, and in its sole and absolute discretion, issue a notice to XXXX stating whether the term will expire or whether an extension will be granted. If an extension is to be granted, the notice shall set out the terms of such extension.

5 SUSPENSIVE CONDITION

- 5.1 The obligations of the parties under this agreement are subject to the fulfilment or waiver of the following suspensive conditions:
- 5.1.1 that both Parties must obtain board approval or approval from the relevant or appropriate authority for entering into this Agreement; and
- 5.1.2 the conclusion of the Concession Agreement.
- 5.2 The Parties will use their best endeavours to procure fulfilment of the suspensive conditions within three (3) months of the Signature Date.

PART C – REAL ESTATE DEVELOPMENT

6 REAL ESTATE DEVELOPMENT

- 6.1 All matters pertaining to real estate development are regulated in the Concession Agreement.

PART D – ICT DEVELOPMENT

7 ICT DEVELOPMENT

- 7.1 It is intended that Transnet grants to XXXX the right to deploy (or cause to be deployed) any optic fibre, any train authorisation systems or communication network, or any high sites, all of which will be available to Transnet on terms agreed on in writing between the Parties and which will form a Schedule (ICT Schedule "C") to this Agreement.

PART E – GREEN ENERGY DEVELOPMENT

8 GREEN ENERGY DEVELOPMENT

- 8.1 It is intended that the Parties may participate in green energy development.
- 8.2 The Parties agree that any such development will be set out in a Schedule (Green Energy Development Schedule "D") annexed to this Agreement.

PART F – RAIL TRANSPORT SERVICES

9 RAIL TRANSPORT SERVICES

- 9.1 The _____ Branch Line's Train Operation and Management Services, executed by the Train Operations and Management Provider (BLOM), will originate on the Branch Line and terminate at the _____ exchange yard where after Transnet Freight Rail as the core network operator will continue to provide all train marshalling and haulage services to the XXXX to the end destination point on the Core Network.
- 9.2 The Parties shall ensure that an Interface Agreement is concluded as per the rail safety regulatory requirements. It being recorded that one of the ancillary agreements to the Concession Agreement is a Safety Interface Agreement.

10 GOODS, RAILAGE PRICES, ROUTES AND INSURANCE

10.1 Goods

Transnet Freight Rail agrees, subject to the terms of this Agreement, to haul by rail Goods for and on behalf of XXXX Ltd from the Terminal, or such other exchange yard(s) or handover point to the end destination point on the Core Network, and vice versa.

10.2 Prices and charges

- 10.2.1 The railage prices, charges (and Additional Costs where applicable and determined) payable by XXXX to Transnet Freight Rail for the haulage of Goods "the **Rates**" during the period of validity of this Agreement are set out in the Rate Schedule annexed to this Agreement as annexure "A".
- 10.2.2 The rates payable by XXXX for the services to be rendered by Transnet Freight Rail pursuant to this Agreement shall be negotiated and agreed annually.
- 10.2.3 The Parties agree that the negotiation of the proposed escalation of the rate ("new rate") for each ensuing financial year shall commence at least 3 (three) months prior to the anniversary of the Effective Date. The Parties shall negotiate, agree and confirm the new rate by appending their signatures to the proposed rates schedule to be annexed to this agreement. The validity of the prices in any new rate will be recorded and set out in the rates schedule annexed to this agreement, and any negotiation of new rates for a subsequent period will be determined by the validity period of the relevant rates schedule..
- 10.2.4 Should the Parties fail to reach agreement as per clause 10.2.3 above within the 3 months, the Parties agree that notwithstanding clauses 34.2 and 34.3 of this Agreement:
 - 10.2.4.1 the issue will be referred to the Parties respective General Managers or their nominees who shall endeavour to resolve the dispute within 10 days from the date of referral.
 - 10.2.4.2 in the event that the Parties General Managers cannot reach agreement as to the new rate and/or other issues relating to prices and charges as contemplated in clause 10.2.4.1 above, the matter will then be referred to the Parties respective Chief Executive Officers or their nominees, who shall endeavour to resolve the matter within 10 days or such further period

as the Parties may agree. In the event that the Parties do not agree as contemplated above then the dispute shall be dealt with in accordance to clause 34 of this Agreement.

10.2.5 The Parties agree that the existing rate shall continue to apply pending the resolution of the dispute.

10.3 **Additional Goods/routes/account numbers**

10.3.1 In the event that XXXX requests Transnet Freight Rail to:

- 10.3.1.1 Transport Goods not specified in this Agreement or any Schedule/Annexure hereto;
- 10.3.1.2 Transport Goods specified in this Agreement or a Schedule/Annexure hereto from or to destinations not specified in this Agreement or a Schedule/Annexure hereto;
- 10.3.1.3 render services not specified in this Agreement or a Schedule/Annexure hereto; or
- 10.3.1.4 add separate account numbers;

such matters will be negotiated between the Parties, and if Transnet Freight Rail reaches agreement, will be included as a written amendment to this Agreement;

10.3.2 The Goods will be transported from the Terminal, Hand Over Point or exchange yard to the Point of Placing over a route of Transnet Freight Rail's choice subject to clause 11 of this Agreement, unless Transnet Freight Rail has agreed or authorised a different route, the description of which will be confirmed to XXXX.

10.4 **Delivery**

10.4.1 XXXX or its consignee undertakes, upon receipt of the Goods at the Point of Placing, to furnish Transnet Freight Rail with proof of delivery in one of the following formats:

- 10.4.1.1 rail wagon labels signed on the reverse side; or
- 10.4.1.2 a letter from XXXX reflecting details of all rail wagons with the Consignment Number allocated by Transnet Freight Rail to XXXX; or
- 10.4.1.3 other documentary proof acceptable to Transnet Freight Rail, as confirmation of delivery of the Goods.

10.4.2 Should XXXX fail to provide the proof of delivery within 7 (seven) Days, the provisions of clause 11.4.3 below shall apply.

10.4.3 If delivery cannot be established in terms of clause 10.4.1 above due to a failure or refusal on XXXX part or that of its consignee to supply the proof of delivery, delivery shall be deemed to have been effected at the Point of Placing at the Time of Placing at which time risk in the Goods shall pass to XXXX or its consignee as the case may be.

10.4.4 If XXXX is the consignor Transnet Freight Rail will, on request, make reasonable efforts to supply XXXX with proof of delivery to its consignee in one of the formats stipulated in clause 10.4.1 above.

10.4.5 Transnet Freight Rail shall employ reasonable measures to collect and deliver rail wagons at the times and on the dates specified and communicated to XXXX in writing, following the completion of the relevant ordering process.

10.4.6 Transnet Freight Rail will be liable for all reasonable direct losses suffered by XXXX for failure to collect and deliver rail wagons as specified and communicated in writing, subject to an event of Force Majeure.

10.4.7 If XXXX or XXXX's consignee fail or refuse to take delivery of the Goods and/or comply with XXXX obligations in terms of clause 15.4 below within the Free Time, Transnet Freight Rail shall be entitled, and without prejudice to Transnet Freight Rail's rights in terms of clause 16.4 below, with notice to XXXX or the Consignee, if the rail wagons have not been off-loaded after the Free Time for a period in excess of 30 (thirty) days, dispose of the Goods by auction and to apply the proceeds to satisfy the railage price, charges and any Additional Costs.

10.4.8 Transnet Freight Rail shall ensure that all rail wagons of the type and specification required by XXXX and locomotives are in a suitable condition for the conveyance of the Goods.

10.5 Insurance

10.5.1 It is recorded that Transnet Freight Rail transports and deals with all Goods at the risk of the owner of the Goods, or any other person in whom the risk of loss of or damage to the Goods lies at any relevant time, and that any liability that Transnet Freight Rail may have in relation to loss of or damage to goods is limited.

10.5.2 In the circumstance XXXX is entitled, at its election and own cost, to take out insurance in respect of all risks for which it is prudent for XXXX to insure against, including:

10.5.2.1 Loss, theft, destruction to property, death or injury to any person in the employ of or contracted by XXXX for any activities at the Terminal or any other point at which the Parties interface under this Agreement; and

10.5.2.2 Loss of or damage to its Goods or Goods consigned to it by a third party.

11 AVAILABILITY OF CAPACITY AND MAINTENANCE OF INFRASTRUCTURE

11.1 Availability of Capacity

11.1.1 The Transport of Goods will be provided to XXXX in terms of one or more Transnet Freight Rail's rail categories, as selected by XXXX from time to time. It being recorded that as at the Signature Date the Transnet Freight Rail rail categories were: Mega Rail, Flexi Rail and Access Rail.

