

## **CONCESSION AGREEMENT**

entered into between

**TRANSNET SOC LTD**

**in its Operating Division, Transnet Freight Rail**

(Registration No. 1990 / 000900 / 30)

as concessor

and

(Registration No.)

as concessionaire

for the conduct of a freight and passenger transport rail service on the **A - B branch line** and maintenance of such branch line as well as tourism, real estate and training and development opportunities.

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## ANNEXES

Annex A	Concessionaire Constitutive Documents (including the Memorandum of Incorporation) ( <b>Concessionaire to provide</b> )
Annex B	Concessionaire Shareholders' Agreement [Drafting Note: only relevant if the Concessionaire has more than one shareholder.]

## RECITALS

### WHEREAS:

- (A) Transnet SOC Limited is, in terms of the Legal Succession to the South African Transport Services Act, 9 of 1989, the owner of certain rail infrastructure and the provider and operator of certain rail services.
- (B) Transnet SOC Limited is entitled pursuant to, inter alia, the Legal Succession to the South African Transport Services Act, 9 of 1989, the Public Finance Management Act, 1 of 1999 and Companies Act, 71 of 2008 to concession one or more of its branch lines to one or more concessionaires.
- (C) Transnet embarked on an initiative to leverage private sector participation aimed at reinstating freight services on the 282 km closed branch line between \_\_\_\_\_ and \_\_\_\_\_ to enable movement of rail friendly cargo.
- (D) This initiative includes unlocking real estate opportunities for the container terminal at the \_\_\_\_\_ station on the Branch Line, the tourist opportunities and other revenue sharing developments on the Branch Line.
- (E) Transnet, in line with their branch line strategy, engaged with relevant stakeholders in particular \_\_\_\_\_ (PTY) Ltd as part of the ongoing stakeholder engagement for this project.
- (F) The \_\_\_\_\_ Branch Line resuscitation project is a development opportunity and the Parties are aligned on the objectives of the Branch Line concessioning being to:-
  - a. promote the inter-modal shift of freight from road to rail;
  - b. lower the social and commercial costs of freight transportation;
  - c. access private capital to prioritise investment in rail revitalisation in rural development;
  - d. stimulate employment and other economic opportunities in rural areas; and
  - e. to promote and advance the participation of black people in the undertaking of a concession.
- (G) The Parties wish to record their Agreement regarding the concessioning of the use of the \_\_\_\_\_ Branch Line.

**NOW IT IS HEREBY AGREED AS FOLLOWS:**

**PART I - PRELIMINARY**

**1. DEFINITIONS**

In this concession agreement (defined as 'Agreement'), unless the context otherwise requires, the following capitalised terms shall have the meanings assigned to them below and cognate expressions shall have corresponding meanings –

- |      |                           |   |
|------|---------------------------|---|
| 1.1. | "Access Route"            | means that portion of the Core Network which the Concessionaire is authorised to traverse in order to access a marshalling yard, or exchange yard, or consolidation point, or collection point (or similar natural hand-over point) on the Core Network to deliver and/or collect wagons, being the Core Network line between the access point (as defined in the Track Access Agreement) and Cambridge;  |
| 1.2. | "Affiliate"               | means any person that directly or indirectly through any one or more intermediaries Controls, is Controlled by or is under common Control with any person;  |
| 1.3. | "Agreed Form"             | means in relation to any document not executed simultaneously with this Agreement, the terms and conditions of that document have been agreed by the Parties and initialled by each of them for identification purposes on or before the Signature Date;  |
| 1.4. | "Agreement"               | means this concession agreement as amended from time to time, including any Schedules hereto, but excluding the Ancillary Agreements and Annexes;   |
| 1.5. | "Ancillary Agreements"    | means one or more of the agreements concluded, or to be concluded by the Parties to enable and facilitate the implementation of the Concession, being the agreements in <b>Schedule 3</b> (Ancillary Agreements);   |
| 1.6. | "Annexes"                 | means the documents and agreements attached to this Agreement marked as Annexes, but which do not form part of this Agreement though they are relevant to this Agreement and the Concession;  |
| 1.7. | "Applicable Requirements" | means the mandatory requirements of any existing or future Law, or of any licence, consent, permit, authorisation or agreement issued or entered into under any of the foregoing or of any local authority, statutory authority, court or other competent body or authority which has relevant jurisdiction, in each case to the extent that the same comprise legally enforceable obligations and are applicable to the Concession, the Railway Services and/or the Concession Assets; |
| 1.8. | "Base Freight Service"    | means the minimum freight volumes set out in <b>Schedule 2 Part 2</b> (Concession Specifications – Base Freight and Contracted Volume   |

- Requirements" Service Requirements) to be hauled by the Concessionaire on the Branch Line at the instance of Transnet, subject to the terms of the Train O&M Agreement;
- 1.9. "Branch Line" means the \_\_\_\_\_ Line;
- 1.10. "Branch Line Stations" means collectively \_\_\_\_\_;
- 1.11. "Branch Line Termination Point" means the point as indicated on the Route Plan (Schedule 1 Part 3) being point number \_\_\_\_\_ of the Branch Line at which the \_\_\_\_\_ Branch Line terminates.
- 1.12. "Business Day" means any day except a Saturday, Sunday or public holiday in the Republic of South Africa, as gazetted by the Government of the Republic of South Africa;
- 1.13. "Capital Expenditure" means any expenditure treated as capital expenditure under IFRS;
- 1.14. "Capital Reimbursement Fee" means the amortised value of the applicable asset and the Termination date which calculation shall be done as set out in clauses 1.15.1 and 1.15.2 herein below:-
- 1.15.2 the Parties shall ensure that the value of the Railway Infrastructure is determined at the commencement of the Concession Agreement and agree that the valuation so obtained is a fair and reasonable valuation; and
- 1.15.3 each Party is entitled to appoint any independent valuator to value the Railway Infrastructure. In the event of the valutors so appointed not being able to agree on the value of the Railway Infrastructure, the valuations shall be referred to an independent valuator who shall make a determination and whose determination shall be final
- 1.15. "Catalogued Moveable Rail Assets" has the meaning ascribed to it in clause 17.3;
- 1.16. "\_\_\_\_\_" means a company duly incorporated with limited liability in terms of the laws of South Africa with registration number \_\_\_\_\_;
- 1.17. "Viedgesville station" means the station situate on and servicing the A - B Branch Line, as more fully described in the route plan in Schedule 1 Part 2 ( Route plan A - B Stations)



- means the certificate to be issued by Transnet pursuant to **clause 3.5**;
- 1.18. "Certificate of Commencement"
- 1.19. "Certified Contractor" means a person or entity, including the Concessionaire, which is duly certified by a recognised association of the relevant industry, or by Transnet, as having the requisite skill, expertise, qualification and experience to undertake one or more aspects of the Rail Infrastructure Services;
- 1.20. "Change in Control" means any change whatsoever in Control whether effected directly or indirectly;
- 1.21. "Change in Law" means the coming into effect after the Signature Date of any Law, or any amendment or variation to any Law, other than any Law that on or before the Signature Date, has been published –
- 1.21.1. in a Bill; or
- 1.21.2. as an Act but has not been brought into effect;
- 1.22. "Concession" means the exclusive right to offer and render the Rail Freight Service and Passenger Services in respect of the Branch Line and the obligation to perform and undertake the Infrastructure Services including, but not limited to the development of storage facilities, tourism and telecommunication opportunities and related ancillary services in all instances subjected to the terms and conditions of this Agreement and the Ancillary Agreements;
- 1.23. "Concession Assets" means collectively the Railway Land and Rail Infrastructure;
- 1.24. "Concession Documents" means this Agreement (including the Schedules), the Ancillary Agreements and the Annexes;
- 1.25. "Concession Insurances" has the meaning ascribed to it in **clause 42** (*Insurance*);
- 1.26. "Concession Term" means the period starting on the Effective Date and, subject to earlier termination in terms of this Agreement, ending one day before the 20<sup>th</sup> (twenty-) anniversary of the Effective Date;
- 1.27. "Concession Termination Notice" means any notice issued pursuant to **clause 46** (*Concessionaire Default*), **clause 47** (*Transnet Default*) or **clause 48** (*Non Default Termination*) describing the basis for

the giving of the notice and stating that the obligations hereunder are terminated (upon expiry of the period of notice specified therein, if any);

- 1.28. "Concessionaire" means, \_\_\_\_\_ (Pty) Ltd including any entity subcontracted by the Concessionaire to **undertake Infrastructure Services**, but excluding the Train O&M Provider which would render, inter alia, the Train O&M Services; **[Drafting note: if the Concessionaire subcontracts another entity to undertake any Infrastructure Services (or substantial portion thereof), then such entity will be defined as the rail infrastructure services provider, and its subcontract with the Concessionaire will be annexed as a schedule to the concession agreement, with the proviso that no change of such subcontractor or amendment of such subcontract may be made without Transnet prior approval.]**

- 1.29. "Concessionaire Default" means any of the following events or circumstances:

- 1.29.1. any arrangement, composition or compromise with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act, 1936 or the Companies Act, 2008) being entered into by or in relation to the Concessionaire;
- 1.29.2. a liquidator, judicial manager or the like taking possession of or being appointed over, or any judicial management, winding-up, execution or other process being levied or enforced (and not being discharged within 5 (five) Business Days) upon, the whole or any material part of the assets of the Concessionaire (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);
- 1.29.3. the Concessionaire ceases to carry on business;
- 1.29.4. a resolution being passed or an order being made for the administration or the judicial management, winding-up, liquidation or dissolution of the Concessionaire (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);

- 1.29.5. the Concessionaire, without prior consent of Transnet, sells (or attempts to sell), transfers (or attempts to transfer), leases (or attempts to lease) or otherwise disposes (or attempts to do so) of the whole or any part (which is material in the context of the performance of the Concessionaire's obligations) of its undertakings, properties or assets by a single transaction or a number of transactions (whether related or not and whether at the same time or over a period of time);
- 1.29.6. the Concessionaire transferring, selling, leasing or otherwise disposing (or attempting to do so) of any Concession Asset other than as permitted under this Agreement;
- 1.29.7. the Concessionaire fails to comply with the provisions of **clause 36** (*Security Interests and Concession Assets*) by creating (or attempting to create) a Security Interest or encumbrance over any Concession Asset, or without the approval of Transnet creates or registers (or attempts to create or register) any Security interest over its rights and entitlements under this Agreement;
- 1.29.8. the Concessionaire fails to comply with any provision of **clause 60** (*Cession and Delegation*) or the Concessionaire or any of its Shareholders permitting any change in Control of the Concessionaire in breach and **clause 61** (*Changes in Control*);
- 1.29.9. failure to commence with operations within 3 (three) months of the Effective Date, or having commenced, ceasing to do so and not resuming same within a period of 3 (three) months period in the absence of a Force Majeure event (other than as a consequence of a breach by Transnet of its obligations under this Agreement);
- 1.29.10. expiry of a Safety Permit(s) without submission of an application, or the approval for an application, for a replacement Safety Permit within 3 (three) months of the withdrawal or revocation of the Safety Permit in question;

- 1.29.11. withdrawal or revocation of any Safety Permit by the Safety Regulator without submission of an application, or the approval for an application, for a replacement Safety Permit within 3 (three) months of the expiry of the Safety Permit in question;
- 1.29.12. the Safety Regulator withdrawing its acceptance of the Safety Management System Report or suspending or preventing the operation of the Railway Services (for a period longer than 3 (three) months for any reason, other than a Force Majeure event(s) or a material breach of this Agreement or the Ancillary Agreements by Transnet;
- 1.29.13. failure to maintain the Municipal Rates and Taxes Deposit, or to replenish same in terms of **clauses 41.1** (*Financial Covenants*) and **clause 37** (*Utilities, and Local Authority Rates and Taxes*);
- 1.29.14. failure to maintain the Performance Bond, or to replenish same in terms of **clauses 41.2** (*Financial Covenants*);
- 1.29.15. any of the warranties in clause 5 (*Concessionaire's Warranties and Covenants*) proving to be materially untrue or incorrect;
- 1.29.16. the Concessionaire abandons the Concession Assets (other than as a consequence of a material breach by Transnet of its obligations under this Agreement or Ancillary Agreement(s));
- 1.29.17. the Concessionaire ceases to provide all or a substantial part of the Railway Services in accordance with this Agreement or Ancillary Agreement(s) (other than as a consequence of a material breach by Transnet of its obligations under this Agreement or Ancillary Agreement(s));
- 1.29.18. the Concessionaire, in the absence of a remedy programme accepted by Transnet, fails in a 6 (six) month period to comply with any of its obligations in **clause 30** (*B-BBEE and Socio-Economic Local Development*);
- 1.29.19. the Concessionaire fails, in the absence of any appeal, to comply with or implement any decision

made by the Parties in terms of **clause 62** (*Dispute Resolution*) resolving or determining any dispute, or having lodged an appeal fails to prosecute or pursue same timeously;

- 1.29.20. the Concessionaire fails to pay any sum or sums due to Transnet under this Agreement (which sums are not in dispute) which, either singly or in aggregate, exceed(s) R10 000 (index linked) and such failure continues for 60 (sixty) Business Days from receipt by the Concessionaire of a notice of non-payment from Transnet;
- 1.29.21. the Concessionaire fails to obtain and maintain any Concession Insurances as required in terms of **clause 42** (*Insurance*);
- 1.29.22. the Concessionaire committing a material breach of its Concession obligations under this Agreement, and if capable of remedy, failing to remedy such material breach within the applicable remedy period therefor;
- 1.29.23. the Concessionaire committing a material breach of its Concession obligations under any of the **Annexes** and if capable of remedy, failing to remedy such material breach within the applicable remedy period therefor;
- 1.29.24. lawful termination by the counter-party thereto of any one or more of the Train O&M Agreement, the Track Access Agreement, the Safety Interface Agreement or Commercial Agreement.
- 1.29.25. any breach of any provision of this Agreement has occurred more than once and:
  - 1.29.25.1. Transnet has given an initial warning notice to the Concessionaire describing that breach in reasonable detail and stating that if that breach persists or recurs then Transnet may take further steps to terminate this Agreement; and
  - 1.29.25.2. Transnet has issued a second and final warning notice following the persistence or recurrence of that breach in the period of 30 (thirty) days after the initial

warning notice, stating that if that breach persists or recurs within the period of 10 (ten) days after the final warning notice then Transnet may terminate this Agreement on 5 (five) days' notice to the Concessionaire;

- 1.30. "Consents" means all consents, permits, clearances, authorisations, approvals, rulings, exemptions, registrations, filings, decisions, licenses, permissions required to be issued by or made with any Responsible Authority in connection with the performance of any of the Railway Services;
- 1.31. "Contract Month" means each calendar month occurring during the Concession Term;
- 1.32. "Contract Year" means each Financial Year during the Concession Term or, in respect of the first and last years of the Concession Term, the relevant part of the Financial Year falling within the Concession Term;
- 1.33. "Control" means in relation to any entity, the ability directly or indirectly to direct or cause the direction of the votes attaching to the majority of its issued shares or interests carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body);
- 1.34. "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;
- 1.35. "CPI" has the meaning ascribed thereto in **Schedule 9 (Indexation)**;
- 1.36. "Default Interest Rate" means the Prime Rate plus 200 bps (two hundred basis points);

- 1.37. "Demeter station" means the station situate on and servicing the Wolseley-Ceres - Prince Alfred Hamlet Branch Line, as more fully described in the route plan in Schedule 1 Part 2 ( Route plan Wolseley – Ceres- Port Alfred Hamlet Stations)
- 1.38. "Discriminatory Change in Law" means any Change in Law the principal effect of which is directly borne by:
- 1.38.1. the Concession and not other similar concessions;
  - 1.38.2. the Concessionaire and not other persons; or
  - 1.38.3. parties undertaking freight rail concessions granted by Transnet or similar concessions and not other persons;
- 1.39. "Effective Date" means the first Business Day following fulfilment of the last of the Conditions Precedent, as reflected in the Certificate of Commencement;
- 1.40. "Environmental Harm" means the consequence of any activity on the environment, (including air, water, soil, micro-organisms, plant and animal life, aesthetic and cultural properties, land, surface land and sub-surface land) in the form of either contamination, pollution or impairment of the environment, but shall not include harm to any person or persons;
- 1.41. "Environmental Law" means any Applicable Requirement which relates to or is for the purpose of protecting the environment (including air, water, soil, micro-organisms, plant and animal life, aesthetic and cultural properties, land, surface land and sub-surface land) or a part of the environment, or otherwise regulates Environmental Harm;
- 1.42. "Equity" means the entire issued share capital (including share premiums) of the Concessionaire as at the relevant date;
- 1.43. "Expiry Date" means the date on which the Concession Term is scheduled to expire by effluxion of time;
- 1.44. "Financial Year" means the financial year of Transnet, commencing on 1 April in one year to 31 March in the following year, other than in respect of the first year after Signature Date (which shall commence on the Effective Date and end on the next date which is 31 March) and the last year (which shall commence on 1 April and end on the earlier of the Expiry Date and the Termination Date);

- 1.45. "Force Majeure" means any of the following events to the extent that they are Uninsurable –
- 1.45.1. war, civil war, armed conflicts or terrorism; or
  - 1.45.2. nuclear contamination unless the Concessionaire and/or any of its subcontractors is the source or cause of the contamination;
  - 1.45.3. chemical or biological contamination of the Concession Assets; or,
  - 1.45.4. 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) which include, but will not be limited to the employees of the Concessionaire,
- which directly causes any Party to be unable to comply with all or a material part of its obligations under this Agreement;
- 1.46. "Good Industry Practice" means applying, in relation to the manner in which the Railway Services are performed and rendered, the standards, practices, methods and procedures conforming to applicable Law, and exercising that degree of skill, care, diligence, prudence and foresight that would reasonably and ordinarily be expected from a skilled and experienced person engaged in a similar type of undertaking under similar circumstances;
- 1.47. "IFRS" means International Financial Reporting Standards and interpretations adopted by the International Accounting Standards Board (IASB);
- 1.48. "Independent Expert" has the meaning ascribed to it **clause 62.7** (*Dispute Resolution - Fast-track Dispute Resolution*);
- 1.49. "Infrastructure Services" means the railway infrastructure services on the Branch Line necessary to support and enable the operation of Rolling Stock, including programmed (or planned) and unprogrammed (or unplanned) maintenance, upgrading or refurbishing works to the Permanent Way or Branch Line Stations;
- 1.50. "Initial Rail Infrastructure Refurbishment Works" means the initial design, construction and commissioning works undertaken (or to be undertaken) by or at the instance of the Concessionaire in respect of the Branch Line in restoring to its previous condition the Branch Line to resume



- operations;
- 1.51. "Intellectual Property" means all intellectual property whatsoever used from time to time in connection with undertaking the Railway Services, whether capable of registration, registered or not; (**see clause 34.2**);
- 1.52. "Land Lease Agreement" means the agreement concluded or to be concluded by the Parties pertaining to the letting of land by Transnet and leasing thereof by the Concessionaire, being land which does not comprise Railway Land, which is an Ancillary Agreement annexed as **Schedule 3 Part 4** (Ancillary Agreements – Land Lease Agreement);
- 1.53. "Law" means the common law, 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 of South Africa, judicial decisions, notifications and all similar directives made pursuant thereto with which Transnet and/or the Concessionaire is bound to comply;
- 1.54. "Moveable Rail Assets" has the meaning ascribed to it in **clause 17.1**;
- 1.55. "Municipal Rates and Taxes Deposit" means the deposit to be paid by the Concessionaire to Transnet as contemplated in **clause 37** (*Utilities, and Local Authority Rates and Taxes*);
- 1.56. "nacm" means nominal, annual, compounded monthly in arrear;
- 1.57. "Operating Expenditure" means any expenditure treated as operating expenditure under IFRS;
- 1.58. "Parties" means Transnet and the Concessionaire;
- 1.59. "Passenger Services" means the railway passenger transport service to be offered to third parties by the Concessionaire (and conducted by the Concessionaire);
- 1.60. "Performance Bond" means the performance bond to be provided to Transnet as security for the performance by the Concessionaire of its obligations, undertakings and covenants under this Agreement in relation to the preservation, maintenance and upgrade of the Rail Infrastructure, in the form set out in the **Schedule 16** (Agreed Form of Performance Bond) as replaced or amended from time to time;
- 1.61. "Permanent Way" means the railway track of the Branch Line, comprising the

earthwork formation, ballast, sleepers, rails, fastenings and other property necessarily forming part of the permanent way, together with the land on which such ballast, sleepers, rails and fastenings are laid and includes a reference to –

- 1.61.1. any level crossing, bridges, tunnels, culverts, retaining walls or other structures used for the support of, or otherwise in connection with, the permanent way;
  - 1.61.2. any walls, fences or other structures enclosing the railway or enclosing any adjacent property;
  - 1.61.3. any road(s) servicing the railway track; and
  - 1.61.4. any marshalling yard used exclusively for the Branch Line concerned is located;
- 1.62. "Prime Rate" means the nacm prime rate of interest publicly quoted as such by The Standard Bank of South Africa Limited from time to time, calculated on a 365-day factor, irrespective of whether or not the year is a leap year, as certified by any manager of The Standard Bank of South Africa Limited, whose appointment as such it shall not be necessary to prove, which certificate shall serve as prima facie proof of its contents;
- 1.63. "Rand" or the symbol "R" means the lawful currency of South Africa;
- 1.64. "Rail Infrastructure" means the assets and facilities used to provide Infrastructure Services and include, but are not limited to, the Permanent Way and the Branch Line Stations;
- 1.65. "Rail Freight Service" means the railway freight transport service including Base Freight Service Requirements to be offered to third parties by the Concessionaire [and conducted by the Concessionaire] on the basis that –
- 1.65.1. haulage in respect of the Branch Line and the Access Route is executed by the Train O&M Provider on behalf of and at the instance of the Concessionaire in terms of the Train O&M Agreement; and
  - 1.65.2. haulage in respect of the Core Network, to a point of destination, or from a point of origin on the Core Network is executed by Transnet (in its TFR division) on such terms as may be agreed from

time to time between the Concessionaire and Transnet (in its TFR division);

- 1.66. "Railway Land" means the land on which the Permanent Way is situate including the Rail Reserve;
- 1.67. "Railway Services" means the Infrastructure Services, Rail Freight Services and the Passenger Services;
- 1.68. "Retained Moveable Rail Assets" has the meaning ascribed to it in **clause 17.2**;
- 1.69. "Rolling Stock" has the meaning ascribed to it in the RSR Act, which as at Signature Date, *"means a vehicle that is able to operate on a railway, irrespective of its capability or independent motion"*;
- 1.70. "RSR Act" means the National Railway Safety Regulator Act, 16 of 2002, including any and all regulations promulgated pursuant thereto from time to time, and/or any notices published or issued pursuant thereto from time to time;
- 1.71. "Safety Management System" has the meaning ascribed to it in the RSR Act, which as at Signature Date, means *"a formal framework for integrating safety into day-to-day railway operations and includes safety goals and performance targets, risk assessment, responsibilities and authorities, rules and procedures, monitoring and evaluation processes and any other matter prescribed"*;
- 1.72. "Safety Interface Agreement" means the agreement concluded or to be concluded by the Parties in compliance with the RSR Act (including SANS 3 000 – 1 : 2009), regulating a number of interfaces including, without limitation, the interface between Transnet (in its TFR division) and the Concessionaire in respect of the conduct and operation of their respective network operator and train services on the Branch Line and Access Route, including in respect of operational issues, and which agreement is an Ancillary Agreement annexed as **Schedule 3 Part 3** (Ancillary Agreements – Safety Interface Agreement(s));
- 1.73. "Safety Management System Report" has the meaning ascribed to it in the RSR Act, which as at Signature Date, means *"a written submission, made by an applicant, in support of it's safety permit application that describes the applicant's safety management system and*

*may include any other matters prescribed";*

- 1.74. "Safety Permit" has the meaning ascribed to it in the RSR Act;
- 1.75. "Safety Regulator" means the Railway Safety Regulator established in terms of the RSR Act;
- 1.76. "Schedules" means the attachments forming part of this Agreement, listed as schedules at the end of the table of contents to this Agreement, excluding the Ancillary Agreements;
- 1.77. "Section 37(2) Undertaking" means the undertakings given by the Concessionaire to Transnet in terms of section 37(2) Occupational Health and Safety Act, 1993 on principles set out in **Schedule 13** (Section 37(2) Principles);
- 1.78. "Security Interest" means any mortgage, notarial bonds (whether general or special), encumbrance, pledge, lien, trust arrangement or other third party right or interest over or in respect of the relevant asset, security or right;
- 1.79. "Shareholders" means the holders of the Equity;
- 1.80. "Shareholders' Agreement" means the agreement(s) among the Shareholders and the Concessionaire regulating the Shareholder's relationship with the Concessionaire and that of the Shareholders *inter se*, attached hereto as Annex B (Shareholders' Agreement);
- 1.81. "Signature Date" means the date of signature of this Agreement and, if signed on different dates, the last of such dates;
- 1.82. "South Africa" means Republic of South Africa as constituted in terms of The Constitution of the Republic of South Africa Act, 1996;
- 1.83. "Targeted Groups" means the targeted groups as defined in the Broad Based Black Economic Empowerment Act 53 of 2003 as amended together with the Regulations and Codes published in the Government Gazette in terms thereof;
- 1.84. "Termination Date" means any date on which this Agreement is terminated in accordance with its terms, other than by way of effluxion of time;
- 1.85. "Termination Payment" means the amount which may become payable by Transnet to the Concessionaire under this Agreement, the quantum of which will be determined in accordance with the following formula, namely –
- $TP = TS + TC$ , where
- 1.85.1. 'TP' means termination payment;

