



TRACK ACCESS AGREEMENT

BETWEEN

TRANSNET FREIGHT RAIL an operating division
of
TRANSNET SOC LTD
(REGISTRATION NUMBER: 1990/000900/30)

AND

ABCABC (PROPRIETARY) LIMITED

“the Concessionaire”

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SANS 3000 Standard (By reference only)

To be obtained by the Concessionaire at:

<https://store.sabs.co.za/pdfpreview.php?hash=3c1a912d3d421c7554276e84b58d867da315e62b&preview=yes>

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1. **INTRODUCTION**

- 1.1. Transnet SOC Limited has, through its operating divisions Transnet Freight Rail (TFR), entered into a Concession Agreement with ABC Rail Company (Pty) Limited in terms of which ABC Rail Company (The Concessionaire) undertook to reinstate freight services and passenger services on the 26km closed branch line between ABC – ABC – ABC to enable movement from containerised fast moving consumer goods to XYZ and to undertake passenger services on the Branch Line and the Core Network as agreed with Transnet.
- 1.2. In terms of the Concession Agreement TFR grants the Concessionaire the right to provide the services contemplated in the Concession Agreement on the Branch Line;
- 1.3. Pursuant thereto, the Concessionaire requires Access to the Access Route for the Permitted Purpose as contemplated in this Agreement;
- 1.4. TFR shall grant to the Concessionaire Access to the Access Route for the Permitted Purposes, in terms of this Agreement;
- 1.5. All freight Train movement Operations of the Concessionaire on the Branch Line and the Access Route will be undertaken by the TFR, on behalf of the Concessionaire in terms of the Train O&M Agreement;
- 1.6. In addition to the Core Network Track Access granted to the Concessionaire for the

- Permitted Purpose, the Parties also contemplate that TFR shall require limited Access to the Branch Line which Access right shall be governed in this Agreement;
- 1.7. As such the Concessionaire shall, grant to TFR Branch Line Exceptional Track Access for the Restricted Purposes as stipulated in this Agreement;
 - 1.8. This Agreement governs the terms on which TFR is granted Branch Line Exceptional Track Access, as well as the terms on which the Concessionaire, executing its Train movement Operations through the Train O&M Provider where applicable, is granted Core Network Track Access.

2. **DEFINITIONS**

- 2.1. In this Agreement, unless the context indicates otherwise: -
 - 2.1.1.1. the capitalised terms that follow hereunder shall have the meanings assigned to them and cognate expressions shall have corresponding meanings; and
 - 2.1.1.2. the terms used in this Agreement that have the same meaning as in the RSR Act are set out in inverted commas (“ ”);
 - 2.1.1.3. the terms used in this Agreement that have the same meaning as in the Concession Agreement are typed in *italics*; and
 - 2.1.1.4. as and when the meaning of the terms as used in the RSR Act or Concession Agreement are amended in either the Concession Agreement or the RSR Act, the meanings of those terms in this Agreement will change accordingly and the term used as amended in the RSR Act or Concession Agreement will apply from the date of the relevant amendment to the RSR Act or Concession Agreement as the case may be insofar as such amendment applies or is capable of applying to any transaction entered into under this Agreement:-
- 2.1.2. **“Access”** means Freight Access and/or Passenger Access;
- 2.1.3. **“Access Point”** means the point where the Branch Line connects with the Access Route at ABC [as indicated in Appendix A Plan 2], which shall be the point at the stop board where the Train driver will contact the Train control officer to be granted Access to the Access Route;
- 2.1.4. **“Access Route”** means that portion of the Core Network, operated by TFR, which the Concessionaire’s cargo 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 ABC and Bellville, or ABC and Worcester, commencing at the Access Point and ending at the Exchange Yard to destination point or a point of origin;
- 2.1.5. **“Access Route Maintenance”** means the railway infrastructure services by TFR on the Access Route necessary to support and enable the operation of

Rolling Stock including programmed (planned) and unprogrammed (unplanned) maintenance and/or upgrade and refurbishment works;

- 2.1.6. **“Access Route Plan”** means the Access Route Plan as compiled by TFR for the purposes of the railway undertakings envisaged under the Concession Agreement which is attached hereto as Appendix A;
- 2.1.7. **“Access Services”** means Freight Access Services and/or Agreed Passenger Services;
- 2.1.8. **“Accident”** means an “unplanned event that results in harm to people or damage to property or the environment”;
- 2.1.9. **“Accredited Training Courses”** means training courses applicable to specific tasks which have been accredited by TETA (Transport Education Training Authority);
- 2.1.10. **“Additional Passenger Access Services”** means access to the portions of the TFR Network referred to in Appendix K to be granted by TFR to the Concessionaire in addition to the Baseline Passenger Access Services, in accordance with the provisions of clause 7 below;
- 2.1.11. **“Agreed Passenger Services”** means such terms and conditions applicable on a Scheduled Passenger Railway Operation where Passenger Access is granted to the Concessionaire by TFR in terms of this Agreement wherein the details of the Agreed Passenger Services to be provided are set out, including costs and Tariffs, deliverables, method of payment, reporting, period of agreement and nominated persons from both Parties responsible for management of the Agreed Passenger Services as more fully set out in Appendix J to be initialled by the Parties for identification purposes and annexed to this Agreement from time to time;
- 2.1.12. **“Agreement”** means this Agreement, as amended from time to time, including any and all Appendices hereto;
- 2.1.13. **“Allocated Capacity”** means the Available Capacity to be reserved by TFR for the Concessionaire to enable TFR to provide Access Services in respect of the Concessionaire’s volume requirements, as projected and agreed to by the Parties in the Service Design Appendix (as defined in clause 2.1.102);
- 2.1.14. **“Ancillary Services”** means all services reasonably related to the Freight Access Services and required in order to give effect to the provisions of this Agreement;
- 2.1.15. **“Annual Safety Improvement Plan”** means the annual safety improvement plan compiled and produced by the Concessionaire for its railway undertakings which is incorporated herein by reference;
- 2.1.16. **“Applicable Requirements”** means the mandatory requirements of any existing 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;

- 2.1.17. **“Available Capacity”** means the availability of the TFR’s resources and capacity including but not limited to Train slots, Rolling Stock and Personnel to provide Access and the related Freight Access Services in accordance with any Consents and Applicable Requirements;
- 2.1.18. **“Baseline Passenger Access Services”** means access to the portions of the TFR Network for purposes of the Agreed Passenger Services;
- 2.1.19.
- 2.1.20. **“Branch Line”** means the ABC-ABC-ABC Rail Line;
- 2.1.21. **“Branch Line Exceptional Track Access”** means the limited right of Access granted to TFR by the Concessionaire for TFR to traverse the Branch Line for any one or more of the Restricted Purposes;
- 2.1.22. **“Branch Line Network Operator”** means the Concessionaire;
- 2.1.23. **“Branch Line Termination Point”** means *the point as indicated on the route plan (Schedule 1 Part 3 of the Concession Agreement) being point number 13 of the Branch Line at which the ABC - ABC – ABC Branch Line terminates*;
- 2.1.24. **“Branch Line Train Operator”** means, where applicable, the Train O&M Provider or a third party;
- 2.1.25. **“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;
- 2.1.26. **“ABC Rail Company”** means a company duly incorporated with limited liability in terms of the laws of South Africa with registration number 2013/171073/07;
- 2.1.27. **“Certification”** means the process of declaring an employee Competent to perform his/her tasks;
- 2.1.28. **“Certified”** means certified by Transnet’s School of Rail or any party accredited by them or personnel with a valid qualification as stipulated by the Relevant Authority;
- 2.1.29. **“Competent”** means the Certification of an employee by means of an Accredited Training Course relating to a specific task to perform that task correctly;
- 2.1.30. **“Concession”** means the exclusive right to offer and render the Rail Freight Service and Passenger Service in respect of the Branch Line and the obligation to perform and undertake the Infrastructure Services, in all instances subject to the terms and conditions of the Concession Agreement and the Ancillary Agreements;

- 2.1.31. "**Concession Agreement**" means the Concession Agreement entered into, by and between Transnet and the Concessionaire and to which this Agreement is attached as Schedule 3 Part 3;
- 2.1.32. "**Concessionaire**" means the ABC Rail Company;
- 2.1.33. "**Consents**" means all permissions, approvals, certificates, permits, licences, registrations, statutory agreements and authorisations required by law, and all necessary consents, approvals and agreements from any third parties necessary to enable a Party to lawfully and validly carry out any of its obligations under this Agreement;
- 2.1.34. "**Core Network Track Access**" means the Concessionaire's right to Freight Access and traverse the Access Route for the Permitted Freight Purpose;
- 2.1.35. "**Core Network**" means that part of the rail network (excluding the Branch Line and other branch lines) that is Transnet's primary network, designated by Transnet as such, from time to time, in its sole discretion;
- 2.1.36. "**Core Network Operator**" means Transnet Freight Rail (TFR) an operating division of Transnet SOC Ltd;
- 2.1.37. "**Dangerous Goods**" means Goods, including those Goods defined as a Hazardous Substance, which have the potential to cause harm to persons, property or the environment or the potential to cause pollution or degradation of the environment as contemplated in the National Environmental Management Act 107 of 1998 ("NEMA") including such goods as defined by the South African Bureau of Standard 0228 and the International Maritime Dangerous Goods ("IMDG") Code as well as the commodities substances and goods listed in SANS 10228:2012 "The identification and classification of dangerous goods for transportation by road and rail modes";
- 2.1.38. "**Effective Date**" means the date upon which the last of the suspensive conditions of this Agreement have been fulfilled or waived as the case may be;
- 2.1.39. "**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;
- 2.1.40. "**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;
- 2.1.41. "**Exchange Yard**" means the designated yard lines at ABC, Belville, or Worcester, Table Bay Docks, and any other exchange yard agreed to between

the Parties from time to time, where the exchange of traffic between the Concessionaire and TFR will take place in relation to the Branch Line;

- 2.1.42. **"Freight Access"** means depending on the context, either Core Network Track Access or Branch Line Exceptional Track Access;
- 2.1.43. **"Freight Access Services"** means all services required to enable Freight Access, including the Ancillary Services and the Planning and Integration Services, and depending on the context, to enable the Concessionaire, to exercise its rights in relation to the Access Route for the Permitted Freight Purpose, or to enable TFR to exercise its rights in relation to the Branch Line for one or more of the Restricted Purposes, as the case may be;
- 2.1.44. **"Force Majeure"** means any of the following events to the extent that they are uninsurable –
- 2.1.44.1. war, civil war, armed conflicts or terrorism; or
 - 2.1.44.2. nuclear/environmental contamination unless the Concessionaire and/or any of its subcontractors is the source or cause of the contamination;
 - 2.1.44.3. chemical or biological contamination of the Concession Assets;
or
 - 2.1.44.4. 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;
- 2.1.45. **"Goods"** means the commodities that will be transported subject to the terms set out in this Agreement together with the Concession Agreement;
- 2.1.46. **"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;
- 2.1.47. **"Hand-over Point"** means: -
- 2.1.47.1. in relation to the Concessionaire an agreed place as determined by the Route Plan at a siding, station or marshalling yard, exchange yard or an area where the customer will place empty or loaded wagons to be Hauled and to which place the customer will return empty/or loaded wagons to the Concessionaire for collection by the Concessionaire;

- 2.1.47.2. in relation to the Core Network Operator, an agreed place as determined by the Route Plan at a siding, station or marshalling yard, exchange yard or an area, including, an area on the Access Route, where the Concessionaire will place empty or loaded wagons to be Hauled and to which place the Core Network Operator will return empty/or loaded wagons to the Concessionaire for collection, it being recorded that such hand-over point as at Signature Date is the Exchange Yard;
- 2.1.48. **"Haul"** means the haulage of the wagons on the rail from and between the point of placing and the Hand-over Point (and vice versa) in accordance with the time tables set out in the Integrated Train Plan, and **"Hauling"/"Haulage"** has a corresponding meaning;
- 2.1.49. **"Hazardous Substance"** means any Goods that have been designated as a Group I, II, III or IV hazardous substance or grouped hazardous substance by the Relevant Minister in terms of the Hazardous Substances Act 15 of 1973 as well as a substance listed in the South African Bureau of Standard document no. 0228, 0223, 0226, SANS 10405;
- 2.1.50. **"Incident"** means an unplanned event which under different circumstances could have resulted in an Accident;
- 2.1.51. **"Infrastructure Services"** means the railway infrastructure services on the Branch Line necessary to support and enable the operation of Rolling Stock, including programmed (planned) and un-programmed (unplanned) maintenance, upgrading or refurbishing works to the Permanent Way or Branch Line Stations;
- 2.1.52. **"Integrated Train Plan"** means the Train plan as determined from time to time by TFR for the integrated operation of the Access Route and Core Network;
- 2.1.53. **"Interface"** means the area, point or location, either physical or organisational, where the Parties' respective activities meet and have the potential to affect one another;
- 2.1.54. **"IC"** means the Interface Committee consisting of persons delegated by TFR and the Concessionaire, which committee will be responsible for the management of this Agreement;
- 2.1.55. **"Law"** means any law of general application and includes the common law and any statute, constitution, decree, treaty, regulation, directive, ordinance, by-law, order or any other enactment or legislative measure of government (including local and provincial government) statutory or regulatory body which has the force of law;
- 2.1.56. **"NCC"** means the Nation Command Centre of TFR situated in Johannesburg which is responsible for the design, planning and execution of the Integrated