11.2 Maintenance of Core Network Infrastructure

11.2.1 The rail transport services that Transnet Freight Rail undertakes in terms of this Agreement may be either: (i) scaled down (ii) re-scheduled, (iii) temporarily suspended or (iv) interrupted by scheduled or unscheduled maintenance that is required to be performed on its rail infrastructure in order to ensure that the infrastructure is in a condition that is suitable for rail operations to be conducted on it. Transnet Freight Rail will use its reasonable endeavours to ensure that there is a minimal impact on XXXX's orders.

11.2.2 Where Transnet Freight Rail requires scheduled maintenance, it will notify XXXX at least ten 10 (ten) working days in advance of such scheduled maintenance. XXXX acknowledges that such maintenance may result in planned transport being delayed or rescheduled. Each instance of scheduled maintenance ("scheduled occupation") shall not be longer than 10 (ten) days and Transnet Freight Rail may require up to 3 (three) scheduled occupations per annum.

- 11.2.3 In the event of unscheduled maintenance having to be undertaken due to unforeseen circumstances or an event of Force Majeure that has given rise to such unscheduled maintenance being required, then Transnet Freight Rail shall notify XXXX either when it commences with such unscheduled maintenance in the event of an emergency, or as soon as is reasonably possible prior to undertaking the scheduled maintenance in all other circumstances.

12 DOCUMENTATION NECESSARY FOR GOODS TRANSPORTED IN RAIL WAGONS

- 12.1 Transport will commence on receipt of XXXX's Combined Consignment Note & Wagon Label/Release Pro Forma approved by Transnet Freight Rail to release the loaded wagons reflecting XXXX as either the consignor or consignee (after completion of loading) and will end when the rail wagon is Placed at the Hand Over Point.
- 12.2 In terms of the Customs and Excise Act 91 of 1964 ("Customs and Excise Act"), the Transport of Goods for export/import over South African borders must be supported by the necessary custom clearance documentation.
- 12.3 Without limitation, the following documentation, must be submitted at the time of release of the Goods for Transport over the border for export or at the time of delivery of the Goods at the border for import:
- 12.3.1 Consignments to and from other African countries; and
- 12.3.2 a copy of the SAD500 Custom & Excise/Customs Release Notification document duly processed at a Customs and Excise regional office.
- 12.4 Goods will not be moved or Placed for off-loading without the customs clearance documentation stipulated in clause 12.3.1 and 12.3.2 above.
- 12.5 XXXX shall be liable for all Additional Costs associated with failure to provide clearance documentation stipulated in clause 12.3.1 and 12.3.2 above and shall also be liable for Wagon Delay Charges as set out in the Rates Schedule, and, if applicable, the costs related to the loading and the off-loading of the consignment from the wagon.
- 12.6 South African Revenue Services (Customs and Excise) may find it necessary to stop and inspect Goods for export or import and Transnet Freight Rail shall adhere to such requests. Additional Costs resulting from such inspections will, however, be for XXXX's account.
- 12.7 Transnet Freight Rail will not be held liable for any costs arising from or connected with XXXX's failure to comply with the terms set out in clauses 12.2, 12.3, 12.5 and 12.6 above, the Customs and Excise Act, and any regulations or the requirements of any Relevant Authority.
- 12.8 XXXX shall indemnify Transnet Freight Rail against all Losses incurred by or Claims made against Transnet Freight Rail solely and directly as a result of XXXX's failure to comply with:
- 12.8.1 the terms of this Agreement; or
- 12.8.2 the provisions of the Customs and Excise Act, any regulations or the requirements of any Relevant Authority relating to the importation or exportation of Goods.
- 12.9 XXXX undertakes that all foreign regulations relating to the Transport of the Goods into, out of, or within a foreign country have been or will be fully complied with in respect of all the Transport of all Goods by Transnet Freight Rail to, from or within any such foreign country. XXXX shall indemnify Transnet Freight

Rail against any Losses incurred by or Claims made against Transnet Freight Rail as a result of any such non-compliance by XXXX.

- 12.10 Notwithstanding any information furnished to XXXX by Transnet Freight Rail regarding any documentation required, Transnet Freight Rail will not be liable to XXXX or any third party for any claim made or loss suffered if such information is incorrect or incomplete in any respect. XXXX agrees that it is its entire and sole responsibility to arrange all documentation required, provided that Transnet provides information which it reasonably believes to be correct and complete.

13 PACKING AND SECURING OF GOODS ON WAGONS

- 13.1 XXXX shall be responsible for ensuring that all Goods for Transport have, in accordance with Best Industry Practice and the requirements of all Relevant Authorities, been properly, lawfully and sufficiently packed, loaded, secured and prepared to:
- 13.1.1 withstand all modes of Transport applicable to the Transport contemplated;
 - 13.1.2 prevent injury to any person or damage to Transnet Freight Rail's or any third party's equipment.
- 13.2 Transnet Freight Rail may refuse to Transport any Goods that are not properly, lawfully and sufficiently packed, loaded, secured and prepared for Transport.
- 13.3 Inadequate packing may result in any claim for damage being rejected by Transnet Freight Rail's and/or the XXXX's insurers where that was the proximate cause of loss.
- 13.4 XXXX will be liable for Additional Costs to correct any packaging or packing of XXXX's Goods on Transnet Freight Rail's rail wagons which creates any danger. XXXX will also be liable for Wagon Delay Charges as set out in the Rates Schedule, if such delays arise.
- 13.5 XXXX shall indemnify Transnet Freight Rail against any Claims of third parties arising from or connected with any inadequate, incorrect packaging or packing or securing of the Goods.

14 LOADING AND OFF-LOADING

- 14.1 XXXX shall be responsible for the loading and off-loading of its Goods whether XXXX does so personally or arranges for a third party or instructs its consignor or consignee (whichever applies) to do so, unless specific alternative arrangements have been agreed in Writing (which include e-mail) between the Parties.
- 14.2 XXXX must schedule the loading and off-loading of wagons at each specific Hand Over Point and Point of Placing in such a manner that the number of rail wagons to be loaded or off-loaded is within the loading and off-loading capability at that Hand Over Point or Point of Placing as the case may be.
- 14.3 If the number of rail wagons requested by XXXX to be loaded or off-loaded at any Hand Over Point or Point of Placing on any Day, exceeds the handling capacity of such Hand Over Point or Point of Placing and one or more or all of the rail wagons dispatched to that Hand Over Point or Point of Placing is or are delayed beyond the Free Time, XXXX will be liable for Wagon Delay Charges arising out of such delays and XXXX's account will be debited with the Wagon Delay Charges as set out in the Rates Schedule.
- 14.4 If a Schedule includes or refers to a Loading Profile, XXXX is obliged to load the Goods on the rail wagon according to that Loading Profile and, if XXXX fails to do so, Transnet Freight Rail shall be entitled to require XXXX to re-load before it accepts:

- 14.4.1 the Goods for Transport; or
- 14.4.2 a Combined Consignment Note & Wagon Label/Release Pro Forma.
- 14.5 XXXX is liable for any Additional Costs incurred by Transnet Freight Rail and any Wagon Delay Charges incurred as a result of re-loading.
- 14.6 XXXX is responsible for off-loading of the rail wagons and must ensure that all rail wagons:
 - 14.6.1 are fully off-loaded in terms of the requirements of any Relevant Authority and Best Industry Practice or Loading Profile; and
 - 14.6.2 are clean for re-loading,
 - before any empty rail wagons are handed back to Transnet Freight Rail.
- 14.7 Transnet Freight Rail will be entitled to recover from XXXX all Additional Costs and Losses incurred by it in loading and/or off-loading, fully or in part, any rail wagon, and/or storage of the Goods for XXXX and/or the disposal of any debris.
- 14.8 In instances where loaded or empty wagons are required to be staged en route due to XXXX or its service provider's fault/inability to receive these wagons at the destination, where XXXX requests Transnet Freight Rail to stage these wagons, or in the event where Transnet Freight Rail establishes that XXXX cannot receive these wagons at the destination (e.g. yard/siding blocked out, stock pile full, etc.) and Transnet Freight Rail has no other option other than to stage these wagons en route, Transnet Freight Rail will inform XXXX in writing of such instances, reflecting the time and dates where such wagons are staged. Transnet Freight Rail will be entitled to levy Wagon Delay Charges from the date and time that such wagons are staged until the date and time that these wagons are ready for onward railing to be Placed at the Point of Placing for off-loading or loading.