- 1.85.2. 'TS' means termination sum; and
- 1.85.3. 'TC' means termination cost,
- which is to be applied in the manner set out in **Schedule 20** (Termination Payment);
- 1.86. "TFR" means Transnet Freight Rail, an operating division of Transnet;
- 1.87. "Track Access" means the limited and controlled access granted by Transnet to the Concessionaire for the Concessionaire to traverse the Access Route;
- 1.88. "Track Access Agreement" means the agreement concluded or to be concluded by the Parties regulating the terms on which Track Access will be granted, and the terms on which Transnet will be granted rights by the Concessionaire to traverse the Branch Line during the Concession Term, which agreement is an Ancillary Agreement annexed as **Schedule 3 Part 1** (Ancillary Agreements – Track Access Agreement);
- 1.89. "Train Control Systems" means all train control and authorisation systems (train authorisation systems) in relation to the Branch Line which are physically located on Railway Land, as at the Signature Date including, but not limited to, communication and signalling systems, as identified in **Schedule 12** (Rail Infrastructure Register). It being recorded that all train control systems located on the Branch Line and used for the Branch Line shall be operated by Transnet, and form part of the Rail Infrastructure to be maintained by the Concessionaire at the risk and cost of the Concessionaire. It being further recorded that any replacement or upgrade of the train control systems as at the Signature Date by the Concessionaire with Transnet prior approval shall continue to be operated by Transnet and form part of the Rail Infrastructure to be maintained by the Concessionaire at the risk and cost of the Concessionaire;
- 1.90. "Train O&M Agreement" means the train operations and management agreement concluded, or to be concluded between the Concessionaire and the Train O&M Provider for the provision of the Train O&M Services to the Concessionaire by the Train O&M Provider, which is an Ancillary Agreement annexed as **Schedule 3 Part 2** (Ancillary Agreements – Train Operations and Management Agreement);
- 1.91. "Train O&M" means the operating division or sub-contractor of TFR,

- Provider" known as the Branch Line Operations and Management unit (BLOM);
- 1.92. "Train O&M Services" means the train operations and management services to be provided by the Train O&M Provider to the Concessionaire under the Train O&M Agreement, for the provision of services including –
- 1.92.1. train operations and planning management services;
  - 1.92.2. haulage services;
  - 1.92.3. traction and train control services
- on and in respect of the Branch Line and Access Route;
- 1.93. "Train Operating Services" means railway freight transport services including the Base Freight Service Requirements and Passenger Services to be provided or undertaken by, or at the instance of the Concessionaire on the Branch Line, and if applicable on the Access Route;
- 1.94. "Transferred Moveable Rail Assets" has the meaning ascribed to it in **clause 17.5**;
- 1.95. "Transnet" means Transnet SOC Ltd and any operating division thereof, as may be applicable from time to time;
- 1.96. "Transnet Default" means any one of the following events:
- 1.96.1. an expropriation of a material part of the Concessionaire's assets by Transnet which has the effect of preventing the Concessionaire from being able to perform the Railway Services;
  - 1.96.2. a failure by Transnet to make payment of any amount or amounts that are due and payable by Transnet under this Agreement (which amounts are not in dispute) which, either singly or in aggregate exceeds the sum of R10 000.00 (ten thousand) (index linked) and such failure continues for 60 (sixty) Business Days from receipt by Transnet of a notice of non-payment from the Concessionaire;
  - 1.96.3. a breach by Transnet of its obligations under this Agreement which substantially frustrate or renders it impossible for the Concessionaire to perform its

obligations under this Agreement for a continuous period of 3 (three) or more months;

- 1.96.4. any failure to give access to, or occupation and use of the Railway Land to the Concessionaire in terms of **clause 11** (*Grant of the Concession*) for a continuous period of 20 (twenty) Business Days, (in the absence of a Force Majeure Event) which substantially frustrates or renders it impossible for the Concessionaire to perform its Concession obligations under this Agreement;
- 1.96.5. a breach by Transnet of its obligations in terms of **clause 60** (*Cession and Delegation*); and
- 1.96.6. lawful termination by the counter-party thereto of any one or more of the Track Access Agreement, the Safety Interface Agreement or the Train O&M Agreement or Commercial Agreement;

1.97. "Uninsurable"

in relation to a risk means either that –

- 1.97.1. insurance is no longer available from reputable insurers in the worldwide insurance market; or
- 1.97.2. even if insurance is available from reputable insurers in the worldwide insurance market, the insurance premium payable for insuring that risk has increased to such a level that the risk is no longer commonly being insured against in the South African insurance markets;

1.98. "A - B Branch Line"

means the railway line and Rail Reserve classified as a branch line by Transnet running from and between **point A** and the Branch Line Termination Point, comprising approximately 282 route kilometres, as more fully described in Schedule 1 Part 1 (**Route Plan – A - B Line**). The **A - B 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;

1.99. "VAT"

means any value-added tax in terms of the Value Added Tax Act, 89 of 1991 or any similar tax which is imposed in place of or in addition to such tax;

1.100. "VAT Act"

means the Value Added Tax Act, 89 of 1991.

## 2. **INTERPRETATION**

### 2.1. **Construction**

This Agreement shall be interpreted according to the following provisions, unless the context requires otherwise -

- 2.1.1. references to the provisions of any Law shall include such provisions as amended, re-enacted or consolidated from time to time in so far as such amendment, re-enactment or consolidation applies or is capable of applying to any transaction entered into under this Agreement;
- 2.1.2. any reference to any enactment, order, regulation or similar instrument shall be construed as a reference to enactment, regulation or instrument as amended, re-enacted or replaced from time to time;
- 2.1.3. references to "**index linked**" in relation to any amount of money shall mean that such amount has been expressed in [*insert date*] values or prices and shall be escalated annually as at the commencement of each Financial Year and each anniversary thereof with reference to the then most recent publication of the CPI, in accordance with the provisions of **Schedule 9 (Indexation)**;
- 2.1.4. any notice, query, request, approval, consent, demand, or other communication given in connection with or required by this Agreement shall be made in writing (entirely in the English language) and delivered in accordance with the provisions of **clause 63 (Notices and Legal Service)**;
- 2.1.5. references to "Parties" shall include the Parties' respective successors-in-title and, if permitted in this Agreement, their respective cessionaries and assignees;
- 2.1.6. references to a "**person**" shall include an individual, firm, company, corporation, juristic person, Responsible Authority, and any trust, organisation, association or partnership, whether or not having separate legal personality;
- 2.1.7. references to any "Responsible Authority", the "Safety Regulator" or any public or professional organisation shall include a reference to any of its successors or any organisation or entity, which takes over its functions or responsibilities;
- 2.1.8. references to "clauses", "sub-clauses" and "Schedules" are references to the clauses, sub-clauses and schedules of this Agreement;
- 2.1.9. the headings of clauses, sub-clauses and Schedules are included for convenience only and shall not affect the interpretation of this Agreement;



- 2.1.10. the Schedules to this Agreement are an integral part of this Agreement and references to this Agreement shall include the Schedules;
- 2.1.11. the Parties acknowledge that each of them has had the opportunity to take legal advice concerning this Agreement, and agree that no provision or word used in this Agreement shall be interpreted to the disadvantage of either Party because that Party was responsible for or participated in the preparation or drafting of this Agreement or any part of it;
- 2.1.12. words importing the singular number shall include the plural and vice versa, and words importing either gender or the neuter shall include both genders and the neuter;
- 2.1.13. references to "this Agreement" shall include this Agreement as amended, varied, novated or substituted in writing from time to time;
- 2.1.14. references to any other agreement or document shall include (subject to all approvals required to be given pursuant to this Agreement for any amendment or variation to or novation or substitution of such agreement or document) a reference to that agreement or document as amended, varied, novated or substituted from time to time;
- 2.1.15. where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail;
- 2.1.16. general words preceded or followed by words such as "other" or "including" or "particularly" shall not be given a restrictive meaning because they are preceded or followed by particular examples intended to fall within the meaning of the general words, unless inconsistent with the context;
- 2.1.17. when any number of days is prescribed in this Agreement, same shall be reckoned inclusively of the first and exclusively of the last day unless the last day falls on a day which is not a Business Day in which case the last day shall be the immediately following Business Day; and
- 2.1.18. reference to day(s), month(s) or year(s) shall be construed as Gregorian calendar day(s), month(s) or year(s).

## **2.2. Inconsistency**

- 2.2.1. To the extent of any inconsistency between the provisions of this Agreement and those of the Schedules, the following order of priority shall (save where the contrary is expressly provided) prevail -
  - 2.2.1.1. this Agreement;
  - 2.2.1.2. **Schedule 1** – Route Plan (Branch Line Routes and Branch Line Stations);

- 2.2.1.3. **Schedule 2** – Concession Specifications, in the following order of priority, Part 1 (Transnet Requirements), **Part 2 (Base Freight and Contracted Volume Service Requirements)**, Part 3 (Concessionaire Proposals), **Part 4 (Infrastructure Performance Measures)** and Part 5 (Train Operating Measures);
- 2.2.1.4. **Schedule 4** – Railway Land Ownership and use Conditions;
- 2.2.1.5. **Schedule 5** - Concessionaire Equity Holder and Company Structure Details;
- 2.2.1.6. **Schedule 9** - Indexation;
- 2.2.1.7. **Schedule 11** - Register of Moveable Rail Assets;
- 2.2.1.8. **Schedule 12** – Rail Infrastructure Register;
- 2.2.1.9. all other Schedules.
- 2.2.2. To the extent of any inconsistency between the provisions of this Agreement and the **Ancillary Agreements**, the provisions of this Agreement shall prevail.
- 2.2.3. To the extent of any inconsistency between the provisions of the Ancillary Agreements, the following order of priority shall (save where the contrary is expressly provided) prevail –
  - 2.2.3.1. **Schedule 3 Part 1** - Track Access Agreement, save in respect of safety interface matters in which the Safety Interface Agreement shall prevail and Train O&M Services in which instance the Train O&M Agreement shall prevail and commercial matters in which instance the Commercial Agreement shall prevail;
  - 2.2.3.2. **Schedule 3 Part 2** - Train Operations and Management Agreement, save in respect of Access Route matters in which the Track Access Agreement shall prevail and safety interface matters in which the Safety Interface Agreement shall prevail and commercial matters in which instance the Commercial Agreement shall prevail;
  - 2.2.3.3. **Schedule 3 Part 3** – Safety Interface Agreement(s), save in respect of Access Route matters in which the Track Access Agreement shall prevail and Train O&M Services in which instance the Train O&M Agreement shall prevail and commercial matters in which instance the Commercial Agreement shall prevail;

2.2.3.4. Schedule 3 Part 4 – Commercial Agreement, save in respect of Access Route matters in which the Track Access Agreement shall prevail and Train O&M Services in which instance the Train O&M Agreement shall prevail and safety interface matters in which the Safety Interface Agreement shall prevail.

2.2.4. Each Party shall notify the other of all instances of apparent discrepancies and/or errors within or between or omissions from the Concession Documents. Any disagreement between the Parties regarding the Concession Documents shall be resolved in accordance with **clause 62** (*Dispute Resolution*).

### 3. **CONDITIONS PRECEDENT**

3.1. Save for this **clause 3** (*Conditions Precedent*) and **clauses 1** (*Definitions*), **2** (*Interpretation*), **45** (*Force Majeure*), **56** (*Confidentiality*), **58** (*Transnet Representative*), **59** (*Concessionaire Representative*), **60** (*Cession and Delegation*), **61** (*Changes in Control*), **62** (*Dispute Resolution*), **63** (*Notices and Legal Service*), **64** (*Entire Agreement*), **65** (*Amendments*), **66** (*Severability*), **68** (*Waiver*), **70** (*Counterparts*), **72** (*Governing Law and Jurisdiction*), and **73** (*Costs and Expenses*) which shall be of immediate force and effect, this Agreement is subject to the fulfilment of the following suspensive conditions –

- 3.1.1. receipt by Transnet of the Performance Bond, duly executed by a bond provider acceptable to Transnet and in a form acceptable to Transnet;
- 3.1.2. receipt by Transnet of the Municipal Rates and Taxes Deposit;
- 3.1.3. evidence of Concession Insurances satisfactory to Transnet;
- 3.1.4. receipt by the Concessionaire of the requisite Safety Permits to enable it to take custody of the Rail Infrastructure and to undertake the Infrastructure Services in respect of the full extent of the Branch Line, [and to the extent necessary to offer and provide the Rail Service,] and delivery by the Concessionaire to Transnet of a copy of each Safety Permit so issued to the Concessionaire, to be annexed as **Schedule 18** (Concessionaire Safety Permits);
- 3.1.5. following issuance of the Safety Permit(s) in terms of **clause 3.1.5**, submission by Transnet (in its TFR division) of a revised Safety Management System Report reflecting the basis on which it remains a

'network operator' (as defined in the RSR Act) of the Branch Line and acceptance thereof by the Safety Regulator;<sup>1</sup>

- 3.1.6. the conclusion of the Train O&M Agreement, the Track Access Agreement, the Safety Interface Agreement and the Commercial Agreement;
- 3.1.7. receipt by Transnet from the Concessionaire of an original valid tax clearance certificate of the Concessionaire as at the Signature Date; and
- 3.1.8. receipt of the Annexes in substance and form acceptable to Transnet, having regard to **clause 5** (*Concessionaire Warranties and Covenants*), and the Concessionaire's obligations under this Agreement and the Ancillary Agreements.
- 3.1.9. Business plan
- 3.1.10. receipt of the duly completed schedules in substance and form acceptable to Transnet, within 90 days after the Signature Date of this Agreement.

**3.2. The suspensive conditions referred to in clauses 3.1.1, 3.1.2, 3.1.3, 3.1.5 and 3.1.8 shall not be capable of being waived.**

- 3.3. The Parties shall co-operate and shall use all reasonable endeavours to procure the fulfilment of the suspensive conditions in **clauses 3.1.6 and 3.1.7**.
- 3.4. The Concessionaire shall use all reasonable endeavours to procure the fulfilment of the suspensive conditions in **clauses 3.1.1 to 3.1.3** (both inclusive) and **clauses 3.1.5, 3.1.8 and 3.1.9** (all inclusive). .
- 3.5. As soon as Transnet is satisfied that each of the conditions precedent in **clause 3.1** have been satisfied (except to the extent waived by the Party so entitled) it shall issue to the Concessionaire a Certificate of Commencement, which shall state the Effective Date (which shall not, without the Concessionaire's consent, be a date less than three clear Business Days after the date of issue of the Certificate of Commencement).
- 3.6. Where documents are required to be entered into or executed and delivered or any steps required to be taken under **clause 3.1** by the Concessionaire, Transnet may require, to the extent appropriate and as an additional condition precedent, such evidence (including a legal opinion) of the power and authorisation of the relevant person to enter into, execute or deliver any such document, or take any such steps, and the Concessionaire shall supply such additional evidence, within the period referred to in **clause 3.7**.

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<sup>1</sup> The wording of clause 3.1.6 is to be reviewed to take into account the outcome of the TFR on-going engagement(s) with the Rail Safety Regulator.

- 3.7. Unless the suspensive conditions contained in **clause 3.1** are fulfilled on or before the [180<sup>th</sup> (one hundred and eightieth) day] following the Signature Date or such later date as the Parties may agree to in writing, the provisions of this **clause 3** (*Conditions Precedent*) and **clauses 1** (*Definitions*), **2** (*Interpretation*), **45** (*Force Majeure*), **56** (*Confidentiality*), **58** (*Transnet Representative*), **59** (*Concessionaire Representative*), **60** (*Cession and Delegation*), **61** (*Changes in Control*), **62** (*Dispute Resolution*), **63** (*Notices and Legal Service*), **64** (*Entire Agreement*), **65** (*Amendments*), **66** (*Severability*), **68** (*Waiver*), **70** (*Counterparts*), **72** (*Governing Law and Jurisdiction*), and **73** (*Costs and Expenses*) shall continue to be of full force and effect, but the remainder of this Agreement shall not become operative or effective and shall have no force or effect whatsoever.
- 3.8. No Party shall have any claim against any other Party pursuant to the non-fulfilment of a suspensive condition in **clause 3.1**, save where a Party (the "Guilty Party") has breached the terms of this **clause 3** and/or has deliberately frustrated the fulfilment of such condition or intentionally caused that condition not to be fulfilled, in which event the Guilty Party shall be liable to other Party for such damages as such other Party may have suffered thereby.

It is recorded that prior to the Effective Date Transnet reserves the right to commence with Railway Services on the Branch Line.

#### 4. **COMMENCEMENT AND DURATION**

- 4.1. This Agreement and the rights and obligations of the Parties under this Agreement shall take effect, subject to **clause 3.1** (*Conditions Precedent*), on the Effective Date and terminate on the earlier of the Expiry Date and the Termination Date.
- 4.2. This Agreement shall, subject to **clause 3.1**, subsist for the Concession Term, unless earlier terminated in terms of this Agreement.

#### 5. **CONCESSIONAIRE WARRANTIES AND COVENANTS**

- 5.1. The Concessionaire warrants to Transnet that -
- 5.1.1. it is a limited liability company, duly incorporated and validly existing under the Law and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement and the Concession Documents;
  - 5.1.2. its main business is to undertake the Concession;
  - 5.1.3. it is registered in South Africa and resident in South Africa for tax purposes;
  - 5.1.4. its obligations under this Agreement and those under the Concession Documents to which it is a party are legal, valid, binding and enforceable

against it, in accordance with the terms of this Agreement and such Concession Documents to which it is a party;

- 5.1.5. all the Concession Documents have been duly executed on proper authority and are in full force and effect as at the Signature Date;
- 5.1.6. the execution and performance of any Concession Documents do not and will not contravene any provision of the founding and incorporation documents, subject to the applicable company and corporate legislation as amended or enacted, of the Concessionaire as at the Signature Date, or any order or other decision of any Responsible Authority, the Safety Regulator or arbitrator that is binding on the Concessionaire as at the Signature Date;
- 5.1.7. all Consents required for the conduct of the Railway Services are in full force and effect as at the Signature Date, save for any Consents and Safety Permits which are not required under the Laws to be obtained by the Signature Date; provided that the Concessionaire warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent or Safety Permits will not be granted on reasonable terms by the time it is required to obtain such Consent or Safety Permits;
- 5.1.8. no litigation, arbitration, investigation or administrative proceeding is in progress as at the Signature Date or, to the best of the knowledge of the Concessionaire as at the Signature Date having made all reasonable enquiries, threatened against it which is likely to have a material adverse effect on the ability of the Concessionaire to provide the Railway Services;
- 5.1.9. the Concessionaire is not subject to any obligation non-compliance with which is likely to have a material adverse effect on its ability to conduct the Railway Services;
- 5.1.10. no proceedings or any other steps have been taken or, to the best of the knowledge of the Concessionaire having made all reasonable enquiries, threatened for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final) or deregistration of the Concessionaire or for the appointment of a liquidator, judicial manager or similar officer over it or over any of its assets;
- 5.1.11. it has carried out trading or business activities since its incorporation and has incurred no liabilities other than as set out in the audited annual financial statements of the Concessionaire in **Schedule 7** (Annual Financial Statements of the Concessionaire);
- 5.1.12. it will use reasonable care and skill in carrying out its obligations under this Agreement and each Ancillary Agreement where failure to do so would

materially and adversely affect the safety and health of its staff or third parties;

- 5.1.13. no material information known to any of the Concessionaire's representatives engaged in interactions concerning the Concession, with representatives of Transnet has, to the best of the Concessionaire's knowledge, been withheld from Transnet;
- 5.1.14. it has, or had opportunity to inspect the Branch Line and Concession Assets and, **save as otherwise contemplated in this Agreement**, satisfied itself with regard to all matters relating thereto;
- 5.1.15. all information disclosed by or on behalf of the Concessionaire to Transnet at any time up to the Signature Date, is true, complete and accurate in all material respects and the Concessionaire is not aware of any material facts or circumstances not disclosed to Transnet which would, if disclosed, be likely to have an adverse effect on the Transnet decision (acting reasonably) to award the Concession to the Concessionaire;
- 5.1.16. the copies of the executed Concession Documents, which have been delivered to Transnet, are true and complete copies of such Concession Documents and there are no other documents replacing or relating to any such Concession Documents, which would materially affect the legality, enforceability and operation of these Concession Documents or the Concessionaire's rights and obligations hereunder;

as at the Signature Date -

- 5.1.17. the Concessionaire has an authorised and issued share capital as set out in **Schedule 5** (Concessionaire Equity Holder and Company Structure Details) and Annex B (Concessionaire Shareholders' Agreement) and all shares in the issued share capital of the Concessionaire are fully paid up;
- 5.1.18. all shares in the issued share capital of the Concessionaire are legally and beneficially owned as represented in the Shareholders' Agreement;
- 5.1.19. save as provided in the Shareholders' Agreement, no person has the right (whether actual or contingent) to call for the issue of any share or loan capital in the Concessionaire whether pursuant to any option or otherwise including on realisation of security; and
- 5.1.20. save as provided in the Shareholders' Agreement, there is no encumbrance over or affecting any of the Equity or any Shareholder loans and there is no agreement or commitment to grant or create any such encumbrance.

- 5.2. Without prejudice to its other obligations under the Concession Documents, the Concessionaire covenants with Transnet that for the duration of the Concession Term –
- 5.2.1. it will maintain in full force and effect all Safety Permits, Consents and relevant authorisations (governmental and otherwise) necessary and will promptly obtain any further authorisation which may become necessary to enable it to perform any of the transactions contemplated by the Concession Documents. Any revision, amendment or change to any Concessionaire Safety Permit shall promptly be notified by the Concessionaire to Transnet and a copy of any revised or amended Safety Permit shall be submitted by the Concessionaire to Transnet and the Parties shall procure that any revised or amended Safety Permit is annexed as **Schedule 18** (Concessionaire Safety Permits);
  - 5.2.2. it will not, and it will procure that any operator it may subcontract as provided for in **clause 35** (*Sub-contracting*) does not, sell, transfer, lease, lend or otherwise dispose of or cease to exercise direct control over the Concession;
  - 5.2.3. it will notify Transnet forthwith upon the occurrence of any event which could reasonably be expected materially and adversely to affect its ability to perform its obligations under this Agreement or one or more of the Concession Documents;
  - 5.2.4. it will not allot, issue or purchase, or register any transfer of any of its Equity in favour of any person, firm or company which would result in a Change in Control, without the prior written consent of Transnet;
  - 5.2.5. it will not, without the prior written consent of Transnet sell, transfer, lease or otherwise dispose of the whole or any part (which is material in the context of the performance of the Concessionaire's obligations) of its undertakings, properties or assets by a single transaction or a number of transactions whether related or not and whether at the same time or over a period of time;
  - 5.2.6. it will (promptly upon becoming aware that the same is threatened or pending and in any case immediately after the commencement thereof) give to Transnet notice in writing of any litigation, arbitration or administrative proceedings or any dispute affecting the Concessionaire or any of its assets, rights or revenues which if determined against it might have a material adverse effect on the ability of the Concessionaire duly to perform and observe its obligations under the Concession Documents;
  - 5.2.7. it will promptly pay all taxes, imposts or other duties to which it may become subject during the Concession, subject to the right of the Concessionaire reasonably and properly to dispute the amount or



applications to the Concessionaire of any such taxes, imposts or other duties;

- 5.2.8. the Concessionaire shall not, without the prior written consent of Transnet (which Transnet may at its sole discretion withhold), make application as contemplated section 3(2)(d) of the RSR Act for any Branch Line or any portion thereof to be exempted from the application of the RSR Act;
- 5.2.9. the Concessionaire shall not, without the prior written consent of Transnet (which Transnet may at its sole discretion withhold) seek, as contemplated section 29(3) of the RSR Act, exemption to it of the application of any standards (whether in whole or in part) adopted by the board of directors of the Safety Regulator binding all persons authorised under the RSR Act to conduct railway operations;
- 5.2.10. it will not make application in terms of section 54 of the RSR Act for any financial assistance without the prior written notification to Transnet of its intention to apply for financial assistance in terms of section 54 of the RSR Act; and
- 5.2.11. it will take such steps and actions as may be necessary to safeguard the Concession Assets.