Train Plan ("ITP") as well as the monitoring and reporting of railway occurrences on a daily basis;

- 2.1.57. "**Marshalling**" means the process of assembling or building Trains by connecting a wagon or wagons to a locomotive or locomotives into Train loads as planned for transit, or disassembling Train loads;
- 2.1.58. "**Marshalling Yard**" means a depot or rail yard or such other place used for Marshalling;
- 2.1.59. "**Network**" means "a system of railway infrastructure elements comprising track, civil infrastructure, Train control and signalling systems and where applicable electric infrastructure which constitutes running lines, and any part of the following on which those elements are situated: -
- 2.1.59.1. Railway yards;
 - 2.1.59.2. Marshalling yards;
 - 2.1.59.3. Sidings and private sidings;
 - 2.1.59.4. Freight terminals;
 - 2.1.59.5. Depots; or
 - 2.1.59.6. Stations; and
 - 2.1.59.7. Any other matter that may be prescribed";
- 2.1.60. "**Network Operator**" means "the person or persons who have ultimate accountability for one or more of the following: -
- 2.1.60.1. the safety of a Network or part thereof including the proper design, construction, maintenance and integrity of the Network;
 - 2.1.60.2. ensuring compliance of Rolling Stock with the applicable standards of the Network; or
 - 2.1.60.3. for the authorising and directing of the safe movement of Rolling Stock on the Network";
- 2.1.61. "**Occurrence**" means "any Accident or Incident, including a railway Occurrence, which must be managed by the Operator in accordance with its Safety Management System";
- 2.1.62. "**Occupation(s)**" means a time period allowed for maintenance purposes in respect of a section of a Network;
- 2.1.63. "**Operational Constraint**" means any Constraint the Concessionaire deems necessary to impose for the protection of any person or property, including any Rail Infrastructure, the Permanent Way, or any other part of the Branch Line Network;
- 2.1.64. "**Operation(s)**" means the process of planning or any related administrative function for scheduling and moving of Trains for whatever purpose and includes Train Services, Access Services, Access Route Maintenance, Infrastructure Services, Rolling Stock Maintenance and Planning and Integration Services;

- 2.1.65. **“Operations And Safety Requirements”** means the operational and safety requirements set out in the safe working procedures, safety instructions, general operating instructions and the Train working rules by Transnet Freight Rail from time to time and in accordance with SANS 3000-2-5 (Technical Requirements for Engineering and Operational Standards: Operational Principles for Safe Movement on Rail), including, but not limited to the Standards stipulated in the Appendices of this Agreement;
- 2.1.66. **“Operator”** means “a Network Operator, Train Operator, Station Operator or a combination of two or three of them;
- 2.1.67. **“Parties”** means TFR, and the Concessionaire collectively, and **“Party”** means any of the Parties;
- 2.1.68. **“Passenger Access”** means the granting of access by TFR to the Concessionaire to use the TFR Network for the Permitted Passenger Purposes subject to the terms and conditions of this Agreement;
- 2.1.69. **“Passenger Access Condition”** means the specific conditions contained in clause 8.17 to be fulfilled prior to the granting of Passenger Access to the Concessionaire following the scheduling of Baseline Passenger Access Services or a Passenger Access Request received from time to time;
- 2.1.70. **“Passenger Access Request”** means a notice given by the Concessionaire to obtain Additional Passenger Access Services as contemplated in clause 7;
- 2.1.71. **“Passenger Access Requirements and Risk Assessments”** means the Passenger Access Requirements and Risk Assessments contained in **Appendix L**;
- 2.1.72. **“Passenger Services”** means the railway passenger transport service to be offered to third parties by the Concessionaire and conducted by the Concessionaire;
- 2.1.73. **“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: –
- 2.1.73.1. any level crossing, bridges, tunnels, culverts, retaining walls or other structures used for the support of, or otherwise in connection with, the permanent way;
- 2.1.73.2. any walls, fences or other structures bounding the railway or bounding any adjacent property;
- 2.1.73.3. any road(s) servicing the railway track; and
- 2.1.73.4. any Marshalling Yard used exclusively for the Branch Line is located;

- 2.1.74. "**Permitted Freight Purpose(s)**" means the purposes for which Freight Access is granted by TFR to the Concessionaire namely for the Concessionaire to deliver and collect Rolling Stock at the Hand-Over Point and for the transportation of freight;
- 2.1.75. "**Permitted Passenger Purpose(s)**" means the purposes for which Passenger Access is granted by TFR to the Concessionaire, namely for the transportation of passengers and freight, including water, oil and coal required for own consumption within the time schedules and operating times as set out in the Agreed Passenger Services;
- 2.1.76. "**Permitted Purpose**" means the Permitted Freight Purpose and the Permitted Passenger Purpose;
- 2.1.77. "**Personnel**" means, depending on the context, the Train drivers, Train assistants, Train control officers, safety personnel, and other persons employed or contracted to operate Trains in the provision of all Rail Freight Services and/or the Agreed Services of either the Concessionaire, Train O&M Provider (TFR);
- 2.1.78. "**Pilot**" means a Competent TFR section manager or Train driver, with the necessary road knowledge of a particular section of a railway line, accompanying a Train driver for the Concessionaire on the footplate of a train that assists the Train driver with knowledge of the section they are traversing on a Scheduled Passenger Railway Operation, without having any responsibilities or duties whatsoever in respect of the driver and locomotive of such Scheduled Passenger Railway Operation;
- 2.1.79. "**Planning and Integration Services**" means the planning and integration of Trains on rail to destinations and services related thereto for movement of Trains on the Access Route or Branch Line as the case may be and as set out in Appendix B;
- 2.1.80. "**PRASA**" means the Passenger Rail Agency of South Africa, a network operator, train operator and station operator as envisaged in the RSR Act;
- 2.1.81. "**Quarter**" means a three-calendar month period commencing on 1 January, 1 April, 1 July and 1 October, provided that the initial Quarter shall commence on the Effective Date and shall end on the earliest of 31 March, 30 June, 30 September and 31 December thereafter;
- 2.1.82. "**Rail Freight Service**" means *the railway freight transport services including base freight Service Requirements (as defined in the Concession Agreement between the Concessionaire and Transnet) to be offered to third parties by the Concessionaire [and conducted by the Concessionaire] on the basis that:-*
- 2.1.82.1. *haulage in respect of the Branch Line and the Access Route is executed by the Train O&M Provider (TFR) on behalf of and at the instance of the Concessionaire in terms of the agreement between*

*the Train O&M Provider and the Concessionaire, where applicable;
and*

2.1.82.2. *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);*

2.1.83. **“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;*

2.1.84. **“Rail Reserve”** means *that portion of land on either side of the Branch Line set aside as the rail reserve in respect of the Permanent Way and for each the Branch Line stations, as set out in the Concession Agreement;*

2.1.85. **“Railway Services”** means the Infrastructure Services and the Rail Freight Services and the Passenger Services.

2.1.86. **“Rail Worthy”** means that the rail infrastructure of the Network necessary to support and enable the operation of Rolling Stock is technically sound to ensure safe and efficient Train movements;

2.1.87. **“Rates”** means the fees to be charged by TFR to the Concessionaire for the provision of the Access, Access Services and Railway Service;

2.1.88. **“Regulations”** means regulations issued from time to time in terms of the RSR Act;

2.1.89. **“Relevant Authority”** means the Safety Regulator or any governmental department, commission, board, body, bureau, agency, authority, instrumentality, administration body at national, provincial or local level, having jurisdiction over the Parties, the Railway Network or any portion thereof or any matter addressed in this Agreement (as applicable);

2.1.90. **“Restricted Purposes”** means the purpose for which the Concessionaire has granted TFR Access to the Branch Line, being to: -

2.1.90.1. enable TFR to respond to an Occurrence in emergency and unforeseen circumstances that have or are likely to cause service disruptions on the Core Network and/or any other part of the Branch Line Network not operated by the Concessionaire;

2.1.90.2. enable TFR to deliver maintenance material as per and in the event of an agreement in respect of such maintenance material to be delivered or to enable TFR to Access the Branch Line in respect of any other specific agreement and/or arrangement; or

2.1.90.3. as further agreed to between the Parties on such track access and Interface arrangements as may be concluded between the Parties, taking into account the respective operating schedules and safety requirements of the Concessionaire and TFR;

- 2.1.91. **“RIC”** means the Rail Incident Commander, namely a TFR appointed employee to take charge of clear-up operations at the scene of Occurrences. This excludes the person first on the scene of the Occurrence who must take charge until relieved by the relevant RIC;
- 2.1.92. **“RIC Office”** means the facility established by the RIC from which clearing up operations will be managed and controlled;
- 2.1.93. **“Rolling Stock”** means a vehicle that is able to operate on a railway, irrespective of its capability of independent motion including, but not limited to, wagons, locomotives and any other vehicle used for Passenger Services approved by the Relevant Authority, and certified by TFR;
- 2.1.94. **“Rolling Stock Maintenance”** means all functions required from the relevant Train Operator to keep its Rolling Stock in a Train Worthy condition, for Train Services or Train movements as the case may be;
- 2.1.95. **“RSR Act”** means the National Railway Safety Regulator Act, No. 16 of 2002, as amended, including any and all regulations promulgated in terms thereof from time to time. All terms defined in the RSR Act will have a corresponding meaning in this Agreement. In the event of a conflict between any term in the RSR Act and this Agreement, the meanings contained in the RSR Act shall prevail;
- 2.1.96. **“RSR Standards”** means National Railway Safety Regulator Standards;
- 2.1.97. **“Safety Management System”** has the meaning ascribed to it in SANS 3000 which, "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;
- 2.1.98. **“Safety Permit”** means a permit required in terms of section 22 of the RSR Act as issued by the chief executive officer of the Safety Regulator in terms of sections 23 and 24 of the RSR Act;
- 2.1.99. **“Safety Regulator”** means the National Railway Safety Regulator established in terms of section 4 of the RSR Act;
- 2.1.100. **“SANS 3000”** means the series of Standards of the South African National Standard for Railway Safety Management as issued by Standards South Africa, a division of the South African Bureau of Standards and as amended from time to time by the Safety Regulator;
- 2.1.101. **“Scheduled Passenger Railway Operation”** means a Train consisting of the Concessionaire’s own Rolling Stock being scheduled by the Concessionaire on a railway network, which is owned and managed by either TFR or PRASA, along an agreed route and in respect of the TFR Network as agreed upon in writing with TFR to be operated subject to the terms and

conditions contained in the Agreed Passenger Services. Access to TFR mainlines shall be limited to certain mainlines only;

- 2.1.102. "**Scheduled Slot(s)**" means Train Slots as agreed to between the Parties and set out in the Service Design Appendix during which the Concessionaire shall be entitled to Access the Access Route;
- 2.1.103. "**Service Design Appendix**" means the Appendix detailing the route, timetables and Scheduled Slots, capacity and volumes in relation to the services to be provided by TFR to the Concessionaire on the Access Route, attached hereto as Appendix "D";
- 2.1.104. "**Service Worthiness**" means infrastructure that is technically sound, with or without prescribed conditions or restrictions, and in a condition to ensure safe and efficient Rolling Stock or Shunting movements;
- 2.1.105. "**Signature Date**" means the date on which the Agreement is signed by the Parties, and if signed on different dates, the last of such dates;
- 2.1.106. "**Shunting**" means the movement of a locomotive, motor powered vehicle or vehicles, or of a locomotive or motor-powered vehicle with vehicles attached, to, from or on a running line or siding within certain prescribed limits;
- 2.1.107. "**South Africa**" means the Republic of South Africa;
- 2.1.108. "**Station**" means a facility for passengers to enter or leave a train as listed in Appendix J, including a railway passenger terminal and a passenger halt an may include facilities for passenger modal transfer and commercial activities forming part of the station and also includes any other place that may be prescribed, but excludes that part of the network running through the station;
- 2.1.109. "**Station Operator**" means "a person in control of a station, and the management of a station";
- 2.1.110. "**Suspensive Conditions**" means the suspensive conditions as contemplated in clause 5;
- 2.1.111. "**Tariffs**" means the tariffs being charged by TFR for the Agreed Passenger Services as set out in **Appendices J and K** respectively;
- 2.1.112. "**TFR**" means Transnet SOC Ltd acting through its operating division Transnet Freight Rail (TFR), with registration number 1990/000900/30, a state-owned company duly incorporated in accordance with the laws of South Africa;
- 2.1.113. "**TFR Network**" means the Network operated by TFR or its contractors;
- 2.1.114. "**TFR Yard**" means the designated arrivals and departure railway lines to which the Concessionaire requires Access at the departure and arrival points where the Concessionaire's Rolling Stock arrive at or depart from in respect of a Scheduled Passenger Railway Operation;