15 FREE TIME

- 15.1 The Free Time will commence:
 - 15.1.1 when the rail wagon is Placed at the Hand Over Point or Point of Placing as the case may be;
 - 15.1.2 when the rail wagon was available to be Placed if XXXX or its consignor or consignee were not in a position or failed to receive it;
 - whichever occurs first and ends upon the expiry of a 24 hour period.
- 15.2 If XXXX, its consignor or consignee, whichever is applicable, is unable to load or off-load in the Free Time, Transnet Freight Rail will calculate the applicable Wagon Delay Charges and levy them against the XXXX.
- 15.3 XXXX shall take the necessary steps to load or off-load within the Free Time, being 24 hours.
- 15.4 Transnet Freight Rail shall be entitled to charge the Wagon Delay Charges, as set out in the Rates Schedule for any rail wagon released after Free Time.
- 15.5 At the completion of loading or off-loading XXXX must provide Transnet Freight Rail with the completed Combined Consignment Note & Wagon Label/Release Pro Forma.
- 15.6 If Transnet Freight Rail has not received a Combined Consignment Note & Wagon Label/Pro Forma Note after the expiry of the Free Time then collection of the rail wagons will in such circumstances be dependent on Available Capacity.

- 15.7 If XXXX is importing or exporting Goods in shipload quantities or it has limited capacity in any private siding where the Goods are to be loaded or off-loaded, the provisions of clauses 15.2 to 16.5 will apply, unless XXXX has made prior Written arrangements with Transnet Freight Rail to accommodate possible rail wagon delays caused by loading or off-loading Goods in shipload quantities or at such private siding with limited capacity.

16 OVERLOADING AND MASS DECLARED

- 16.1 XXXX shall not:
- 16.1.1 overload wagons (i.e. load wagons in excess of their carrying capacity or modified/amended carrying capacity as prescribed for lines with axle load restrictions); nor
 - 16.1.2 under - declare the net mass per wagon (i.e. declare a net mass per wagon that is less than the actual mass of the Goods loaded on the wagon). XXXX is responsible to ensure compliance with this clause by its consignor, loader or transport coordinator, if applicable.
- 16.2 XXXX will be liable for losses (including but not limited to any damage to Transnet Freight Rail's rolling stock and infrastructure, and any environmental liability, notwithstanding any other term of this Agreement) caused directly or indirectly by such overloading or under-declaration.
- 16.3 Should overloading of a rail wagon in excess of its carrying capacity or amended carrying capacity or any under-declaration of the net mass be detected during or after Transport, the charges payable on the actual mass conveyed in the rail wagon will be levied against XXXX as follows:
- 16.3.1 if a per ton railage price applies, the railage price payable will be calculated on the actual mass plus the Mass Measuring Fee plus a surcharge as stipulated in the Loading Profile Schedule annexed to this Agreement.
 - 16.3.2 if a per rail wagon railage price applies, the railage price payable will be increased by a factor derived by dividing the actual mass Transported in the rail wagon by the carrying capacity or the amended carrying capacity of the rail wagon plus the Mass Measuring Fee plus a surcharge as stipulated in the Loading Profile Schedule.
- 16.4 XXXX must declare or, if XXXX is not the consignor, ensure that the consignor declares the correct net mass of the Goods per rail wagon on the Combined Consignment Note & Wagon Label/Release Pro Forma provided by Transnet Freight Rail. Transnet Freight Rail is entitled to verify the mass declared by Mass Measuring each rail wagon prior to, during or after Transport of the Goods. Should Transnet Freight Rail find that the mass per rail wagon has been under declared the amount payable by XXXX will be as set out in clause 16.3 above.
- 16.5 If Transnet Freight Rail finds that mass has been under declared or that a rail wagon is overloaded, Transnet Freight Rail will furnish XXXX and/or the consignor, where applicable, with a report of the results with a view to discussing the causes thereof with XXXX.
- 16.6 Transnet Freight Rail reserves the right to hold back, at any time, a rail wagon found to be overloaded or improperly loaded (either at the Hand over Point or en route) and it may require XXXX to off-load or arrange to off-load sufficient quantity of the Goods to bring the mass of the rail wagon within the carrying capacity of the rail wagon and/or require XXXX to re-arrange the improperly loaded Goods. Wagon Delay

Charges as set out in the Rates Schedule, Mass Measuring Fees, overloading surcharges and all other charges and Additional Costs reasonably attributable to or arising out of the holding back of the rail wagon will be for the XXXX's account. Transnet Freight Rail shall not be liable for any claims arising out of delays due to overloading or improper loading by XXXX.

- 16.7 If XXXX wishes to load the excess mass of Goods into another rail wagon, subject to Available Capacity, the applicable railage price stipulated in the Rates Schedule, will apply but the carrying capacity of the rail wagon will be used as a minimum.
- 16.8 In the event that Transnet Freight Rail does not have Available Capacity to accommodate the excess mass of Goods, Transnet Freight Rail shall not be liable for any Loss incurred by XXXX.
- 16.9 It is advisable for XXXX to have a Verified Mass Measuring Device in its siding to ensure accurate weighing of the goods to be transported by Transnet Freight Rail.
- 16.10 If either of the Parties disputes the accuracy of the other's Verified Mass Measuring Device, the accuracy of the device will have to be verified in accordance with the provisions of the Legal Metrology Act (as amended). If the accuracy of the device is verified the cost of the certification will be borne by the Party who disputed the accuracy. If the accuracy of the device is not verified the cost of the certification will be born by the Party whose device it is.
- 16.11 Any Verified Mass Measuring Device owned by Transnet Freight Rail shall be presumed to be accurate and XXXX bears the onus of disproving its accuracy or the accuracy of the records of such device or both.

17 NON-UTILISATION

- 17.1 XXXX must cancel an order or part of an order:
 - 17.1.1 before rail wagons are Placed; or
 - 17.1.2 before the time when rail wagons were available to be Placed, if XXXX is not going to utilize all or some of the rail wagons ordered.
- 17.2 If XXXX fails to notify Transnet Freight Rail in terms of clause 17.1 at least 48 hours before the scheduled time of Placing, Transnet Freight Rail shall be entitled to levy the non-utilisation charges set out in the Rates Schedule.

18 AGENTS

- 18.1 If XXXX at any time engages the services of an agent to perform XXXX's obligations or exercise XXXX's rights in terms of this Agreement with Transnet Freight Rail, a copy of XXXX's agreement with any agent must be furnished to Transnet Freight Rail prior to XXXX's agent so performing or exercising any obligations or rights.
- 18.2 The agreement between XXXX and the agent must specify that the agent acts on the XXXX's behalf and that XXXX is liable for any act or omission of XXXX's agent.
- 18.3 XXXX indemnifies Transnet Freight Rail against any Claim brought against Transnet Freight Rail or Loss Transnet Freight Rail suffers as a result of any action or omission of XXXX's agent.

- 18.4 If XXXX acts as agent for an undisclosed principal XXXX indemnify Transnet Freight Rail against any Loss Transnet Freight Rail may suffer as a result of any action or omission of XXXX's undisclosed principal.