## 6. **TRANSNET WARRANTIES**

6.1. Transnet warrants to the Concessionaire that –

- 6.1.1. it is a limited liability company, duly incorporated and validly existing under the Law and has taken all necessary actions to authorise its execution of and to fulfil its obligations under this Agreement and the Ancillary Agreements;
- 6.1.2. its obligations under this Agreement are legal, valid, binding and enforceable against it, in accordance with the terms of this Agreement;
- 6.1.3. the execution and performance of this Agreement does not and will not contravene any provision of the memorandum of Incorporation of Transnet as at the Signature Date, or any order or other decision of any Responsible Authority, the Safety Regulator or arbitrator that is binding on Transnet as at the Signature Date;
- 6.1.4. the Railway Land will be availed to the Concessionaire in terms of clause 11 (*Grant of the Concession*) from the Signature Date and Transnet shall

ensure and procure the removal of any existing unlawful occupiers, and unauthorised encroachments within a reasonable time<sup>2</sup>, whereafter the Concessionaire shall ensure, at its costs and expense to ensure that no person unlawfully occupy and part of the Railway Land.; and

6.1.5. it will, at the Concessionaire's cost, operate the Train Control Systems.

6.2. Transnet warrants to the Concessionaire at Commencement Date

6.2.1. the condition of the Concession Assets or any aspect thereof; and

6.2.2. the fitness for purpose of the Concession Assets for the provision of the Railway Services or any aspect thereof.

## 7. **INDEMNITIES**

### 7.1. **Concessionaire Indemnities**

7.1.1. Notwithstanding the provisions of section 53 of the RSR Act, as between Transnet and the Concessionaire, the Concessionaire indemnifies and shall keep Transnet indemnified at all times against all direct losses that may be sustained by Transnet in consequence of -

7.1.1.1. any -

7.1.1.1.1. loss of or damage to property including, without limitation, any Concession Assets;

7.1.1.1.2. breach of a statutory duty arising under any Law(s);

7.1.1.1.3. claim for or in respect of the death or personal injury of any individual; or

7.1.1.1.4. other claim, action, charge, cost, demand or expense, (including, without limitation, any legal fees or costs) arising in connection with the performance or non-performance of any one or more of the Railway Services, save to the extent caused by -

7.1.1.1.5. the gross negligence or wilful misconduct of Transnet staff; or

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<sup>2</sup> Transnet is to ascertain and confirm the factual circumstance prior to the Signature Date.

7.1.1.1.6. any event of Force Majeure, or arising from any event of Force Majeure; or

7.1.1.1.7. a breach by Transnet of an express provision of this Agreement; and

7.1.1.2. any breach by the Concessionaire of any warranties given by it in this Agreement.

7.1.2. Where the act, omission or default of the Concessionaire or of its employees, agents or contractors causes Transnet or any of its officers, employees, agents or contractors to commit an offence, the Concessionaire shall immediately take any measure necessary to ensure that the act, omission or default no longer causes Transnet or that officer, employee, agent or contractor to commit that offence. Where Transnet reasonably suspects that such an act, omission or default is about to take place and it reasonably believes that this will result in Transnet or any of its officers, employees, agents or contractors committing an offence Transnet may issue an instruction to the Concessionaire to remedy the act, omission or default forthwith and the Concessionaire shall immediately comply with the said instruction.

7.1.3. The Concessionaire liability to Transnet arising under any indemnity in this Agreement shall be without prejudice to any other right or remedy available to Transnet and in particular shall not prejudice in any way the ability of Transnet to enforce the Performance Bond or any bond, guarantee or other security given pursuant to **clause 41** (*Financial Covenants*) at any time and in any manner whatsoever.

## 7.2. Transnet Indemnities

7.2.1. Notwithstanding the provisions of section 53 of the RSR Act, as between Transnet and the Concessionaire, Transnet indemnifies and shall keep the Concessionaire indemnified at all times against all direct losses that may be sustained by the Concessionaire arising as a result of the performance or non-performance of Transnet's obligations under this Agreement in respect of -

7.2.1.1. personal injury to or death of any person whosoever arising out of or in any way caused by the Transnet's negligence or performance or non-performance of this Agreement (including acts or omissions of Transnet's employees, agents or contractors) ("**Personal Losses**"); and

7.2.1.2. loss of or damage to any property, real or personal of the Concessionaire or its employees insofar as such loss or damage arises out of or is caused by Transnet's negligence or performance or non-performance of this Agreement (including

acts or omissions of Transnet's employees, agents or contractors) ("**Property Losses**").

7.2.2. Transnet's liability to indemnify the Concessionaire under this **clause 7.2** does not extend to any Personal Losses or Property Losses to the extent that they -

7.2.2.1. arise from or are caused or contributed to by any negligence of the Concessionaire, its employees, agents or contractors or the performance or non-performance by the Concessionaire of its obligations under this Agreement;

7.2.2.2. arose from any event of Force Majeure; or

7.2.2.3. are covered by any insurance policy being maintained by the Concessionaire, or ought to have been maintained by the Concessionaire in terms of clause 42 (*Insurance*) and under which insurance proceeds have actually been received, or would have been received if the insurance policy had been arranged or maintained, by the Concessionaire in respect of the Personal Losses and/or the Property Losses.

## 8. **DOUBLE RECOVERY AND MITIGATION**

8.1. Neither Party to this Agreement shall be entitled to recover (whether pursuant to an indemnity or otherwise) any loss to the extent that it has already been compensated for that loss whether by way of insurance payments or otherwise.

8.2. In particular, each Party shall be under an obligation to mitigate the consequences of any conduct in respect of which it may be entitled to compensation from the other Party under this Agreement (whether by way of indemnity or otherwise).

## 9. **BACKGROUND INFORMATION**

9.1. In this **clause 9** "Background Information" shall mean all and any documents, drawings, plans or other information relating in any way to the Concession made available by Transnet, its officers, employees or agents in connection with the negotiation and preparation of this Agreement, the Ancillary Agreements and stakeholder engagements which preceded such negotiation and preparation.

9.2. Transnet has provided the Background Information in good faith and on the basis that the Concessionaire has conducted its own due diligence and has taken its own advice with respect to the Background Information.

- 9.3. Notwithstanding clause 9.2 and the express provisions of this Agreement, Transnet does not give any warranty or undertaking as to the completeness, accuracy or fitness for any purpose of any of the Background Information.
- 9.4. Subject to the express provisions of this Agreement neither Transnet nor any of their agents employees or contractors shall be liable to the Concessionaire in contract, delict (including negligence or breach of statutory duty), or otherwise as a result of –
- 9.4.1. any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information;
  - 9.4.2. any failure to make available to the Concessionaire any materials, documents, drawings, plans or other information relating to the Concession Assets; or
  - 9.4.3. any unlawfulness of any Background Information where such unlawfulness is or ought reasonably to be known to the Concessionaire as at the date of this Agreement through the conduct of a due diligence investigation.

## **PART II – LAND AND GRANT OF RIGHTS**

### **10. CONDITIONS OF THE CONCESSION ASSETS**

#### **10.1. Conditions of Title of the Railway Land**

- 10.1.1. The conditions of –
- 10.1.1.1. title and restrictions applicable to the Railway Land as at the Effective Date are set out **Schedule 4 Part 1** (Railway Land Ownership and Use Conditions - Title Deed Conditions); and
  - 10.1.1.2. the right of way over and restrictions applicable to the Railway Land as at the Effective Date are set out in **Schedule 4 Part 2** (Railway Land Ownership and Use Conditions - Servitude Conditions).
- 10.1.2. The zoning and use rights applicable to each of the Branch Line Stations, as at the Effective Date, is set out in **Schedule 4 Part 3** (Railway Land Ownership and Use Conditions - Branch Line Station Zoning).
- 10.1.3. The Concessionaire undertakes –
- 10.1.3.1. to abide by and observe, at its cost and expense, all conditions of title and rights of way pertaining to the Railway Land;

- 10.1.3.2. not to apply for or procure any change to the title or servitude conditions applicable to the Railway Land, including any zoning, use rights, environmental or heritage conditions, without the prior written approval of Transnet; and
- 10.1.3.3. to only use the Railway Land for undertaking the Railway Services and for no other purpose without the prior written approval of Transnet.

## 10.2. **Railway Land Site Conditions**

10.2.1. The climatic, hydrological, hydro geological, ecological, environmental, geotechnical, geological, palaeontological and archaeological conditions of the Railway Land (the "**Railway Land Site Conditions**") shall be the sole responsibility of the Concessionaire. Accordingly, without limiting any other obligations of the Concessionaire under this Agreement in relation to the Railway Services, the Concessionaire shall be deemed as at the Signature Date to have -

- 10.2.1.1. carried out an investigation of all Railway Land Site Conditions and of any extraneous material in or under the Railway Land including its surface, subsoil and ground water to enable the Railway Services to be carried out with due regard for the Railway Land Site Conditions and the seismic activity (if any) in the region of the Railway Land;
- 10.2.1.2. for the purpose of the investigation referred to in **clause 10.2.1.1**, inspected and examined the Railway Land and surroundings;
- 10.2.1.3. satisfied itself as to the nature of the Railway Land Site Conditions, the surface, subsoil and ground water of the Railway Land, the form and nature of the Railway Land, the load-bearing and other relevant properties of the Railway Land, the risk of damage to property affecting the Railway Land;
- 10.2.1.4. satisfied itself as to the adequacy of its right of passage over, access to and through the Railway Land and any accommodation it may require for the purposes of fulfilling any of its obligations included in the Railway Services, such as any additional land or buildings located outside the Railway Land;
- 10.2.1.5. satisfied itself as to the possibility of interference by persons with rights-of-way across, access to or use of the Railway Land with particular regard to the owners and users of any land adjacent to the Railway Land; and

10.2.1.6. satisfied itself as to the precautions, times and methods of working and operating necessary to prevent or minimise nuisance or interference being caused to any third parties.

10.2.2. To avoid doubt, the Concessionaire accepts full responsibility for all matters in **clause 10.1** and the Concessionaire shall subject to **clause 7.2** (*Transnet Indemnities*), not be entitled to make any claim against Transnet whether in contract, delict or otherwise on any ground relating to the matters in **clause 10.1**.

### 10.3. Condition of Rail Infrastructure

10.3.1. It is recorded and agreed by the Parties that the average condition of all the main components Rail Infrastructure taken as whole is<sup>3</sup> as set out in Schedule 12 Part 2 (Rail Infrastructure Register - Register of the Condition of each Asset Class), and shall be maintained and upgraded in accordance with the agreed Asset Management Plan as set out in Schedule 2, Part 4 (Infrastructure Performance Measures), as may be amended by agreement between the Parties from time to time.

10.3.2. The Concessionaire will reinvest in the Rail Infrastructure and undertake the necessary upgrade of the Rail Infrastructure during the Concession Term to ensure that the Rail Infrastructure condition complies with at least a 20 ton/axle standard at hand over stage as contemplated in clause 51.3 of this Agreement in accordance with Transnet's specifications and subject to the Parties reaching agreement on the Asset Management Plan Schedule 2 Part 4, subject to the Concessionaire' Comprehensive Business Case.

10.3.3. The Rail Infrastructure is availed by Transnet to the Concessionaire and taken by the Concessionaire on a voetstoots (as is) basis, subject to the provisions of **clauses 6.2**.

### 10.4. Contamination

10.4.1. Transnet shall be responsible for all contamination present on the Railway Land (or any part thereof) as at the Signature Date and indemnifies the Concessionaire against all direct losses which may be sustained by the Concessionaire in consequence of cleaning-up and otherwise dealing with any potentially hazardous materials (being any natural or artificial substance, whether in solid, gaseous or liquid form capable of causing

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<sup>3</sup> A new condition assessment would have to be undertaken following completion of the initial restoration works on the Branch Line, which would firstly replace the initial schedule, and secondly be the base condition for determining an appropriate hand-back condition of the Rail Infrastructure.

harm to any human or the environment (including air, water, soil, micro-organisms, plant and animal life, aesthetic and cultural properties, land, surface land and sub-surface land) for which in each case liability or responsibility is imposed under applicable Environment Law) on all or any part of the Railway Land.

- 10.4.2. Transnet has undertaken a baseline site assessment in respect of the Railway Land, and has accordingly identified insignificant amounts of environmental pollution in respect of the **A – B Branch Line**.
- 10.4.3. If the Concessionaire, during its due diligence exercise prior to the Signature Date identified any contamination as contemplated in **clause 10.4.1**, and submitted to Transnet a pre-Signature Date contamination report ("**Pre-Signature Date Contamination Report**"). If Transnet accepted any finding or findings of the Pre-Signature Date Contamination Report (taking into account, inter alia, any baseline site assessment report it may have), Transnet shall, within a reasonable time and at its cost, undertake or procure the undertaking of the requisite clean-up or remedial action, as may be required to mitigate such contamination or the effect thereof. The timing, nature and extent of the requisite clean-up or remedial action shall, subject to Applicable Requirements, be at the discretion of Transnet. The Concessionaire grants to Transnet (and its nominee(s)) such rights of access to the Railway Land and Concession Assets as may be required to undertake the requisite clean-up or remedial steps.
- 10.4.4. It is recorded that the Pre-signature Date Contamination Report, if any, contains such information as may be customary for a base line report of such nature, and includes the following information, namely –
  - 10.4.4.1. the nature and source (or cause) of the contamination including pictures;
  - 10.4.4.2. the perceived remediation option(s); and
  - 10.4.4.3. the estimated cost of rehabilitation quantified using a market related costing model for the type of contamination present.
- 10.4.5. The Concessionaire shall be obliged, within 90 (ninety) days of the Signature Date, to undertake and complete (or procure the undertaking and completion of) a due diligence investigation to establish whether or not there is any contamination present on the Railway Land (or any part thereof), and (within such 90 (ninety) day period, prepare (or procure the preparation of) and submit to Transnet a post-Signature Date contamination report ("**Post-Signature Date Contamination Report**"). The Post-Signature Date Contamination Report shall include the following information, namely -
  - 10.4.5.1. the nature and source (or cause) of the contamination;



- 10.4.5.2. the effect and extent of the contamination on the environment or human(s), including any harm caused and/or anticipated to be caused;
  - 10.4.5.3. the proposed remediation option(s); and
  - 10.4.5.4. the estimated cost of rehabilitation quantified using a market related costing model for the type of contamination present.
- 10.4.6. Upon submission of any Post-Signature Date Contamination Report, Transnet shall within 60 (sixty) days of receipt thereof respond to the Concessionaire on any aspect thereof, including any further information or inspection, test or investigation that Transnet may require to fully consider the Post-Signature Date Contamination Report. Once Transnet is in possession of all the information it reasonably requires to consider the Post-Signature Date Contamination Report, it shall notify the Concessionaire whether or not it accepts or take issue with matters mentioned in or findings of the Post-Signature Date Contamination Report. If Transnet takes issue with any matter or finding of the Post-Signature Date Contamination Report, and the Parties are unable to reach consensus thereon, then either Party shall be entitled to refer that dispute for resolution in accordance with the provisions of the dispute resolution procedure in **clause 62.7** (*Dispute Resolution - Fast-track Dispute Resolution*).
- 10.4.7. If Transnet agrees, or it is determined, arising out of a Post-Signature Date Contamination Report that Transnet is responsible for any pre-existing contamination in terms of **clause 10.4.1**, then Transnet shall, within a reasonable time and at its cost, undertake or procure the undertaking of the requisite clean-up or remedial action as may be required to mitigate such contamination or the effect thereof. The timing, nature and extent of the requisite clean-up or remedial action shall, notwithstanding any other provision in this Agreement to the contrary and subject to Applicable Requirements, be at the discretion of Transnet,
- 10.4.8. The Concessionaire shall be responsible for all contamination introduced to the Railway Land (or any part thereof) at any time between the Signature Date and the Expiry Date or Termination Date, as the case may be. The Concessionaire indemnifies Transnet against all direct losses which may be sustained by Transnet in consequence of cleaning-up and otherwise dealing with any potentially hazardous materials (being any natural or artificial substance, whether in solid, gaseous or liquid form capable of causing harm to any human or the environment (including air, water, soil, micro-organisms, plant and animal life, aesthetic and cultural properties, land, surface land and sub-surface land) for which in each case liability or responsibility is imposed under applicable Environment Law) on all or any part of the Railway Land.

10.4.9. The Concessionaire shall, at its cost and on an annual basis for the duration of the Concession Term, procure that a suitably qualified environmental assessment practitioner registered with or accredited by the South African Council for Natural Scientific Professions -

10.4.9.1. undertakes environmental monitoring and inspections; and

10.4.9.2. submits an environmental assessment report to the Concessionaire setting out, inter alia, the then current environmental compliance and conditions of the Concessionaire's operations,

a copy of which report the Concessionaire shall submit to the Transnet Representative within 30 (thirty) days of receipt by the Concessionaire.

10.4.10. The Concessionaire shall, subject to any instruction or directive it may receive from a relevant environmental authority, immediately take action to resolve the requirement of such instruction or directive in the interest of environmental protection. The Concessionaire shall promptly and in any event within 15 (fifteen) Business Days of receipt of any instruction or notice from a relevant environmental authority, notify Transnet thereof specifying what action the Concessionaire has taken or plans to take in relation to the instruction or directive.

10.4.11. Transnet shall be entitled, pursuant to **clause 32** (*Reviews and Performance Monitoring*) to undertake audits and reviews of the environmental condition of the Railway Land and Concession Assets, and the Concessionaire's obligations in respect of environmental management.

10.4.12. It is recorded that Transnet will as at the Effective Date remove or procure the removal of all of noxious weeds from the Permanent Way. It being recorded, for the avoidance of doubt, that the removal of noxious weeds at any time after the Effective Date shall be the sole responsibility of the Concessionaire.

## 10.5. **Heritage Resources**

### Discovery

10.5.1. Upon the discovery of any heritage object or resource (as defined in the National Heritage Resources Act, 1999 or any corresponding provincial legislation) during the course of the Concession Term, the Concessionaire shall -

10.5.1.1. promptly notify Transnet of such discovery, and report same as required under the National Heritage Resources Act, 1999 or any corresponding provincial legislation;

- 10.5.1.2. take all necessary steps not to disturb the heritage object or resource, including cessation of any Railway Services to the extent that the carrying out of Railway Services might reasonably endanger the heritage object or resource or prevent or impede its excavation or preservation; and
- 10.5.1.3. take all necessary steps to preserve the object in the same position and condition in which it was discovered.

#### Action

- 10.5.2. The Concessionaire shall, subject to any instruction or directive it may receive from the relevant heritage resource authority, immediately take such action as it may deem appropriate to protect or preserve such discovery pending an instruction or directive it may receive from the relevant heritage resource authority, and shall promptly and in any event within 15 (fifteen) Business Days of the notice in **clause 10.5.1.1** notify Transnet specifying what action the Concessionaire has taken or plans to take in relation to such discovery.
- 10.5.3. The Concessionaire shall promptly and diligently comply with any instruction or directive issued by the relevant heritage resource authority as contemplated in **clause 10.5.2**. The costs incurred by the Concessionaire in complying with any such instruction or directive shall, as between the Parties, be borne by the Concessionaire.
- 10.5.4. If so directed by Transnet or Responsible Authority or the Safety Regulator, the Concessionaire shall allow representatives of Transnet or Responsible Authority or Safety Regulator to enter onto the Railway Land for the purposes of removal or disposal of such discovery; provided that such entry shall be subject to Transnet or Responsible Authority or Safety Regulator complying with all relevant safety procedures which shall include any relevant health and safety plans of the Concessionaire and any reasonable directions regarding the safety of the Railway Land that may be issued by or on behalf of the Concessionaire.

## **11. GRANT OF THE CONCESSION**

- 11.1. Subject to the terms of the Concession Documents, Transnet hereby grants to the Concessionaire the Concession for the duration of the Concession Term, by granting the Concessionaire an exclusive right subject to clause 11.2, to enter, occupy and use –
  - 11.1.1. the Railway Land, subject to **clause10** (*Conditions of the Concession Assets*) to enable the Concessionaire to carry-out the Railway Services; and

- 11.1.2. the Rail Infrastructure to enable the Concessionaire to undertake the Infrastructure Services and provide the Rail Freight Services and Passenger Service.
- 11.2. The exclusive right referred to in clause 11.1 is granted to the Concessionaire (i) in the Concessionaire's capacity (as at the Effective Date) as a network operator (as that term is defined in the RSR Act) of the Branch Line, and (ii) in the Concessionaire's capacity (as at the Effective Date) as a station operator (as that term is defined in the RSR Act) of each of the Branch Line Stations.
  - 11.2.1. Transnet shall be entitled to enter and be upon the Railway Land and the Rail Infrastructure and the Concessionaire shall at all reasonable times permit Transnet or its agent(s) or nominee(s) from time to time on notice to the Concessionaire to enter the Railway Land (or any part thereof) and the Rail Infrastructure (or any part thereof) subject to the applicable Safety Management System for any purpose in relation to –
    - 11.2.1.1. the inspection and operation of all or any part(s) or component(s) of the Train Control Systems, from time to time;
    - 11.2.1.2. the exercise of any rights or entitlements of Transnet under this Agreement, the Ancillary Agreements or at Law; or
    - 11.2.1.3. inspecting and determining whether or not the Concessionaire is complying with its obligations and to what extent under this Agreement or the Ancillary Agreements;
  - 11.2.2. the Concessionaire grants reasonable access to the Branch Line, subject to its operating schedule and safety requirements, to those persons, whether governmental or non-governmental who require access to reach rural communities in order to provide or roll out on a social welfare or humanitarian basis essential services, products or goods, including, any Transnet initiated or supported corporate social investment initiatives, subject to its operating schedule and safety requirements, provided that any rights of access granted by the Concessionaire to any person contemplated in this clause 11.2.2 shall be on such contractual arrangements as may be concluded between the Concessionaire and the person concerned in relation to inter alia, track access terms and safety interface arrangements required under the RSR Act;
  - 11.2.3. the Concessionaire grants to Transnet reasonable access -
    - 11.2.3.1. to enable Transnet to efficiently move its Rolling Stock past blockages on the Core Network, on terms provided for in the Track Access Agreement, for which an access fee or other charge shall be payable by Transnet to the Concessionaire;

- 11.2.3.2. as may be required by Transnet if and when Transnet accedes to any Concessionaire request on Transnet for assistance in dealing with or responding to any emergency event or situation on the Branch Line, for which no access fee or other charge shall be payable by Transnet to the Concessionaire;
  - 11.2.3.3. as may from time to time be requested by Transnet on such track access and interface arrangements as may be concluded by the Parties, taking account the respective operating schedules and safety requirements of the Concessionaire and Transnet.
- 11.3. The grant of rights in and to the Concession by Transnet to the Concessionaire does not extend to any part of the Transnet railway network which does not comprise the Wolseley – Ceres – Prince Alfred Hamlet Branch Line or the Access Route.
- 11.4. In consideration for the grant of the Concession, the Concessionaire shall become liable to pay to Transnet a Concession fee of **[insert amount of concession fee]** (index linked) which shall be payable **[insert whether payable monthly/quarterly/annually]**.
- 11.5. The Concessionaire may, if in possession of the requisite Safety Permit, use the Railway Infrastructure for the conveyance of passengers, or permit the use of the Railway Infrastructure for such Passenger Service. The grant of the Concession does not constitute the transfer of any business or undertaking by Transnet to the Concessionaire, or any part thereof.
- 11.6. The Concessionaire shall ensure that –
- 11.6.1. all Railway Services carried out on the Railway Land by or on behalf of the Concessionaire shall be carried out in a manner which does not breach any provision of the title deed(s) or servitudes pertaining to the Railway Land; and
  - 11.6.2. there shall be no action, or omission to act by it or any contractor, which shall give rise to a right for any person to obtain title to the Railway Land (or any part thereof) or to the Rail Infrastructure (or any component thereof).
- 11.7. Transnet undertakes that for the duration of this Agreement and subject to the terms of this Agreement and the Ancillary Agreements, it shall not prevent the Concessionaire or its subcontractors from accessing, occupying or using the Railway Land or the Rail Infrastructure for purposes of the Concession.
- 11.8. The rights of and to Track Access contemplated in this Agreement are granted by Transnet to the Concessionaire on the terms set out in the Track Access Agreement, on the following primary premises, namely –

- 11.8.1. the Concessionaire's rights of and to Track Access are exercised by the Train O&M Provider for and on behalf of the Concessionaire to the exclusion of the Concessionaire under the Train O&M Agreement; and
- 11.8.2. if any marshalling yard, or exchange yard, or consolidation point, or collection point or similar natural hand-over point for the delivery and/or collection of wagons ("hand-over point") is established or constructed on the Branch Line to form part of the Rail Infrastructure, then notwithstanding any provision to the contrary in the Track Access Agreement, or other Ancillary Agreement, any and all rights of and to Track Access shall be terminated from the date of commissioning of such hand-over point.
- 11.9. It is recorded, that as per this **clause 11** (*Grant of this Concession*) or any other provision of this Agreement, that Transnet grants to the Concessionaire the right or entitlement to deploy (or cause to be deployed) any optic fibre, subject to terms to be agreed with Transnet, any train authorisation systems or networks, or any high sites, all of which will be available to Transnet as part of the Ancillary Agreements.
- 11.10. The Concessionaire may not grant any right(s) pursuant to **clause 11.2.2** or to any other third party without the prior written consent of Transnet, and such grant of right(s) must provide for the termination thereof on termination of the Concession, whether on the Expiry Date or Termination Date.