- 2.1.115. **"Train"** means a locomotive, or motor-powered vehicle, with marker attached, at a stand or passing over a running line or siding, or any vehicle or vehicles, with marker attached, coupled to a locomotive or motor vehicle, at a stand, or drawn or propelled over a running line or siding;
- 2.1.116. **"Train Control Officer"** means a Competent employee authorised by a Network Operator who is responsible for the authorisation of movement on the Network;
- 2.1.117. **"Train Control Systems"** means all Train control and authorisation systems in relation to the Branch Line, as at signature date including, but not limited to, communication and signalling systems;
- 2.1.118. **"Train Notice"** means a notice ("YQ") to be given authorising the movement of a Scheduled Passenger Railway Operation as more fully described in Appendix M;
- 2.1.119. **"Train Operator"** means "the person or persons who have the ultimate accountability for: -
- 2.1.119.1. the safe movement of Rolling Stock on a Network;
 - 2.1.119.2. safety and integrity of Rolling Stock;
 - 2.1.119.3. safety of freight or persons being conveyed".
- 2.1.120. **"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 (Ancillary Agreements – Train Operations and Management Agreement) to the Concession Agreement;
- 2.1.121. **"Train O&M Provider"** means, in respect of the Branch Line, TFR, the Concessionaire or any third party where applicable;
- 2.1.122. **"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 in respect of the Branch Line and Access Route including: –
- 2.1.122.1. Train Operations and planning management services;
 - 2.1.122.2. haulage services;
 - 2.1.122.3. traction and Train control services.
- 2.1.123. **"Train Services"** means execution of the haulage and rail transportation services on the Branch Line and Access Route respectively as contemplated in this Agreement and the Train O&M Agreement;
- 2.1.124. **"Train Slot"** means the predetermined departure and arrival day and times at specified places, as set out in the Integrated Train Plan;
- 2.1.125. **"Train Worthy"** means Rolling Stock that is technically sound, complies with the Transnet Operating Instructions and generally meets the applicable

standards of the Transnet Network including prescribed conditions/restrictions and vehicle loads that conform to loading specifications and Certified as such by appropriately qualified personnel accredited by the Safety Regulator;

- 2.1.126. **“Transnet”** means Transnet SOC Ltd and any operating division thereof, as may be applicable from time to time;
- 2.1.127. **“ABC-ABC-ABC Branch Line”** means the railway line and Rail Reserve classified as a branch line by Transnet running from and between ABC – ABC – ABC and the Branch Line Termination Point, comprising approximately 26 route kilometres, as more fully described in Schedule 1 Part 1 (Route Plan – ABC to ABC Line). The ABC – ABC – ABC Branch Line excludes any Transnet railway line (and attendant rail reserve) or portion thereof which is classified as Core Network by Transnet as at Signature Date;
- 2.1.128. **“Writing”** (or words of similar meaning) means legible writing and in English and includes any form of electronic communication contemplated in the Electronic Communications and Transactions Act 25 of 2002;
- 2.1.129. **“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.

3. **INTERPRETATION**

3.1. Any reference in this Agreement to: –

- 3.1.1. "**business hours**" shall be construed as being the hours between 07:30 and 16:00 on any Business Day. Any reference to time shall be based upon South African Standard Time;
- 3.1.2. "**days**" shall be construed as calendar days unless qualified by the word "business", in which instance a "Business Day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time;
- 3.1.3. "**month**" means the period from 00h01 on the first day of a calendar month to 24h00 on the last day of such calendar month;
- 3.1.4. "**laws**" means all constitutions; statutes; regulations; by-laws; codes; ordinances; decrees; rules; judicial, arbitral, administrative, ministerial, departmental or regulatory judgments, orders, decisions, rulings or awards; policies; voluntary restraints; guidelines; directives; compliance notices; abatement notices; agreements with, requirements of or instructions by any governmental body; and the common law, and "**law**" shall have a similar meaning; and
- 3.1.5. "**person**" means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality.
- 3.1.6. The words "**include**" and "**including**" mean "include without limitation" and "including without limitation". The use of the words "**include**" and "**including**" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it;
- 3.1.7. Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions in this or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of the Agreement;
- 3.1.8. Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this Agreement;
- 3.1.9. Unless otherwise provided, defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning;
- 3.1.10. A reference to any statutory enactment shall be construed as a reference to that enactment as at the Signature Date and as amended or substituted from time to time;
- 3.1.11. Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the

last day falls on a day that is not a Business Day, the next succeeding Business Day;

- 3.1.12. If the due date for performance of any obligation in terms of this Agreement is a day which is not a Business Day then (unless otherwise stipulated) the due date for performance of the relevant obligation shall be the immediately preceding Business Day;
- 3.1.13. Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention;
- 3.1.14. The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting of this Agreement, shall not apply.
- 3.1.15. No provision of this Agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (stipulatio alteri) who is not a Party to this Agreement;
- 3.1.16. The use of any expression in this Agreement covering a process available under South African law, such as winding-up, shall, if either of the Parties to this Agreement is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such other jurisdiction;
- 3.2. Any reference in this Agreement to "**this Agreement**" or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document, as amended, varied, novated or supplemented from time to time;
- 3.3. In this Agreement the words "**clause**" or "**clauses**" and "**appendix**" or "**appendices**" refer to clauses of and annexures to this Agreement.
- 3.4. Where there is a conflict between the terms of this Agreement and the terms of the Concession Agreement, the terms of the Concession Agreement will prevail.

4. **COMMENCEMENT AND DURATION**

- 4.1. This Agreement is at all times subject to the duration of the Concession Agreement, and in the event of the termination of the Concession Agreement this Agreement will automatically terminate and be of no force and effect;
- 4.2. This Agreement shall take effect on the Effective Date.

5. SUSPENSIVE CONDITIONS

- 5.1. The obligations of the Parties under this Agreement are subject to the fulfilment or waiver of the following suspensive conditions **by 30 June 2021**: -
 - 5.1.1. the Safety Regulator shall have approved the Concessionaire's Annual Safety Improvement Plan;
 - 5.1.2. the issuing of a Safety Permit to the Concessionaire by the Safety Regulator; and
 - 5.1.3. the conclusion of the Concession Agreement and the fulfilment of any conditions thereunder.
- 5.2. Both Parties shall use its reasonable endeavours to procure fulfilment of these Suspensive Conditions;
- 5.3. The Suspensive Conditions have been stipulated for the benefit of both Parties, as such, both Parties shall by mutual agreement accordingly be entitled to extend the date by which such Conditions must be fulfilled by up to [180] Business Days with or without further conditions or waive fulfilment of any such Suspensive Conditions by giving written notice to that effect to the other Parties;
- 5.4. If the Suspensive Conditions are not fulfilled or waived by the date upon which such must be fulfilled, then upon delivery by any Party of a written notice to the other Party declaring that the Suspensive Conditions have not been fulfilled or waived, as the case may be, by the date of fulfilment, this Agreement shall lapse and shall cease to be of any force or effect, no Party shall have any claim against any other Party arising out of the non-fulfilment of the Suspensive Conditions or any of them.

6. BASELINE PASSENGER ACCESS SERVICES

- 6.1. For the period reckoned from the Effective Date to the termination of the Concession Agreement, TFR shall provide the Baseline Passenger Access Services to the Concessionaire.
- 6.2. For the duration of this Agreement, TFR and the Concessionaire shall annually or before 31 October of each year finalise a schedule for the provision of the Baseline Passenger Access Services for the following year for purposes of incorporation into the Integrated Train Plan ("ITP").
- 6.3. In circumstances where it is not feasible or practicable for the Baseline Passenger Access Services to be scheduled in accordance with the foregoing provisions of this clause 6 (including, for example, where an ad hoc access service is required at short notice) the Concessionaire may request Additional Passenger Access Services to the TFR Network in accordance with the provisions of clause 7.

- 6.4. The Concessionaire shall at its own risk and peril market and sell tickets for an intended Scheduled Passenger Railway Operation prior to approval thereof and will have no claim against TFR if a Baseline Passenger Access Service is not scheduled in terms of the provisions of this clause **6Error! Reference source not found..**

7. ADDITIONAL PASSENGER ACCESS SERVICES

- 7.1. The Concessionaire shall after the fulfilment of the Suspensive Conditions as referred to in clause 5.1 be entitled to request Additional Passenger Access Services from TFR in terms of the following procedure:
- 7.1.1. the Concessionaire shall deliver a Passenger Access Request to TFR, which Passenger Access Request shall be delivered to the NCC not less than 28 (twenty eight) days prior to the date of the intended Access;
- 7.1.2. the Concessionaire may only request Passenger Access for a Permitted Passenger Purpose;
- 7.1.3. the Passenger Access Request shall include all relevant information of the intended Scheduled Passenger Railway Operation, including without limitation the relevant dates, times, route, Rolling Stock and other such reasonable information to enable TFR to take an informed decision about Passenger Access;
- 7.1.4. the Passenger Access Request shall be supported by all relevant documentation including proof of the fulfilment of Passenger Access Conditions referred to in clause 8.17 below;
- 7.2. If TFR receives a Passenger Access Request which is valid and compliant in terms of all the provisions contained in clause 7.1 and the remainder of this Agreement, it shall in its sole discretion decide if Passenger Access will be granted. The Concessionaire acknowledges that if a Passenger Access Request is given in respect of:
- 7.2.1. a mainline being used that final approval thereof by TFR may be given up to 7 (seven) Business Days prior to the planned date of the intended Scheduled Passenger Railway Operation; and
- 7.2.2. a line that is not being used as a mainline that final approval thereof by TFR may be given up to 14 (fourteen) Business Days prior to the planned date of the intended Scheduled Passenger Railway Operation.
- 7.3. The Concessionaire shall at its own risk and peril market and or sell tickets for an intended Scheduled Passenger Railway Operation prior to approval thereof and will have no claim against TFR if Access is not granted in terms of the provisions of this clause 7.

- 7.4. The Parties shall thereafter prepare a schedule (to be appended to this Agreement) setting out all relevant information of the Additional Passenger Access Services as well as all costs, Tariffs and expenses to be paid to TFR for the Additional Passenger Access Services.

8. PASSENGER ACCESS TERMS AND CONDITIONS

- 8.1. Passenger Access to the TFR Network will be as described in Appendix J and as negotiated and agreed upon in writing between the Parties.
- 8.2. The range of the Passenger Access shall be as described in Appendix J, after prior inspection and assessment by the Concessionaire and finding it to be safe and suitable for steam and other Train operations subject to fire-risk levels.
- 8.3. The Concessionaire also undertakes and agrees that all TFR Trains take precedence over any Trains operated by the Concessionaire.
- 8.4. The Concessionaire acknowledges and accepts that TFR does not have personnel at certain Stations as will be fully set out and described in Appendix J and the Concessionaire will be obliged to provide any services at such Stations at its own cost expense and risk.
- 8.5. The Concessionaire acknowledges and accepts that TFR no longer maintains the railway reserve to suit steam traction with the result that combustible vegetation proliferates on certain railway lines right up to the railway track. The Concessionaire fully realises the serious fire risk that this poses for coal steam locomotives. This Agreement will be terminated immediately with written notice from TFR in the event of the Concessionaire being proved negligent in the case of a fire.
- 8.6. On certain railway lines, which are no longer frequented by passenger Trains, the encroachment of bushes or trees into the railway reserve is also evident in places. Allowing passenger Trains over these “non-passenger” lines may be risky for passengers who lean out of windows. The Concessionaire accepts therefore, that passenger Trains will not be allowed on such lines, unless the Concessionaire carries the cost of repairing the right of way on such lines in a manner that is safe for passenger trains. Such repairs shall be done at the sole cost and expense of the Concessionaire upon such terms and conditions and standards as agreed upon with the relevant owner of the railway line in question. The Concessionaire indemnifies and holds TFR harmless against any claim by any third party in respect of such repair costs and expenses.