19 SAFETY

- 19.1 If the Hand Over Point or the Point of Placing is a private siding XXXX must ensure that there is safe and proper access at the Hand Over Point as well as the Point of Placing. XXXX accept all responsibility for any Loss of or damage to the Goods or Transnet Freight Rail's rolling stock due to any unsuitability of the access to the Hand Over Point or the Point of Placing and XXXX indemnifies Transnet Freight Rail against any Claims arising from damage to property or injury or death to persons arising directly or indirectly as a result of XXXX's failure to provide proper and safe access.
- 19.2 The Parties agree that all persons, whether employed by or subcontracted by either of the Parties, to undertake shunting of rolling stock within a private siding or an exchange yard are trained in terms of, comply with and adhere to the Best Industry Practice while performing their services.
- 19.3 XXXX must keep walkways in XXXX's siding clear of obstructions so as to ensure safety for Transnet Freight Rail's train marshalling crew. Transnet Freight Rail reserves the right not to shunt or allow shunting of its rail wagons where Transnet Freight Rail considers the siding unsafe. The provisions of the National Railway Safety Regulator Act 16 of 2002 ("National Railway Safety Act") shall, be complied with.

20 RISK TO GOODS AND ROLLING STOCK

- 20.1 Transnet Freight Rail transports and deals with all Goods at the risk of the owner of the Goods, or any other person in whom the risk of Loss of or damage to the Goods lies at any relevant time.
- 20.2 Transnet Freight Rail shall not be liable for:
- 20.2.1 any Loss of, or damage to the Goods whatsoever, whether due in whole or in part to any negligence or breach of contract on Transnet Freight Rail's part save, in the case of wilful misconduct or gross negligence on the part of Transnet Freight Rail in either case causing Loss;
- 20.2.2 any consequential or economic loss whatsoever, including but not limited to loss of production or profit, whether arising out of such Loss or not; and
- 20.2.3 any direct or indirect, incidental, special or consequential damages, loss of revenue incurred by XXXX or any third party, even if Transnet Freight Rail has been advised of the possibility of such damages , unless in a case of wilful misconduct or gross negligence on the part of Transnet Freight Rail.
- 20.3 XXXX indemnifies Transnet Freight Rail against all Claims made against it by any third party arising out of Loss of or damage to the Goods if XXXX is not the owner or the person in whom the risk of Loss of or damage to the Goods lies at the relevant time provided that such claims are not as a result of wilful misconduct or gross negligence on the part of Transnet Freight Rail.
- 20.4 If XXXX wishes to proceed with any Claim against Transnet Freight Rail XXXX must report any Loss to Transnet Freight Rail and obtain an incident number from Transnet Freight Rail.
- 20.5 If a Claim of any nature is lodged for any reason it must be lodged with the person named in the communication Schedule within 180 Days from the date the Goods arrived, or ought to have arrived at their final destination, failing which the Claim will prescribe, i.e. irrevocably lapse and be of no further

force or effect. The Parties intend that the periods of prescription set out in the Prescription Act, (or any Act of Parliament that replaces it) are therefore reduced by this clause.

20.6 The risk of loss or damage to Transnet Freight Rail's rolling stock will pass to XXXX at the Point Of Placing and will pass back to Transnet Freight Rail at the time the rail wagons are coupled back to Transnet Freight Rail's locomotive for dispatch.

20.7 XXXX:

20.7.1 must take reasonable care to ensure safe operations when shunting wagons in XXXX's siding or exchange yard;

20.7.2 must notify Transnet Freight Rail immediately of any derailment of any wagons in the siding or any damage to the wagons;

20.7.3 must under no circumstances attempt to re-rail a derailed wagon without Transnet Freight Rail's technical personnel being involved.

20.8 In the event of any damage to Transnet Freight Rail's rolling stock by XXXX, XXXX shall be liable for all such damages, including all costs of repair and transport of the rolling stock to a Transnet Freight Rail repair facility.

PART H – GENERAL

21 STATUTORY REQUIREMENTS

21.1 Each of the Parties will comply with all Laws and requirements of all Relevant Authorities applicable to the performance of their obligations in terms of this Agreement.

21.2 Without derogating from the provisions of this clause each of the Parties will, with regard to employees of the other conducting work in the vicinity of the Hand Over Point or the Point of Placing comply with the provisions of the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Minerals and Petroleum Resources Development Act 28 of 2002, Mine Health and Safety Act 29 of 1996 and the regulations in the Parties' places of work respectively.

21.3 Transnet Freight Rail is, and XXXX may be, regulated by the provisions of the National Railway Safety Regulator Act (as amended), which provides that to ensure that railway operations are conducted safely Transnet Freight Rail must adhere to strict safety requirements in the manner in which Goods are Transported by rail. XXXX:

21.3.1 confirms to Transnet Freight Rail that XXXX is familiar with the provisions of the National Railway Safety Regulator Act (as amended);

21.3.2 undertakes not to act or omit to act in any manner that will result in itself and/or Transnet Freight Rail contravening the provisions of the National Railway Safety Regulator Act (as amended) in Transporting Goods;

21.3.3 will comply with all requirements of any Relevant Authority and Best Industry Practice;

- 21.3.4 indemnifies Transnet Freight Rail against any Claim against Transnet Freight Rail arising out of a breach by XXXX of this clause 21.
- 21.3.5 undertakes that its agent, Consignor and/or Consignee shall be bound by the undertakings in clauses in 21.3.1 to 21.3.4 above.
- 21.4 The Private Siding, is for purposes of the Occupational Health and Safety Act, No. 85 of 1993, a workplace and shall be deemed at all times to be under the complete control of XXXX, subject to any agreement in writing entered into by the Parties.
- 21.5 XXXX shall, if subject to the National Railway Safety Regulator Act, at all times, be in possession of a valid Safety Permit.
- 21.6 It is recorded that:
- 21.6.1 Transnet Freight Rail has access to the Private Siding;
- 21.6.2 XXXX either owns, leases or has the right of use of the Private Siding;
- 21.6.3 where applicable, XXXX is at all times responsible for the maintenance of the Private Siding at its own cost and expense.
- 21.7 XXXX hereby indemnifies and holds Transnet Freight Rail harmless against all actions, claims, injuries, loss or damage of whatsoever nature and howsoever arising which may be suffered by Transnet Freight Rail or any third party and which arise from the construction, use or operation of the Private Siding and shall, without limitation, include any accident or incident which may occur at any place where the Private Siding crosses a public street or road, provided that this indemnity shall not apply in any case where the event that gives rise to any such action, claim, injury, loss or damage is attributable to the gross negligence or wilful misconduct of Transnet Freight Rail or its officials or employees.
- 21.8 The Parties shall, in their capacity as Operators as set out in the RSR Act, reasonably assist each other to comply, as stipulated and without limitation, with the provisions of the National Railway Safety Regulator Act, Occupational Health and Safety Act, Hazardous Substances Act, National Environmental Management Act, the National Water Act 36 of 1998 ("The National Water Act") and any requirement of any other Relevant Authority in the Transportation of Goods, in such manner as agreed to by the Parties in writing and stipulated by the Relevant Authority.
- 21.9 In compliance with the requirements of any Law, Relevant Authority and Best Industry Practice, Transnet Freight Rail requires XXXX to abide by Transnet Freight Rail's guidelines on loading, a copy of which is contained in the Schedule. Transnet Freight Rail is not liable for any Claim or Loss arising from or connected with non-compliance by XXXX with such guidelines, requirements of any Relevant Authority and Best Industry Practice. XXXX must advise Transnet Freight Rail of any improvements or enhancements to such guidelines that XXXX may consider desirable but Transnet Freight Rail is not obliged to adopt any suggestions by XXXX.
- 21.10 Transnet Freight Rail will not Transport Dangerous Goods in terms of this Agreement save to the extent and on the terms as set out in this Agreement.
- 21.11 XXXX will be responsible for:
- 21.11.1 using and completing the correct rail documentation for the Transport of Dangerous Goods;

- 21.11.2 signing the declaration on the reverse of above documentation which states that "*I hereby declare that the contents of this consignment are fully and accurately described by the proper shipping name and are classified, packed marked and labelled/placard, and are in all respects in proper condition for Transport according Best Industry Practice and requirements of any Relevant Authority*";
- 21.11.3 loading and off-loading of Dangerous Goods to be Transported;
- 21.11.4 ensuring that Dangerous Goods have been properly and sufficiently secured to withstand loading, Transportation by rail and off-loading;
- 21.11.5 observing and implementing:
- 21.11.5.1 Best Industry Practice;
 - 21.11.5.2 the requirements of Law or any Relevant Authority,
- in the packaging, loading, securing and off-loading of any such Dangerous Goods.
- 21.12 Transnet Freight Rail shall be entitled to refuse to Transport any Dangerous Goods that are not properly, lawfully and sufficiently packed, loaded, secured and prepared for Transport in accordance with any requirements of any Relevant Authority, Best Industry Practice and its guidelines and Transnet Freight Rail shall not be liable for any Loss incurred by XXXX as a result of such refusal.