## 12. **STATUTORY PROVISIONS**

Transnet does not grant or delegate to the Concessionaire the right to exercise the rights, powers or exemptions of Transnet under any legislation.

## 13. **THIRD PARTY UNDERTAKINGS AND AGREEMENTS**

- 13.1. The Concessionaire shall not, without the prior written approval of Transnet apply for or seek to have any part or portion of the Concession Assets declared a heritage site or a nature conservancy under any Law.
- 13.2. If the whole or any part of the Concession Assets is declared by any Responsible Authority as a heritage site or nature conservancy under applicable Law, the Concessionaire shall, with the prior approval of Transnet, conclude such agreement with the Responsible Authority as may be necessary pertaining to the preservation and conditions on which the heritage site or nature conservancy is to be used or maintained by the Concessionaire. Transnet shall not, as between it and the Concessionaire, be liable for any cost or expense occasioned by or attributable to the declaration of the whole or any part of the Concession Assets as a heritage site or nature conservancy.

- 13.3. The Concessionaire, at its own cost and expense, may conclude such agreements with owners of land adjacent to the Branch Line concerned, which the Concessionaire may either require access to such land or any form of co-operation from such landowners to enable it to carry-out its business in undertaking the Concession.

14. **LETTING OF TRANSNET ADJOINING OR ADJACENT PROPERTY(IES)**

- 14.1. All adjacent or adjoining properties not part of the Concession Assets will be made available and covered by a separate lease agreement, subject to approval, which approval will not be unreasonably withheld.
- 14.2. The Parties acknowledge and record that the buildings at the **Station A**, and properties at Viedgesville Station are integral requirements for the execution of the **A - B Concession** and shall be reserved as an adjacent property for a lease to be entered into when the use of the property is so required.

15. **ASSISTANCE AND CO-OPERATION**

- 15.1. Subject to **clause 15.2** each party (the "**First Party**") undertakes to co-operate with the other (the "**Second Party**") in order to facilitate the performance of this Agreement and in particular will –
- 15.1.1. use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;
  - 15.1.2. comply with the provisions of the dispute resolution procedure in **clause 62 (Dispute Resolution)** in relation to any such complaints, disputes and claims;
  - 15.1.3. not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;
  - 15.1.4. assist the Second Party in performing those obligations, so far as is reasonably practicable; and
  - 15.1.5. take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in **clauses 15.1.1 to 15.1.4 (inclusive)**.
- 15.2. Nothing in **clause 15.1** shall –

- 15.2.1. interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit in order to perform its obligations under this Agreement and, (in the case of Transnet), its statutory duties, powers and functions; or
- 15.2.2. oblige either Party to incur any additional cost or expense, or suffer any loss of profit; or
- 15.2.3. relieve either Party from any obligation contained in this Agreement (subject to **clause 7 (Indemnities)**) or from any obligation to pay any debt due and payable under this Agreement.

**16. CONSULTATION IN ANTICIPATION OF EXPIRY OF THE CONCESSION TERM**

- 16.1. The Parties will, within 90 (ninety) days of every 5<sup>th</sup> (fifth) anniversary of the Effective Date, consult with each other on a no-obligation basis to decide, subject to **clause 16.2**, -

- 16.1.1. whether or not there should be an extension of the 20 year Concession Term ; and
- 16.1.2. such other amendments to the Concession Documents as the Parties may agree,

and following such consultation Transnet may, subject to all required approvals and in its sole and absolute discretion, issue a notice to the Concessionaire stating whether the Concession Term will expire on the Expiry Date or whether an extension will be granted. If an extension is to be granted, the notice shall set out the terms of such extension.

- 16.2. In undertaking the consultation referred to above the Parties shall have regard to such policy, commercial, contractual and legal considerations and matters as may be applicable, including –

- 16.2.1. the strategic objectives of Transnet at the time;
- 16.2.2. the applicable Transnet procurement framework at the time; and
- 16.2.3. the spirit and letter of the Competition Act, 89 of 1998,

to ensure that any extension of the Concession Term being discussed will not result in the violation of any consideration or matter contemplated in this **clause 16.2**.

- 16.3. For the avoidance of doubt, Transnet has no obligation under this **clause 16** to consent to or approve any extension of the Concession Term.



### **PART III – TRANSFER, UPGRADE AND REFURBISHMENT OF ASSETS**

#### **17. MOVEABLE RAIL ASSETS**

- 17.1. Any and all moveable assets situate on the Railway Land and on or in the Rail Infrastructure do not form part of the Concession Assets and are not transferred to the Concessionaire ("**Moveable Rail Assets**"). A further description of the nature and type of what constitutes Moveable Rail assets is contained in **Schedule 11** (Register of Moveable Assets).
- 17.2. All Moveable Rail Assets known to Transnet have been or will have been removed by Transnet as at the Signature Date. If any Transnet known Moveable Rail Assets are not removed, or will not be removed from the Railway Land as at the Signature Date, then Transnet shall document such assets ("**Retained Moveable Rail Assets**") and notify them to the Concessionaire in the manner provided for in **Schedule 11 Part 1** (Register of Moveable Rail Assets - Agreed Form of Retained Moveable Rail Assets Register). The Concessionaire shall be obliged to ensure safe custody of all Retained Moveable Assets, on such terms as may be set out in **Schedule 11 Part 1** (Register of Moveable Rail Assets - Agreed Form of Retained Moveable Rail Assets Register).
- 17.3. If the Concessionaire finds any Moveable Rail Assets after the Signature Date which are not Retained Moveable Rail Assets, the Concessionaire shall catalogue such Moveable Rail Assets stating the nature and location of each such asset and indicating whether or not it wishes to retain or make use of any asset so catalogued ("**Catalogued Moveable Rail Assets**"). The Concessionaire shall, on completing the compilation of any one or more list of Catalogued Moveable Rail Assets, promptly furnish such list to Transnet for consideration.
- 17.4. On receipt of any list of Catalogued Moveable Assets, Transnet shall within a reasonable time, no longer than 60 (sixty) days from receipt thereof, determine whether it wishes to retain any Moveable Rail Asset on such list and advise the Concessionaire accordingly. In respect of any Moveable Rail Assets which Transnet elects to retain, Transnet shall notify the Concessionaire accordingly and make arrangement for the removal of such asset(s) from its location on the Railway Land or Rail Infrastructure.
- 17.5. In respect of any Movable Rail Assets which Transnet elects not to remove or to treat as Retained Moveable Rail Assets, whether or not the Concessionaire had indicated a desire to retain or make use thereof, such assets shall be deemed to have been transferred by Transnet to the Concessionaire ("**Transferred Moveable Rail Assets**"). Upon notification by Transnet to the Concessionaire of the Transferred Moveable Assets, the Transferred Moveable Rail Assets shall be deemed to be transferred in the condition they are in and Transnet shall furnish no warranty in respect of the Transferred Moveable Rail Assets, including any warranty pertaining to the condition or fitness for purpose of any of the Transferred Moveable Rail Assets.

- 17.6. No consideration is payable by the Concessionaire to Transnet for the Transferred Moveable Rail Assets.
- 17.7. The Concessionaire shall be entitled to use, transfer, sell, dispose of, encumber or otherwise deal with the Transferred Moveable Rail Assets as owner, subject to the preparation and acceptance of a moveable assets register in terms of **clause 17.8**.
- 17.8. The Concessionaire shall, within 30 (thirty) days of the notification to it by Transnet of the Transferred Moveable Rail Assets in terms of **clause 17.5**, procure the preparation and submission of a register of the Transferred Moveable Rail Assets in the Agreed Form, which assets register, on acceptance by Transnet, will be initialled by the Parties as **Schedule 11 Part 3** (Register of Moveable Rail Assets - Agreed Form of Transferred Moveable Assets Register).
- 17.9. On the Expiry Date, or Termination Date, as the case may be, the Concessionaire shall transfer all Transferred Moveable Rail Assets, not disposed of at the time to Transnet in their then as is condition. Transnet shall not be obliged to and shall not pay any consideration for the transfer of the Transferred Moveable Rail Assets on expiry or earlier termination of the Concession.
- 17.10. The Parties agree that Transnet may place certain Moveable Rail Assets on the Rail Way Land during the Concession Term, the terms and conditions to be agreed on between the Parties.

18. **ROLLING STOCK**

- 18.1. The Concessionaire shall, under the Train O&M Agreement and at its cost, acquire the use or capacity of such Rolling Stock as it requires from time to time to perform the Rail Freight Services and Passenger Service in respect of the Branch Line.
- 18.2. The Concessionaire shall, subject to the RSR Act requirements, Applicable Requirements (including Environmental Law) ensure at all times that any Rolling Stock used on the Branch Line is fit for the purpose for which it is being used and is consistent with and complementary to the condition of the Permanent Way and Branch Line Stations.

19. **REFURBISHMENT AND UPGRADE OF CONCESSION ASSETS**

19.1. **Initial Rail Infrastructure Refurbishment Works**

Transnet shall undertake, or procure that the Initial Rail Infrastructure Refurbishment Works are undertaken by a suitably qualified and experienced contractor in respect of the Branch Line.

## 19.2. Other Upgrade and Refurbishment Works

- 19.2.1. The Concessionaire shall, at its cost and expense, undertake any upgrading or refurbishment works to the Rail Infrastructure as may be directed or required by any Responsible Authority, the Safety Regulator, or to enable the Concessionaire to comply with or maintain any Consent and Safety Permit.
- 19.2.2. The Concessionaire may at its election, cost and expense and subject to all Applicable Requirements (including those under the RSR Act and Environmental Law), undertake any and all upgrade or refurbishment work in respect of the Rail Infrastructure in order to render the Railway Services, or to optimise the rendering of the Railway Services from time to time, provided that –
  - 19.2.2.1. no upgrade or refurbishment works ("proposed works") may be commenced or undertaken without Transnet's prior written consent having been granted approving the nature and extent of the proposed works, the design of the proposed works and execution methodology for the proposed works;
  - 19.2.2.2. Transnet has approved the nature and extent of the warranties to be given by the Concessionaire's design and construction Certified Contractor(s) for the proposed works, and the Concessionaire has procured that such warranties are transferable, at no cost to Transnet, by the Concessionaire to Transnet at the request of Transnet; and
  - 19.2.2.3. the Certified Contractor shall provide suitable performance bond to financially underpin the performance of its obligations (which are to include, without limitation, environmental rehabilitation), which performance bond the Concessionaire must ensure is transferrable to Transnet in the event of termination of the Concession.
- 19.2.3. The Concessionaire shall, during the Concession Term undertake all upgrade requirements and reinvest in the Rail Infrastructure as to ensure that the Rail Infrastructure meets updated standard requirements as referred to in clause 10.3 of this Agreement.
- 19.2.4. Any and all refurbishment and upgrading works are to be undertaken by a Certified Contractor for the relevant works package with the prior approval of Transnet.
- 19.2.5. Notwithstanding the foregoing, the Concessionaire may not without the prior approval of Transnet make any changes to the layout or alignment of the Branch Line(s).

**19.3. Disposal of Lifted Rail Track and Scrap Metal**

- 19.3.1. Any and all railway track lifted by or at the instance of the Concessionaire classified as scrap metal, and scrap metal from Rail Infrastructure shall be handed by the Concessionaire to Transnet, in accordance with the provisions of **Schedule 17** (Disposal of Lifted Rail Track and Scrap Metal from Rail Infrastructure);
- 19.3.2. In the event that the Concessionaire replaces existing railway track with new railway track the Concessionaire can apply to Transnet to be reimbursed for the value received by Transnet for sale of the old railway track subject to negotiation and agreement between the Parties.
- 19.3.3. Any railway track lifted by the Concessionaire may be utilised in the upgrade of the Railway Line as contemplated in this Agreement after consultation and agreement with Transnet. The Concessionaire shall ensure that all materials used in the upgrade, whether new or second hand lifted track comply with the applicable RSR and Transnet minimum standards.

**PART IV – OPERATION OF THE CONCESSION**

**20. THE CONCESSION OPERATOR**

- 20.1. It is recorded, as between the Parties and for purposes of this Agreement (notwithstanding the Train O&M Agreement), that –
  - 20.1.1. the Concessionaire is a network operator and a station operator of the Branch Line as contemplated in the definition of 'network operator' in the RSR Act, as the Concessionaire will ultimately be responsible for, inter alia, the safety of a network or part thereof including the proper design, construction, maintenance and integrity of the Branch Line network; and
  - 20.1.2. Transnet is a network operator of the Branch Line as contemplated in the definition of 'network operator' in the RSR Act, as Transnet will ultimately be responsible in its TFR division for the authorising and directing of the safe movement of Rolling Stock on the Branch Line network.
- 20.2. The Concessionaire undertakes to provide the Railway Services and operate the Concession subject to and in accordance with the terms and conditions of this Agreement, the applicable Ancillary Agreements and in compliance with Laws, including the RSR Act, Applicable Requirements (including Environmental Law and the Astronomy Geographic Advantage Act, 21 of 2007), Consents, Safety Permits and the Fencing Act, 31 of 1963.
- 20.3. It is further recorded that –

- 20.3.1. the execution of the Rail Freight Service will be undertaken, on behalf of the Concessionaire by the Train O&M Provider pursuant to the Train O&M Agreement; and
  - 20.3.2. the conclusion of the Train O&M Agreement does not relieve or excuse the Concessionaire from any of its obligations under this Agreement in relation to the Railway Services.
- 20.4. Any and all RSR Act contemplated rail safety interface requirements between Transnet and the Concessionaire as operators in respect of the Branch Line are regulated in the Safety Interface Agreement(s).

## 21. **INFRASTRUCTURE SERVICES**

- 21.1. The Concessionaire shall provide the Infrastructure Services as may be required to discharge its obligations under this Agreement (including Asset Management Plan set out in **Schedule 2 Part 4 (Concession Specifications - Infrastructure Performance Measures)**), the Ancillary Agreements and to comply with Laws, including the RSR Act, Applicable Requirements (including Environmental Law and the Astronomy Geographic Advantage Act, 21 of 2007), Consents, Safety Permits and the Fencing Act, 31 of 1963.
- 21.2. Infrastructure Services shall, subject to the provisions of **clause 19.2 (Other Upgrade and Refurbishment Works)**, be undertaken at the sole risk and expense of the Concessionaire by one or more Certified Contractors. It is recorded that the performance of Infrastructure Services includes the undertaking of any refurbishment works as may be necessary or implicit in the execution of the Infrastructure Services.
- 21.3. The Concessionaire shall, on an annual basis for the duration of the Concession Term submit a written report to Transnet on its performance of the Infrastructure Services measured against the Concessionaire Annual Infrastructure Works Plan (set out in Schedule 2 Part 4 (Concession Specifications – Infrastructure Performance Measures) for the year under review ("Annual Maintenance Report"). If there is any shortfall between the actual performance of Infrastructure Services and the Concessionaire Annual Infrastructure Works Plan, the Concessionaire shall –
- 21.3.1. set the nature and extent of such shortfall, the reason therefor;
  - 21.3.2. when and how the shortfall is to be made good also indicating that in the Concessionaire Annual Infrastructure Works Plan for the ensuing year; and
  - 21.3.3. the consequence to the Rail Infrastructure or condition thereof as a result of the delay occasioned by the shortfall,
- and Transnet shall be entitled to physically verify any aspect of any Annual Maintenance Report.

- 21.4. Transnet shall be entitled, in intervals of 5 (five) years each and as part of a relevant performance review contemplated in **clause 32.2 (Performance Reviews)**, to procure the undertaking of an interim maintenance survey by a Certified Contractor ("**Interim Maintenance Survey**") to -
- 21.4.1. review the actual maintenance carried out during the period since Effective Date, or the last Interim Maintenance Survey (as the case may be) to the current Interim Maintenance Survey for the Concession Assets;
  - 21.4.2. review the programmed (or planned) maintenance as set out in the Asset Management Plan in Schedule 2, Part 4 (Infrastructure Performance Measures) during the period since Effective Date, or the last Interim Maintenance Survey (as the case may be) to the current Interim Maintenance Survey for the Concession Assets; and
  - 21.4.3. determine the degree to which actual maintenance carried out complied with the programmed maintenance set out in the Asset Management Plan in Schedule 2, Part 4 (Infrastructure Performance Measures) during the period under review of each item of the Concession Assets.
- 21.5. If Transnet determines that the Concessionaire has failed to materially comply with the Asset Management Plan set out in **Schedule 2, Part 4 (Concession Specifications - Infrastructure Performance Measures)**, it shall notify the Concessionaire accordingly ("**Interim Maintenance Survey Notice**").
- 21.6. Upon receipt of the Interim Maintenance Survey Notice under **clause 21.5**, the Concessionaire shall indicate whether or not it accepts Transnet's determination, within 30 (thirty) days of receipt thereof, failing which, the Concessionaire shall be deemed to have accepted the determination of Transnet set out in the Interim Maintenance Survey Notice. If the Concessionaire takes issue with the Interim Maintenance Survey Notice, or any determination therein, such issue shall be referred by either Party for determination under the dispute resolution procedure in **clause 62 (Dispute Resolution)**.
- 21.7. When any Interim Maintenance Survey Notice is agreed, or determined, as the case may be, indicating that maintenance is to be undertaken by the Concessionaire to meet programmed (or planned) maintenance as set out in the Asset Management Plan in **Schedule 2, Part 4 (Concession Specifications - Infrastructure Performance Measures)**, then the Concessionaire shall within 15 (fifteen) days of such agreement or determination issue a programme to Transnet setting out when the outstanding maintenance is to be undertaken ("**Maintenance Remedial Programme**"). If the Maintenance Remedial Programme is acceptable to Transnet, then Transnet shall notify the Concessionaire accordingly, and if it fails to do so within 30 (thirty) days of receipt thereof, Transnet shall be deemed to have accepted such Maintenance Remedial Programme.
- 21.8. If Transnet does not accept the Maintenance Remedial Programme, it shall be entitled to demand the Concessionaire to forthwith undertake, or procure the

undertaking of the outstanding maintenance work in the agreed or determined Interim Maintenance Survey Notice, as the case may be. If the Concessionaire fails forthwith to undertake or procure the undertaking of the requisite maintenance work, Transnet shall be entitled, at the cost of the Concessionaire to either undertake the requisite maintenance work itself, or procure a Certified Contractor to do so. Transnet shall be entitled to call on the Performance Bond for the amount of maintenance work undertaken by or at the instance of Transnet pursuant to this **clause 21.8**, which is not paid by the Concessionaire on demand. The Concessionaire shall replenish the Performance Bond to the quantum it was prior to any call thereon by Transnet under this **clause 21.8**.

21.9. The Concessionaire –

21.9.1. shall cease to provide any Infrastructure Services if so directed by the Safety Regulator or Responsible Authority; and

21.9.2. may cease to provide or withdraw or propose to discontinue any Infrastructure Service if in its determination it would pose material risk to the environment, health and safety of persons.

21.10. Transnet shall be entitled to instruct the Concessionaire to cease the provision of any Infrastructure Service if any affected Infrastructure Service(s) are being carried out or proposed to be carried out by any person who is not a Certified Contractor.

21.11. The Concessionaire shall ensure that each Certified Contractor and their employees and officers are duly inducted of safety, health and environmental requirements prior to the commencement of any Infrastructure Services.

21.12. Any rail track lifted, or scrap metal arising from any maintenance work of the Concessionaire or any of its contractors shall be handed over to Transnet as provided for in clause 19.3 of this Agreement and Transnet shall deal with same on the terms provided for in **Schedule 17** (Disposal of Lifted Rail Track and Scrap Metal from Rail Infrastructure).

22. **RAIL FREIGHT AND PASSENGER SERVICE AND TRAIN OPERATING SERVICES**

22.1. The Concessionaire shall offer and perform the Rail Freight Services, and procure the undertaking of the Train Operating Services subject to and in accordance with the terms and conditions of this Agreement, the Ancillary Agreements and in compliance with Laws, including the RSR Act, Applicable Requirements (including Environmental Law and the Astronomy Geographic Advantage Act, 21 of 2007), Consents, Safety Permits and the Fencing Act, 31 of 1963.

22.2. The Concessionaire shall ensure that it has and maintains or procures adequate resources including Rolling Stock capacity to meet the projected annual freight volumes and the Base Freight Service Requirements from time to time. The

Concessionaire shall provide all requisite support services to those customers of Transnet whose freight comprises the Base Freight Service Requirements to ensure that the haulage of their freight is undertaken expeditiously for Transnet to meet its performance obligations under its haulage arrangements with each of its customers whose freight comprises the Base Freight Service Requirements. The salient terms of the Transnet performance obligations under such haulage arrangements are set out in the Train O&M Agreement. Any decline in the level of Base Freight Service Requirements equal to or greater than 10% (ten per cent) measured as at Financial Year end directly occasioned by a failure of the Concessionaire to provide the requisite support services will constitute Concessionaire Default of the nature contemplated in clause 1.29.22. For the avoidance of doubt any decline in the level of the Base Freight Service Requirements not occasioned by or attributable to any lack of or, poor service on the part of the Concessionaire will not constitute Concessionaire Default.

- 22.3. Train O&M Services shall, subject to the Train O&M Agreement, be provided by the Train O&M Provider to the Concessionaire at the account of and at the sole risk and expense of the Concessionaire.
- 22.4. The Concessionaire is entitled, for the Concession Term and to the exclusion of Transnet, to place advertisements or sell advertising space on any part of the Concession Assets, excluding the Permanent Way and the Rolling Stock.
- 22.5. The Concessionaire shall comply with and ensure that all advertisements on the Concession Assets, excluding the Permanent Way and Rolling Stock -
  - 22.5.1. comply with Good Industry Practice;
  - 22.5.2. comply with all relevant Applicable Requirements and Consents;
  - 22.5.3. comply with all applicable requirements of the Safety Regulator and the RSR Act, if any;
  - 22.5.4. comply with the current versions from time to time of all applicable codes of practice, including (without limitation) the South African Manual of Outdoor Advertising;
  - 22.5.5. no advertisement is placed which is disparaging (or derogatory), whether gratuitously or otherwise of Transnet, whether directly, indirectly or by innuendo or any other way; and
  - 22.5.6. comply with Transnet's applicable code(s) on advertising from time to time.
- 22.6. Transnet shall be entitled at any time to instruct the Concessionaire to immediately remove any advertisement which violates any provision of clause 22.5.



## **23. FREIGHT CHARGES**

### **23.1 Rail Freight Service Charges to Third Parties**

- 23.1.1 The Concessionaire is, subject to Applicable Requirements and the Ancillary Agreements, at liberty to determine the level of freight charges and collection procedures and other terms and conditions on which the Rail Freight Service is offered and provided to third parties.
- 23.1.2 Any and all Concessionaire service offerings shall be marketed, sold and provided at the sole risk of the Concessionaire.

### **23.2 Rail Freight Service Charges to Transnet**

- 23.2.1. The Concessionaire shall be entitled to charge Transnet a fee for the haulage of any freight that Transnet may require traverses the Branch Line, and whenever applicable also the Access Route.
- 23.2.2. The fee chargeable by the Concessionaire and payable by Transnet shall be computed in accordance with the formula and tariff set out in **Schedule 21** (Concessionaire Rail Freight Service Charges to Transnet).
- 23.2.3. Any and all payments due by Transnet to the Concessionaire pursuant to this **clause 23.2** shall be payable within 30 (thirty) days of submission of a tax invoice (in terms of the VAT Act) therefor by the Concessionaire.
- 23.2.4. If Transnet disputes all or any part of the Concessionaire tax invoice (in terms of the VAT Act) calculated in accordance with **clause 23.2.2**, the undisputed amount of the tax invoice (in terms of the VAT Act) shall be paid by Transnet and the provisions of **clause 23.2.5** shall apply in respect of the disputed portion.
- 23.2.5. Transnet shall give written notification to the Concessionaire, within [10 (ten)] Business Days of the date of receipt of the Concessionaire tax invoices (in terms of the VAT Act) referred to in **clause 23.2.3** of any dispute regarding the tax invoice (in terms of the VAT Act), which notification shall state the amount of the disputed portion and its reasons for disputing such portion. The Parties shall use all reasonable endeavours to resolve the dispute in question within [15 (fifteen)] Business Days of the date of notification by Transnet to the Concessionaire. If they fail so to resolve it, either Party may refer the dispute for resolution in accordance with the dispute resolution procedure in **clause 62.7 (Dispute Resolution – Fast-track Dispute Resolution)**. Following resolution of the dispute, the Concessionaire shall, to the extent necessary, issue a replacement tax invoice(s) (in terms of the VAT Act) to Transnet reflecting the agreed or determined amount due by Transnet, but excluding any amounts already paid in accordance with **clause 23.2.4**, if any. Such amount, if any, shall be paid by Transnet to the Concessionaire, together

with interest on such amount calculated in accordance with **clause 39.2 (Late Payments)** forthwith after receipt by it of the replacement tax invoice(s) (in terms of the VAT Act).