- 8.7. Any derailment or Occurrence involving the Concessionaire's Rolling Stock while on the TFR Network will be managed and/or cleared by TFR according to the TFR Contingency Plans for the account of the Concessionaire if such derailment or Occurrence was caused by the negligence of the Concessionaire, which includes without limitation the lack of maintenance of the Concessionaire's Rolling Stock. The Concessionaire shall be responsible to arrange for medical assistance for injured passengers and to arrange alternative transport for other passengers.
- 8.8. The Parties shall make all reasonable efforts to ensure that they achieve efficient Passenger Access and efficient and safe operations upon Passenger Access in order to give effect to the spirit and intent of this Agreement.
- 8.9. **Appendix J** shall also include all agreed upon pricing, expenses and costs payable to TFR for Additional Passenger Access Services.
- 8.10. The Concessionaire's operations shall be in possession of and comply with all relevant safety and operating instructions and regulations pertaining to a particular railway line it operates on.
- 8.11. The Concessionaire's Trains shall operate in strict accordance with the agreed schedules and Train Notices applicable to the occasion as more fully set out in **Appendix J**.
- 8.12. TFR shall –
 - 8.12.1. timeously give the Concessionaire notice of any known TFR circumstances or events which may prevent adherence to the agreed schedules, such as engineering work, occupations, Train failures, changes in maintenance regimes and Occurrences;
 - 8.12.2. give notice to the Concessionaire and allow sufficient time for discussion regarding changes to procedural issues and other areas of mutual concern. Notwithstanding anything to the contrary contained or implied in this Agreement, TFR shall not be obliged to provide Passenger Access Services (even if scheduled in accordance with the foregoing provisions of clauses 6 and 7) or the telecommunication or other ancillary services in the event of any Railway Occurrence or other network, route or service disruption which makes it unsafe to do so, provided that TFR shall give the Concessionaire as much notice of any such Railway Occurrence or disruption as reasonably possible during the applicable stage of the Transnet Planning Cycle.

- 8.13. If required, a qualified TFR Pilot with the necessary road knowledge will accompany the Train being used for the Scheduled Passenger Railway Operation. No more than four persons, including the Pilot, will be allowed on the footplate for the duration of the journey. If a Pilot is not required, only the Train driver who is Certified for the road on the particular line and his Train assistant (fireman) will be allowed on the footplate. A third person may only be allowed on the footplate of a steam locomotive for training purposes when a Pilot is not required. The other persons on the footplate must be in possession of a valid footplate permit. It is specifically recorded that the Pilot shall not be regarded for the aforesaid purposes as an employee or agent of TFR and shall be under the control and supervision of the Concessionaire where the Concessionaire shall take full responsibility for the Pilot and TFR shall not be liable for any acts or omissions of the Pilot and the Concessionaire shall have no claim against TFR in this regard. The Pilot shall, however, be in control of a train on a mainline and TFR shall take responsibility for the Pilot at such times.
- 8.14. The following general Passenger Access Conditions will apply to a Scheduled Passenger Railway Operation:
- 8.14.1. detonators and points keys required for the trip will be under control of the Concessionaire, which will be supplied by TFR, the costs of which will be borne by the Concessionaire;
- 8.14.2. a maximum speed limit of 60 km per hour for the entire route will apply, subject to lesser section speed limits on the railway lines being adhered to and applicable to various types of Rolling Stock (e.g. wooden coaches). TFR will do speed monitoring from time-to-time;
- 8.14.3. steam locomotives used by the Concessionaire shall only operate tender first in unavoidable circumstances. All steam locomotives will be limited to a maximum of 30 km per hour tender first with the exception of class 24 and 25NC, which are limited to 40 km per hour tender first and the Garret running either direction shall be limited to 60 km per hour as contemplated in clause 8.14.2;
- 8.14.4. steam trains may only be operated during hours of daylight (from sunrise to sunset), but should an evening or night operation be necessitated by operational factors beyond the control of the Concessionaire, such operation may be permitted in exceptional circumstances only, and provided appropriate safety precautions as stipulated in **Appendix G** are observed. Only the TFR NCC may grant such permission. Should the Concessionaire in its Passenger Access Request require operating before sunrise or after sunset, TFR may in its sole discretion consider the said request;
- 8.14.5. wooden-bodied coaching Rolling Stock may be utilised on the Concessionaire's Trains, provided that such a Train will be subject to a speed restriction of 60 km per hour;

- 8.14.6. the Concessionaire shall within 72 (seventy-two) hours of completion of the trip, submit a detailed Trip Report to the TFR NCC Tel: (011) 544 9094 / 544 9257 (or such other contact numbers as advised in writing to the Concessionaire by TFR);
 - 8.14.7. all Occurrences on the TFR Network shall immediately be reported by the Concessionaire, at the time of the Occurrence, to the NCC (as contemplated in clause 8.14.6), who will in turn report the Occurrence to the Safety Regulator, as required and must be confirmed in writing on the Trip Report;
 - 8.14.8. the Concessionaire shall at all times comply with Occurrence reporting procedures, as required by the Occupational Health and Safety Act 85 of 1993 as well as the RSR Act.
- 8.15. In view of the potentially serious line side fire risk, resulting from steam locomotive operations, specific fire protection measures will be taken by the Concessionaire where authorised to do so and upon such conditions as imposed by TFR as follows:
- 8.15.1. an environmental risk assessment must be undertaken for the relevant sections over which a steam Train will run. The validity of such a risk assessment will be in force of 14 (fourteen) days unless clause 8.14.4 is applicable;
 - 8.15.2. the Concessionaire must ensure that fire protection measures are implemented and furnish confirmation that its personnel have received adequate fire-fighting training. Comprehensive fire-fighting equipment, including water, a water pump and fire hoses, must be carried on the Train on the basis that the Concessionaire shall at all times have sufficient water to operate a locomotive and to sufficiently address fire risks;
 - 8.15.3. liaison (where applicable and possible) with potentially affected parties e.g. local Farmer's Association, Fire Protection Association, landowners and Emergency Services, etc.;
 - 8.15.4. the Concessionaire will not run coal fired steam locomotives during excessively windy and/or dry conditions or where a fire hazard warning was issued by the Weather Bureau for a specific day. In such an event any Train Notice and/or any prior approval in terms of the Integrated Train Plan for the Scheduled Passenger Railway Operation shall be deemed to be revoked; and
 - 8.15.5. the Concessionaire shall indemnify and hold TFR harmless from any loss or damage to its assets, its employee's and agents arising out of or from any line side fire and related instances caused by the Concessionaire.
- 8.16. Access to TFR mainlines shall be limited to certain mainlines only.

- 8.17. Notwithstanding anything to the contrary contained in this Agreement, TFR shall not be obliged to grant Passenger Access to the Concessionaire and issue a Train Notice in respect of the Additional Passenger Access Services unless the following Passenger Access Conditions have been fulfilled (or waived by TFR in terms of clause 8.18):
- 8.17.1. the supply to TFR of sufficient proof that the Concessionaire has a valid Safety Permit and complies with all conditions imposed by the Safety Regulator in terms thereof (if applicable);
 - 8.17.2. the supply to TFR of sufficient proof that the Concessionaire has sufficient insurance cover over TFR assets which is in TFR's sole discretion and assessment adequate for purposes of the intended Scheduled Passenger Railway Operation;
 - 8.17.3. the Concessionaire shall furthermore indemnify TFR for any amount in excess of its shortfall resulting from such insurance cover;
 - 8.17.4. the actual receipt by TFR of all amounts due in respect of the Additional Passenger Access Services as more fully set out in **Appendix K** by not later than 7 (seven) Business Days prior to the intended Scheduled Passenger Railway Operation;
 - 8.17.5. the supply to TFR of the written confirmation given by PRASA that the Scheduled Passenger Railway Operation or ad hoc railway operation has been approved by PRASA in respect of the use of the PRASA Network (in so far as it may be applicable).
- 8.18. The Passenger Access Conditions have been inserted into this Agreement for the benefit of TFR and TFR may accordingly waive such Passenger Access Conditions by delivering a written notice of such waiver to the Concessionaire at any time.

9. OTHER OBLIGATIONS OF THE CONCESSIONAIRE WITH RESPECT TO PASSENGER ACCESS

- 9.1. The Concessionaire accepts full responsibility for the safe operation of steam or other locomotives, Rolling Stock, equipment and personnel used by the Concessionaire for Scheduled Passenger Railway Operation Purposes and shall ensure that it meets the following requirements:
- 9.1.1. a Train driver shall be trained, qualified and Certified by the Concessionaire as Competent to operate the specific class of locomotive, over a specific section of line, for a specific type of Train;
 - 9.1.2. a Train driver's assistant (fireman) shall be trained, qualified and Certified by the Concessionaire as Competent to undertake the relevant duties;
 - 9.1.3. a Train safety officer shall be trained, qualified and Certified by the Concessionaire as Competent to undertake the relevant duties;

- 9.1.4. coach controllers in each coach of the Train shall be trained and qualified by the Concessionaire as Competent to undertake the relevant duties.
- 9.2. When locomotives and Rolling Stock will be used the Concessionaire will ensure that the required certificates with regards to Train Worthiness are in accordance with TFR standards.
- 9.3. The Concessionaire's Rolling Stock shall be operated in strict accordance with the relevant TFR and PRASA Train Notices which shall be made available not less than 72 (seventy two) hours before the Train's scheduled departure time.
- 9.4. The image of TFR shall not be tarnished or brought into disrepute through inappropriate and/or unprofessional and/or related activities by the Concessionaire.
- 9.5. No locomotive, or combination of locomotives, shall be allowed to haul a Train of more than 21 (twenty-one) vehicles, unless the prior written consent of TFR was given thereto after it was proven that the capacity of the locomotive(s) can haul the number of vehicles and has the required braking and train handling capacities.
- 9.6. All the Concessionaire's Rolling Stock shall have a valid weighbridge certificate, as a requirement for entry onto the TFR Network. The Concessionaire will be allowed a 12 (twelve) month period after the Signature Date to reach full compliance with the locomotive weighing requirement.
- 9.7. The civil engineering Certification by TFR Infrastructure (Maintenance) staff where applicable (the contact details of which shall be supplied by the NCC to the Concessionaire from time to time and TFR shall use its best endeavours to facilitate such Certification), for the safe operation of Rolling Stock over certain bridges and lines is mandatory. Rolling Stock will not be allowed to run unless written confirmation is given to the Concessionaire that the envisaged route is safe for the passage of a passenger Train.
- 9.8. The Concessionaire shall, at its own cost and expense, ensure that the entire Train including the locomotive and Train crew of any particular Train, are provided with effective, suitable and reliable means of communication with each other and with the appropriate emergency services and local Train Control Officers of Transnet Freight Rail and PRASA. The Concessionaire acknowledges that arrangements for Train control and operating purposes, including any special authority, will only be allowed where voice logging is possible.
- 9.9. A passenger Train operated by the Concessionaire shall be:
- 9.9.1. accompanied by at least two people with recognised and valid first aid qualifications;
- 9.9.2. provided with at least two suitable and approved first aid boxes and fire fighting equipment
- 9.9.3. each coach shall be fitted with an appropriate fire extinguisher and Train personnel to handle fire fighting equipment.

- 9.10. The Train shall be accompanied by a fully qualified and Competent train safety officer (as well as a train manager. The Concessionaire warrants that all such Competent persons shall at all times be fully qualified for the said purposes.
- 9.11. Authority is vested in the train safety officer to prohibit movement of the Train if he has good cause to believe that the safety of the Train and/or public is at risk.
- 9.12. In the event that the Rolling Stock and/or crews of the Concessionaire should fail to meet the standards required for a particular duty, TFR reserves the right to recover all related costs from the Concessionaire resulting from an Occurrence.
- 9.13. The attaching of any materials, banners, flags, etc. to the sides of the Rolling Stock, is prohibited but a locomotive headboard or banner shall be permissible, subject to it being firmly fixed to the Rolling Stock and not creating a safety or fire risk and in particular with due consideration of the profile or structural gauge of the locomotive and infrastructure.
- 9.14. The hours of duty of the Concessionaire's crews, calculated from signing on duty to signing off duty, shall comply with the Basic Conditions of Employment Act (Act 75 of 1997) (BCEA) and all other applicable legislation.
- 9.15. The Concessionaire shall have agreements with its Train crews and/or staff for the right at any time for TFR to test its Train crews and/or staff for substance abuse, without the need to give any advanced notice of such intention.
- 9.16. The Concessionaire acknowledges and agrees that TFR may remove the Concessionaire's Train drivers or fireman from normal duties if suspected of any violation of any TFR standards where applicable. The costs of such remedial action shall be borne by the Concessionaire.
- 9.17. The Concessionaire will provide at its own cost, coal, water, lubrication and other support facilities including fire protection for steam locomotives at the start of every Scheduled Passenger Railway Operation and also en route and at terminating points.
- 9.18. The Concessionaire will ensure that arrangements are made for the cleaning of steam locomotives' fires only in designated places which are far removed from overhead electric power lines and not on wooden sleepers anywhere in a section, and will ensure the disposal of ash at its own cost.
- 9.19. The Concessionaire will ensure the hygienic disposal in the prescribed manner of all refuse and domestic and human waste resulting from the use of the Concessionaire's rolling stock by passengers and personnel. This undertaking will also include the use of any Stations by the Concessionaire and its passengers.