21.13 National Environmental Management Act

- 21.13.1 XXXX undertakes to comply with all the provisions of the NEMA, insofar as it relates to this Agreement.
- 21.13.2 XXXX hereby indemnifies Transnet Freight Rail against any liability including any penalties, damages, fines or any other forms of compensation for which Transnet Freight Rail is held liable in terms of the NEMA, arising out of any acts or omissions by XXXX.
- 21.13.3 XXXX also indemnifies Transnet Freight Rail in the event of any other obligation or obligations being imposed on Transnet Freight Rail in terms of any of the provisions of the NEMA, arising out of any acts or omissions by XXXX.
- 21.13.4 Should XXXX fail to comply with any such provisions of the NEMA, and any penalties, damages, fines or any other forms of compensation are imposed on Transnet Freight Rail as a result thereof, XXXX undertakes to refund the full amount of such penalties, damages, fines or compensation to Transnet Freight Rail within seven (7) days after written notice to that effect has been made or given by Transnet Freight Rail to XXXX.

21.14 Atmospheric Pollution Prevention Act 45 of 1965 ("Atmospheric Pollution Prevention Act")

- 21.14.1 XXXX undertakes to comply with all the provisions of the Atmospheric Pollution Prevention Act, insofar as it relates to this Agreement.
- 21.14.2 XXXX hereby indemnifies Transnet Freight Rail against any liability including any penalties, damages, fines or any other forms of compensation for which Transnet Freight Rail is held liable in terms of the Atmospheric Pollution Prevention Act, or in terms of section 34 of the NEMA read with section 9 of the Atmospheric Pollution Prevention Act, arising out of any acts or omissions by XXXX.
- 21.14.3 XXXX also indemnifies Transnet Freight Rail in the event of any other obligation or obligations being imposed on Transnet Freight Rail in terms of any of the provisions of the Atmospheric Pollution Prevention Act, arising out of any acts or omissions by XXXX.

21.14.4 Should XXXX fail to comply with any such provisions of the Atmospheric Pollution Prevention Act, and any penalties, damages, fines or any other forms of compensation are imposed on Transnet Freight Rail as a result thereof, XXXX undertakes to refund the full amount of such penalties, damages, fines or compensation to Transnet Freight Rail within seven (7) days after written notice to that effect has been made or given by Transnet Freight Rail to XXXX.

21.15 National Water Act 1998 (Act 36 of 1998)

XXXX undertakes to comply with all the conditions laid down in terms of the above-mentioned National Water Act, insofar as it relates to this Agreement. Should XXXX fail to comply with any such conditions and penalties are imposed on Transnet Freight Rail as a result thereof, XXXX undertakes to refund the full amount of such penalties to Transnet Freight Rail within seven (7) days after written notice to that effect has been made or given by Transnet Freight Rail to XXXX.

21.16 Conservation of Agricultural Resources Act 43 of 1983 ("Conservation of Agricultural Resources Act")

21.16.1 XXXX undertakes to comply with all the provisions of the Conservation of Agricultural Resources Act, insofar as it relates to this Agreement.

21.16.2 XXXX hereby indemnifies Transnet Freight Rail against any liability including any penalties, damages, fines or any other forms of compensation for which Transnet Freight Rail is held liable in terms of the Conservation of Agricultural Resources Act, or in terms of section 34 of the NEMA read with section 6 and 7 of the Conservation of Agricultural Resources Act, arising out of any acts or omissions by XXXX.

21.16.3 XXXX also indemnifies Transnet Freight Rail in the event of any other obligation or obligations being imposed on Transnet Freight Rail in terms of any of the provisions of the Conservation of Agricultural Resources Act, arising out of any acts or omissions by XXXX.

21.16.4 Should XXXX fail to comply with any such provisions of the Conservation of Agricultural Resources Act, and any penalties, damages, fines or any other forms of compensation are imposed on Transnet Freight Rail as a result thereof, XXXX undertakes to refund the full amount of such penalties, damages, fines or compensation to Transnet Freight Rail within seven (7) days after written notice to that effect has been made or given by Transnet Freight Rail to XXXX Women Investments.

Specific mention of the above legislation is to draw XXXX's attention thereto, and shall not derogate from, or diminish XXXX's general obligation to comply with all other Laws in force at all times during this Agreement.

21.17 Enterprise Development

21.17.1 XXXX shall comply with all Broad Based Black Economic Empowerment (BBBEE) codes. XXXX, as at Effective Date is a Developing Organisation (DO). Once XXXX becomes an Established Organisation (EO) in terms of the aforementioned codes, it must have a relationship and/or agreement with a Developing Organisation (DO). Transnet Freight Rail's monitoring and key performance areas of this aspect will be linked to its New Business Development portfolio.

21.17.2 In terms of the code series 2600:

A relationship agreement of co-operation and assistance has to be in place between the established organization (EO) and developing organisation (DO).

- (a) The EO may not have an equity holding larger than 20% in the DO, either directly or through a flow through calculation.
- (b) The DO that can qualify for Enterprise Development must:
 - (i) be a legal entity compliant with South African Revenue Service requirements;
 - (ii) be an employer of at least three other permanently employed personnel and not merely a one person operation with temporary employees.
 - (iii) must be 50% or more black owned or 30% or more black women owned.

21.18 Stopping of containers/wagons by competent authority en route

- 21.18.1 Should the transport of any containers/wagons be stopped at any point before, during or after transit and while still in the possession of Transnet Freight Rail, for inspection, search or seizure, by written order of any competent court or of any government official or other competent authority in the exercise of powers conferred by any law, Transnet Freight Rail shall be obliged to adhere to such order at the risk of the XXXX.
- 21.18.2 Transnet Freight Rail shall notify XXXX of such order within a reasonable time.
- 21.18.3 XXXX will be responsible for compliance with such written order of a competent court or of any government official or other competent authority as shall be required, including but not limited to, lodgement of a correction voucher with such authority and a copy thereof to Transnet Freight Rail.
- 21.18.4 Whenever any containers/wagons on which railage has been prepaid have been stopped as aforesaid at any point short of the destination, and to be offloaded or the contents unpacked, XXXX shall be liable for any miscellaneous charges or any other charges related to the delay which may have been incurred. If, however, any authorised government official or other competent authority should direct that the said containers be transported to some place other than that at which the containers were stopped for purposes of examination or otherwise, Transnet Freight Rail shall comply with such direction. In that case XXXX shall be liable to pay to Transnet Freight Rail all additional railage and miscellaneous amounts which may have been incurred by reason of Transnet Freight Rail compliance with such direction.
- 21.18.5 Notwithstanding the above, it is hereby recorded that all Transnet Freight Rail's Container Terminals are only approved to allow for "Tailboard Inspections" by such authority, i.e. no contents of any container can be unpacked. Any request or directive to unpack and inspect the contents of the containers will be conducted at a Licensed Container Depot. All non-cleared or "in bond" containers stopped in a Transnet Freight Rail Container Terminal for inspection, must be removed to a Licensed Container Depot by the authorised official of such government authority ("approved Removal in Bond") for inspection, within 24 hours.
- 21.18.6 All additional costs resulting from such Stopping/inspections will, be XXXX's account and Transnet Freight Rail will not incur any liabilities arising out of such stoppages and inspections.
- 21.18.7 Transnet Freight Rail will not be held liable for any costs or any other liabilities arising from or connected with XXXX's failure to comply with the terms set out in any regulations or the requirements of any Relevant Authority.