**24. RAILWAY ACCESS ARRANGEMENTS AND OPERATOR INTERFACE**

24.1. It is recorded that –

24.1.1. Transnet will not in the ordinary course of events require access to the Branch Line in providing its freight rail services;

24.1.2. Transnet may require access to the Branch Line on a temporary basis following –

24.1.2.2. an occurrence or accident on Core Network; or

24.1.2.3. an occurrence or accident on the Branch Line to which it is lending assistance at the request of the Concessionaire, assuming Transnet is able to lend the assistance so requested of it at the time;

24.1.3. any access which Transnet may require onto the Branch Line is regulated in this Agreement and more fully in the Track Access Agreement.

24.2. It is recorded that the Concessionaire does require access to the Access Route, and that such Track Access is regulated in this Agreement and more fully in the Track Access Agreement.

24.3. It is further recorded that -

24.3.1. an operational interface on the Branch Line will arise between the operations of Transnet and the operations of the Concessionaire, as network operators (as that term is defined in the RSR Act) and that the operational safety aspects of such interface(s) is regulated in this Agreement and more fully in the Safety Interface Agreement;

24.3.2. the Concessionaire shall ensure, to the extent necessary in compliance with the RSR Act, that any operational safety interface(s) which may arise as between the Concessionaire and the Train O&M Provider in respect of the Branch Line, are regulated in an appropriate safety interface agreement; and

24.3.3. the Concessionaire shall ensure, to the extent necessary in compliance with the RSR Act, that any operational safety interface(s) which may arise as between the Concessionaire and private siding owners and/or operators

in respect of the Branch Line are regulated in one or more appropriate safety interface agreements.

25. **PERSONNEL**

- 25.1. No employees of Transnet are or will be transferable to the Concessionaire solely on account of the grant of the Concession and conclusion of this Agreement. The provisions of section 197 of the Labour Relations Act, 66 of 1995 shall not be invoked by the conclusion of this Agreement.
- 25.2. The Concessionaire shall be responsible for employing at its own cost all personnel required for the purposes of providing the Infrastructure Services and shall be responsible for all wages, salaries, entitlements to pension contributions and other benefits of such personnel. The Concessionaire shall be responsible for the selection, hiring, assigning and supervising of its personnel (including the obtaining, maintaining and, where necessary, renewing of work permits and any other necessary permissions, registrations, authorisations, licences and permits in relation to such personnel).
- 25.3. The Concessionaire shall employ and shall ensure that its contractors and their sub-contractors, if any, employ only such persons as are properly qualified, experienced and competent to perform the work assigned to them and, where appropriate, duly licensed.
- 25.4. The Concessionaire shall, subject to Laws and Applicable Requirements -
  - 25.4.1. ensure that there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of the Rail Freight and Passenger Service with the requisite level of skill and experience; and
  - 25.4.2. undertake regularly to train and assess all staff. The training shall include such training as is necessary for initial qualification and assessment of new staff and for periodic re-assessment of proficiency and competency for current staff. The training courses shall cover all tasks (inclusive of induction of staff on safety, health and environmental matters) which are required to perform duties assigned to staff and appropriate actions in any emergency that may be encountered while performing such duties.
- 25.5. The Concessionaire shall not at any time prior to the 3<sup>rd</sup> (third) anniversary of the Effective Date, either themselves or through the medium of an agent, persuade, induce, solicit, encourage or procure any employee (or officer) of Transnet who was directly engaged in the procurement process of the Concession to become employed by or interested in any manner whatsoever, with the Concessionaire.

26. **AUTHORITY TO ACT AS AGENT**

The Concessionaire shall not in any circumstances hold itself out as being the agent or in service of Transnet or as being authorised to enter into any contract on behalf of Transnet or in any other way to bind Transnet to the performance, variation, release or discharge of any obligation(s).

27. **HEALTH AND SAFETY**

27.1. **Health and Safety Management**

27.1.1. The Concessionaire, [its directors, management and staff] shall, subject to the RSR Act, be wholly responsible and accountable for the following –

- 27.1.1.1. developing and implementing an effective Safety Management System which establishes and maintains safe operating and maintenance standards and procedures and ensures that safety-critical and safety-related posts are staffed by suitably qualified, trained and experienced persons in accordance with the provisions and the objectives of its Safety Management System Report;
- 27.1.1.2. ensuring that all safety-related operational and maintenance information is promptly distributed and that personnel and sub-contractors are adequately briefed to ensure the safe operation of the Railway Services;
- 27.1.1.3. the safe provision, control and operation of the Infrastructure Services;
- 27.1.1.4. the safe provision and performance of Rail Freight and Passenger Service;
- 27.1.1.5. ensuring that the Concession Assets are maintained in a safe condition in accordance with its obligations under this Agreement;
- 27.1.1.6. complying with the lawful directions of the Safety Regulator, any Responsible Authority and, subject to this Agreement, of Transnet; and
- 27.1.1.7. discharging the Concessionaire's statutory health and safety duties and obligations under any Law and Applicable Requirements.

- 27.1.2. The Concessionaire shall implement at its own cost all alterations and improvements to the Railway Services and the Concession Assets which are required by any Applicable Requirements relating to health and safety and shall revise the Safety Management System and/or Safety Management System Report as may be required (at its own cost) by the Safety Regulator. The Concessionaire shall notify Transnet of any proposed change prior to the implementation of such change.

## **27.2. Safety Management System Report**

- 27.2.1. The Concessionaire shall be responsible for -
  - 27.2.1.1. preparing and submitting its Safety Management System Report for the performance of the Railway Services to the Safety Regulator in terms of section 23(3)(c) of the RSR Act; and
  - 27.2.1.2. obtaining the approval by the Safety Regulator of its Safety Management System Report for the performance of the Railway Services.
- 27.2.2. The Concessionaire shall comply with the accepted Safety Management System Report in performing all of its tasks and obligations under this Agreement.

## **27.3. Provision of Copies**

- 27.3.1. The Concessionaire shall at the reasonable request of Transnet and at no cost to Transnet provide (on each such request) up to two copies of each Safety Management System Report, including any updated material relating thereto and all versions thereof.
- 27.3.2. All such documents and information submitted under this clause 27.3 shall be held by Transnet subject to the provisions of clause 56 (*Confidentiality*).

## **27.4. Notification to Transnet of Failures and Emergencies**

- 27.4.1. The Concessionaire shall notify Transnet promptly (in a period not exceeding 24 (twenty four) hours) of any incident and accident involving material damage to the Concession Assets or component(s) thereof, and shall furnish a written report within 10 (ten) Business Days. A representative of Transnet shall be entitled to attend the site of the accident to examine any such reported damage to Concession Assets.
- 27.4.2. The written report shall include, but not be limited to, a statement of probable cause, chronology of events, immediate actions taken to mitigate causes and any ongoing investigations or considerations of further action.

27.4.3. The Concessionaire shall, at no cost to Transnet, and upon receipt thereof by the Concessionaire, forthwith provide a copy of–

27.4.3.1. any and all reports of a board of enquiry;

27.4.3.2. any incident investigation report; or

27.4.3.3. any joint examination report whether as joint between the Concessionaire and Transnet, or as between the Concessionaire and any third party(ies).

**27.5. Co-operation with Special Inquiries**

The Concessionaire and Transnet shall co-operate with any special inquiries or investigations carried out by the Safety Regulator pursuant to section 38 of the RSR Act or other Responsible Authority, as a result of accidents or incidents and shall promptly provide all information, resources and facilities within their control which are reasonably required for such inquiries or investigations. The Concessionaire and Transnet shall review the finding of and implement any recommendations arising from any such special inquiry or investigation.

**27.6. Changes to Procedures regarding Safety**

The Concessionaire acknowledges, subject to the Safety Interface Agreement that –

27.6.1. any change to procedures relating to safety shall be carried out pursuant to the Safety Management System;

27.6.2. any such change(s) will require the prior approval of the Safety Regulator; and

27.6.3. the Safety Regulator may (subject to the Applicable Requirements) impose such directions in relation to any procedures relating to safety as it sees fit and the Concessionaire will comply with any such directions.

**27.7. General Obligations under Occupational Health and Safety Act, 1993**

27.7.1. Without derogating from the provisions of the RSR Act, the Concessionaire shall, during the Concession Term, –

27.7.1.1. be responsible for the observance by itself and its the contractors of all applicable health and safety precautions necessary, whether required by Law or Good Industry Practice, for the protection of itself, its staff and contractors involved in providing the Railway Services and any third parties within the Railway Land;

- 27.7.1.2. maintain proof of compliance with the Occupational Health and Safety Act, 1993 and produce the same to Transnet within 24 (twenty four) hours of a request for same;
- 27.7.1.3. keep record of all accidents involving the Concessionaire's or its contractor's employees which ordinarily require reporting in accordance with the Occupational Health and Safety Act, 1993 which shall also be reported to Transnet within 3 (three) Business Days of the accident in question;
- 27.7.1.4. provide full co-operation and information if and when Transnet inquires into occupational health and safety issues concerning the Concessionaire, its contractors and any of their employees.

**27.8. Section 16 of the Occupational Health and Safety Act, 1993**

- 27.8.1. The Concessionaire as an employer in its own right shall ensure that the duties in relation to employers as contemplated in the Occupational Health and Safety Act, 1993 are properly discharged by itself and/or its chief executive officer in accordance with section 16(1) of the Occupational Health and Safety Act, 1993.
- 27.8.2. In accordance with section 16(2) of the Occupational Health and Safety Act, 1993 the Concessionaire may appoint competent persons who shall be trained on any occupational health and safety matters, including any provisions in the Occupational Health and Safety Act, 1993 pertinent to the Railway Services.

**27.9. Section 37(2) Undertaking**

- 27.9.1. Notwithstanding the provisions of **clause 27.7** (*General Obligations under the Occupational Health and Safety Act, 1993*) Transnet shall not be liable in respect of a breach of any of the provisions under the Occupational Health and Safety Act, 1993 in relation to the performance and rendering of the Railway Services by the Concessionaire, its contractors and any of their employees to the extent agreed upon by the respective parties to the Section 37(2) Undertaking given on the principles set out in **Schedule 13** (Section 37(2) Principles).
- 27.9.2. The Concessionaire shall provide the Section 37(2) Undertaking in respect of itself and each Applicable Requirement (as defined in **Schedule 13** (Section 37(2) Principles) prior to such entity entering the Railway Land and ensure that its contractors and their subcontractors comply with their obligations in respect thereof. It being recorded that the Concessionaire shall remain responsible for the compliance of each Applicable Requirement with the principles set out in **Schedule 13** (Section 37(2) Principles), including providing full co-operation and information if and

when Transnet requests same in respect of the occupational health and safety issues concerning any Applicable Requirement.

27.9.3. The Concessionaire acknowledges that the Section 37(2) Undertaking constitutes an agreement in terms of Section 37(2) of the Occupational Health and Safety Act, 1993 in terms of which, all responsibility (both civil and criminal) for health and safety matters in relation to the performance and rendering of the Railway Services by the Concessionaire and any of its employees, shall be that of the Concessionaire.

27.9.4. In accepting such responsibility as set out in **clause 27.9.3**, the Concessionaire shall indemnify Transnet against any loss, damage, injury or death, however caused, to the Concessionaire or to its contractors or any of their employees and shall hold Transnet harmless against all and any claims, losses, damages, liability, costs and expenses of whatsoever nature, which Transnet may, at any time sustain or incur arising out of the aforementioned circumstances; provided that such loss, damage, injury or death is not caused by the wilful action or omission or gross negligence of Transnet.

## **28. ENVIRONMENTAL MANAGEMENT**

### **28.1. Compliance with Environmental Law**

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

### **28.2. Concessionaire to Obtain and Maintain Environmental Consents**

The Concessionaire shall be responsible at its own expense for obtaining in a timely fashion and maintaining in full force and effect all necessary or appropriate authorisations, permits or licenses in relation to Environmental Law as may be required for provision of the Railway Services and undertaking of the Concession.

### **28.3. Prevention of Environmental Harm**

In performing its obligations under this Agreement and the Ancillary Agreements the Concessionaire shall at all times use all reasonable endeavours to prevent any damage to the environment (including air, water, soil, micro-organisms, plant and animal life, aesthetic and cultural properties, land, surface land and sub-surface land) or other interference with the rights of any adjoining landowners, tenants or occupiers or any Responsible Authority and the Concessionaire shall indemnify Transnet from



and against any and all liabilities, losses and costs and expenses suffered by Transnet as a result of claims or demands from third parties arising therefrom.

**28.4. Clean Up of Environmental Harm**

Any and all remedial action(s) and/or clean up of Environmental Harm on the Railway Land shall be undertaken by the Concessionaire at its cost and expense, pending determination of the cause of the Environmental Harm and liability therefor by any party (or parties), including, without limitation, Transnet.

**29. MAINTENANCE OF CONCESSION ASSETS**

**29.1. General**

For the avoidance of doubt, the Concessionaire shall entirely bear the risk and cost in relation to the loss of or damage to the Concession Assets during the Concession Term and shall maintain the Concession Assets to the level required to comply with –

- 29.1.1. this Agreement;
- 29.1.2. the Ancillary Agreements;
- 29.1.3. its Safety Permit(s);
- 29.1.4. its Safety Management System Report;
- 29.1.5. Environmental Management Plan (EMP) Regulations and other applicable environmental requirements;
- 29.1.6. the Transnet Engineering Standards (to be made available in the Data Room Information) and SANS 3000 as may be amended from time to time, to the extent applicable to the Railway Infrastructure taking into account the nature and extent of the Railway Services;
- 29.1.7. the future Rail Network minimum standard of 20 ton/axle read with clause 10.3.2 of this Agreement.

**29.2. Maintenance of Rail Infrastructure**

Notwithstanding the foregoing clause 29.1, if there are any Initial Rail Infrastructure Refurbishment Works to be undertaken by Transnet scheduled to be commissioned after the Effective Date, then –

- 29.2.1. prior to the commissioning of Initial Rail Infrastructure Refurbishment Works, the Concessionaire shall be responsible at its cost and risk to

maintain the Rail Infrastructure, excluding that portion(s) of the Rail Infrastructure which are subject to the Initial Rail Infrastructure Refurbishment Works, for which Transnet shall be responsible to maintain at Transnet's cost and risk; and

- 29.2.2. after commissioning of the Initial Rail Infrastructure Refurbishment Works, the Concessionaire shall be responsible, at its cost and risk, for the maintenance of all Rail Infrastructure, including the refurbished portion(s) of the Branch Line.

### 30. **B-BBEE AND SOCIO-ECONOMIC LOCAL DEVELOPMENT**

#### 30.1. **Broad-based Black Economic Empowerment**

- 30.1.1. It is recorded that the Broad-based Black Economic Empowerment rating of the Concessionaire as at -

- 30.1.1.1. the Signature Date is level [*insert rating*]; and

- 30.1.1.2. [*insert date*] will be level [*insert rating*].

- 30.1.2. The Concessionaire shall ensure that it complies with its obligations as required in **Schedule 8** (B-BBEE and SELD) of this Agreement..

- 30.1.3. The Shareholders shall not sell, dispose of or alienate any Equity if as a result of such sale, disposal or alienation the Equity effectively then held by Targeted Groups would be less than the minimum recorded in **Schedule 8** (B-BBEE and SELD). The Concessionaire shall not consent to or approve any such sale, disposal or alienation of Equity without Transnet prior written approval. For the purposes of this clause 30 and Schedule 22, 'Targeted Groups' refer inter alia to those persons who are Black women, Black youth or people living with disabilities, including any entities owned by persons who are Black women, Black youth or people living with disabilities as defined in the B-BBEE Act and regulations and codes promulgated and published in terms thereof.

- 30.1.4. A failure by the Concessionaire to comply with its obligations in **Schedule 8** (B-BBEE and SELD) may result in Concessionaire Default if the failure is not remedied within 6 (six) months of an initial warning notice issued by Transnet pursuant to **clause 1.29.25.1**.

- 30.1.5. The Concessionaire shall, within 30 (thirty) days after annual audited financial statements has been provided, prepare and submit to Transnet, in a form reasonably acceptable to Transnet, details of how it has complied with its obligations in **Schedule 8** (B-BBEE and SELD), and where it has failed to do so, the reasons therefor and the steps it proposes to take to

ensure that that failure(s) does not recur. This report may be furnished by the Concessionaire to Transnet on submission by the Concessionaire of its audited annual financial statements in terms of **clause 31.3**.

30.1.6. If the Concessionaire having undertaken, as at the Effective Date, to increase the Equity held by Targeted Groups and/or BEE partner(s) and fails within the time undertaken to achieve the increased Equity shareholding, then, in the absence of a remedy (or remedial programme) acceptable to Transnet, Transnet shall be entitled, at its sole discretion, to either –

30.1.6.1. treat the default as a Concessionaire Default and follow its rights pursuant to **clause 46** (*Concessionaire Default*); or.

30.1.6.2. exercise its option to call the designated Equity in the Concessionaire, in the manner provided for in **Schedule 22** (Transnet Call Option on Designated Equity).

## 30.2. **Socio-Economic and Local Development**

For the purposes of this clause 30.2 all references to 'socio-economic local development' shall have the import contemplated in **Schedule 8** (B-BBEE and SELD).

30.2.1. The Concessionaire shall ensure that it complies with its obligations in **Schedule 8** (B-BBEE and SELD) with respect to the following –

30.2.1.1. the Concessionaire shall at the conclusion of each Contract Year report to Transnet on the number of jobs created, and adherence to the socio-economic local development matrix contained in **Schedule 8** (B-BBEE and SELD);

30.2.1.2. the Concessionaire shall at the end of each Contract Year report to Transnet on the performance and progress of the local economic and socio-economic local development projects commissioned or established within the locality of the Branch Line as set out in **Schedule 8** (B-BBEE and SELD), and other deliverables of the economic projects stated in the socio-economic local development matrix in **Schedule 8** (B-BBEE and SELD);

30.2.1.3. the Concessionaire shall at the end of each Contract Year report to Transnet on the number of local black-owned enterprises that have benefited from its procurement, as well as the minimum standards on procurement as stipulated in **Schedule 8** (B-BBEE and SELD);

30.2.1.4. the Concessionaire shall at the end of each Contract Year report to Transnet on the number of individuals that have

received skills training, stating the areas of competence where such individuals were trained, and compliance thereof with the minimum performance standards outlined in **Schedule 8** (B-BBEE and SELD);

- 30.2.1.5. the Concessionaire shall at the end of each Contract Year report to Transnet on its performance with respect to community development, or social investment made to benefit the communities surrounding the Branch Line, in compliance with **Schedule 8** (B-BBEE and SELD).
- 30.2.2. A failure by the Concessionaire to comply with its obligations in **Schedule 8** (B-BBEE and SELD) may result in Concessionaire Default if the failure is not remedied within 6 (six) months of an initial warning notice issued by Transnet pursuant to **clause 1.29.25.1**.
- 30.2.3. The Concessionaire shall communicate to Transnet any areas where there have been structural changes that impede its delivery on the socio-economic and local economic development undertakings to enable the Parties to explore and consider alternative mechanisms or interventions for the Concessionaire to deliver on the socio-economic and local economic development undertakings.
- 30.2.4. Transnet shall be entitled, on an annual basis, as part of a relevant performance review contemplated in **clause 32.2** (*Performance Reviews*), to inspect any of the projects implemented by the Concessionaire for local economic development. Transnet may, at its election and cost, appoint an independent entity to conduct an assessment on any of the projects or deliverables of the Concessionaire in respect of socio-economic local development undertakings. The Concessionaire shall procure that the independent assessor conducting such review shall be provided with all such assistance and access to facilities, records and assets (including the provision of copies of documents) as they may reasonably require in order to discharge their audit function in a proper manner.

## **31. MAINTAINING OF RECORDS AND PROVISION OF INFORMATION**

- 31.1. The Concessionaire shall, for the duration of the Concession Term, maintain (which shall include the back-up, storage and safe custody) true, up to date and complete records –
  - 31.1.1. financial records and accounts pertaining its business in undertaking the Concession;
  - 31.1.2. relating to the operation and maintenance of the Railway Services;

- 31.1.3. relating to the maintenance, upgrade and refurbishment of the Concession Assets;
- 31.1.4. relating to the staff of the Concessionaire; and
- 31.1.5. relating to the health and safety of the operations of the Concessionaire.
- 31.2. The Concessionaire shall make available, and if requested by Transnet, provide copies of, on reasonable notice by Transnet and at reasonable times for inspection by Transnet, the records and accounts referred to in **clauses 31.1.1 to 31.1.3** (inclusive) for inspection by Transnet. Transnet shall be entitled to appoint one or more representatives to check, verify and take copies of any such records and accounts.
- 31.3. All records and accounts required to be maintained in accordance with this **clause 31** shall be held until the 3<sup>rd</sup> (third) anniversary of the Expiry Date, or the Termination Date, as the case may be.
- 31.4. The Concessionaire shall for the duration of the Concession Term -
  - 31.4.1. deliver to Transnet as soon as they become available (and in any event within 90 (ninety) days of the end of each Financial Year, copies of its financial statements for that period which shall contain an income statement and a balance sheet and a cash flow statement audited and certified by a firm of independent auditors; and
  - 31.4.2. prepare the financial statements referred to in this **clause 31.4.1** on the basis consistently applied in accordance with IFRS and those financial statements shall give a true and fair view of the results of its operations for the period in question and the state of its affairs as at the date to which the financial statements are made up and shall disclose or reserve against all the liabilities (actual or contingent) of the Concessionaire.
- 31.5. The Concessionaire shall for the duration of the Concession Term inform Transnet –
  - 31.5.1. of any change to the following information relating to it within 7 (seven) days of occurrence of any such change, namely -
    - 31.5.1.1. name;
    - 31.5.1.2. business address and registered office;
    - 31.5.1.3. directors and company secretary;
    - 31.5.1.4. auditors;
    - 31.5.1.5. trading name or names; and

- 31.5.1.6. any change in Shareholders, or any change in Control of any Shareholder;
- 31.5.2. any material change or proposed material change in its business (including the employment or the termination of employment of any key employees, the termination of any key contracts, any litigation or other dispute) which may have a material effect on its business and any material change in or restructuring of the capitalisation or financing of the Concessionaire. For the purposes of this **clause 31.5.2**, key employees refers to (i) the chief executive officer, (ii) the head of sales and marketing, (iii) the head of maintenance, (iv) the head of operations, and (v) the head of railway safety, the identities of whom are to be disclosed in **Schedule 6** (Concessionaire's Business Plan);
- 31.5.3. so far as possible before it may occur and, in any event, as soon as reasonably practicable after its occurrence, of any contravention by the Concessionaire of any provision of the Concession Documents.
- 31.6. The Concessionaire shall deliver, or procure the delivery of, such other information, records or documents relating to, or connected with, the Railway Services, the Concession Assets or the Concession Documents to Transnet, and within such period as Transnet may in each case reasonably require.
- 31.7. Without prejudice to the provisions of **clauses 31.1 and 31.2** Transnet and its representatives shall be permitted to inspect at any reasonable time the books, records and other material kept by or on behalf of the Concessionaire (insofar as the same are relevant to the Concession) in order to check or audit any information supplied to it under this Agreement or Ancillary Agreements, to monitor compliance with the Concessionaire's obligations under this Agreement, the Ancillary Agreements or to prepare Transnet's accounts (including statutory accounts). The Concessionaire shall make available to Transnet and its representatives such information (including copies of documents) and grant such access or procure the grant of such access (including to or from third parties) as they shall reasonably require in connection therewith. In the event that any such inspection reveals that information previously supplied to Transnet was in any material aspect inaccurate on the basis of information available to the Concessionaire at the time, the cost incurred by Transnet in respect of any such inspection shall be borne by the Concessionaire.
- 31.8. Any financial operational or other information data and records required to be provided or made available to Transnet shall be provided or made available in such form as Transnet may reasonably request (including in the form of a hard copy and/or electronic data) and, if so requested by Transnet, in such a form as may be compatible with Transnet's electronic data and records systems on the Effective Date as modified from time to time.

## 32. **REVIEWS AND PERFORMANCE MONITORING**

### 32.1. **Right of Audit**

Transnet or its representatives shall be entitled to audit compliance with any of the provisions of this Agreement or the Ancillary Agreements on a random basis on notice to the Concessionaire. Any such audit may involve the examination, inspection or testing of works, activities or assets on or off the Railway Infrastructure, or audits of safety, health and environmental performance. Transnet shall use reasonable endeavours to implement any such audit in such a way that the ability of the Concessionaire to operate the Railway Services is not materially and adversely affected. The Concessionaire shall procure that the representatives of Transnet conducting such an audit shall be provided with all such assistance and access to facilities, records and assets (including the provision of copies of documents) as they may reasonably require in order to discharge their audit function in a proper manner.