10. SAFETY OBLIGATIONS OF THE CONCESSIONAIRE IN RESPECT OF THIS AGREEMENT

- 10.1. The Concessionaire shall not be exempt from any Law imposing duties or obligations on it as the Train Concessionaire or affecting the use of the TFR Network, infrastructure and facilities.
- 10.2. The Concessionaire undertakes to carry out all its obligations in accordance with the Occupational Health and Safety Act, (Act 85 of 1993) the RSR Act as well as any other relevant Laws.
- 10.3. The Concessionaire shall not contravene or permit the contravention of any Law that TFR is required to observe resulting from the TFR Network.
- 10.4. TFR will not be an intermediary between the Concessionaire and the National Department of Labour and/or Transport or any other Government Department.
- 10.5. The Concessionaire shall be obliged to use conditions of carriage, in ticket or other form and shall be completed between a passenger and the Concessionaire. These conditions shall clearly state that TFR is not the Train Operator and TFR must approve the wording of such contracts of carriage.
- 10.6. The Concessionaire shall not cede, delegate, assign, dispose of or in any way transfer any of its rights or obligations in terms of this Agreement.
- 10.7. The parties agree that interface between the Concessionaire and TFR will be conducted in the operating framework of TFR in terms of the interface procedure set out in Appendix C.
- 10.8. The operational working on the TFR Network will be conducted under the control systems of either PRASA or TFR as and when applicable.
- 10.9. Details of the operational working on the Railway Line are set out in Appendix J hereto, which will include without limitation requirements on who must be contacted and how and when Passenger Access will be given.
- 10.10. The Concessionaire or TFR will undertake all Shunting to be conducted at TFR Yards and the Concessionaire shall be liable to pay its pro rata costs thereof upon demand to TFR.
- 10.11. The Concessionaire shall ensure that its employees are registered in terms of the Compensation for Occupational Injuries and Diseases Act, 1993.
- 10.12. The Concessionaire shall be liable for any act and omissions of its employees in the execution of this Agreement.
- 10.13. The Concessionaire shall have in operation for the duration of this Agreement a Safety Management System (SMS) including Management Information Systems (MIS) as required in the Act and the Regulations, as well as other relevant structures for compliance with the principles of "good governance".
- 10.14. As part of the compliance to the RSR Act for Safety Permit holders safety system audits will be conducted bi-annually by the IC. These audits are additional to any other audits conducted by the Safety Regulator or Department of Labour from time to time.

11. OPERATIONAL DESCRIPTION OF THE BRANCH LINE

- 11.1. The Branch Line connects with the Access Route at the Access Point on which Trains are controlled by means of TFR Train authorisation systems;
- 11.2. Trains traversing the Branch Line, as at the Effective Date, are controlled by means of a Train Control System provided by the Concessionaire;
- 11.3. The exchange of traffic between the Parties will take place at the Exchange Yard where lines will be made available to the Concessionaire;
- 11.4. All Trains of the Concessionaire, to and from the Branch Line, traversing the Access Route shall be under the control of a TFR Pilot or a driver, or a driver of the Concessionaire Certified by TFR, who is qualified to operate the class of locomotive used to work the Train and who possesses the necessary road knowledge in terms of clause 9038.0 of the General Appendix (Part I).

12. RELATIONSHIP WITH SAFETY INTERFACE

- 12.1. The Concessionaire represents that it has applied for a Safety Permit as a Network Operator. It is further agreed and accepted that such permit shall be used for the purpose to operate the Freight Rail Service through the Train O&M Provider as stipulated in the Concession Agreement using: –
 - 12.1.1. the Branch Line under and by virtue of the Concession Agreement; and
 - 12.1.2. the Access Route under and by virtue of the provisions of this Track Access Agreement.
- 12.2. Any and all Track Access to the Access Route shall be executed by TFR (i.e. the Train O&M Provider) on behalf of the Concessionaire;
- 12.3. The Parties record further that the Concessionaire's application for a Safety Permit as aforesaid is supported by this Agreement;
- 12.4. The Concessionaire shall use all reasonable endeavours to ensure that: –
 - 12.4.1. all of the conditions stipulated under the Safety Permits are duly and timeously complied with; and
 - 12.4.2. that this Agreement is lodged with and accepted by the Safety Regulator in accordance with the provisions of the RSR Act.
- 12.5. .

13. CORE NETWORK TRACK ACCESS

- 13.1. Freight Access
 - 13.1.1. TFR hereby grants to the Concessionaire Freight Access to the Access Routes for the Permitted Freight Purposes;
 - 13.1.2. Freight Access would be granted by TFR subject to: -
 - 13.1.2.1. the condition of the track along the Access Route; and
 - 13.1.2.2. facilities required at the Hand Over Point;
 - 13.1.2.3. The availability of capacity to operate Trains on the Access Route

- 13.1.2.4. the operational and other requirements of the Parties (exclusively incidental to the import and intent of this Agreement); and
- 13.1.2.5. the anticipated growth all traffic to be operated and the impact thereof on the Access Route and Branch Line Network; and
- 13.1.2.6. any and all other capacity requirements.

13.2. Forecasts

13.2.1. For the purposes of permitting TFR to plan for the maintenance and upgrading of the railway infrastructure on the Access Route, the Concessionaire, after being instructed by TFR shall, within thirty (30) days after being requested to do so by TFR, (such requests to be made not more than once in any six (6) month period), provide to TFR a forecast in writing representing the Concessionaire's best estimate for the next six (6) month period specified by the Concessionaire in its request of:-

- 13.2.1.1. the number and frequency of Train Services required;
- 13.2.1.2. the gross tonnage it will transport;
- 13.2.1.3. the average number of gross tonnes per Train it will transport; and
- 13.2.1.4. any changes in Rolling Stock or Rolling Stock configuration which will vary any of the above, such forecast of the above information to be made up of:-

- 13.2.1.4.1. a forecast for each month of the first year of such period; and
- 13.2.1.4.2. a forecast for each of the remaining five (5) years of such period.

13.2.2. The Concessionaire will, within thirty (30) days after being requested to do so by TFR (such requests to be made not more than once in any six (6) month period), provide to TFR forecasts of planned maintenance relating to the Branch Line for the next 6 years;

13.2.3. The information and/or forecasts referred to above shall be prepared and supplied in good faith however the information and/or forecasts shall not be a representation or warranty as to the accuracy of the information and/or forecasts itself and the Parties have no liability in any respect for the information and/or forecasting.

13.3. Train Control Systems

13.3.1. TFR will provide and will have exclusive responsibility for Train control in respect of the Access Route;

13.3.2. The Concessionaire shall comply with all relevant Safety Standards pertaining to the Access Route;

13.4. Telecommunications

- 13.4.1. The Parties agree and must ensure all Trains are equipped with or have available effective means of communication to permit the Concessionaire to execute the Train Services as stipulated in this Agreement. In this regard, the Parties agree to apply appropriate technology and train authorisation systems for all Train movements.
- 13.4.2. Transnet will communicate any change to the telecommunication system that may require an upgrade to the telecommunications systems that the Trains must be equipped with at least 24 months ahead of the implementation.
- 13.4.3. The Concessionaire is obliged to and agrees that the telecommunication system will be upgraded as soon as the volume of Train Services or safety considerations so require, or as per agreement between the Parties.
- 13.4.4. The Parties agree and the Concessionaire acknowledge that the telecommunication system as at the commencement of the Concession is sufficient for the provision of the Train Services.
- 13.5. Compliance with Scheduled Slots of the Integrated Train Plan
 - 13.5.1. The Concessionaire shall reasonably endeavour to: -
 - 13.5.1.1. operate Train Services in accordance with the relevant daily Train plan as provided for in the Integrated Train Plan; and
 - 13.5.1.2. otherwise comply with all other Scheduled Slots.
- 13.6. Alterations to Train Services
 - 13.6.1. The Concessionaire must prior to the alteration or cancellation of Scheduled Operation of the Train Service, advise TFR of the cancellation of such Train Service and the reason for such cancellation;
 - 13.6.2. In the event that a Train Service is unable to operate in accordance with its Scheduled Slot then, provided that the Concessionaire has complied with its obligations as set out herein, TFR shall use its reasonable endeavours to provide an alternative Scheduled Slot for the relevant Train Service;
 - 13.6.3. In the event that a Train Service is for any reason unable to commence to operate in accordance with its Scheduled Slot and following bona fide consultation between the Concessionaire and TFR, and it is not possible for the Concessionaire or TFR to provide an alternative Scheduled Slot reasonably acceptable to both Parties, such Train Service may be cancelled by either the Concessionaire or TFR giving notice to the other Party as soon as is practical;
 - 13.6.4. TFR may delay, alter or add a Train Service on the Access Route;
 - 13.6.5. TFR may cancel, re-route, cancel or re-Schedule a Train Service on the Access Route as set out in the Integrated Train Plan;
 - 13.6.6. TFR may impose any Operational Constrain on the Access Route.
 - 13.6.7. The Concessionaire and TFR shall notify each other of planned Occupations on the Branch Line and Access Route.

13.7. Notification

- 13.7.1. TFR must notify the Concessionaire (such notification to include where relevant the anticipated effect on the relevant Train Service) as soon as reasonably practical after TFR discovers or becomes aware of any circumstances including obstructions (other than those circumstances of which the Concessionaire is aware or ought to have been aware) which: -
- 13.7.1.1. have materially affected, or could potentially materially affect, the ability of any Train Service to comply with its Scheduled Slots; or
 - 13.7.1.2. have affected, or could potentially affect, the security or safety of the Rolling Stock of the Concessionaire.

13.8. Operation of Trains and Rolling Stock

- 13.8.1. The Concessionaire shall: -
- 13.8.1.1. be responsible for the safe Operations of Rolling Stock on the Access Route Line;
 - 13.8.1.2. ensure at all times that when the Concessionaire's Rolling Stock operates on the Core Network that the Concessionaire's Rolling Stock complies with all applicable Standards as set out in the Safety Interface Agreement and by the Safety Regulator from time to time;
 - 13.8.1.3. ensure that all loading and off-loading of Concessionaires Rolling Stock is undertaken in a manner that is consistent with the requirements of the Operations and Safety Requirements, applicable loading profiles and the Safety Interface Agreement and does not impair the safe Operation of such Rolling Stock.

13.9. Management and Control of the Core Network and Access Route

- 13.9.1. TFR is, as Network Operator, responsible for all Operations of the Core Network and shall retain control over all activities on the Core Network;
- 13.9.2. TFR carries out Access Route Maintenance on the Access Route according to its standards, such that: -
- 13.9.2.1. the Access Route Rail Infrastructure is consistent with the Rolling Stock interface standards set out in the Safety Interface Agreement; and
 - 13.9.2.2. the Concessionaire can operate Train Services in accordance with their Scheduled Slots as per the Train O&M Agreement.

- 13.9.3. TFR may impose either temporarily or permanently such Operational Constraint as it considers necessary for the protection of any person or any property (including the infrastructure) or to facilitate the performance of maintenance work or enhancements provided that in exercising its rights under this clause, TFR must use its reasonable endeavours to minimise disruption to Train Services (including giving as much notice as possible and, where possible, providing alternate Scheduled Slots having regard to the reasonable requirements of the Concessionaire) and comply with the relevant procedures specified in the Safety Interface Agreement;
 - 13.9.4. Except to the extent that an Operational Constraint resulted from a breach by TFR of this Agreement, any delays or cancellations of Train Services caused by or resulting from Operational Constraint shall not constitute a default by TFR of its obligations under this Agreement and TFR will not be liable for any claims suffered or incurred by or made or brought by or against the Concessionaire as a result of or arising from the imposition of such an Operational Constraint;
 - 13.9.5. The Concessionaire must notify TFR as soon as is reasonably practicable of any damage to or disrepair or failure in operation or function of any part of the Rail Infrastructure on the Access Route of which the Concessionaire becomes aware of;
 - 13.9.6. TFR shall, after reasonable consideration either approve or reject written requests from the Concessionaire to amend the Access Route Plan to allow for an increase or decrease in the Concessionaire's Allocated Capacity, provided however that TFR shall only be obliged to consider such requests from the Concessionaire once every 6 months during a designated period;
 - 13.9.7. TFR shall not be obliged to provide the Concessionaire Access to the Access Route in respect of Scheduled Train Services, other than in accordance with the stipulations under the Services Design Appendix finalised and approved by TFR in accordance with the foregoing provisions or as otherwise agreed between the parties.
- 13.10. Pricing Principles
- 13.10.1. Core Network Track Access charges will be as per the Core Network Track Access Rates Appendix, Appendix E.
- 13.11. Limitation on provision of Access
- 13.11.1. At its sole discretion, TFR shall not be obliged to provide any Freight Access to the Concessionaire in the event of an Occurrence or such circumstances or situation which renders it unsafe or impractical;