22 LIMITATION OF LIABILITY, INDEMNITY

- 22.1 Transnet Freight Rail shall not be liable to XXXX, whether in terms of any indemnity or otherwise, for any Loss arising in whole or in part from any act or omission of XXXX.
- 22.2 XXXX indemnifies and holds Transnet Freight Rail harmless against any Loss suffered by, or Claims made against Transnet Freight Rail as a result of, or in connection with any act or omission of XXXX and/or any of its responsible persons (including any default or failure by XXXX to comply with any of its obligations under this Agreement).
- 22.3 For the purposes of this clause 22, "responsible persons" means any subcontractor, agent, servant, officer or employee of the Party concerned.
- 22.4 If any legal action is brought or Claim is made against Transnet Freight Rail and Transnet Freight Rail is entitled to be indemnified pursuant to this clause 22, XXXX shall be entitled at XXXX's own expense to defend, have conduct of, or settle any such action or Claim, and Transnet Freight Rail shall notify XXXX promptly of any such Claims or any such threatened Claims and take such action as XXXX reasonably directs. Transnet Freight Rail shall be entitled to engage its own legal counsel and XXXX shall co-ordinate XXXX's defence with Transnet Freight Rail. If XXXX fails to defend, deal with, or negotiate any such action or Claim diligently, Transnet Freight Rail may proceed to do so, after first giving XXXX reasonable notice so to act, defend or settle the Claim, without XXXX's consent and without relieving XXXX of the obligation to indemnify Transnet Freight Rail as provided in sub-clause 22.2 above.
- 22.5 Insofar as the performance of any obligation or duty by either of the Parties in terms of this Agreement is performed by any of Transnet Freight Rail's respective responsible persons, clauses limiting and/or excluding the liability of Transnet Freight Rail are stipulated for the benefit of such responsible persons as well, and their liability shall be limited and/or excluded and they shall be indemnified accordingly.

23 ACCOUNT NUMBER

If Transnet Freight Rail has granted credit facilities to XXXX, it will allocate an account number to XXXX ("the XXXX Women Investments credit account"). The account number must be quoted on all orders and payments.

24 CREDIT FACILITIES AND PAYMENT

- 24.1 The granting, amendment, or extension of credit facilities will be subject to XXXX providing Transnet Freight Rail with an appropriate bank guarantee in terms of this clause 24. In order to ensure that XXXX's obligations to Transnet Freight Rail can be fulfilled XXXX must furnish Transnet Freight Rail with such a guarantee within 30 Days of its request in the amount requested by Transnet Freight Rail. If:
- 24.1.1 the guarantee is at any time withdrawn according to its terms or is held to be unenforceable for any reason; or
- 24.1.2 XXXX fails to provide the bank guarantee as requested; or
- 24.1.3 XXXX fails to make alternative arrangements satisfactory to Transnet Freight Rail;
- then, notwithstanding any other clause in this agreement, Transnet Freight Rail will be entitled to terminate this agreement in terms of clause 28 (Breach) below with immediate effect upon reasonable notice to XXXX, and/or, suspend all Transport of consignments.

- 24.2 XXXX will be invoiced and be held liable for all amounts which Transnet Freight Rail may pay on XXXX's behalf to other Railway administrations, hauliers or other persons.
- 24.3 If XXXX's authorised credit limit on such an account is exceeded, XXXX must make an immediate interim payment in order to bring the account within the authorised credit limit.
- 24.4 Transnet Freight Rail will render a weekly tax invoice to XXXX, which will serve as an account for consignments transported by Transnet Freight Rail including Wagon Delay Charges. Any other amounts due to Transnet Freight Rail by XXXX in terms of this Agreement such as interest charges will appear on the monthly statement, which serves as a summary of all transactions on XXXX's account. The weekly tax invoice and the monthly credit account statements are available on Transnet freight Rail's website at www.transnetfreightrail.co.za. The weekly tax invoice will furthermore also be:
- 24.4.1 a VAT invoice; and
- 24.4.2 proof of the VAT payable.
- 24.5 Amounts debited to XXXX's account during any particular month must be paid by XXXX on or before the 25th Day of the month following the month in which the debits were raised. Payments must be made into such account as Transnet Freight Rail may from time to time notify XXXX. When the 25th is not a Business Day payment is required on the last Business Day prior to the 25th.
- 24.6 If any railage prices are quoted in a foreign currency, the prevailing monthly SARA exchange rate for the month during which specific consignments were transported, will be applied in converting the foreign currency to Rand for invoicing purposes.
- 24.7 Unless otherwise agreed by the Parties and permitted by the South African Reserve Bank invoices and accounts will be:
- 24.7.1 Rand based; and
- 24.7.2 be payable in Rand.
- 24.8 Overdue amounts shall bear interest at a rate stipulated in the Rates Schedule, above the published prime overdraft rate of the Standard Bank of South Africa Limited (e.g. prime rate 17% plus 1% above = 18%), as applicable from time to time calculated daily and compounded monthly in arrears. Any change in the prime overdraft interest rate will be applied from the first Day of the next month.
- 24.9 XXXX may query any invoice in Writing within 90 (ninety) Days of the invoice date, if no query is received in the said period the invoice will be:
- 24.9.1 deemed to be correct; and
- 24.9.2 final and binding on both Parties.
- 24.10 If any amount is erroneously debited to XXXX's account due to a mistake on the part of XXXX or XXXX's agent and XXXX subsequently requests Transnet Freight Rail to transfer the debit to another account, such transfer will not be done without the prior written consent of the account holder concerned. XXXX will be liable to compensate Transnet Freight Rail for any adjustment fees arising out of the correction of any such errors. Interest will also be payable by XXXX from the date of first debit as if the amount had been originally included to the correct account number. No request for the transfer of debits lodged 90(ninety) Days or more after the date of the statement will be entertained.

- 24.11 Transnet Freight Rail is entitled to refuse to Transport any consignment for XXXX (whether on a cash in advance basis or not) if any amount due by XXXX to Transnet Freight Rail is overdue for payment.
- 24.12 XXXX is not entitled to:
- 24.12.1 withhold payment of any amount due by XXXX for services because of any Loss or Claim of XXXX;
- 24.12.2 set off any amounts due by XXXX to Transnet Freight Rail against any amount due to or alleged to be due to XXXX by Transnet Freight Rail.
- 24.13 XXXX must furnish Transnet Freight Rail on request with such information and references relating to XXXX's financial position as Transnet Freight Rail may from time to time require.
- 24.14 If at any time during the term of this Agreement and after an evaluation of XXXX's financial position in terms of clause 24.13 above, Transnet Freight Rail requires an additional bank guarantee on the same terms as clause 24.1 above, in order to ensure that XXXX's obligations to Transnet Freight Rail can be fulfilled. XXXX must furnish Transnet Freight Rail with such a guarantee within 30 (thirty) Days of that request in the amount requested.
- 24.15 Transnet Freight Rail may at any time in its sole discretion amend, vary or revoke XXXX 's credit facilities and/or suspend Transport for or on behalf of XXXX if its account is unpaid or if XXXX has not provided the bank guarantees required by Transnet Freight Rail.
- 24.16 The terms of this Agreement are without prejudice to Transnet Freight Rail's rights to exercise a lien over XXXX's consignments in Transnet Freight Rail's possession for unpaid railage charges and additional costs and XXXX agrees that Transnet Freight Rail may exercise such a lien whether or not the unpaid amounts relate to the consignments in question. The lien shall not be exercised by Transnet Freight Rail unless the procedure in clause 34 has first been followed.
- 24.17 XXXX may authorise anyone to despatch goods for the debit of XXXX's account, provided XXXX has advised Transnet Freight Rail in writing prior to granting such authorisation. XXXX may withdraw any such authorisation on 14 (fourteen) Days' notice to Transnet Freight Rail. XXXX will remain liable before the lapse of such notice period for all debits against XXXX's account in terms of the authorisation.

25 CERTIFICATE

- 25.1 XXXX agrees that any certificate given under the signature of any credit manager of Transnet Freight Rail (whose signature and capacity it shall not be necessary to prove) shall be *prima facie* evidence of:
- 25.1.1 any amount owing by XXXX to Transnet Freight Rail, whether liquid, liquidated or illiquid, including any interest and the rate thereof;
- 25.1.2 the reasonableness or normality of any charge raised by Transnet Freight Rails against XXXX.

26 CONFIDENTIALITY

- 26.1 The Parties acknowledge that all information disclosed as a result of this Agreement is confidential business and technical information, data, documents or other information necessary or useful for the carrying on by a Party of its business which shall include, but shall not be limited to operating procedures, quality control procedures, approximate operation personnel requirements, descriptions and trade names

and trademarks, know how, techniques, technology, information relating to clients, XXXX's suppliers, business associates, relevant authorities, copyright, trade secrets and all goodwill relating to the business and any other intellectual property rights, technical data and documents in whole or in part, used by a Party in respect of its business; ("**Confidential Information**"), shall remain confidential and shall not be made known unless the disclosing Party has given written consent to do so.