### 32.2. **Performance Reviews**

32.2.1. The Concessionaire, if so requested by Transnet shall attend meetings with Transnet or its representatives for the purpose of enabling Transnet to conduct periodic reviews of –

32.2.1.1. the financial and operational performance of the Concessionaire and the performance of its obligations under this Agreement or the Ancillary Agreements; or

32.2.1.2. the potential impact on the Concession, Transnet and/or the Concessionaire of any proposed rail policy or market structure changes, or the actual impact thereof when such rail policy come into effect, or on the occurrence of a market structure change.

Such meetings shall be held at reasonable times and no more frequently than at 12 (twelve) monthly intervals unless Transnet otherwise reasonably requests. The persons attending such meetings on behalf of the Concessionaire shall be of appropriate seniority and responsibility and shall include such directors or senior management of the Concessionaire as Transnet may reasonably require. The Concessionaire shall prepare and present reports at such meetings in respect of such aspects of its performance as Transnet may reasonably request.

32.2.2. The Concessionaire may, at reasonable times and on reasonable grounds, request Transnet to call a meeting for the purpose of discussing issues arising under this Agreement or one or more Concession Documents.

32.2.3. If the Parties reach agreement on how to improve performance of the Concession, or how to accommodate policy, regulatory or market changes, such agreement shall be reduced to writing to amend this Agreement as provided for in **clause 65 (Amendments)**.

### 32.3. Review of the Concession Agreement

- 32.3.1. The Parties shall undertake a comprehensive review of this Agreement every 5 (five) years, the first being within 6 (six) months of the 5<sup>th</sup> (fifth) anniversary of the Effective Date, and the second within 6 (six) months of the 10<sup>th</sup> (tenth) anniversary of the Effective Date, each being a "**Concession Agreement Review**".
- 32.3.2. Each of the Concession Agreement Reviews provided for in **clause 32.3** will –
- 32.3.2.1. consider and confirm the Concessionaire's delivery of the Railway Services, which may include reference to any business or operating plan of the Concessionaire;
  - 32.3.2.2. consider and confirm the Concessionaire's compliance with the terms of the Concession Documents;
  - 32.3.2.3. consider and confirm –
    - 32.3.2.3.1. the Concessionaire's delivery of infrastructure maintenance during the previous 5 (five) years;
    - 32.3.2.3.2. that the Concessionaire has regularly inspected and adequately maintained all bridges and culverts comprising part of the Permanent Way;
  - 32.3.2.4. review and agree the plans, if any, for infrastructure upgrades, if any proposed by the Concessionaire, and maintenance over the then ensuing 5 (five) year period;
  - 32.3.2.5. require confirmation from the Safety Regulator that the Safety Permit(s) of the Concessionaire remain(s) valid;
  - 32.3.2.6. consider the effect on the Concessionaire of any Discriminatory Change in Law;
  - 32.3.2.7. consider and confirm the Concessionaire's compliance with the provisions of **clause 30** (*B-BBEE and Socio-Economic Development*); and
  - 32.3.2.8. consider and confirm whether for these or any other reasons relating to the Concession it is recommended that any of the Concession Documents be varied.
- 32.3.3. The Parties may from time to time agree to undertake annual reviews of certain aspects of this Agreement or in any of the Ancillary Agreements. The Parties may in response to materially changed circumstances in the



rail or transport industry or macro-economic factors agree to meet to undertake a review of the impact of such circumstances, provided that such ad hoc responsive reviews shall have a frequency of no more than 1 (one) per Financial Year. Transnet reserves the right to schedule such specific annual reviews (as and when so agreed) and the ad hoc responsive meetings (as and when agreed) at a time which may result in Transnet meeting more than one branch line concessionaire at a time.

#### 32.4. Remedial Action

Without prejudice to any other right or remedy available to Transnet -

32.4.1. if at any time Transnet is of the opinion that the Concessionaire has failed to perform any of its obligations under the Concession Documents and such failure is capable of remedy, then Transnet may serve a notice on the Concessionaire requiring the Concessionaire (at its own cost and expense) to remedy such failure (and any damage resulting from such failure) and for the avoidance of doubt a failure to perform shall include a failure to remedy as required by this **clause 32.4** ("**Remedial Notice**"). Any such notice shall state on its face that it is a "Remedial Notice" and shall be signed by or on behalf of Transnet;

32.4.2. within 14 (fourteen) days of receipt of a Remedial Notice the Concessionaire shall put forward to Transnet a reasonable and appropriate programme for the remedying of such failure, such programme to specify in reasonable detail the manner in which such failure is proposed to be remedied and the latest date by which it is proposed that such failure shall be remedied. If the Parties fail to agree the programme within 7 (seven) days, the dispute may be referred by either Party for resolution under **clause 62.7** (*Dispute Resolution - Fast-track Dispute Resolution*).

#### 32.5. Warning Notices

Without prejudice to any other right or remedy available to Transnet, if at any time Transnet is of the opinion that the Concessionaire has failed to comply with a programme agreed or determined under **clause 32.4**, then Transnet may give written notice to the Concessionaire setting out in general terms the matter or matters giving rise to such notice and containing a reminder to the Concessionaire of the implications of such notice. Any such notice shall state on its face that it is a "**Remedial Programme Warning Notice**" and shall be signed by or on behalf of Transnet.

#### 32.6. Increased Monitoring

In the event of the Concessionaire receiving any Remedial Programme Warning Notice(s), Transnet may (without prejudice to any other right or remedy available to Transnet) by notice to the Concessionaire increase the level of its monitoring of the Concessionaire in a manner that is proportionate to the nature and extent of the

Concessionaire breaches until such time as the Concessionaire shall have demonstrated to the reasonable satisfaction of Transnet that it will perform and is capable of performing its obligations under the Concession Documents. The notice to the Concessionaire shall specify the additional measures to be taken by Transnet in monitoring the Concessionaire in response to the matters which led to such Remedial Programme Warning Notice being sent. The Concessionaire shall co-operate with and provide assistance in relation to such increased level of monitoring and shall compensate Transnet for all additional costs properly incurred by Transnet as a result of such increased level of monitoring.

### 33. **ASSET REGISTERS**

#### 33.1. **Rail Infrastructure**

33.1.1. It is recoded that, as the Signature Date, –

33.1.1.1. assets comprising the Rail Infrastructure are listed per asset class in Schedule 12 Part 1 (Rail Infrastructure Register – Register of each Asset Class); and

33.1.1.2. condition of each asset class comprising the Rail Infrastructure is set out in Schedule 12 Part 2 (Rail Infrastructure Register – Register of the Condition of each Asset Class),

(the "**Rail Infrastructure Register**").

33.1.2. The Concessionaire shall keep the Rail Infrastructure Register up to date at all times (no less than annually) such that it gives a true and accurate representation of those assets comprising the Rail Infrastructure assets from time to time. Any updated Rail Infrastructure Register prepared by the Concessionaire shall upon acceptance by Transnet be initialled and signed by the Parties as the replacement **Schedule 12** (Rail Infrastructure Register).

#### 33.2. **Moveable Rail Assets**

33.2.1. If there are any Moveable Rail Assets to be transferred to the Concessionaire pursuant to **clause 17.5** (*Moveable Rail Assets*), the Concessionaire is required under **clause 17.8** (*Moveable Rail Assets*) to prepare a register of Transferred Moveable Rail Assets ("**Transferred Moveable Rail Assets Register**"), being **Schedule 11 Part 3** (Register of Moveable Rail Assets - Agreed Form of Transferred Moveable Rail Assets Register).

33.2.2. The Concessionaire shall keep the Transferred Moveable Rail Assets Register up to date at all times (no less than annually) such that it gives a true and accurate representation of those assets comprising the

Transferred Moveable Rail Assets from time to time. Any updated Transferred Moveable Rail Assets Register prepared by the Concessionaire shall upon acceptance by Transnet be initialled and signed by the Parties as the replacement **Schedule 11 Part 3** (Register of Moveable Rail Assets - Agreed Form of Transferred Moveable Rail Assets Register).

#### 34. **RESTRICTIONS ON ACTIVITIES**

- 34.1. The Concessionaire shall have the obligation and the right to provide and operate the Concession during the Concession Term and shall not directly or indirectly, without the prior written consent of Transnet, which consent will not be unreasonably withheld, carry on any business or activity other than the provision and operation of the Concession save that nothing in this **clause 34** shall prevent the Concessionaire from holding any shares or securities in any limited liability company.
- 34.2. The Concessionaire shall ensure that every contract or other arrangement or transaction to which it may be party with any Affiliate for the supply of goods, the provision of services (**including the licensing of any Intellectual Property**) or otherwise, is on arm's length terms.
- 34.3. The Concessionaire shall ensure that any ancillary services and/or business procured will assist in expanding the migration of freight from road to rail in order to continuously increase rail activity and the development of the tourist, rail and related activities, which will include and not be limited to development of storage and ICT (Information Communication and Telecommunication) facilities.

#### 35. **SUB-CONTRACTING**

- 35.1. The Concessionaire shall, subject to **clause 35.2** be entitled to sub-contract or delegate all or part of the Rail Freight and Passenger Service or infrastructure maintenance elements of the Infrastructure Services, provided that any sub-contracting or delegation by the Concessionaire shall not relieve the Concessionaire from any of its obligations in respect of such Railway Services under this Agreement and the Ancillary Agreements.
- 35.2. The Concessionaire must obtain Transnet's prior written consent, which may be withheld or delayed in Transnet's absolute discretion, to any sub-contracting or delegation by the Concessionaire of all or part of the Infrastructure Services.
- 35.3. The Concessionaire shall retain full responsibility and liability for the work of sub-contractors. The Concessionaire shall ensure that all sub-contractors' personnel are suitably qualified, trained and experienced and have been fully familiarised with the Concessionaire's working methods and safety procedures.

- 35.4. The Concessionaire shall ensure, with respect to each contract or sub-contract for the procurement of goods and services hereunder, the contract or sub-contract is entered by the Concessionaire as principal and that Transnet has no obligations pursuant thereto.

36. **SECURITY INTERESTS AND CONCESSION ASSETS**

- 36.1. The Concessionaire shall not create or permit the creation or registration of any Security Interest over any or in respect of any of the Concession Assets.
- 36.2. The Concessionaire may, with the prior approval of Transnet which will not be unreasonably withheld or delayed, create or permit the encumbrance or registration of Security Interest of its rights and entitlements under this Agreement.
- 36.3. The Concessionaire may only deal with the Concession Assets for the purpose of undertaking the Concession. The Concessionaire may not sell, dispose, remove or otherwise deal with any Rail Infrastructure asset or assets, save with the prior written consent of Transnet.

37. **UTILITIES, AND LOCAL AUTHORITY RATES AND TAXES**

- 37.1. In respect of utilities, the Concessionaire shall –
- 37.1.1. make arrangement, at its cost, expense and in its own name (without reference to Transnet), directly with the relevant utility provider(s) and supplier(s) for the provision of any utility, utilities (including electricity, water and telecommunications) it requires for the undertaking of the Concession; and
- 37.1.2. promptly pay all amounts as may be chargeable by the utility provider or supplier for the provision of such utility. For the avoidance of doubt, the Concessionaire shall be liable for payment of all utilities used or consumed in respect of the Concession.
- 37.2. In respect of municipal services-
- 37.2.1. TFR shall be liable for payment of all Municipal Rates and Taxes up and until the Effective Date and in this regard TFR shall provide a clearance certificate from all relevant municipalities/local authorities to the Concessionaire in respect of payment of all relevant Municipal Rates and Taxes on the Effective Date or as soon as possible thereafter
- 37.2.2. The Concessionaire shall make arrangement, at its cost, expense and its own name (without reference to Transnet), directly with the local authority

or local authorities concerned for the provision and delivery of all municipal services which the Concessionaire may require to undertake the Concession;

- 37.2.3. make arrangement, at its cost, expense and in its own name (without reference to Transnet), directly with the local authority or local authorities concerned for the levying and payment of any assessment rates and taxes payable in respect of the Railway Land;
  - 37.2.4. promptly pay all assessment rates and taxes and such other amounts as may be chargeable by the local authority concerned. For the avoidance of doubt, the Concessionaire shall be liable for payment of all municipal services availed, used, consumed or delivered in respect of the Concession.
- 37.3. The Concessionaire shall, at the inception of this Agreement, as security for its obligations to pay any and all assessment rates and taxes in terms of clause 37.2, and such other amounts as may be chargeable by the local authority concerned, pay to Transnet within 60 (sixty) days an amount equal to the aggregate of the last 3 (three) months of municipal rates and charges in the preceding 12 (twelve) month period as the Municipal Rates and Taxes Deposit, or such amount as may be required to supplement the then existing Municipal Rates and Taxes Deposit to equal the required Municipal Rates and Taxes Deposit
- 37.4. On termination of the Agreement, for any reason whatsoever, the Concessionaire shall provide TFR with clearance certificates from all relevant municipalities/local authorities in respect of all relevant Municipal Rates and Taxes on date of termination or as soon as possible thereafter and the Concessionaire shall remain liable of all outstanding amounts due despite termination of the Concession.
- 37.5. On receipt of the clearance certificates from the Concessionaire Transnet undertakes to reimburse the Concessionaire with the Municipal Rates and Taxes Deposit.
- 37.6. If the Concessionaire is for any reason unable (after having taken all reasonable steps and endeavours) to make arrangement with any one or more local authorities for the Concessionaire to be registered at the municipal rates payer, then Transnet shall collaborate with the Concessionaire and the local authority or local authorities concerned to procure that –
- 37.6.1. all municipal accounts in the name of Transnet, with effect from the Effective Date, relate, for the purposes of this Agreement only to the Railway Land and the Branch Line Stations;
  - 37.6.2. all such municipal accounts are directed to Transnet, or collected by the Concessionaire on behalf of Transnet; and
  - 37.6.3. any deposit(s) payable to any local authority is duly paid in full by the Concessionaire, and if lawfully used at any time by the local authority

concerned, the required balance shall be promptly paid by the Concessionaire, proof of which is to be furnished within 7 (seven) days of payment to Transnet, in the form of a receipt of deposit by the local authority concerned.

## **PART V – FINANCE AND INSURANCE**

### **38. PAYMENTS**

- 38.1. It is recorded and agreed by the Parties that for the duration of this Agreement that -
- 38.1.1. a Concession fee is payable by the Concessionaire to Transnet for the grant of the Concession in terms of **clause 11.4** (*Grant of Concession*);
  - 38.1.2. no consideration, fee or charge is payable by the Concessionaire to Transnet for the transfer, if any, of the Transferred Moveable Rail Assets pursuant to **clause 17.5** (*Moveable Rail Assets*); and
  - 38.1.3. any and all revenues from the provision of the Railway Services (including freight charges) shall, as between Transnet and the Concessionaire, accrue to the Concessionaire at the sole risk and for the account of the Concessionaire.
  - 38.1.4. any and all revenues relating to access arrangements along the concessioned branch line shall, as between Transnet and the Concessionaire, accrue to the Concessionaire at the sole risk and for the account of Transnet.
- 38.2. When any amount becomes payable by one Party to the other under this Agreement, then subject to **clause 39** (*Administration of Payments*), **clause 40** (*Disputed Payments*) and **clause 50.4** (*Termination Payment – Set-Off*) such amount shall be paid without deduction or set-off on the due date in the manner provided for in **clause 39** (*Administration of Payments*).

### **39. ADMINISTRATION OF PAYMENTS**

#### **39.1. Currency, Payment Method and Bank Details**

Any payment(s) due by one Party to the other under this Agreement are to be made -

- 39.1.1. in Rand in South Africa; and
- 39.1.2. by electronic funds transfer to the bank account of the receiving Party. The bank account details of each Party are set out in **Schedule 15** (Bank Details of the Parties).

**39.2. Late Payments**

Each Party shall be entitled, without prejudice to any other right or remedy, to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date, calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment.

**40. DISPUTED PAYMENTS**

- 40.1. In the event that there is a dispute as to the amount of any payment due by one Party to the other, such dispute shall be resolved in accordance with **clause 62.7** (*Dispute Resolution– Fast-track Dispute Resolution*).
- 40.2. Any payment which was the subject of dispute shall become payable on the next Business Day following determination of the amount due and payable, subject to any interest which may be payable thereon in terms of **clause 39.2** (*Late Payments*).

**41. FINANCIAL COVENANTS**

**41.1. Municipal Rates and Taxes Deposit**

The Concessionaire shall at all times maintain the Municipal Rates and Taxes Deposit at the quantum required in **clause 37** (*Utilities, and Local Authority Rates and Taxes*) during the Concession Term and for 12 (twelve) months after the Expiry Date or the Termination Date, whichever is applicable. For the avoidance of doubt, maintaining the Municipal Rates and Taxes Deposit at the required quantum includes replenishing same to make up any shortfall occasioned by either a call thereon, or an upward adjustment due to indexation.

**41.2. Performance Bond**

- 41.2.1. The Concessionaire shall maintain at the requisite quantum the continuing validity and effectiveness of the Performance Bond during the Concession Term and for 12 (twelve) months after the Expiry Date or the Termination Date, whichever is applicable.
- 41.2.2. For the avoidance of doubt, maintaining the Performance Bond at the required quantum includes replenishing same to make up any shortfall occasioned by either a call thereon, or an upward adjustment due to indexation.

**41.3. Other Financial Covenants**

The Concessionaire shall not –

- 41.3.1. incur any liability or financial indebtedness except in the ordinary course of the business of providing and operating the Railway Services;
- 41.3.2. make any loans or grant any credit, or have or permit to subsist any loan or any credit, to any person (other than as permitted under **clause 41.3.3**) or to a director or employee in the ordinary course of its business or otherwise in the ordinary course of the business of providing the Railway Services;
- 41.3.3. create or permit to subsist any Security Interest over any of its assets and property or give any guarantee or indemnity to or for the benefit of any person or otherwise assume liability or become obliged (actually or contingently) in respect of any obligation of any other person, in each case other than in the ordinary course of the business of providing the Railway Services;
- 41.3.4. save as expressly permitted under the terms of this Agreement, create or acquire any subsidiary or make or have any investment in any other entity, except for the formation of a wholly-owned subsidiary comprising a limited liability company.

## **42. INSURANCE**

### **42.1. Insurance by the Concessionaire**

- 42.1.1. The Concessionaire shall take out and shall thereafter maintain and keep in full force and effect the insurances listed in **Schedule 14** (Concession Insurances) and any other insurances in respect of the Concession as may be required by Law (the "**Concession Insurances**") and as may commercially appropriate in accordance with the tenets and standards of prudent insurance practice, given the obligations it has assumed under this Agreement and the Ancillary Agreements and attendant level of risk arising out of such obligations. Each of the Concession Insurances listed in **Schedule 14** (Concession Insurances) must be taken out and become fully effective not later than the Effective Date, or other corresponding date set forth in **Schedule 14** (Concession Insurances). Each of the Concession Insurances (if any) not listed in **Schedule 14** (Concession Insurances) must be taken out and become fully effective not later than the earliest date required by Law or pursuant to Good Industry Practice.
- 42.1.2. Each of the insurances listed in **Schedule 14** (Concession Insurances) must be taken out with a recognised insurer in South Africa and on terms approved by Transnet.



- 42.1.3. The payment of the insurance premiums due and payable in respect of any Concession Insurance shall be the responsibility of the Concessionaire.
- 42.1.4. The Concessionaire shall procure that each of the Concession Insurances shall name Transnet as a co-insured for its separate interest.
- 42.1.5. If the Concessionaire fails or refuses for any reason to take out and maintain any Concession Insurance or fails to maintain any Concession Insurance, Transnet may do so at its election at the cost and expense of the Concessionaire.
- 42.1.6. No Party to this Agreement shall take any action or fail to take any action, or (in so far as is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under the policy applying to any Concession Insurance.
- 42.1.7. The Concessionaire undertakes that each Concession Insurance shall—
  - 42.1.7.2. name the Concessionaire as the insured and Transnet as co-insured for its separate interest;
  - 42.1.7.3. apply to each of the insured's as if a separate policy had been issued to each of them, other than in the event of exhaustion of the sum insured or the limit of indemnity;
  - 42.1.7.4. provide for non-vitiation protection in respect of any claim made by Transnet as co-insured. If non-vitiation protection is unavailable when any such insurance policy is first placed, then the Concessionaire shall procure same insofar as any non-vitiation protection subsequently becomes available prior to each renewal of the policy, or provide written confirmation promptly upon the renewal thereof as to the unavailability thereof to Transnet. If any non-vitiation protection subsequently becomes available, Transnet shall be entitled to require the Concessionaire to procure such protection and the costs thereof shall be borne by the Concessionaire;
  - 42.1.7.5. contain a provision waiving the insurers' subrogation rights against Transnet, officials, employees, staff, or agents of Transnet;
  - 42.1.7.6. provide for 90 (ninety) days' prior written notice of its cancellation, non-renewal or amendment to be given to Transnet by the underwriter of such Concession Insurance;
  - 42.1.7.7. contain a provision recording that such Concession Insurance is a primary insurance and shall not be brought into contribution by any other insurances; and

- 42.1.7.8. provide for payment of any proceeds under any of the material damage insurances included in the Concession Insurances to be made by the insurers to reinstate the damages goods, materials or facility.
- 42.1.8. The Concessionaire shall furnish Transnet, on request, with –
  - 42.1.8.2. true and complete copies of the policies of all the Concession Insurances (together with any other information reasonably requested by Transnet relating to such policies) and Transnet shall be entitled to inspect them during ordinary business hours; and
  - 42.1.8.3. satisfactory evidence that the premiums due and payable under any such policies have been paid and that the Concession Insurances are in full force and effect in accordance with the requirements of this **clause 42**.
- 42.1.9. The Concessionaire shall notify Transnet within 10 (ten) days after submitting a claim for an incident which occurred on the Concession Assets under any of the Concession Insurances, accompanied by full details of the event that gave rise to the claim.
- 42.1.10. The Concessionaire shall bear the risk of any shortfall in the proceeds of any Concession Insurance.
- 42.1.11. Notwithstanding anything contained to the contrary in this Agreement, it is specifically recorded that Transnet shall not be precluded from instituting a claim against the Concessionaire following an 'occurrence' (as that term is defined in the RSR Act) whether or not it is covered in terms of the insurance policies referred to in **Schedule 14** (Concession Insurances).
- 42.1.12. The Concessionaire shall, at its own cost and expense, appoint a risk surveyor from a reputable insurance company to determine the reasonably possible loss or damage which it could cause to property or assets, and the extent to which it could reasonably be held liable for causing the death of and/or injury to persons in general in the conduct of the business and in particular as a result of providing train services on the various routes, including but not limited to the risk of causing fire. This determination shall be shared with Transnet once complete who may, based on the outcome of the determination, require the Concessionaire to amend its insurance policies so as to insure that it is appropriately covered for the risks to which it is reasonably exposed.

## **42.2. Insurance by Transnet**

- 42.2.1. It is recorded that Transnet has and maintains a policy of insurance to cover risk of loss to the Rail Infrastructure together with resultant damage

to Rolling Stock for the events and on the conditions set out in **Schedule 14 Part G** (Concession Insurances – Transnet Policy Exclusions for Rail Infrastructure Insurance).

42.2.2. The Concessionaire undertakes –

42.2.2.1. at all times to abide by and observe the terms of **Schedule 14 Part G** (Concession Insurances – Transnet Policy Exclusions for Rail Infrastructure Insurance), as may be amended from time to time, and procure that all of its officers, employees, agents, contractors, subcontractors and their respective officers, employees, agents and contractors abide by and observe the terms of **Schedule 14 Part G** (Concession Insurances – Transnet Policy Exclusions for Rail Infrastructure Insurance);

42.2.2.2. to pay, on demand by and to Transnet, any excess or deductible payable by Transnet under any policy of insurance in **Schedule 14 Part G** (Concession Insurances – Transnet Policy Exclusions for Rail Infrastructure Insurance), upon any claim being made if the cause of the loss was occasioned (whether in whole or in part) by any conduct or omission of the Concessionaire or any agent, contractor or subcontractor of the Concessionaire; and

42.2.2.3. to take out and maintain such insurance policy(ies), on terms acceptable to Transnet, to insure any excess or deductible which may be payable under any policy of insurance set out in **Schedule 14 Part G** (Concession Insurances – Transnet Policy Exclusions for Rail Infrastructure Insurance).

#### **43. UNINSURABLE RISKS**

43.1. If a risk usually covered by the Concession Insurances in **Schedule 14** (Concession Insurances) becomes Uninsurable, then the Concessionaire shall notify Transnet within 14 (fourteen) days of the risk becoming Uninsurable or the Concessionaire becoming aware that such risk shall become Uninsurable on the renewal of any Concession Insurance. Such notice shall include the Concessionaire's proposals on what it reasonably considers appropriate to manage, mitigate and control the Uninsurable risk.

43.2. If the Parties agree, or it is determined in accordance with **clause 62** (*Dispute Resolution*), that –

43.2.1. the risk is Uninsurable;

43.2.2. the risk being Uninsurable is not caused by the actions or omissions of the Concessionaire or a contractor of the Concessionaire; and

43.2.3. other service providers carrying on businesses similar to the Concession would cease to do so as a result of such Uninsurability,

then the Parties shall meet to discuss and agree on the means by which the risk should be managed (including by way of self-insurance by either Transnet or the Concessionaire with an appropriate limit of liability). Pending determination thereof, the Uninsurable risk shall be at the risk of the Concessionaire.