- 13.11.2. The Parties warrant and undertake to the other that, in relation to all aspects of their Interface and Access that all Rolling Stock shall be Train Worthy, all infrastructure used in Train Operations shall be Rail Worthy and it shall adhere to and comply with the Operations And Safety Requirements, the RSR Act, SANS all other applicable laws and regulations and the provisions of this Agreement;
- 13.11.3. Any Rolling Stock from the Concessionaire traversing the Access Route shall be subject to ad hoc inspections by TFR to establish whether such Rolling Stock are in compliance with the relevant Standards;
- 13.11.4. Should any of the Rolling Stock not be in a Train Worthy condition, the Concessionaire shall be so informed, who must see to it that the defects are rectified immediately;
- 13.11.5. Should the Concessionaire not be able to rectify the defect and TFR, as Network Operator deems it fit or necessary to rectify the defect for operational or safety requirements the costs of such rectification shall be reimbursed by the Concessionaire to TFR;
- 13.11.6. In the event of a breakdown such as, but not limited to, a locomotive failure, wagon failure, communication failure, on the Access Route, of any Rolling Stock of the Concessionaire, the Concessionaire shall notify TFR immediately of such a breakdown and will be obliged to remedy the obstruction or delay that such a breakdown may have caused. Should the Concessionaire be unable to do so, TFR may take any and all action necessary to remedy the obstruction or delay the breakdown caused in its sole discretion any costs incurred by TFR in doing so shall be borne by the Concessionaire;
- 13.11.7. In addition, TFR shall not be obliged to provide any Access to the Concessionaire if: -
- 13.11.7.1. the Concessionaire's Train drivers, Train assistants or other staff or contractors utilised in the provision of Rail Freight Services and/or Passenger Services are found not to have the necessary competence and/or capability to operate the Rolling Stock or undertake such other key responsibilities relating to the provision of the Rail Freight Services or Passenger Services and/or have been found guilty or are reasonably suspected of substance abuse;
 - or
 - 13.11.7.2. the Concessionaire's Rolling Stock does not meet the standards specified in the Operations And Safety Requirements; or
 - 13.11.7.3. all the Concessionaire's Train drivers are not accompanied by a TFR pilot where this is required as contemplated in clause 11.4
- 13.12. Overloading and Mass Declared

- 13.12.1. The Concessionaire may not overload wagons in excess of safe Operating standards prescribed for the Access Route railway lines with axle load restrictions and wagon loading capacity nor under-declare the net mass per wagon. The Concessionaire is responsible to ensure compliance with this clause by its customer, nominee or transport co-ordinator if applicable;
- 13.12.2. The Concessionaire will be liable for losses and/or damage to the Network caused by such overloading or under declaration. The Concessionaire must, in order to avoid overloading, ensure that the wagons are loaded in accordance with their respective loading profiles;
- 13.12.3. The Concessionaire must ensure that the correct net mass of the Goods per wagon is indicated correctly on the combined consignment note & wagon label/release pro forma;
- 13.12.4. TFR is entitled to verify the mass declared by measuring the mass of each wagon prior to, during or after the Haulage. Should TFR find that the mass per wagon has been under declared, it will report this to the Concessionaire;
- 13.12.5. If TFR finds that mass has been under-declared or that a wagon is overloaded by the Concessionaire TFR will furnish the Concessionaire with a report of the results with the view to discussing the causes thereof with the Concessionaire;
- 13.12.6. TFR reserves the right to stop the overloaded wagon at the first safe place and not to Haul a wagon found to be overloaded (either at the Hand-Over Point or en route);
- 13.12.7. TFR may require the Concessionaire to off-load or arrange to off-load sufficient quantities of the Goods to bring the mass of the wagon within the carrying capacity of the wagon and the railway line capacity restrictions. Mass measuring fees and all other related charges and additional costs reasonably attributable to or arising out of the holding back of the wagon will be for the Concessionaire's account;
- 13.12.8. If the Concessionaire wishes to load the excess mass of Goods into another wagon, subject to Available Capacity, the applicable fees will apply subject to the applicable Rates Appendix;
- 13.12.9. If one Party disputes the accuracy of the other Party's verified mass measuring device, the accuracy of the Device will have to be verified in accordance with the provisions of the Trade Metrology Act 77 of 1973. If the accuracy of the device is verified as correct, the cost of the certification will be borne by the Party who disputed the accuracy. If the accuracy of the device is not verified as correct, the cost of the certification will be borne by the Party whose device it is;

13.12.10. The accuracy of any verified mass measuring device owned by TFR shall be presumed and the Concessionaire bears the onus of disproving its accuracy or the accuracy of the records of such device or both.

13.13. Insurance

13.13.1. The Concessionaire shall supply to TFR sufficient proof that the Concessionaire has sufficient insurance cover over TFR assets which is in TFR's sole discretion and assessment adequate for purposes of this clause 13; and

13.13.2. the Concessionaire shall furthermore indemnify TFR for any amount in excess of its shortfall resulting from such insurance cover.

14. BRANCH LINE EXCEPTIONAL TRACK ACCESS

14.1. The Parties agree that the Access Point will be at ABC as set out on the annexed Route Plan. Any Access granted to TFR to the Branch Line in terms of this clause 14 shall be paid in accordance with the Branch Line Exceptional Track Access Rates Appendix and clause 15 shall not be applicable to this clause 14.

14.2. Access

14.2.1. The Concessionaire hereby grants to TFR Access to the Branch Line for the Restricted Purposes;

14.2.2. Access would be granted by the Concessionaire subject to: -

14.2.2.1. the condition of the track along the Access Route and Branch Line as at the time of Access;

14.2.2.2. the Scheduled movement of Trains on the Branch Line as is set out in the Integrated Train Plan; and

14.2.2.3. the Operational and other requirements, including safety requirements of the Concessionaire (exclusively incidental to the import and intent of this Agreement).

14.3. Train Control Systems

14.3.1. The Concessionaire will provide and will have exclusive responsibility, subject to the Concession Agreement, for Train control in respect of the Branch Line;

14.3.2. The Concessionaire shall have regard to all relevant Safety Standards pertaining to the Branch Line.

14.4. Telecommunications

14.4.1. TFR must ensure that all its Trains are equipped with or have available effective means of communication to enable and ensure safe Train movements on the Branch Line.

14.4.2. The Concessionaire must notify TFR at least 2 years ahead of any changes to the technology of communications on Trains on the Branch Line.

14.5. Notification

- 14.5.1. The Concessionaire shall notify TFR (such notification to include where relevant the anticipated effect on the relevant Train service) as soon as reasonably practicable after the Concessionaire discovers or becomes aware of any circumstances including obstructions (other than those circumstances of which the Concessionaire is aware or ought to have been aware) which: -
- 14.5.1.1. have materially affected, or could potentially materially affect, the ability of any movement of Trains on the Branch Line, subsequent to Access being granted; or
 - 14.5.1.2. have affected, or could potentially affect, the security or safety of the Rolling Stock and crew of TFR.

14.6. Operation of Trains and Rolling Stock

- 14.6.1. The Concessionaire shall be responsible for the safe Operations of Rolling Stock on the Branch Line and as such, TFR shall: -
- 14.6.1.1. ensure at all times that when TFR's Rolling Stock operates on the Branch Line that TFR's Rolling Stock complies with all applicable Standards as set out in the Safety Interface Agreement and by the RSR from time to time;
 - 14.6.1.2. ensure that all loading and off-loading of TFR's Rolling Stock is undertaken in a manner that is consistent with the requirements of the Operations and Safety Requirements, applicable loading profiles and the Safety Interface Agreement and does not impair the safe Operation of such Rolling Stock.

14.7. Management and Control of the Branch Line

- 14.7.1. The Concessionaire is, as Network Operator, responsible for all Operations of the Branch Line and shall retain control over all activities on the Branch Line as stipulated in the Concession Agreement and the RSR Act;
- 14.7.2. The Concessionaire shall carry out Infrastructures Services, as contemplated in the Concession Agreement, on the Branch Line, such that the Rail Infrastructure is consistent with the agreed on and applicable standards;
- 14.7.3. The Concessionaire may impose either temporarily or permanently such Operational Constraint as it considers necessary for the protection of any person or any property (including the Rail Infrastructure) or to facilitate the performance of Infrastructure Services or enhancements provided that in exercising its rights under this clause, the Concessionaire must use its reasonable endeavours to minimise disruption to Branch Line Exceptional Track Access and comply with the relevant procedures specified in the Safety Interface Agreement;

- 14.7.4. Except to the extent that an Operational Constraint resulted from a breach by the Concessionaire of this Agreement, any delays or cancellations of Branch Line Exceptional Track Access caused by or resulting from Operational Constraint shall not constitute a default by the Concessionaire of its obligations under this Agreement and the Concessionaire will not be liable for any claims suffered or incurred by or made or brought by or against TFR as a result of or arising from the imposition of such an Operational Constraint;
 - 14.7.5. TFR must notify the Concessionaire as soon as is reasonably practicable of any damage to or disrepair or failure in Operation or function of any part of the Rail Infrastructure on the Branch Line of which TFR becomes aware of;
 - 14.7.6. The Concessionaire and TFR shall notify each other of planned Occupations on the Branch Line and Access Route.
 - 14.7.7. The Concessionaire may delay, alter or add Train Services on the Branch Line;
 - 14.7.8. The Concessionaire may cancel, re-route, cancel or re-Schedule Train Services on the Branch Line;
 - 14.7.9. The Concessionaire may impose any Operational Constraint on the Branch Line in order to ensure safe operations.
- 14.8. Pricing Principles
- 14.8.1. Branch Line Exceptional Track Access charges will be as per the Branch Line Exceptional Track Access Rates Appendix, Appendix F.
- 14.9. Limitation on provision of Access
- 14.9.1. The Concessionaire shall not be obliged to provide any Access to TFR in the event of an Occurrence or such circumstances or situation which renders it unsafe or impractical;
 - 14.9.2. The Parties warrant and undertake to the other that, in relation to all aspects of their Interface and Access that all Rolling Stock shall be Train Worthy, all infrastructure used in Operations shall be Rail Worthy and it shall adhere to and comply with the Operations And Safety Requirements, the RSR Act, SANS all other Applicable Laws and regulations and the provisions of this Agreement;
 - 14.9.3. Any Rolling Stock from TFR traversing the Branch Line shall be subject to ad hoc inspections by the Concessionaire to establish whether such Rolling Stock is in compliance with the relevant Standards of the Branch Line.
 - 14.9.4. Should any of the Rolling Stock not be in a Train Worthy condition, TFR shall be so informed, who must see to it that the defects are rectified immediately;
 - 14.9.5. Should TFR not be able to rectify the defect and the Concessionaire, as Network Operator deems it fit or necessary to rectify the defect for operational or safety requirements the costs of such rectification shall be reimbursed by TFR to the Concessionaire;

- 14.9.6. In the event of a breakdown on the Branch Line, of any Rolling Stock, TFR shall notify the Concessionaire immediately of such a breakdown and will be obliged to remedy the obstruction or delay that such a breakdown may or have caused. Should TFR be unable to do so, the Concessionaire may take any and all action necessary to remedy the obstruction or delay the breakdown caused in it its sole discretion and any costs incurred by the Concessionaire in doing so shall be borne by TFR;
- 14.9.7. In addition, the Concessionaire shall not be obliged to provide any Access to TFR if: -
- 14.9.7.1. TFR's Train drivers, Train assistants or other staff or contractors are found not to have the necessary competence and/or capability to operate the Rolling Stock or undertake such other key responsibilities relating to the provision of such Train movements and/or have been found guilty or are reasonably suspected of substance abuse; or
- 14.9.7.2. TFR's Rolling Stock does not meet the standards specified in the Operations And Safety Requirements.
- 14.10. Overloading and Mass Declared
- 14.10.1. TFR may not overload wagons in excess of safe operating standards prescribed for the Branch Line with axle load restrictions nor under-declare the net mass per wagon;
- 14.10.2. TFR will be liable for losses and/or damage to the Network caused by such overloading or under declaration. TFR must, in order to avoid overloading, ensure that the wagons are loaded in accordance with their respective loading profiles.
- 14.10.3. TFR must ensure that the correct net mass of the Goods per wagon is indicated correctly on the combined consignment note & wagon label/release pro forma;
- 14.10.4. The Concessionaire is entitled to verify the mass declared by measuring the mass of each wagon prior to, during or after the Haulage. Should the Concessionaire find that the mass per wagon has been under declared, it will report this to TFR;
- 14.10.5. If the Concessionaire finds that mass has been under-declared or that a wagon is overloaded by TFR the Concessionaire will furnish TFR with a report of the results with the view to discussing the causes thereof with TFR;
- 14.10.6. The Concessionaire reserves the right to stop the overloaded wagon at the first safe place and not to allow the Haulage of a wagon found to be overloaded;

- 14.10.7. The Concessionaire may require TFR to off-load or arrange to off-load sufficient quantity of the Goods to bring the mass of the wagon within the carrying capacity of the wagon. Mass measuring fees and all other related charges and additional costs reasonably attributable to or arising out of the holding back of the wagon will be for TFR's account;
- 14.10.8. If TFR wishes to load the excess mass of Goods into another wagon, subject to Available Capacity, the applicable fees will apply subject to the applicable rates appendix;
- 14.10.9. If one Party disputes the accuracy of the other Party's verified mass measuring device, the accuracy of the Device will have to be verified in accordance with the provisions of the Trade Metrology Act 77 of 1973. If the accuracy of the device is verified as correct, the cost of the certification will be borne by the Party who disputed the accuracy. If the accuracy of the device is not verified as correct, the cost of the certification will be borne by the Party whose device it is. The accuracy of any verified mass measuring device owned by TFR shall be presumed and the Concessionaire bears the onus of disproving its accuracy or the accuracy of the records of such device or both.