- 26.2 The information provided by the disclosing Party in the context of this Agreement is Confidential Information of the disclosing Party and the receiving Party shall take all reasonable measures to keep the information confidential and will only use the Confidential Information for the purpose for which it was provided.
- 26.3 The Parties undertake not to disclose any such Confidential Information. However, there will be no obligation of confidentiality or restriction on use where:
- 26.3.1 the information is publicly available, or becomes publicly available otherwise than by action of the receiving Party; or
- 26.3.2 the information was already known to the receiving Party (as evidenced by its written records) prior to its receipt under this or any previous agreement between the Parties or their affiliates; or
- 26.3.3 The information was received from a third Party not in breach of an obligation of confidentiality.
- 26.4 Neither Party shall during the term of this Agreement (save in this Agreement) or at any time after the expiry or termination of this Agreement for any reason disclose to any person (other than to its professional advisers subject to obtaining similar confidentiality undertakings to those contained in this Agreement in favour of the other Party) or otherwise make use of any confidential information including information relating to prices without the prior written approval of the either Party save for such information or documentation that is or becomes in the public domain (other than through the default of one of the Parties) and such information or documentation that is required by law to be delivered to any Relevant Authority, stock exchange, or any other person. Nothing in this clause shall preclude either Party from using such information and documents in enforcing rights against the other.

27 TERMINATION OF AGREEMENT

- 27.1 Transnet Freight Rail may, at any time after termination of the Concession Agreement, elect to regard this Agreement as cancelled if XXXX has not consigned any Goods to it for Transportation for the period of 3 (three) months.
- 27.2 This Agreement may also be terminated by agreement in writing setting out the terms of such termination.

28 BREACH

- 28.1 Subject to clause 28.2 below should either of Parties ("the aggrieved party") commit a breach of a material term of this Agreement, then the other Party ("the non-defaulting party") shall be entitled to give the defaulting party notice to remedy such breach within 60 (sixty) days of receipt of such notice and, if the defaulting party fails to comply with the notice, the aggrieved party shall be entitled, but not obliged, without prejudice to any other rights or remedies which it may have, including the right to claim damages:
- 28.1.1 cancel this Agreement; or

28.1.2 claim specific performance.

28.2 The aggrieved party shall not be entitled to exercise the rights granted to it in terms of clause 29 until such time as the aggrieved party shall first have given the defaulting party notice as contemplated in clause 28.1 above and the defaulting party shall have failed to comply therewith within a period of 60 (sixty) Days reckoned from the date upon which the defaulting party received such notice.

28.3 This Agreement may be terminated forthwith by either of the Parties if the other is placed under winding-up or placed under the provisions of Business Rescue, whether provisional or final.

28.4 Notwithstanding any other provision in this Agreement, Transnet Freight Rail reserves a right, on 7 (seven) Days Written notice, to terminate this Agreement if XXXX's account is in arrears in excess of 30(thirty) Days, unless satisfactory arrangements are made for the payment of charges under the Agreement.

28.5 The termination of this Agreement in terms of clause 27 above or this clause shall have the effect of terminating the Parties' respective rights and obligations save for the rights of either Party that have already accrued prior to the event giving rise to the termination.

29 CESSION AND DELEGATION

Neither Party shall be entitled to cede any of their rights or delegate any of its obligations in terms of this Agreement save with the prior approval of the other Party which approval in the case of a cession shall not be unreasonably withheld.

30 FORCE MAJEURE

30.1 Notice of Force Majeure

Each Party shall promptly notify the other of the occurrence of a perceived event of Force Majeure and when such event has ceased.

30.2 Continuation of Performance

30.2.1 Each Party shall take all reasonable steps to prevent, limit and minimise the effect of events of Force Majeure on the performance of its obligations under this Agreement.

30.2.2 Decisions concerning Force Majeure and the application of this clause shall be directed toward the performance to the extent possible of all obligations under this Agreement for the period of the Agreement.

30.2.3 A Party affected by the occurrence of the Force Majeure shall be excused from performance of its obligations under this Agreement to the extent that it is unable to perform those obligations as a result of such Force Majeure and neither of the Parties shall be entitled to:

30.2.3.1 terminate this Agreement on account of such occurrence other than in accordance with the terms of this clause; and/or

30.2.3.2 claim damages, penalties or other compensation from the other as a result of such failure to perform.

30.3 Insured Events of Force Majeure

To the extent that the consequences of an event of Force Majeure fall within any insurance cover then the Party who is insured shall forthwith make the appropriate Claims there under and shall apply the proceeds in rectification of those consequences.

30.4 Consequences of Force Majeure

- 30.4.1 If the Parties agree or it is determined that an event of Force Majeure has occurred, the Parties shall promptly consult to agree a mutually satisfactory resolution to the changed circumstances resulting from the event of Force Majeure.
- 30.4.2 If an event of Force Majeure (or its consequences) continues for an aggregate of 60 (sixty) or more Days in any 180 (one hundred and eighty) Day period or 180 (one hundred and eighty) consecutive Days and Transnet Freight Rail have not reached a mutually satisfactory resolution to the changed circumstances and the effect of the Force Majeure is continuing, this Agreement may, upon 14 (fourteen) Days prior notice, be terminated by either Party.
- 30.4.3 Neither Party shall be obliged to counter-perform any obligation where performance of the other has not taken place as a result of Force Majeure.

31 NOTICES AND COMMUNICATIONS

- 31.1 The Parties choose as their respective *domicilia citandi et executandi* for all purposes under this Agreement whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), the addresses set out hereunder:

31.1.1 TRANSNET

ATTENTION: THE CHIEF EXECUTIVE OFFICER – Transnet Freight Rail

15 Girton Road

Parktown, Johannesburg

South Africa

TELEFAX: +27 11 774-9978

31.1.2 XXXX

ATTENTION: THE CHIEF EXECUTIVE OFFICER

TELEFAX: +27 86 627 9701

- 31.2 Any notice or communication required or permitted in terms of this Agreement shall be valid and effective only if in Writing but it shall be competent to give notice by facsimile.
- 31.3 Either Party may by notice to the other change the physical address chosen as its *domicilium citandi et executandi* to another physical address or change its postal address or its telefax number, provided that the change shall become effective on the 20th Business Day from the receipt of the notice by the addressee.
- 31.4 Any notice to either Party:

- 31.4.1 sent by prepaid registered post (by airmail if appropriate) in a correctly addressed envelope to the addressee at an address chosen as the *domicilium citandi et executandi* and to which post is delivered shall be deemed to have been received on the 14th Business Day after posting (unless the contrary is proved);
- 31.4.2 delivered by hand to a responsible person during ordinary Business hours at the physical address chosen as the *domicilium citandi et executandi* shall be deemed to have been received on the Day of delivery; or
- 31.4.3 sent by fax to the chosen fax number stipulated in clause 31.1 above, shall be deemed to have been received on the date of despatch if that Day is a Business Day and, if it is not a Business Day, on the next succeeding Business Day (unless the contrary is proved).
- 31.5 Notwithstanding anything to the contrary in this Agreement a notice or communication actually received by one Party shall be an adequate notice or communication notwithstanding that it was not sent to or delivered at the chosen *domicilium citandi et executandi*.
- 31.6 All communication, requests, notices, and any other queries in terms of this Agreement by XXXX shall be made only to the contact person nominated by Transnet Freight Rail in this Agreement, or to the contact person nominated by Transnet Freight Rail in any other written communication to XXXX. Notwithstanding any other clause in this Agreement, a failure to do so shall give Transnet Freight Rail the right to claim confidentiality and/or privilege over information obtained from any source other than the contact person nominated by Transnet Freight Rail in this Agreement, to designate such information as improperly obtained, and to require XXXX to return or destroy such information. If Transnet Freight Rail claims confidentiality and/or privilege over any such improperly obtained information, XXXX shall not be entitled to use such information for the purposes of any claim or legal proceedings that it may contemplate lodging against Transnet Freight Rail.