43.3. The Concessionaire shall bear the onus of proving the circumstances in **clauses 43.2.1 to 43.2.3** (inclusive).

43.4. If the requirements of **clauses 43.1 and 43.2** are met -

43.4.1. this Agreement shall continue in force and effect;

43.4.2. on the occurrence of a Transnet owned risk (but only if that risk has continued to be Uninsurable) Transnet shall, at its election, either pay -

43.4.2.1. for the reinstatement of the damaged Concession Asset(s); or

43.4.2.2. the Termination Payment, if due, on the basis set out in **clause 48** (*Non Default Termination*) and this Agreement will terminate as if for Force Majeure;

43.4.3. on the occurrence of a Concessionaire owned risk (but only if that risk has continued to be Uninsurable) the Concessionaire shall reinstate the damaged or destroyed assets up to an amount agreed pursuant to **clause 43.2**, and if that amount is insufficient to complete the reinstatement, then the Concessionaire, at its election, shall either -

43.4.3.1. make available and pay the shortfall required to complete the reinstatement balance; or

43.4.3.2. terminate this Agreement for force majeure as contemplated in **clause 45** (*Force Majeure*), after paying to Transnet the total sum of the amount agreed to pursuant to **clause 43.2**, if same has not been applied if reinstatement.

43.5. Where a risk which was previously Uninsurable, ceases to be Uninsurable, the Concessionaire shall procure and maintain insurance in respect of that risk and the provisions of this Agreement shall apply in respect of that risk.

#### **44. FUNDING OF THE CONCESSIONAIRE**

- 44.1. The Concessionaire shall be responsible for raising all funding required for the Concession.
- 44.2. Save as expressly provided in this Agreement, Transnet shall have no responsibility for raising or providing funding for the Concession.

### **PART VI – FORCE MAJEURE, TERMINATION AND HAND-BACK**

#### **45. FORCE MAJEURE**

- 45.1. Subject to clauses 45.2 and 45.3 the Party claiming relief shall be relieved from liability under this Agreement to the extent that by reason of the Force Majeure event it is not able to perform all, or a material part of its obligations under this Agreement.
- 45.2. Where a Party is (or claims to be) affected by an event of Force Majeure -
  - 45.2.1. it shall take all reasonable steps to mitigate the consequences of such an event upon the performance of its obligations under this Agreement, resume performance of its obligations affected by the event of Force Majeure as soon as practicable and use all reasonable endeavours to remedy its failure to perform;
  - 45.2.2. it shall not be relieved from liability under this Agreement to the extent that it is not able to perform, or has not in fact performed, its obligations under this Agreement due to its failure to comply with its obligations under clause 45.2.1; and
  - 45.2.3. if the event of Force Majeure has caused damage to any Transferred Moveable Rail Assets or other assets of the Concessionaire used in the provision of the Railway Services, then the Concessionaire shall at its cost undertake all repairs, reinstatement and rectification works required to make good any damage to any Transferred Moveable Rail Assets or other Concessionaire asset, which the Concessionaire chooses or is required to undertake (having regard to its obligations under the Concession Documents).
- 45.3. The Party claiming relief shall serve written notice on the other Party within 5 (five) Business Days of it becoming aware of the relevant event of Force Majeure. Such initial notice shall give sufficient details to identify the particular event claimed to be an event of Force Majeure.
- 45.4. A subsequent written notice shall be served by the Party claiming relief on the other Party within a further 30 (thirty) days, or such longer period as may be agreed between the Parties, which shall contain such relevant information relating to the failure to perform (or delay in performing) as is available, including (without limitation) the effect of the event of Force Majeure on the ability of the Party to perform, the

action being taken in accordance with **clause 45.2**, the date of the occurrence of the event of Force Majeure and an estimate of the period of time required to overcome it (and/or its effects).

- 45.5. If the Party receiving the claim for relief disputes either the occurrence of the Force Majeure, or the effect thereof, or the claiming Party's estimate of the period of time required to overcome it (and/or its effects), the disputing Party shall, within 15 (fifteen) days of the **clause 45.4** notice, notify the claiming Party of its objection stating the grounds on which it disputes such claim. If neither party retracts its claiming or disputing notice within 15 (fifteen) days of service of the disputing notice, such dispute(s) shall be determined in accordance with **clause 62** (*Dispute Resolution*).
- 45.6. The Party claiming relief shall notify the other Party as soon as the consequences of the event of Force Majeure have ceased and when performance of its affected obligations can be resumed.
- 45.7. If, following the issue of any notice referred to in **clause 45.4**, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.
- 45.8. Subject to **clause 48** (*Non Default Termination*) the Concessionaire's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this **clause 45**.
- 45.9. The Parties shall endeavour to agree any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure, including extension of the Concession Term. **Clause 62** (*Dispute Resolution*) shall not apply to a failure of Transnet and the Concessionaire to reach agreement pursuant to this **clause 45.9**.
- 45.10. If, Parties have failed to reach agreement on any modification to this Agreement pursuant to **clause 45.9** within 180 (one hundred and eighty) days of the **clause 45.4** notification date, either Transnet or the Concessionaire may at any time afterwards terminate this Agreement on 30 (thirty) days written notice to the other Party to that effect, provided always that the effects of the relevant events of Force Majeure continue to prevent the Party affected from performing any material obligation under this Agreement.

#### **46. CONCESSIONAIRE DEFAULT**

##### **46.1. Notification of Concessionaire Default**

As soon as reasonably practicable on, and, in any event, within 2 (two) days of, it becoming aware of the occurrence of a Concessionaire Default or an event which is

likely to result in the occurrence of a Concessionaire Default, the Concessionaire shall notify Transnet of such Concessionaire Default or potential Concessionaire Default and will provide Transnet with full details of any steps which it is taking, or is considering taking, in order to remedy or mitigate the effect of such Concessionaire Default or potential Concessionaire Default or otherwise in connection therewith. The Concessionaire shall take such action or steps as Transnet may reasonably require in order to remedy or mitigate the effect of any Concessionaire Default or potential Concessionaire Default.

#### **46.2. Remedies of Concessionaire Default**

46.2.1. Upon the occurrence of a Concessionaire Default, Transnet may at its option and without prejudice to any of its other rights or remedies and to any rights of action which shall accrue or shall have already accrued to Transnet do any or all of the following –

- 46.2.1.1. forthwith issue a Concession Termination Notice to the Concessionaire terminating this Agreement, in respect of any Concessionaire Default which is not capable of remedy, or for which the Concessionaire Default in question was not remedied or cured to the satisfaction of Transnet;
- 46.2.1.2. suspend payment of any payment(s) that may be due from Transnet to the Concessionaire under this Agreement or otherwise howsoever arising;
- 46.2.1.3. without determining this Agreement, by notice in writing having immediate effect, suspend performance by the Concessionaire of part only of the functions to be performed by it under the Concession Documents until such time as the Concessionaire shall have demonstrated to the reasonable satisfaction of Transnet that it will perform and is capable of performing the Concession obligations and thereafter itself to perform or procure a third party to perform such part of the functions for such period;
- 46.2.1.4. the Concessionaire acknowledging and agreeing that the occurrence of a Concessionaire Default shall go to the root of this Agreement and accordingly shall be a breach of a condition which Transnet shall be entitled (without prejudice to any of its other rights hereunder or under any of the other Concession Documents) to treat as a repudiation by the Concessionaire of this Agreement, give a Concession Termination Notice to the Concessionaire to terminate this Agreement; save that Transnet must provide in any Concession Termination Notice pursuant to **clause 46.2.1.4** such period or periods within which the Concessionaire must

rectify the circumstances giving rise to the notice or otherwise cure the relevant Concessionaire Default, and upon such rectification or curing to the reasonable satisfaction of Transnet, the notice shall lapse.

#### **46.3. Transactional Costs**

46.3.1. It is hereby recorded and agreed that:-

46.3.1.1. The negotiations prior to the Concession have required commitment by Transnet of significant financial, legal and other resources in order to effect the realisation of the Concession;

46.3.1.2. As the resources committed are an indispensable part of the success of the Concession the Concessionaire undertakes to, immediately upon conclusion of this Agreement and pursuant to this clause 46.3, make a contribution towards the aforementioned transactional costs in the amount of R1 000 000.00 (one million) to Transnet;

46.3.1.3. The Parties further agree that should they elect to do so, payments of the amount referred to in clause 46.3.1.2 above may be spaced over an agreed period within which payments of the amount may be made either on a monthly or annual basis, provided that this is agreed to in writing in accordance with the provisions of this Agreement.

#### **46.4. Transnet Remedies not Exhaustive**

The rights of Transnet under this clause 46 are in addition and without prejudice to any other right Transnet may have to obtain redress or relief available at Law (whether by way of damages, specific performance or otherwise) on account of the acts or omissions of the Concessionaire, whether pursuant to this Agreement or any of the Concession Documents, or otherwise.

#### **46.5. Capital Reimbursement**

46.5.1. For the avoidance of doubt, upon termination of this Agreement pursuant to clause 46.2.1.1 or clause 46.2.1.4 the Concessionaire shall not be entitled to compensation in accordance with clause 50 (*Termination Payment*).

46.5.2. Subsequent to termination of this Agreement as contemplated in this clause 46.5, the Concessionaire shall be entitled to a Capital Reimbursement Fee in the event of a substantial increase in the value



of the Railway Infrastructure due to the capital investment made by the Concessionaire for upgrades to the Railway Infrastructure.

46.5.3. Transnet shall pay the Capital Reimbursement Fee to the Concessionaire within 60 (sixty) days after receipt of an invoice from the Concessionaire in respect hereof.

#### 46.6. **Facilitation of orderly Hand-back or Handover**

It is acknowledged that termination of this Agreement by Transnet will be carried out in conjunction with the exercise by Transnet of its powers in, and the obligations of the Concessionaire under, this Agreement dealing with termination and hand-back or handover of the Concession, and accordingly Transnet may in its absolute discretion extend any of the time periods contemplated in this clause 46 or in a notice issued under this clause 46, or otherwise alter any of the terms of such notice, to facilitate the orderly termination and hand-back of the Concession to Transnet or orderly termination and handover of the Concession to a succeeding concessionaire, as provided for in Schedule 19 (Hand-back Procedure).

#### 46.7. **Demands under the Performance Bond**

Transnet shall be entitled to issue a demand notice to the bond provider under the Performance Bond for, and to apply all amounts obtained thereunder in or towards satisfaction of -

- 46.7.1. such loss as Transnet may have incurred or suffered or may be reasonably likely to incur or suffer as a result of the Concessionaire's failure to comply with any obligation under this Agreement, or any Concession Document;
- 46.7.2. such amount as the Concessionaire is responsible for indemnifying Transnet against, and/or holding harmless Transnet from, and/or pursuant to, any obligation under this Agreement or any Concession Document;
- 46.7.3. such amount as the Concessionaire has failed to pay to Transnet or a third party;
- 46.7.4. liquidated damages pursuant to clause 46.3;
- 46.7.5. such other damages to which Transnet is or may be reasonably likely to be entitled as a result of the Concessionaire's failure to comply with any obligation under this Agreement, or any Concession Document.

## **47. TRANSNET DEFAULT**

### **47.1. Notification of Transnet Default**

On the occurrence of a Transnet Default, or within 10 (ten) Business Days after the Concessionaire becomes aware of same, the Concessionaire must serve notice on Transnet of the occurrence (and specifying details) of such Transnet Default.

### **47.2. Remedies for Transnet Default**

47.2.1. If the relevant Transnet Default has not been remedied or rectified within 60 (sixty) Business Days of the notice referred to in **clause 47.1** being delivered to Transnet, the Concessionaire may serve a Concession Termination Notice on Transnet terminating this Agreement with immediate effect.

47.2.2. The Concessionaire shall not exercise or purport to exercise any rights to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly provided for herein.

### **47.3. Termination Payment**

Upon termination of this Agreement pursuant to **clause 47.2.1** the Concessionaire shall be entitled to compensation in accordance with **clause 50** (*Termination Payment*).

### **47.4. Facilitation of orderly Hand-back or Handover**

It is acknowledged that termination of this Agreement by the Concessionaire is subject to the exercise by Transnet of its powers in, and the obligations of the Concessionaire under, this Agreement dealing with termination and hand-back or handover of the Concession, and accordingly Transnet may in its absolute discretion extend any of the time periods contemplated in this **clause 47** or in a notice issued under this **clause 47**, or otherwise alter any of the terms of notice, to facilitate the orderly termination and hand-back of the Concession to Transnet or orderly termination and handover of the Concession to a succeeding concessionaire, as provided for in **Schedule 19** (Hand-back Procedure).

## **48. NON DEFAULT TERMINATION**

### **48.1. Expiry of the Concession Term**

48.1.1. This Agreement shall terminate automatically on the Expiry Date unless it shall have previously been terminated in accordance with the provisions of this Agreement or any Concession Document.

- 48.1.2. In the event of automatic termination of the Concession subject to the Concession Documents and upon expiry of the Concession Term, the Concessionaire shall not be entitled to a Termination Payment unless otherwise agreed with Transnet.

**48.2. Termination for Force Majeure**

- 48.2.1. In the circumstances referred to in **clause 45.10** (*Force Majeure*) and so long as such circumstances continue, any party may terminate the Concession Documents by giving a Concession Termination Notice to the other Party on not less than 30 (thirty) days notice.
- 48.2.2. In the event of any termination pursuant to **clause 48.2.1**, the Concessionaire shall not be entitled to a Termination Payment in accordance with **clause 50** (*Termination Payment*), but shall be entitled to a Capital Reimbursement Fee.

**48.3. Termination for Discriminatory Change in Law**

- 48.3.1. If a Discriminatory Change in Law comes into effect then, following consultation to reach a solution acceptable to all Parties of not less than 90 (ninety) days, any Party may terminate this Agreement and the Concession Documents by giving a Concession Termination Notice to the other Party of not less than 30 (thirty) days' notice.
- 48.3.2. In the event of any termination pursuant to **clause 48.3.1** the Concessionaire shall not be entitled to a Termination Payment in accordance with **clause 50** (*Termination Payment*), but shall be entitled to a Capital Reimbursement Fee.

**48.4. Termination for Branch Line Reclassification**

- 48.4.1. Transnet shall be entitled to terminate the Concession, in whole or in part and from time to time in the latter instance, for sound operational reasons requiring it to use the Branch Line as part of the Core Network for any extended period, by reclassifying the Branch Line, or any portion thereof as Core Network (or main network), or any other classification which is not branch line.
- 48.4.2. If Transnet reclassifies the Branch Line in terms of **clause 48.4.1** such that it prevents the Concessionaire from being able to provide and render the Railway Services or to undertake the Concession, then either Party may terminate this Agreement by giving a Concession Termination Notice to the other Party on not less than 30 (thirty) days' notice.

48.4.3. In the event of any termination pursuant to **clause 48.4.2** the Concessionaire shall be entitled to a Termination Payment in accordance with **clause 50** (*Termination Payment*).

**48.5. Facilitation of orderly Hand-back or Handover**

It is acknowledged that termination of this Agreement by the Concessionaire is subject to the exercise by Transnet of its powers in, and the obligations of the Concessionaire under, this Agreement dealing with termination and hand-back or handover of the Concession, and accordingly Transnet may in its absolute discretion extend any of the time periods contemplated in this **clause 48** or in a notice issued under this **clause 48**, or otherwise alter any of the terms of notice, to facilitate the orderly termination and hand-back of the Concession to Transnet or orderly termination and handover of the Concession to a succeeding concessionaire, as provided for in **Schedule 19** (Hand-back Procedure).

**49. EFFECT OF TERMINATION**

**49.1. Termination of this Agreement**

49.1.1. Subject to **clauses 46.6, 47.4 and 48.5** (each, *Facilitation of orderly Hand-back or Handover*), if Transnet or the Concessionaire serves a Concession Termination Notice, this Agreement shall end on the date specified in that notice, and the grant by Transnet of the Concession shall terminate on that date.

49.1.2. Upon termination of this Agreement, it is acknowledged that as and from the Concession Termination Date the Concession rights granted and delegated to the Concessionaire under **clause 11** (*Grant of the Concession*) will each without any further action required on the part of Transnet or the Concessionaire entirely re-vest in and return to Transnet to the complete exclusion of the Concessionaire.

**49.2. No Prejudice to Accrued Rights and Obligations**

49.2.1. Save as otherwise expressly provided in the Concession Documents –

49.2.1.1. termination of this Agreement shall be without prejudice to any accrued rights and obligations under this Agreement as at the Concession Termination Date (including without limitation the right of either party to recover damages from the other where the termination has arisen as a result of a Concessionaire Default or an Transnet Default (as the case may be); and

49.2.1.2. termination of this Agreement shall not affect the continuing rights and obligations of the Concessionaire and Transnet

under clauses 50 (*Termination Payment*), 56 (*Confidentiality*) and this clause 49.2 or under any other clause which is expressed to survive termination.

Save as provided in this clause 49.2, all rights and obligations of Transnet and the Concessionaire under this Agreement shall cease and be of no further force and effect upon termination of this Agreement.

- 49.2.2. Notwithstanding any breach of this Agreement by the Concessionaire or Transnet and without prejudice to any other rights which the other of them may have in relation thereto, the other Party may elect to continue to treat this Agreement as in full force and effect and to enforce their rights hereunder, and failure of either Party to exercise any right hereunder including any right to terminate this Agreement and any right to claim damages shall not be deemed a waiver of such right for any continuing or subsequent breach.
- 49.2.3. Save as expressly provided in clause 46 (*Concessionaire Default*), clause 47 (*Transnet Default*), clause 48 (*Non-default termination*), this clause 49 and clause 50 (*Termination Payment*), the Concessionaire shall have no claim for compensation or otherwise as a result of termination of this Agreement.

## **50. TERMINATION PAYMENT**

### **50.1. Determination of the Termination Payment**

The quantum of the Termination Payment shall be determined in accordance with the formula set out in the definition of 'Termination Payment'.

### **50.2. Situations in which a Termination Payment is Payable**

- 50.2.1. A Termination Payment will be payable in the following situations where this Agreement is terminated (and in no other situations) –
  - 50.2.1.1. pursuant to clause 47.3 (*Transnet Default*) due to Transnet Default; or
  - 50.2.1.2. pursuant to clause 48.4 (*Termination for Branch Line Reclassification*) for a reclassification of the Branch Line by Transnet.
- 50.2.2. For the avoidance of doubt, no other Termination Payment will be payable on account of the termination of this Agreement.

### **50.3. Payment of Termination Payment**

50.3.1. Subject to clause 50.3.2, within 180 (one hundred and eighty) days of agreement or determination of the Termination Payment in accordance with clause 50.1, Transnet shall pay to the Concessionaire in the circumstances identified in clause 50.2 (*Situations in which a Termination Payment is Payable*) the amount of the Termination Payment.

50.3.2. Notwithstanding clause 50.3.1, Transnet is entitled to withhold payment of the Termination Payment until the Concessionaire has fully relinquished possession of the Concession Assets and the Transferred Moveable Rail Assets, if any, on such date and in such manner as Transnet has directed and no interest shall be payable by Transnet until possession of the Concession Assets and the Transferred Moveable Rail Assets, if any, have been fully relinquished.

#### 50.4. **Set-Off**

Transnet shall, notwithstanding any other provision in this Agreement or in any one or more of the Ancillary Agreements, be entitled to set off against any Termination Payment payable by it under this clause 50 any payments which may be payable or due to it and any other amount payable to or due to it under this Agreement, any Concession Document or otherwise howsoever arising.

#### 50.5. **Limitation of Liability**

50.5.1. Subject to clause 50.5.2, any determination pursuant to this clause 50 as to the amount and form of the Termination Payment payable by Transnet shall represent the sole entitlement of the Concessionaire to compensation in relation to the relevant termination of one or more of the Concession Documents and, save as provided in clause 50.5.2, the Concessionaire shall have no other rights or remedies and Transnet shall have no other liability to the Concessionaire whether under this Agreement, any Concession Document or at Law, in respect of such termination.

50.5.2. This clause 50 shall not preclude the Concessionaire from seeking redress at Law for any failure by Transnet to pay any amount agreed or determined to be due and payable by Transnet to the Concessionaire under this clause 50 or in respect of any accrued rights of the Concessionaire as at the Concession Termination Date (as set out in clause 49.2 (*No Prejudice to Accrued Rights and Obligations*)). The Concessionaire shall have no right to make any further claims for compensation ensuing from the relevant termination of this Agreement or one or more of the Concession Documents pursuant to this clause 50.

### 51. **HAND-BACK OF CONCESSION**

#### 51.1. **Concessionaire Acknowledgement**

The Concessionaire acknowledges that Transnet may wish, at or before the expiry of the Concession Term, to invite persons, who if it is at the expiry of the Concession Term may include the Concessionaire, to tender for, the right to provide or operate all or part of the Concession. The Concessionaire accordingly accepts and agrees to the restrictions and obligations imposed on it under this **Part VI of this Agreement**.

#### **51.2. Preparation for New Tender**

If Transnet elects, as entitled to under this Agreement, to tender the Concession prior to the Expiry Date, then the Concessionaire, if and to the extent so requested by Transnet, shall provide Transnet and its representatives and advisers with reasonable access to its employees, contractors and sub-contractors of any tier and the books, records and other material kept by or on behalf of the Concessionaire or its contractors of any tier in connection with the Concession in relation to operational information pertaining to, inter alia, freight volumes, customer information, fleet details, asset registers and asset condition, for the purpose of such representatives and advisers preparing any reports or other documents in connection with any invitation to potential succeeding Concession operators to tender for the right and obligation to provide or operate all or part of the Concession. The Parties record, however, that no access contemplated in this clause shall entitle Transnet or any prospective tenderer to have access to or allow access to any information of the Concessionaire that may be confidential in nature. The Concessionaire shall make available to Transnet and its representatives and advisers such information, and shall assist in the verification of such information (including the provision of answers to verification questions), as they shall reasonably require in connection with such exercise. In addition, the Concessionaire shall co-operate with any potential succeeding Concession operators and allow them reasonable access to the Railway Land and Rail Infrastructure for the purposes of due diligence.

#### **51.3. Hand-back of Concession Assets**

51.3.1. On termination of this Agreement in accordance with its terms for any reason the Concessionaire shall hand over to Transnet or its nominee, free from all encumbrances, the Concession Assets which shall be in the state required in accordance with **Schedule 19** (Hand-back Procedure).<sup>4</sup>

51.3.2. The Concessionaire shall ensure that provision is made in all contracts of any description whatsoever that it enters into, other than employment contracts, to ensure that Transnet or its nominee will be in a position to take cession and assignment of any one, more all such contracts.

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<sup>4</sup> The proposition is that Schedule 19 be developed by TFR from the Concessionaire's proposal, which will describe the condition that each Concession Asset is to be handed back in, and the practical procedure under which the Concession Assets will be handed back to Transnet.

## **52. ASSOCIATED OBLIGATIONS ON TERMINATION OF THE CONCESSION**

### **52.1. Assistance in Securing Continuity**

In order to facilitate the continuity of the Railway Services on expiry of the Concession Term the Concessionaire shall take such steps, both before and after the expiry of the Concession Term, as Transnet may reasonably require, to assist and advise any succeeding Concession operator in providing and operating the Railway Services. In particular, the Concessionaire shall provide any succeeding Concession operator with such records and information relating to or connected with the Railway Services as Transnet may reasonably request (other than confidential financial information but including all relevant records relating to the Concessionaire's employees). The Concessionaire undertakes to not in any way obstruct and interfere with Transnet's handover of the Concession to any succeeding Concession operator.

### **52.2. Access**

The Concessionaire hereby authorises Transnet and its representatives to have such access as it may reasonably request on the expiry of the Concession Term to such property as it may own, lease or operate at such time, for the purpose of facilitating the continuity of the Railway Services.

## **PART VII – FURTHER GENERAL PROVISIONS**

## **53. COMPLIANCE WITH APPLICABLE REQUIREMENTS**

- 53.1. The Concessionaire and any contractor or sub-contractor shall comply with all Applicable Requirements pertaining to any obligation contemplated in this Agreement. It is recorded that a failure or refusal by any contractor or sub-contractor appointed by the Concessionaire shall be deemed to be a failure or refusal by the Concessionaire to comply with the relevant Applicable Requirement(s).
- 53.2. Transnet shall be entitled, at intervals no shorter than 12 (twelve) months each, to require the Concessionaire to furnish written proof or confirmation of compliance with Applicable Requirements by the Concessionaire, its contractors and subcontractors.
- 53.3. The Concessionaire shall ensure that it at all times maintains a valid tax clearance certificate of good standing issued by the tax authorities in South Africa, being the South African Revenue Service as at the Signature Date. The Concessionaire shall on each anniversary of the Signature Date furnish Transnet with a valid tax clearance certificate.



## **54. EXCLUSION OF LIABILITY**

### **54.1. Liability with Respect to Concessionaire Staff and Third Parties**

The Concessionaire hereby acknowledges that Transnet will not be responsible for the actions of the Concessionaire, or any Affiliate of the Concessionaire and that, otherwise than as expressly provided in this Agreement, the Concessionaire will provide and operate the Railway Services at its own cost and risk without recourse to Transnet or government funds or guarantees on account of this Agreement. The Concessionaire accordingly holds Transnet fully protected and indemnified in respect of all losses, liabilities, costs, charges, expenses, actions, proceedings, claims or demands incurred by or made on Transnet in connection with any death, personal injury, loss or damage suffered by any employee of the Concessionaire or by any third party using or affected by the Railway Services caused or contributed to by the Concessionaire, any Affiliate of the Concessionaire, their employees, agents, contractors or sub-contractors.

### **54.2. Liability of Transnet**

Neither Transnet nor any of its officers, agents or employees shall in any circumstances be liable to the Concessionaire for any loss or damage caused by the negligent exercise of any powers reserved to Transnet under this Agreement, except to the extent that such negligence also constitutes a breach of an obligation of Transnet under this Agreement. **The Concessionaire may not recover from Transnet or any of his officers, agents, or employees any amount in respect of loss of profit or other consequential loss.**

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

### **55.1. Value Added Tax**

Any amount(s) due, or invoice or other request for payment of monies due by the one Party to the other under this Agreement or under any one or more of the Ancillary Agreements shall comply with the requirements of the Value Added Tax Act, 89 of 1991 and be deemed to be exclusive of value added tax, unless otherwise stated.

### **55.2. Other Taxes and Imposts**

55.2.1. Each Party shall without reference to the other Party comply with all tax laws of the South Africa and any rulings and directive of a competent tax authority in South Africa. No Party shall be required to gross up any payment that may be due by one Party to the other under this Agreement, or otherwise.

55.2.2. All stamp, documentary, registration or other like duties or taxes, including any penalties, additions, fines, surcharges or interest relating thereto, which are imposed or chargeable on or in connection with any of the Concession Documents in South Africa shall be promptly paid by the Concessionaire provided that Transnet shall be entitled (but not obliged) to pay any such duties or taxes (whether or not they are its primary responsibility), whereupon the Concessionaire shall on demand indemnify Transnet against those duties or taxes and against all costs and expenses so incurred.

55.3. **Set-Off**

Save as otherwise provided in this Agreement, all sums payable by any Party under this Agreement shall be paid free and clear of any deductions, withholdings, set-offs or counter-claims, save only as may be required by law or as expressly permitted or required under this Agreement or relevant Ancillary Agreement.

56. **CONFIDENTIALITY**

56.1. For purposes of this **clause 56**, “**Confidential Information**” means any information which is agreed by the Parties at the time of conclusion of this Agreement or before it is provided to the recipient Party to be commercially sensitive.

56.2. Each Party shall keep all Confidential Information of the other Party confidential while this Agreement remains in force and for as long as that information remains confidential. Each Party shall also use reasonable endeavours to prevent its employees, agents and contractors from making any disclosure to any person of any Confidential Information of the other Party while this Agreement remains in force and for as long as that information remains confidential.

56.3. **Clause 56.2** shall not apply to -

56.3.1. any disclosure of information that is reasonably required by persons engaged in the performance of the restricted Party's obligations under this Agreement;

56.3.2. any matter which a Party can reasonably demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this **clause 56**;

56.3.3. any disclosure as part of any attempt to resolve a dispute in accordance with **clause 62** (*Dispute Resolution*);

56.3.4. any disclosure which is required by any Law, or the rules of any stock exchange or governmental or regulatory authority having the force of law;

- 56.3.5. any disclosure of information that is already lawfully in the possession of the receiving Party prior its disclosure by the disclosing Party;
  - 56.3.6. any provision of information to the advisors of the receiving Party, or to any funders or potential funders, but in the latter case, only to the extent reasonably necessary to enable a decision to be taken on whether that potential funder will become a funder;
  - 56.3.7. any disclosure by Transnet of information relating to the Concession that may be reasonably required for the purpose of retendering of the Concession in accordance with **clause 51.2** (*Preparation for Retendering*); or
  - 56.3.8. any disclosure of information by Transnet to any Responsible Authority.
- 56.4. The disclosures permitted under **clauses 56.3.6, 56.3.7, 56.3.8** may only be made subject to obtaining appropriate confidentiality restrictions consistent with the provisions of this **clause 56** from the intended recipients.

## **57. SAFETY REGULATOR AND CONCESSIONAIRE COMMUNICATION**

- 57.1. Notwithstanding any other provision in this Agreement pertaining to the submission of records and reports by the Concessionaire to Transnet, if –
- 57.1.1. the Concessionaire receives any notice or communication from the Safety Regulator pertaining to any suspension, revocation, or surrender of any Safety Permit as contemplated in section 26 of the RSR Act;
  - 57.1.2. the Concessionaire receives any directive, notice or communication from the Safety Regulator pertaining to any directive issued by a railway safety inspector in terms of section 36 of the RSR Act;
  - 57.1.3. the Concessionaire notifies or submits a report to the Safety Regulator, or if the concessionaire receives any notice, directive or communication pertaining to any matter contemplated in Chapter 7 of the RSR Act;
  - 57.1.4. any notice or communication from the Safety Regulator pertaining to any of the matters contemplated in Chapter 10 of the RSR Act,
- then the Concessionaire, within 5 (five) Business Days of receipt of any such notice or communication or submission of any report referred to in **clauses 57.1.1 to 57.1.4** (inclusive) furnish Transnet with a copy thereof.
- 57.2. If Transnet receives any notice, communication or directive from the Safety Regulator pertaining to or affecting the Branch Line, Transnet shall furnish the Concessionaire with a copy thereof as soon as reasonably possible.

## **58. TRANSNET REPRESENTATIVE**

- 58.1. Transnet shall appoint from the Effective Date until the Expiry Date an individual (the "**Transnet Representative**") whose identity shall be notified to the Concessionaire to act as the duly authorised representative of Transnet for all purposes connected with this Agreement. Transnet shall notify the Concessionaire in writing forthwith upon the replacement at any time of the Transnet Representative and such replacement shall not be effective until notice has been given.
- 58.2. The Transnet Representative may delegate any of his functions from time to time to a person or persons the identity of whom shall be notified to the Concessionaire and references in this Agreement to the Transnet Representative shall be construed to include such persons.
- 58.3. Any notice, instruction or information required to be given by or made to Transnet shall only be valid if given by or delivered to the Transnet Representative.

## **59. CONCESSIONAIRE REPRESENTATIVE**

- 59.1. The Concessionaire shall appoint from the Effective Date until the Expiry Date, an individual (the "**Concessionaire Representative**") whose identity shall be notified to Transnet to act as the Concessionaire's duly authorised representative for all purposes connected with this Agreement. The Concessionaire shall notify Transnet in writing forthwith upon the replacement at any time of the Concessionaire Representative and such replacement shall not be effective until such notice has been given.
- 59.2. Any notice, instruction or information required to be given by or made to the Concessionaire shall only be valid if given by or delivered to the Concessionaire Representative.

## **60. CESSION AND DELEGATION**

Subject to **clause 49** (*Effect of Termination*) -

- 60.1. this Agreement shall be binding on, and shall ensure for the benefit of, Transnet and the Concessionaire and their respective successors-in-title and permitted transferees and assigns;
- 60.2. any Concession Document to which both Transnet and the Concessionaire are parties shall be binding on, and shall ensure to the benefit of, them and their respective successors-in-title and permitted transferees and assigns;

- 60.3. the Concessionaire shall not, without the prior written approval of Transnet, assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this Agreement or any Concession Document to which it is a party to any other person; and
- 60.4. Transnet shall not assign, cede, delegate, transfer or otherwise dispose of any right or obligation under this Agreement or any Concession Document to which it and the Concessionaire are parties to any person other than the government of South Africa, save with the prior written approval of the Concessionaire (such approval not to be unreasonably withheld or delayed) or to give effect to any mandatory requirement of any Law.

## **61. CHANGES IN CONTROL**

- 61.1. For the duration of the Concession Term, the Concessionaire shall ensure that there is no Change in Control, whether in a single or a series of transactions, in aggregate in the Concessionaire (or in any company of which the Concessionaire is a subsidiary) without the prior written approval of Transnet.
- 61.2. Notwithstanding the provisions of **clause 61.1**, prior to the expiry of a period of 5 (five) years from the Effective Date, the Concessionaire shall ensure that there is no sale, assignment, cession, transfer, exchange, renunciation or other disposal of the whole or any part of the Equity and/or the Shareholder loans, nor any dilution of the Equity, without the prior written approval of Transnet.

## **62. DISPUTE RESOLUTION**

### **62.1. Referable Disputes**

The provisions of this **clause 62** shall, save where expressly provided otherwise, apply to any dispute arising in relation to or in connection with any aspect of this Agreement between the Parties.

### **62.2. Internal Referrals**

- 62.2.1. If a dispute arises in relation to any aspect of this Agreement, the Parties to the dispute shall attempt in good faith to come to an agreement in relation to the disputed matter, in accordance with the following informal process –
- 62.2.1.1. all disputes shall first be referred to the Concessionaire Representative (or his alternate) and the Transnet Representative (or his alternate) for resolution;

62.2.1.2. if Transnet and the Concessionaire have been unable to resolve the dispute within 10 (ten) Business Days of referral to the persons specified in **clause 62.2.1.1**, any of those Parties may refer the dispute for a decision by the respective Chief Executive Officers of the Parties or in the case of Transnet, the chief executive of its Freight Rail division.

62.2.2. In attempting to resolve the dispute in accordance with the provisions of this **clause 62.2**, Transnet and the Concessionaire shall (and shall ensure that their employees and representatives shall) use reasonable endeavours to resolve any matter or issue without delay by negotiations or any other informal procedures which the relevant representatives may adopt. Those attempts shall be conducted in good faith in an effort to resolve the matter or issue without necessity of formal proceedings.

62.2.3. Any matter or issue which has not been resolved by the representatives contemplated in **clause 62.2.1.2** within 15 (fifteen) Business Days of the dispute being referred to them (or any longer period agreed between those Parties) or in respect of which either Transnet or the Concessionaire has refused to participate in the informal procedures contemplated in this **clause 62.2.3**, shall be treated as a dispute in respect of which informal resolution has failed.

#### 62.3. **Performance to Continue**

No reference of any dispute to any resolution process in terms of this **clause 62** shall relieve any Party from any liability for the due and punctual performance of its obligations under this Agreement.

#### 62.4. **Litigation**

62.4.1. If informal resolution of any dispute has failed, then the dispute may be referred to litigation in the courts by any Party to the dispute.

62.4.2. No Party is limited in any proceedings before the court to the information, evidence or arguments used in the informal attempts to resolve the dispute.

#### 62.5. **Arbitration**

62.5.1. Notwithstanding the provisions of **clause 62.4** (Litigation), if informal resolution of any dispute has failed and that dispute does not fall to be determined in accordance with **clause 62.6** (Interlocutory Proceedings) or **clause 62.7** (*Fast-track Dispute Resolution*), then as an alternative to referring that dispute to litigation, the Parties may, at the request of either Party, agree to refer that dispute to arbitration.

62.5.2. The rules to be applicable to any arbitration that may be agreed to by the Parties pursuant to clause 62.5.1 shall be such rules as the Parties may agree, and failing agreement thereon, either Party shall be entitled to refer such dispute to arbitration in accordance with the rules **for commercial arbitrations** of the Arbitration Foundation of Southern Africa ("AFSA") or its successor body, for arbitration by an arbitrator appointed in accordance with the AFSA rules, on the basis that –

62.5.2.1. the arbitrator's decision shall be final and binding on the Parties;

62.5.2.2. the arbitration shall be held in Johannesburg, Gauteng;

62.5.2.3. the arbitration shall be conducted in the English language; and

62.5.2.4. the arbitration shall be subject to the procedural and substantive laws of the Republic of South Africa where the AFSA rules are silent.

#### 62.6. **Interlocutory Proceedings**

Notwithstanding the previous provisions of this **clause 62** any Party shall have the right to seek appropriate interdictory relief or an order of specific performance against any other in an appropriate court having jurisdiction in South Africa.

#### 62.7. **Fast-track Dispute Resolution**

62.7.1. Disputes expressly referred for determination pursuant to this clause 62.7 shall be determined by the relevant Independent Expert as defined in clause 62.7.2.

62.7.2. **"Independent Expert"** means –

62.7.2.1. an accountant of not less than 10 (ten) years professional experience, preferably in project finance, agreed to by the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the South African Institute of Chartered Accountants from the ranks of accountants suitably qualified as provided above, if the dispute or issue(s) to be resolved relates primarily to a financial matter;

62.7.2.2. an attorney or advocate of not less than 10 (ten) years professional experience, preferably in project finance, agreed to by the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the Law Society of the Northern Provinces from the ranks of

attorneys suitably qualified as provided above, if the dispute or issue(s) to be resolved relates primarily to a legal matter;

62.7.2.3. an environmental assessment practitioner of not less than 10 (ten) years professional experience agreed to by the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the South African Council for Natural Scientific Professions, if the dispute or issue(s) to be resolved relates primarily to an environmental matter; or

62.7.2.4. an engineer of not less than 10 (ten) years professional experience, preferably in design build and operate projects, agreed to by the Parties, and failing agreement nominated (at the request of either Party) by the President for the time being of the Engineering Council of South Africa from the ranks of engineers suitably qualified as provided above, if the dispute or issue(s) to be resolved relates to primarily to an engineering matter.

62.7.3. Prior to the appointment of an Independent Expert in terms of clause 67.7.2 the Parties may, in the absence of any dispute and from time to time, identify and agree for one or more of the categories of Independent Experts, a panel of Independent Experts, on account of expertise and likely cost or fee rate, and list such persons in **Schedule 23** (Panel of Independent Experts).

62.7.4. Within 5 (five) Business Days after a dispute has been referred by either Transnet or the Concessionaire to the appropriate Independent Expert, the Independent Expert shall require those Parties to submit in writing their respective arguments. The Independent Expert shall, in his/her absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.

62.7.5. It shall be entirely within the power and competence of the Independent Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Expert shall direct the relevant Parties accordingly.

62.7.6. The Independent Expert shall set the date for the hearing, choose the venue for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the Independent Expert may decide whether at the hearing the relevant Parties are to give oral evidence or confine themselves to presenting their cases in writing or by some other appropriate procedure. In this regard, the Independent Expert must be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.



- 62.7.7. The Independent Expert shall provide all Parties to the dispute with his written decision on the dispute, within 20 (twenty) Business Days of the referral (or such other period as the Parties may agree after the referral). The Independent Expert shall give his/her reasons for the award, if so requested by any of the Parties thereto.
- 62.7.8. The costs of any referral including the costs of the Independent Expert and any venue used for any hearing(s) shall be borne as the Independent Expert shall specify or, if not specified, equally by Transnet and the Concessionaire. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses.
- 62.7.9. The Independent Expert shall act impartially and may take the initiative in ascertaining the facts and the Law. The Independent Expert need not strictly observe the principles of Law and may decide the matter submitted to him/her in accordance with what he/she considers equitable in the circumstances.
- 62.7.10. Should the need arise for any Party to seek interim or temporary relief before the adjudication is finalised, that Party may apply to the Independent Expert to grant such interlocutory order or give the required temporary relief and the Independent Expert shall have the same power to do so as if the matter were one heard by a judge in the High Court of South Africa, save that if by Law such power or order cannot be exercised or given by an Independent Expert then, and then only, should the Parties refer such matter to such High Court.
- 62.7.11. The proceedings shall be confidential and all information, data or documentation disclosed or delivered by any Party to the Independent Expert in consequence of or in connection with his/her appointment as Independent Expert shall be treated as confidential. Neither the Parties nor the Independent Expert shall, save as permitted by **clause 56 (Confidentiality)** of this Agreement, disclose to any person any such information, data or documentation unless the Parties otherwise agree in writing, and all such information, data or documentation shall remain the property of the Party disclosing or delivering the same and all copies shall be returned to such Party on completion of the Independent Expert's work.
- 62.7.12. The Independent Expert is not liable for anything done or omitted in the discharge or purported discharge of his/her functions as Independent Expert, unless the act or omission is grossly negligent or in bad faith. Any employee or agent of the Independent Expert is similarly protected from liability.
- 62.7.13. Should any Party fail to co-operate with the Independent Expert with the result that in the view of the Independent Expert such default or omission

prejudices the adjudication process, then the Independent Expert may, in his/her discretion, either -

62.7.13.1. give that Party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the adjudication; or

62.7.13.2. warn the Party in writing that its default or omission may make it liable to a punitive order of costs irrespective of whether it succeeds in the adjudication or not.

62.7.14. The Independent Expert shall be deemed not to be an arbitrator but shall render his/her decision as an expert and the provisions of any Law relating to arbitration shall not apply to the Independent Expert or his/her determination or the procedure by which he/she reaches his/her determination. The Independent Expert's decision shall be final and binding on the Parties.

62.7.15. If any Party, or both Parties, contend there to have been fraud or manifest error, bias or failure by the Independent Expert to properly apply his/her mind, that Party, or Parties, shall be entitled to refer that contention for resolution by litigation (pursuant to clause 62.4), interlocutory proceedings (pursuant to clause 62.5) or by arbitration if the Parties so agree (pursuant to clause 62.6), provided that the notice of referral of the relevant contention(s) is delivered within five (5) Business Days of the handing down of such decision by the Independent Expert.

## 62.8. Associated Contract Dispute

62.8.1. For the purposes of this clause 62.8, the following terms are according the meanings ascribed to them, namely –

62.8.1.1. "**Associated Contract Dispute**" means –

62.8.1.1.1. any dispute or difference between Transnet and the Concessionaire, arising out of one or more of the Ancillary Agreements to which the Concessionaire is a party and Transnet (whether through one or more of its operating divisions) is also a party; and

62.8.1.1.2. any dispute or difference between the Concessionaire and a Relevant Entity;

which (i) arises out of substantially the same circumstances as any dispute or which raises issues which are substantially the same as issues raised in any dispute and (ii) in respect of which a notice is given by the Concessionaire or the Transnet

requiring reference of the dispute to fast-track dispute resolution procedure (pursuant to **clause 62.7**) or to arbitration if the Parties so agree (pursuant to **clause 62.6**);

62.8.1.2. **"Associated Party"** means –

62.8.1.2.1. any counter-party to an Ancillary Agreement which is neither Transnet nor the Concessionaire;

62.8.1.2.2. any **material subcontractor** of the Concessionaire;

62.8.2. A notice of an Associated Contract Dispute ("**Notice of Associated Contract Dispute**") from either Party shall be served on the other Party contemporaneously with either the consensual referral of any dispute for resolution in terms of **clause 62.5** (*Arbitration*) or referral to expert determination in terms of **clause 62.7** ("**Notice of Referral to Arbitration/Expert Determination**") served by that Party on the other Party, or within 3 (three) Business Days of receipt of a Notice of Referral to Arbitration/Expert Determination from either Party as the case may be, so that it may be determined in the same proceedings as any dispute referred to arbitration under **clause 62.5** (*Arbitration*) or the fast -track dispute resolution procedure under **clause 62.7** (*Fast-track Dispute Resolution*).

62.8.3. The provisions of **clause 62.5** (*Arbitration*) and the fast -track dispute resolution procedure under **clause 62.7** (*Fast-track Dispute Resolution*) shall, where an Associated Contract Dispute arises, be modified accordingly.

62.8.4. Where Transnet refers a dispute and the Concessionaire considers it to be an Associated Contract Dispute, the Concessionaire shall timeously notify the appropriate Associated Party(ies) of the Associated Contract Dispute. Provision shall be made in the Ancillary Agreements **[and the material subcontract(s)]** for the Notice of Associated Contract Dispute to be given timeously to the relevant Associated Parties.

62.8.5. In the event that an Associated Contract Dispute is referred to the same arbitration or expert determination proceeding as another dispute, references to "Parties shall be construed as including a reference to the relevant Associated Party and references to "dispute" shall be construed as including a reference to the related Associated Dispute.

62.8.6. The arbitrator and the Independent Expert in the relevant dispute resolution procedure shall have the same powers in relation to the Associated Contract Dispute as he/she has in relation to the primary dispute.

### **63. NOTICES AND LEGAL SERVICE**

63.1. All notices and any other communications whatsoever (including, without limitation, any approval, consent, demand, query or request) by any Party in terms of this Agreement or relating to it shall be given in writing and sent by registered post, or delivered by hand, or transmitted by facsimile to the recipient Party at its relevant address set out below -

63.1.1. if to Transnet, at:

Street address:

Postal address:

Facsimile number:

marked for the attention of **[insert details of Transnet Representative]**

63.1.2. if to the Concessionaire, at:

Street address:

Postal address:

Facsimile number:

marked for the attention of **[insert details of Concessionaire Representative]**

63.2. Any Party may, by written notice to the other Parties, change any of the addresses at which or the designated person for whose attention those notices or other communications are to be given.

63.3. Any notice or other communication given by any Party to the other Party which -

63.3.1. is sent by registered post to the addressee at its specified address shall be rebuttably presumed to have been received by the addressee on the 7<sup>th</sup> (seventh) day after the date of posting; or

63.3.2. is delivered by hand to the addressee during the normal business hours of the addressee at its specified address shall be rebuttably presumed to have been received by the addressee at the time of delivery; or

63.3.3. is transmitted by facsimile to the addressee during the normal business hours of the addressee at its specified facsimile number shall be rebuttably presumed to have been received by the addressee on the date of transmission as indicated on the sender's facsimile transmission report.

63.4. The previous provisions of this **clause 63** shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.

- 63.5. The Parties choose their respective physical addresses in **clause 63.1** as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within South Africa in writing to be its new *domicilium citandi et executandi*.
- 63.6. The Parties record that whilst they may correspond via email during the currency of this Agreement, no formal notice required in terms of this Agreement, nor any amendment or variation hereto may be given or concluded via email **unless specifically provided for otherwise**.

#### **64. ENTIRE AGREEMENT**

- 64.1. Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.
- 64.2. Each of the Parties acknowledges that -
- 64.2.1. it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly contained in or referred to in this Agreement, and the only remedy available in respect of any misrepresentation or untrue statement made to it shall be a remedy available under this Agreement; and
- 64.2.2. this **clause 64 shall** not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under any Law governing this Agreement.

#### **65. AMENDMENTS**

No provision of this Agreement (including, without limitation, the provisions of this **clause 65**) may be amended, substituted or otherwise varied, and no provision may be added to or incorporated in this Agreement, except (in any such case) by an agreement in writing signed by the duly authorised representatives of the Parties.

**66. SEVERABILITY**

Whenever possible, each provision of this Agreement shall be interpreted in a manner which makes it effective and valid under any Law, but if any provision of this Agreement is held to be illegal, invalid or unenforceable under any Law, that illegality, invalidity or unenforceability shall not affect the other provisions of this Agreement, all of which shall remain in full force.

**67. NO PARTNERSHIP**

Nothing in this Agreement and no action taken by the parties pursuant to this Agreement shall constitute, or be deemed to constitute, a partnership, unincorporated association or other co-operative entity.

**68. WAIVER**

68.1. Any relaxation, indulgence or delay (together “**Indulgence**”) by either Party in exercising, or any failure by either Party to exercise, any right under this Agreement shall not be construed as a waiver of that right and shall not affect the ability of that Party subsequently to exercise that right or to pursue any remedy, nor shall any Indulgence constitute a waiver of any other right (whether against that Party or any other person).

68.2. The waiver of any right under this Agreement shall be binding on the waiving Party only to the extent that the waiver has been reduced to writing and signed by the duly authorised representative(s) of the waiving Party.

**69. FURTHER ASSURANCE**

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

**70. COUNTERPARTS**

This Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of

counterparts taken together which, in either case, are executed by the Parties shall constitute a full original of this Agreement for all purposes.

**71. LANGUAGE OF THE AGREEMENT**

The language of this Agreement is the English language.

**72. GOVERNING LAW AND JURISDICTION**

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

72.2. Each Party agrees that the High Court of South Africa shall have non-exclusive jurisdiction to hear and decide any application, action, suit, proceeding or dispute in connection with this Agreement, and irrevocably submits to the jurisdiction of the High Court of South Africa.

**73. COSTS AND EXPENSES**

Each Party shall be responsible for paying its own costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

SIGNED by the Parties and witnessed on the following dates and at the following places respectively:

DATE

PLACE

NAME AND SIGNATURE

*[insert name and designation]*

**For: Transnet Freight Rail, an Operating Division of  
TRANSNET SOC LTD**

*[signature]*

(who warrants that s/he is duly authorised hereto)

confidential

DATE

PLACE

NAME AND SIGNATURE

*[name and designation]*

For: \_\_\_\_\_ **PROPRIETARY  
LIMITED**

*[signature]*

(who warrants that s/he is duly authorised hereto)