15. THIRD PARTY ACCESS TO THE BRANCH LINE

- 15.1. It is recorded that in terms of the Concession Agreement, third parties may, or have been, granted access to traverse the whole or any portion of the ABC – ABC – ABC Branch Line, using TFR's Rolling Stock or its own Rolling Stock, the circumstances being:-
 - 15.1.1. where the Concessionaire will consider and provide access to third parties, on the terms and conditions to be determined and agreed;
 - 15.1.2. third parties, whether governmental or non-governmental who require access to reach rural communities for socio-economic reasons;
 - 15.1.3. any request that would be in the interest of the Republic of South Africa; or
 - 15.1.4. whatever other reason agreed.

16. PAYMENT

- 16.1. The Concessionaire shall pay TFR a Freight Access fee for the Freight Access Services rendered by TFR to the Concessionaire during each month into such bank account designated by TFR by written notice to the Concessionaire;
- 16.2. TFR shall invoice the Concessionaire using the rate applicable to Train Services on the Access Route and the other components of the Freight Access Services as set out in the Core Network Track Access Rates Appendix;
- 16.3. TFR will render a monthly VAT invoice to the Concessionaire, which will serve as an account for the Freight Access Services during the preceding month;

- 16.4. Amounts debited to the Concessionaire's account during any particular month must be paid by the Concessionaire on or before the 25th Day of the month following the month in which the debits were raised. Payments must be made into such account as Transnet Freight Rail may from time to time notify the Concessionaire. When the 25th is not a Business Day payment is required on the last Business Day prior to the 25th.
- 16.5. 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.
- 16.6. In the event that the Concessionaire disputes or fails to pay any amount of the VAT invoice relating to the Freight Access Services, the Concessionaire shall pay such part of the VAT invoice it does not dispute and shall be entitled to refer the dispute to an independent auditor jointly nominated and appointed by the Parties;
- 16.7. In the event that the Parties are unable to agree on the identity of the independent auditor, the independent auditor shall be nominated by the President (or his nominee) of the Institute of Chartered Accountants of South Africa (or its successor body) for appointment by the Parties. The determination of the independent auditor shall, in the absence of manifest error, be final and binding on the Parties;
- 16.8. Neither Party shall have the right to exercise a lien over the other Party's assets that are in the possession or under the control of the Party for unpaid accounts or for any other reason whatsoever.

17. AUDIT RIGHTS

- 17.1. TFR may carry out checks and inspections necessary to establish whether the Concessionaire is complying with its obligations under this Agreement and carry out such inspections of the books and records kept by or on behalf of the Concessionaire in connection with the Access Services as TFR may reasonably consider to be necessary for such purpose;
- 17.2. Reasonable notice of the audit will be given to the Concessionaire prior to such audit taking place;
- 17.3. If at any time TFR is of the opinion that the Concessionaire has failed to perform any of its obligations under this Agreement and such failure is capable of remedy, then TFR 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 17. 3 ("**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 TFR;

- 17.4. Within 14 (fourteen) days of receipt of a Remedial Notice the Concessionaire shall put forward to TFR 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 17 (*Dispute Resolution*).

18. GENERAL RIGHTS AND OBLIGATIONS OF THE CONCESSIONAIRE IN RESPECT OF FREIGHT ACCESS

- 18.1. The Concessionaire shall ensure that the Trains are Train Worthy and certified as such in accordance with all Applicable Requirements and the agreed standards as set out in this Agreement;
- 18.2. The Concessionaire shall comply with the standards set out in this Agreement in respect of all new or upgraded Rolling Stock forming part of the Trains. To the extent that the Concessionaire does not comply with the standards set out in this Agreement, the Concessionaire shall obtain civil engineering certification by the Core Network's Infrastructure (maintenance) staff that any new or upgraded Rolling Stock forming part of the Trains may safely traverse certain bridges and lines;
- 18.3. The Concessionaire will not be permitted to provide the Train Services in respect of such new or upgraded Rolling Stock unless written confirmation is given to TFR that the route over which a Train service is to be provided is safe for the passage of the relevant Trains;
- 18.4. The Concessionaire acknowledges, agree and undertake that the Operational working on the Core Network shall be conducted under the Train Control Systems of TFR, whichever is applicable from time to time;
- 18.5. The Concessionaire acknowledges further that TFR is the Network and Train Operator as defined under the RSR Act in relation to the Access Route;
- 18.6. The Concessionaire shall duly and timeously comply with all of its duties, functions and obligations as Network Operator in respect of the Branch Line;
- 18.7. The Concessionaire shall ensure that there is regular communication and consultation between its representatives and those of TFR at various levels with regards to the implementation of this Agreement;
- 18.8. The Concessionaire shall ensure that: -
- 18.8.1. all staff members engaged in the provision of its Train Services are suitably qualified and experienced having regard to the Concessionaire's duties, functions and obligations under this Agreement;
 - 18.8.2. it exercises due care and skill having regard to the Concessionaire's duties, functions and obligations under this Agreement;

- 18.8.3. it timeously supplies to the Regulator any data, information, documents, samples or materials that may be requested from it by the Regulator.
- 18.9. The Concessionaire shall be liable for any acts and omissions of its employees in the execution of this Agreement;
- 18.10. The Concessionaire shall, in order to comply with the requirements of the RSR Act, ensure that safety management system audits are conducted bi-annually. These audits are additional to any other audits that may be conducted by the Regulator or the Department of Labour from time to time.
- 18.11. Without derogating from any of its obligations set out in this Agreement or in law. The Concessionaire shall ensure that: -
- 18.11.1. it complies at all times with and adheres to the standards and requirements specified in this Agreement, the RSR Act, any directive from the RSR Regulator, the RSR Standards and all other statutes, regulations and other Applicable Requirements regulating or pertaining to the conduct of its business and/or obligations in terms of this Agreement;
- 18.11.2. it exercises due care and skill in the provision of services or conduct as contemplated in this Agreement;
- 18.11.3. it co-operates with TFR in its efforts to comply with all lawful directives issued by the Safety Regulator;
- 18.11.4. it maintains all Consents required under the Applicable Requirements for its Operations in terms of this Agreement;
- 18.11.5. it furnishes TFR with such written reports in relation to all aspects of its Operations as may reasonably be requested by TFR, from time to time.
- 18.11.6. The Concessionaire shall be liable for any acts and omissions of its employees in the execution of their duties under this Agreement;
- 18.11.7. The Concessionaire shall use all reasonable endeavours including participating in such consultation and joint action as is reasonably necessary in the circumstances to procure that: -
- 18.11.7.1. there is no trespassing;
- 18.11.7.2. there is no vandalism; and
- 18.11.7.3. there is no intrusions on to the Branch Line by animals and unauthorised personnel, in such regard, shall ensure that the relevant part of the Branch Line Network is properly fenced in accordance with the stipulations in the Fencing Act.

19. GENERAL RIGHTS AND OBLIGATIONS OF TFR

- 19.1. Without derogating from any of its other obligations set out in this Agreement or in law, TFR shall ensure that: -

- 19.1.1. it complies at all times with and adheres to the standards and requirements specified in this Agreement, the RSR Act, any directive from the Safety Regulator, the RSR Standards and all other statutes, regulations and other Applicable Requirements regulating or pertaining to the conduct of its business and/or the provision of the Access Services;
 - 19.1.2. it exercises due care and skill in the provision or conduct of all aspects of the Access Services;
 - 19.1.3. it co-operates with the Concessionaire in its efforts to comply with all lawful directives issued by the Safety Regulator;
 - 19.1.4. it maintains all Consents required under the Applicable Requirements for the Operation and conduct of its services and the provision of the Access Services;
 - 19.1.5. it furnishes the Concessionaire with such written reports in relation to all aspects of the Access Services as may reasonably be requested by the Concessionaire and the Train O&M Provider, from time to time.
- 19.2. TFR shall maintain all Rail Infrastructure on the Access Route;
- 19.3. TFR shall be liable for any acts and omissions of its employees in the execution of their duties under this Agreement.
- 19.4. Trespass, vandalism and animals on the Access Route
- 19.4.1. TFR shall use all reasonable endeavours including participating in such consultation and joint action as is reasonably necessary in the circumstances to procure that: -
 - 19.4.1.1. there is no trespassing;
 - 19.4.1.2. there is no vandalism; and
 - 19.4.1.3. there is no intrusions on to the Access Route by animals and unauthorised personnel, in such regard, shall ensure that the relevant part of the Access Route are properly fenced in accordance with the stipulations in the Fencing Act, in each case as may affect those parts of the Core Network on which the Access Services are provided.

20. LIAISON MEETINGS

- 20.1. The Parties agree to hold meetings at least bi-annually at such times and venues as shall be agreed on and each party shall ensure that they are represented at such meetings for purpose of discussing any aspect of Operations as contemplated in this Agreement;
- 20.2. Any Party may schedule ad hoc meetings as and when such meetings are required to discuss any matter dealt with in this Agreement.

21. LEGAL REQUIREMENTS AND DANGEROUS GOODS

- 21.1. The Concessionaire will comply with all Applicable Requirements of all relevant authorities applicable to the performance of their respective obligations in terms of this Agreement;
- 21.2. Without derogating from the provisions of this clause, the Concessionaire will, with regard to their employees and those of the other Party conducting work in the vicinity of the Hand Over Point, comply, without limitation, with the provisions of the Occupational Health and Safety Act No. 85 of 1993, the Environmental Conservation Act No. 73 of 1989, the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993, the Minerals Act No. 50 of 1991, the Mineral and Petroleum Resources Development Act No. 28 of 2002, the National Environmental Management Act No. 107 of 1998, the Explosives Act No. 15 of 2003, the Hazardous Substances Act No. 15 of 1973, the Mine Health and Safety Act No. 29 of 1996 and the safety, health and environmental procedures applicable to the Parties' premises respectively, including any other Applicable Requirements;
- 21.3. The Concessionaire acknowledges that they as well as TFR, are regulated by the provisions of the RSR Act, which provides *inter alia* that to ensure that railway Operations are conducted safely; the Concessionaire and TFR must adhere to strict safety requirements in the manner in which Goods are transported on rail in any manner contemplated in the RSR Act. Accordingly, the Concessionaire: -
 - 21.3.1. warrants and represents to TFR that it is familiar with the provisions of the RSR Act;
 - 21.3.2. undertakes not to act or omit to act in any manner that will result in TFR contravening any provision of the RSR Act in performing the Access Services or any other services under this Agreement;
- 21.4. In complying with the requirements of any Law, Relevant Authority or Good Industry Practice, the Concessionaire will abide by any applicable guidelines in respect of loading and off-loading;
- 21.5. TFR will not be obligated to Haul Dangerous Goods in performing its obligations in terms of this Agreement, save to the extent and on the terms set out or to be set out in the Access Route Plan and the other terms of this Agreement;
- 21.6. The Concessionaire shall be responsible for the due preparation and completion of all the necessary documentation for the transportation of Dangerous Goods as well as the signing of a declaration or legend on the reverse side of such documents stating that: *"I hereby declare that the contents of this consignment are fully and accurately described by the proper shipping name and are classified, packed, marked and labelled/placarded, and are in all respects in proper condition for transportation in accordance with Good Industry Practice and the requirements of any Relevant Authority"*.

22. **FORCE MAJEURE**

- 22.1. Subject to clauses 22.2 and 22.3 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.
- 22.2. Where a Party is (or claims to be) affected by an event of Force Majeure: -
- 22.2.1. 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;
- 22.2.2. 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 22.2.1; and
- 22.2.3. 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 assets, which the Concessionaire chooses or is required to undertake.
- 22.3. 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.
- 22.4. 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 22.2, 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);
- 22.5. 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 22.4 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 24 (*Dispute Resolution*);

- 22.6. 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;
- 22.7. If, following the issue of any notice referred to in clause 22.4, 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;
- 22.8. The Parties shall endeavour to agree to any modifications to this Agreement which may be equitable having regard to the nature of an event or events of Force Majeure. Clause 24 (*Dispute Resolution*) shall not apply to a failure the Concessionaire to reach agreement pursuant to this clause 22.8;
- 22.9. If, Parties have failed to reach agreement on any modification to this Agreement pursuant to clause 22.8 within 180 (one hundred and eighty) days either Party 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.

23. BREACH

- 23.1. Subject to clause 23.2 should either of the Parties commit a breach of a material term of this Agreement, then the other Party ("**non-defaulting Party**") shall be entitled to give the defaulting Party an initial warning notice to remedy such breach within 60 (sixty) days of receipt of such notice and, if the defaulting Party fails to comply with the notice, the aggrieved Party shall be entitled, but not obliged, without prejudice to any other rights or remedies which it may have, including the right to claim damages:
-
- 23.1.1. terminate this Agreement; or
- 23.1.2. claim specific performance.
- 23.2. The aggrieved Party shall not be entitled to exercise the rights granted to it in terms of clause 23 until such time as the non-defaulting Party shall first have given the defaulting Party an initial warning notice as contemplated in clause 23.1 above and the defaulting Party shall have failed to comply therewith within a period of 60 (sixty) days reckoned from the date upon which the defaulting Party received such notice;
- 23.3. The aggrieved Party may issue 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 a period of 10 (ten) days after the final warning notice then the non-defaulting Party may terminate this Agreement on 5 (five) days' notice to the defaulting Party;

- 23.4. This Agreement may be terminated forthwith by either of the Parties if the other is subject to an order or process relating to the provisions of business rescue as stipulated in the Companies Act 71 of 2008, or if the Party is liquidated, whether provisional or final;
- 23.5. The termination of this Agreement in terms of clause 23.4 above or this clause shall have the effect of terminating the Parties' respective rights and obligations save for the rights of either Party that have already accrued prior to the event giving rise to the termination.

24. DISPUTE RESOLUTION

24.1. Referable Disputes

24.2. The provisions of this clause 24 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.

24.3. Internal Referrals

24.3.1. 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: –

24.3.1.1. all disputes shall first be referred to the representative(s) of that Party (or his alternates) for resolution;

24.3.1.2. if the Parties have been unable to resolve the dispute within 10 (ten) Business Days of referral to the persons specified in clause 24.3.1.1 above, 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;

24.3.2. In attempting to resolve the dispute in accordance with the provisions of this clause 24.3, the Parties 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;

24.3.3. Any matter or issue which has not been resolved by the representatives contemplated in clause 24.3.1.2 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 Party has refused to participate in the informal procedures contemplated in this clause 24.3.3, shall be treated as a dispute in respect of which informal resolution has failed.

24.4. Performance to Continue

24.4.1. No reference of any dispute or to any resolution process in terms of this **clause 24** shall relieve any Party from any liability for the due and punctual performance of its obligations under this Agreement.

24.5. Litigation

24.5.1. 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;

24.5.2. 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.

24.6. Arbitration

24.6.1. Notwithstanding the provisions of clause 24.5(Litigation), if informal resolution of any dispute has failed and that dispute does not fall to be determined in accordance with clause 24.7 (Interlocutory Proceedings) or clause 24.8 (*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;

24.6.2. The rules to be applicable to any arbitration that may be agreed to by the Parties pursuant to clause 24.6.1 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: –

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

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

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

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

24.7. Interlocutory Proceedings

24.7.1. Notwithstanding the previous provisions of this **clause 24** 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.

24.8. Fast-track Dispute Resolution

24.8.1. Disputes expressly referred for determination pursuant to this clause 24.8 shall be determined by the relevant Independent Expert as defined in clause 24.8.2.

24.8.2. "**Independent Expert**" means: –

- 24.8.2.1. 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;
- 24.8.2.2. 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;
- 24.8.2.3. 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 National Scientific Professions], if the dispute or issue(s) to be resolved relates primarily to an environmental matter; or
- 24.8.2.4. 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;
- 24.8.3. Prior to the appointment of an Independent Expert in terms of clause 24.8.2 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.
- 24.8.4. Within 5 (five) Business Days after a dispute has been referred by either Party 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;
- 24.8.5. 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;

- 24.8.6. 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;
- 24.8.7. 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;
- 24.8.8. 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 all Parties. Each Party shall bear its own costs arising out of the referral, including its legal costs and the costs and expenses of any witnesses;
- 24.8.9. 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;
- 24.8.10. 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;

- 24.8.11. 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 25 (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;
- 24.8.12. 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;
- 24.8.13. 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: -
- 24.8.13.1. 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
- 24.8.13.2. 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;
- 24.8.14. 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 Applicable Requirement 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;
- 24.8.15. 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 24.5), interlocutory proceedings (pursuant to clause 24.7) or by arbitration if the Parties so agree (pursuant to clause 24.6), 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.

24.9. Associated Contract Dispute

- 24.9.1. It is recorded that this Agreement is entered into between the Parties subsequent to the Conclusion of the Concession Agreement;
- 24.9.2. The Concessionaire and Transnet agreed in the Concession Agreement, to which this agreement is ancillary, that disputes should not be duplicated in the event of disputes between the Concessionaire, Transnet and any Associated Party which relates to substantially the same circumstances as any dispute or which raises issues which are substantially the same as issues raised in any dispute where the Concessionaire, Transnet or any Associated Party are involved;
- 24.9.3. In order to make provision for the aspect of an Associated Contract Dispute, the Parties in this Agreement, agree as is set out in this clause 24.9;
- 24.9.4. For the purposes of this clause 24.9, the following terms are according the meanings ascribed to them, namely: –
- 24.9.4.1. "**Associated Contract Dispute**" means: –
- 24.9.4.1.1. any dispute or difference between Transnet or the Concessionaire, arising out of one or more of the Ancillary Agreements to the Concession Agreement to which the Concessionaire is a party and Transnet (whether through one or more of its operating divisions) is also a party; and
- 24.9.4.1.2. any dispute or difference between the Concessionaire and a subcontractor(s); 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 Transnet requiring reference of the dispute to fast-track dispute resolution procedure (pursuant to clause 24.8) or to arbitration if the Parties so agree (pursuant to clause 24.6);
- 24.9.4.2. "**Associated Party**" means: –
- 24.9.4.2.1. any counter-party to an Ancillary Agreement which is neither Transnet nor the Concessionaire;
- 24.9.4.2.2. any material subcontractor of the Concessionaire;

- 24.9.5. A notice of an Associated Contract Dispute ("**Notice of Associated Contract Dispute**") shall be served on the relevant Party contemporaneously with either the consensual referral of any dispute for resolution in terms of clause 24.6 (*Arbitration*) or referral to expert determination in terms of clause 24.8 ("**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 24.6 (*Arbitration*) or the fast-track dispute resolution procedure under clause 24.8 (*Fast-track Dispute Resolution*);
- 24.9.6. The provisions of clause 24.6 (*Arbitration*) and the fast-track dispute resolution procedure under clause 24.8 (*Fast-track Dispute Resolution*) shall, where an Associated Contract Dispute arises, be modified accordingly;
- 24.9.7. 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 within a reasonable time prior to any proceedings contemplated by the Concessionaire and Transnet, which notice shall be given in terms of clause 28 [*Notices and Domicilia*] of this Agreement;
- 24.9.8. 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;
- 24.9.9. 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.

25. CONFIDENTIALITY

- 25.1. For purposes of this clause 25, "**Confidential Information**" means any information which is agreed upon by the Parties at the time of conclusion of this Agreement or before it is provided to the recipient Party is regarded to be commercially sensitive, including any and all applicable intellectual property relevant to that Party;
- 25.2. Each Party shall keep all Confidential Information of the other Party confidential while this Agreement remains in force and for an indefinite period after it terminates for any reason. 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 an indefinite period after it terminates for any reason;

25.3. Clause 25.2 shall not apply to: -

- 25.3.1. any disclosure of information that is reasonably required by persons engaged in the performance of the restricted Party's obligations under this Agreement;
- 25.3.2. 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 25;
- 25.3.3. any disclosure as part of any attempt to resolve a dispute in accordance with clause 24 (Dispute Resolution);
- 25.3.4. any disclosure which is required by any Applicable Requirements, or the rules of any stock exchange or governmental or regulatory authority having the force of law;
- 25.3.5. any disclosure of information that is already lawfully in the possession of the receiving Party prior its disclosure by the disclosing Party;
- 25.3.6. 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; or
- 25.3.7. any disclosure of information by Transnet to any Responsible Authority.
- 25.3.8. The disclosures permitted under clauses 25.3.6 to 25.3.7 may only be made subject to obtaining appropriate confidentiality restrictions consistent with the provisions of this clause 25 from the intended recipients.

26. APPLICABLE LAW AND JURISDICTION

- 26.1. This Agreement will in all respects be governed by and construed under the Applicable Requirements of the Republic of South Africa;
- 26.2. Subject to the provisions of this Agreement, the Parties hereto hereby consent and submit to the non-exclusive jurisdiction of the Southern Gauteng (Johannesburg) Division of the High Court of the Republic of South Africa in any dispute arising from or in connection with this Agreement. The Parties agree that any costs awarded will be recoverable in accordance with the High Court tariff, determined on an attorney-and-own-client scale.

27. PARTIES REPRESENTATIVES

- 27.1. Each shall for the duration of this Agreement appoint an individual whose identity shall be notified to the other Parties to act as the duly authorised representative of that Party for all purposes connected with this Agreement. Each Party shall notify the other in writing forthwith upon the replacement at any time of the representative and such replacement shall not be effective until notice has been given;

- 27.2. The representative may delegate any of his functions from time to time to a person or persons the identity of who shall be notified to the other Parties and references in this Agreement to the relevant Party's representative shall be construed to include such persons;
- 27.3. Any notice, instruction or information required to be given by or made to that Party shall only be valid if given by or delivered to the relevant representative.

28. NOTICES AND DOMICILIA

- 28.1. The Parties select as their respective *domicilia citandi et executandi* the following physical addresses, and for the purposes of giving or sending any notice provided for or required under this Agreement, the said physical addresses as well as the following facsimile numbers: -

28.1.1. **TRANSNET FREIGHT RAIL**

ATTENTION: THE CHIEF EXECUTIVE

15 Girton Road
Parktown, Johannesburg
South Africa
Telefax: 011 774-9978

28.1.2. **ABC RAIL COMPANY**

ATTENTION: THE CHIEF EXECUTIVE OFFICER

provided that a Party may change its *domicilium* or its address for the purposes of notices to any other physical address or facsimile number by written notice to the other Parties to that effect. Such change of address will be effective 5 (five) Business Days after receipt of the notice of the change;

- 28.2. All notices to be given in terms of this Agreement will be given in writing, in English, and will: -
- 28.2.1. be delivered by hand or sent by facsimile;
- 28.2.2. if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a Business Day will be presumed to have been received on the following Business Day; and
- 28.2.3. if sent by facsimile during business hours, be presumed to have been received on the date of successful transmission of the facsimile. Any facsimile sent after business hours or on a day which is not a Business Day will be presumed to have been received on the following Business Day;
- 28.3. Notwithstanding the above, any notice given in writing in English, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause;

- 28.4. The Parties record that whilst they may correspond via email during the currency of this Agreement for operational reasons, no formal notice required in terms of this Agreement, nor any amendment of or variation to this Agreement may be given or concluded via email;

29. GENERAL

- 29.1. This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on either of the Parties;
- 29.2. No addition to or variation, deletion, or agreed cancellation of any and all clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties;
- 29.3. No waiver of any of the terms and conditions of this Agreement will be binding or effectual for any purpose unless in writing and signed by the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of either Party in exercising any right, power or privilege hereunder will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege;
- 29.4. All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as *pro non scripto* and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof;
- 29.5. Neither this Agreement nor any part, share or interest herein nor any rights or obligations hereunder may be ceded, delegated or assigned by any Party without the prior written consent of the other Parties;
- 29.6. Any consent or approval required to be given by either Party in terms of this Agreement will, unless specifically otherwise stated, not be unreasonably withheld.
- 29.7. This Agreement shall be for the benefit of and be binding upon the successors and permitted assigns of the Parties or either of them;

- 29.8. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts;
- 29.9. Each of the Parties shall pay their own costs of or incidental to the drafting, negotiation and preparation of this Agreement.

30. INSURANCE

- 30.1. The Concessionaire shall take out insurance in respect of all risks for which it is prudent for that Party to insure against, including any liability it may have as a result of its activities under this Agreement and for loss, theft, destruction, death or injury to any person and damage to property, including loss of or damage to its Goods.
- 30.2. The Concessionaire shall comply at all time with its obligations to be insured as stipulated in this Agreement, in addition to any obligation it may have in respect of Insurance as contemplated in the Concession Agreement or any other Agreement that the Concessionaire may be subject to and to which this Agreement is Ancillary to.

31. SIGNATURE

- 31.1. This Agreement is signed by the Parties on the dates and at the places indicated below;
- 31.2. The persons signing this Agreement in a representative capacity warrant their authority to do so;
- 31.3. The Parties record that it is not required for this Agreement to be valid and enforceable that a Party shall initial the pages of this Agreement and/or have its signature of this Agreement verified by a witness.

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

Witnesses:

1. _____
for and on behalf of **ABC Rail Company (Pty) Ltd**

2. _____ **FULL NAME:**

DESIGNATION:

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

Witnesses:

1. _____
for and on behalf of **Transnet Freight Rail**

2. _____ **FULL NAME:**

DESIGNATION::.....