32 MISCELLANEOUS

- 32.1 No approvals, comments, instructions, consents or advice from one Party to the other in connection with the subject matter of this Agreement shall in anyway relieve the other from its obligations under this Agreement, unless it is put in writing and signed by both Parties?
- 32.2 The Parties' respective rights and remedies under this Agreement are cumulative, may be exercised as often as either Party considers appropriate and are, save where such rights are limited in terms of this Agreement, in addition to the Parties' respective rights and remedies in Law.
- 32.3 The Parties' respective rights and remedies whether arising under this Agreement or in Law shall not be capable of being waived or varied otherwise than by an express waiver or variation in Writing duly executed by an authorised representative of the holder of such right or remedy.
- 32.4 The waiver by either Party of any breach of the terms of this Agreement by the other shall not prejudice any remedy of the waiving Party in respect of any continuing or other breach of the terms of this Agreement or any of such terms.
- 32.5 No failure, delay, relaxation or indulgence on the part of either Party in exercising any power, right or remedy conferred on such Party under this Agreement or by Law shall operate as a waiver of such power, right or remedy whether of a like or different character nor shall any single or partial exercise of any such

power, right or remedy preclude any other or further exercises of such power, right or remedy or the exercise of any other power, right or remedy of either Party.

- 32.6 If any of the provisions in this Agreement is or becomes invalid, illegal or unenforceable in any respect under any Law the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired and:
- 32.6.1 that provision shall be deemed for all purposes to be severable from all the other provisions of this Agreement, which provisions shall continue in force unaffected;
- 32.6.2 this Agreement thus continuing shall (subject and without prejudice to any appeal to higher authority as to the status of that provision) exclude the offending provision but, if such deletion substantially affects or alters the commercial basis of this Agreement, then this Agreement including such provision shall be amended in such manner as Transnet Freight Rail agree which will, while not being void or unenforceable, most nearly achieve the object of the allegedly void or unenforceable provisions.
- 32.7 Each Party confirms it has received independent legal advice relating to all the matters provided for in this Agreement, including the provisions of this clause, and agrees, having considered the terms of this clause and this Agreement as a whole, that the provisions are fair and reasonable.
- 32.8 This Agreement shall be binding upon and inure to the benefit of each of the Parties and their respective successors, legal representatives and permitted assigns.

33 LAWS AND JURISDICTION

- 33.1 This Agreement shall be governed by and interpreted according to the Law of the Republic of South Africa irrespective of where Goods are collected, or delivered and irrespective of where the Transport is carried out.
- 33.2 Subject to the provisions of clause 35 below each Party submits to the exclusive jurisdiction of the South African courts in respect of any matter arising from or in connection with this Agreement including its termination. Each Party further consents to the jurisdiction of the High Court of South Africa (South Gauteng High Court (Johannesburg)).

34 DISPUTE RESOLUTION

- 34.1 Save for clause 33 above, or any other clause in this Agreement which provides for its own remedy, should any dispute arise between the Parties in respect of or pursuant to this Agreement, including, without limiting the generality of the a foregoing, any dispute relating to:
- 34.1.1 the interpretation of the Agreement;
- 34.1.2 the performance of any of the terms of the Agreement;
- 34.1.3 any of the Parties' rights and obligations;
- 34.1.4 any procedure to be followed;
- 34.1.5 the termination or cancellation or breach of this Agreement; or
- 34.1.6 the rectification or repudiation of this Agreement;

then any Party may give the other Party written notice of such dispute, in which event the provisions below shall apply.

34.2 A Dispute shall:

- 34.2.1 in the first instance, be referred to the responsible account managers of each Party, who shall attempt to resolve the dispute amicably within 5 Business Days of the dispute being referred to them; and
- 34.2.2 if not resolved, be referred to the responsible executive managers of each Party, who shall attempt to resolve the dispute amicably within 5 Business Days of the dispute being referred to them; and
- 34.2.3 if not resolved as above within five (5) business days, the Parties' General Managers shall meet in the spirit of goodwill and endeavour to resolve the dispute, failing which (and without prejudice to any other alternative dispute resolution to which the Parties may agree, either prior to or concurrently with arbitration) the provisions of clause 29.4 below shall apply.
- 34.3 If the Parties are unable to resolve the dispute within 14 (fourteen) days of the notice of the dispute (or such longer period as they may have agreed to in Writing), then either Party may, on written notice to the other Party, require that the dispute be submitted to and decided by arbitration, in terms of the Arbitration Act, 42 of 1965 of South Africa ("the Arbitration Act").
 - 34.3.1 The arbitration shall be held under the provisions of the Arbitration Act provided that the arbitration shall be
 - 34.3.2 at any place which the Parties agree, in Writing, to be mutually convenient.
 - 34.3.3 in accordance with such formalities and/or procedures as may be settled by the arbitrator and may be held in an informal and summary manner, on the basis that it shall not be necessary to observe or carry out the usual formalities of procedure, pleadings and/or discovery or respect rules of evidence.
- 34.4 If the arbitration is:
 - 34.4.1 a legal matter, then the arbitrator shall be a practicing advocate or a practicing attorney of not less than 10 (ten) years' standing;
 - 34.4.2 an accounting matter, then the arbitrator shall be a practicing chartered accountant of not less than 10 (ten) years' standing;
 - 34.4.3 any other matter, then the arbitrator shall be any independent person agreed upon between the Parties.
- 34.5 Should the Parties fail to agree on an arbitrator within 14 (fourteen) days after the arbitration has been demanded, then the arbitrator shall be nominated at the request of either of the Parties, by the president for the time being of the Law Society of the Northern Provinces.
- 34.6 Should the Parties fail to agree whether the dispute is of a legal, accounting or other nature within seven (7) days after the arbitration has been demanded, then it shall be deemed to be a dispute of a legal nature.
- 34.7 The arbitrator may:-
 - 34.7.1 investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with the dispute and for that purpose, shall have the widest powers of investigating all documents and records of any party having a bearing on the dispute;
 - 34.7.2 interview and question under oath the Parties or any of their representatives;

- 34.7.3 decide the dispute according to what he considers just and equitable in the circumstances; and
- 34.7.4 make such award, including an award for specific performance, damages or otherwise, as he in his discretion may deem fit and appropriate. The arbitration shall be held as quickly as possible after it is requested, with a view to it being completed within thirty (30) days after it has been so requested.
- 34.8 The arbitrator's decision and award shall be in Writing with reasons and shall be final and binding upon the Parties.
- 34.9 The arbitrators award may, on application by either Party to a court of competent jurisdiction and after due notice is given to the other Party, be made an order of court.
- 34.10 Notwithstanding the provisions of clauses 34.5, 34.6, 34.7, 34.8 above in the event of either Party having a claim against the other Party for a liquidated amount or an amount which arises from a liquid documents, or for an interdict or other urgent relief, then the other Party having such a claim shall be entitled to institute action therefore in a court of law rather than in terms of the above clauses, notwithstanding the fact that the other Party may dispute the claim.
- 34.11 The provisions of this clause are severable from the rest of this Agreement and shall remain in effect even where this Agreement is terminated or cancelled for any reason.

35 EXECUTION

- 35.1 This Agreement may be executed in several counterparts, which shall each be deemed an original, but all of which shall constitute the same instrument.
- 35.2 The signatories to this Agreement by their signature warrant their authority to enter into this Agreement and the capacity of their principal, if signing in a representative capacity, to enter into this Agreement.
- 35.3 The signatory or signatories to this Agreement on behalf of XXXX, by appending his/her/their signature hereto, warrant/s that he/she/they has/have the necessary written authority to act on behalf of XXXX, and to take all steps necessary to ensure the conclusion of this Agreement. The signatory or signatories warrant/s that he/she/they acknowledge/s and understand/s the contents of this Agreement, and the effects thereof on all Parties affected thereby.

Signed at _____ on this _____ day of _____ 20__.

Witnesses:

1. _____
for and on behalf of **XXXX**
2. _____
FULL NAME:
DESIGNATION:

Signed at _____ on this _____ day of _____ 20__.

Witnesses:

1. _____
for and on behalf of **Transnet SOC Ltd**
2. _____
FULL NAME:
DESIGNATION: