

M80 STEPPS TO HAGGS DBFO CONTRACT

AGREEMENT

CONFIDENTIAL

DATED

2008

AGREEMENT

between

SCOTTISH MINISTERS

and

HIGHWAY MANAGEMENT (SCOTLAND) LIMITED

relating to the design, build, finance and operation of the M80

*Provisions of this Agreement which are
highlighted in grey shading are based on
SoPCv4*

DUNDAS & WILSON CS LLP

191 West George Street

Glasgow G2 2LD

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DESIGN, BUILD, FINANCE & OPERATE AGREEMENT**BETWEEN**

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

HIGHWAY MANAGEMENT (SCOTLAND) LIMITED, a company registered in England and Wales under the Companies Act 1985 having registered number 06682820 and whose registered address is at 3rd Floor, Braywick Gate, Braywick Road, Maidenhead, Berkshire, SL6 1DA ("**the Company**").

WHEREAS

- (A) The Scottish Ministers wish to procure the design, build, finance and operation of the Project Roads and other works by a public private partnership.
- (B) In accordance with PFI/PPP the Scottish Ministers invited interested parties in the private sector to tender for a contract to implement a scheme to design, build, finance, operate and maintain the Project Roads and other works.
- (C) Following a tendering process in accordance with the provisions of the Public Contracts (Scotland) Regulations SSI 2006 No.1, the Scottish Ministers and the Company have reached agreement for the provision of the Operations.

NOW IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless the context otherwise requires:

1991 Act means the New Roads and Street Works Act 1991;

A80 Improvements means the improvements detailed in Part 2 of Schedule 2 to the roads detailed in Appendix E to Part 2 of Schedule 2;

Access Rights means the rights granted to the Company and those authorised by it under Clause 6 (Access for Operations);

Accommodation Works means those parts of the New Works specified in Appendix 1/15 to Part 3 of Schedule 2 (New Works Requirements);

Accommodation Works Access Tracks means the roads described under the heading 'Accommodation Works Access Tracks' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

Accommodation Works Site means any areas of land outwith the New Works Site that the Company reasonably requires to occupy to construct the Accommodation Works;

Actual Relevant Insurance Cost means the aggregate of the annual insurance premiums reasonably incurred by the Company to maintain the Relevant Insurance during the Insurance Review Period but excluding insurance premium tax and all brokers' fees and commissions;

Additional Permitted Borrowing means on any date, the amount equal to any amount of principal outstanding under the Senior Financing Agreements (as the same may from time to time be amended, whether or not with the approval of the Scottish Ministers) in excess of the amount of principal scheduled under the Senior Financing Agreements at Financial Close to be outstanding at that date,

but only to the extent that:

- (a) this amount is less than or equal to the Additional Permitted Borrowings Limit; and
- (b) in respect of any Additional Permitted Borrowing the Agent is not in material breach of its obligations under clause 11.4.3 of the Direct Agreement as it applies to such Additional Permitted Borrowing;

and provided further that any such excess amount of principal which is (i) invested as part of any Qualifying Variation or (ii) outstanding from time to time as a result of any drawing under the Senior Financing Agreements as entered into at the Date of this Agreement, disregarding any subsequent amendment or (iii) outstanding from time to time as a result of any amendment to the Senior Financing Agreements in respect of which the Scottish Ministers have agreed that their liabilities on a termination may be increased pursuant to Clause 5.3 (Changes to Financing Agreements), shall not be counted as Additional Permitted Borrowing;

Additional Permitted Borrowings Limit means an amount equal to:

- (a) XXX of the Original Senior Commitment for any Additional Permitted Borrowing subsisting in the period from the Effective Date to the date on which the amount outstanding under the Senior Financing Agreements is reduced to 50% or less of the Original Senior Commitment; and thereafter:
- (b) the higher of:
 - (i) XXX of the Original Senior Commitment; and
 - (ii) the amount of any Additional Permitted Borrowing outstanding on the last Business Day of the period referred to in (a);

Adjudicator has the meaning given to that term in Paragraph 2.2 of Schedule 7 (Dispute Resolution Procedure);

Adjusted Amount means the Insurance Term Saving less the Company Amount;

Affiliate means in relation to any person, any holding company or subsidiary of that person or any subsidiary of such holding company and holding company and subsidiary shall have the meaning given to them in Section 1159 and Schedule 6 of the Companies Act 2006;

Agent means Barclays Bank plc in its capacity as common agent for the Senior Lenders under the Senior Financing Agreements;

Agreed Departures means the agreed departures set out in Schedule 3A (Conceptual Design) as at the Date of this Agreement;

Agreed Form has the meaning ascribed to it in Clause 1.2.1(f);

Agreed Non-Compliances means those parts of the Operations set out in Schedule 20 (Agreed Non-Compliances);

Agreement means this agreement (including its Schedules);

APB Distribution means, for the period during which the Additional Permitted Borrowing subsists, an amount equal to the aggregate of all Distributions made during that period up to an amount equal to the principal of the Additional Permitted Borrowing on the first Business Day of that period;

Apparatus means all apparatus (including apparatus as defined in the 1991 Act) located in, on, under, over, across, along or adjacent to the Sites;

Approved Purposes has the meaning given to that term in Clause 63.1;

Articles of Association shall be construed in accordance with the Companies Act 1985;

Assets means all assets and rights to enable the Scottish Ministers or a successor contractor to own, operate and maintain the Project in accordance with this Agreement, including:

- (a) the Project Roads;
- (b) any land or buildings;
- (c) any equipment;
- (d) any books and records (including operating and maintenance manuals, health and safety manuals and other know-how);
- (e) any spare parts, tools and other assets (together with any warranties in respect of assets being transferred);
- (f) any revenues and any other contractual rights; and
- (g) any Intellectual Property Rights,

but excluding any assets and rights in respect of which the Scottish Ministers are full legal and beneficial owner;

Assigned Employees means employees assigned to any extent to the Operations, or, in the case of partial cessation of performance of the Operations by the Company, that part of the Operations which is to cease to be performed at the end of the Transfer Assistance Period;

Associated Company means in respect of a relevant company, a company which is a subsidiary, a Holding Company or a company that is a subsidiary of the ultimate Holding Company of that relevant company, and in the case of the Company shall include Holdco and each of the Shareholders;

Auchenkilns Contract means the A80 Auchenkilns Junction Improvement Contract dated on or about 5th September 2003 between the Scottish Ministers and the Auchenkilns Contractor as contained in the Information Room at the Date of this Agreement;

Auchenkilns Contractor means Galliford Try Infrastructure Limited, formerly AWG Construction Services Limited, registered in Scotland under Company No. SC055775 and having its registered office at 51 Melville Street, Edinburgh EH3 7HL and their permitted assignees and successors under the Auchenkilns Contract;

Auchenkilns Culvert means the culvert identified as "Auchenkilns Minor Culvert No. 2" on the drawings listed in Appendix 0/4 of Part 3 of Schedule 2 (New Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the New Works" and the drawings listed in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the O&M Works";

Auchenkilns Defect means:

- a) defects in the Auchenkilns Culvert;
- b) defects in the Auchenkilns Pavement Joints; and
- c) any other defect in any part of the Auchenkilns Site (including for the avoidance of doubt any existing structures upon the Auchenkilns Site);

caused by the negligence of the Auchenkilns Contractor or a failure of the Auchenkilns Contractor to comply with the Auchenkilns Contract;

Auchenkilns Defects Liability Period means the period expiring on 22 December 2010 or, in relation to landscaping, 31 March 2011 or such later date as may be agreed between the Scottish Ministers and the Auchenkilns Contractor from time to time;

Auchenkilns Pavement Joints means the 20 pavement joints identified on the drawings listed in Appendix 0/4 of Part 3 of Schedule 2 (New Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the New Works" and the drawings listed in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the O&M Works";

Auchenkilns Site means the area of land inside the broken red line including the broken red line on the drawings listed in Appendix 0/4 of Part 3 of Schedule 2 (New Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the New Works" and the drawings listed in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements) under the heading "Land Made Available by the Scottish Ministers for the O&M Works";

Authority means any court with the relevant jurisdiction and any local, national or supra-national agency, inspectorate, minister, ministry, official or public or statutory person of the government of the United Kingdom or of the European Union but shall exclude the Scottish Ministers acting as Road Works Authority for the purposes of this Agreement;

Base Case means the financial model agreed between the Parties prior to the Date of this Agreement in the Agreed Form;

Base Cost means XXX being the amount as agreed at the Bid Date and set out in the Financial Model which represents the insurance costs (which excludes amounts in respect of insurance premium tax and all brokers' fees and commissions) which are proposed to be incurred to maintain the Relevant Insurance in each year following the Full Services Commencement Date, expressed in real terms as at the Bid Date;

Base Relevant Insurance Cost means, the aggregate of the Base Costs which were (at Bid Date) projected to be incurred to maintain the Relevant Insurance during the Insurance Review Period indexed by actual RPI from the Bid Date up to the dates on which the Relevant Insurance was placed or renewed either immediately before or during the Insurance Review Period (as applicable in respect of the year in question) less any Base Relevant Insurance Reduction;

Base Relevant Insurance Reduction means the reduction to be made to the Base Relevant Insurance Cost in respect of a risk which has become Uninsurable or a term or condition which is no longer available and shall be an amount that is either:

- (a) the amount by which the Base Relevant Insurance Cost would have been a lesser amount had such a risk been Uninsurable or such a term or condition been unavailable at the Bid Date (which amount, for the avoidance of doubt, can be XXX); or
- (b) if it is impossible to determine an amount pursuant to paragraph (a) above, an amount that is reasonable to be deducted from the Base Relevant Insurance Cost having due regard to:
 - (i) the amount by which the Actual Relevant Insurance Cost is less than it would have been as a result of the risk becoming Uninsurable, or the term or condition becoming unavailable (the "Actual Reduction");
 - (ii) the size of the Actual Reduction as a percentage of the Actual Relevant Insurance Cost immediately prior to the risk becoming Uninsurable, or the term or condition becoming unavailable; and
 - (iii) the effects of RPI since the Bid Date;

Base Senior Debt Termination Amount means, subject to Clause 5.3 (Changes to Financing Agreements and Project Documents):

- (a) all amounts outstanding at the Termination Date, including interest and Default Interest accrued as at that date, from the Company to the Senior Lenders in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing); and

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- (b) all amounts including costs of early termination of interest rate hedging arrangements, other hedging arrangements and other breakage costs, payable by the Company to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements and other hedging arrangements only, as a result of termination of this Agreement, subject to the Company and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Base Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account and the Distributions Account) held by or on behalf of the Company on the Termination Date which the Senior Lenders may apply in repayment or prepayment of the Senior Debt;
- (ii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Company as a result of prepayment of amounts outstanding in respect of Permitted Borrowing (other than in respect of Additional Permitted Borrowing), or, in the case of early termination of interest rate hedging arrangements only, as a result of early termination of this Agreement; and
- (iii) all other amounts (except insurance proceeds in respect of third party liabilities) received by the Senior Lenders on or after the Termination Date and before the date on which any compensation is payable by the Scottish Ministers to the Company as a result of enforcing any other rights they may have;

Bid Date means 18th April 2008;

Business Day means a day (other than a Saturday, Sunday or public holiday) on which banks are open for domestic business in the city of London;

Business Interruption Cover shall bear the meaning ascribed to it in Schedule 10 (Required Insurances);

Capital Expenditure means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in the United Kingdom from time to time;

Carriageway Section has the meaning given to that term in Part 1 of Schedule 6;

CDM Regulations means the Construction (Design and Management) Regulations 2007 as amended;

Certification Procedure means either or both of the certification procedures set out in Part 4 of Schedule 2 (New Works Requirements) and Part 6 of Schedule 4 (O&M Works Requirements);

Change means a Scottish Ministers Change, a Company Change or a Qualifying Change in Law;

Change of Ownership means:

- (a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares in the Company and/or Holdco (including the control over exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends); and/or
- (b) any other arrangements that have or may have or which result in the same effect as paragraph (a) above;

Change in Law means the coming into effect after the Date of this Agreement of:

- (a) Legislation, other than any Legislation which on the Date of this Agreement has been published:
 - (i) in a draft Bill as part of a Government Departmental Consultation Paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) as a proposal in the Official Journal of the European Union;
- (b) any Guidance; or
- (c) any applicable judgment of a relevant court of law which changes a binding precedent;

Clarifications means the clarifications contained in Schedule 3C (Clarifications);

Codes of Practice means the codes of practice issued from time to time pursuant to Part IV of the 1991 Act together with the Code of Considerate Practice operated by the Considerate Constructors Scheme;

Commercially Sensitive Information means the subset of Confidential Information listed in Schedule 17 (Commercially Sensitive Information) of this Agreement in each case for the period specified in that Schedule 17;

Common Terms Agreement means the common terms agreement dated on or around the date hereof between inter alia the Company, the Agent and the Senior Lenders;

Company Amount has the meaning given to it in Clause 57.4;

Company Change means a change proposed by the Company in accordance with Clause 35;

Company Default means one of the following events:

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- (a) a breach by the Company of any of its obligations under this Agreement which materially and adversely affects the performance of the O&M Works;
- (b) a Persistent Breach;
- (c) a court makes an order that the Company or Holdco be wound up or a resolution for a voluntary winding-up of the Company or Holdco is passed;
- (d) any receiver, administrator or administrative receiver in respect of the Company or Holdco is appointed or possession is taken by or on behalf of any creditor of any property that is the subject of a charge;
- (e) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 1985 in respect of the Company or Holdco;
- (f) an administration order is made, or an administrator is appointed in respect of the Company or Holdco;
- (g) a material breach by the Company of Clause 64 (Assignment and Sub-Contracting) occurs;
- (h) a material breach of Clause 66.3 (Change of Ownership) occurs;
- (i) the abandonment of the Agreement by the Company;
- (j) a failure to achieve Full Services Commencement by the Long-Stop Date;
- (k) the Company incurring Unavailability Deductions and/or Service Shortfall Deductions in excess of the following average monthly amounts:
 - (i) XXX of the Monthly Availability Payment for any 3 Payment Months in any rolling period of 12 months;
 - (ii) XXX of the Monthly Availability Payment for any 6 Payment Months in any rolling period of 24 months;

provided that any Performance Deductions directly incurred as a result of Protestor Action affecting the O&M Works Site or any part thereof shall not be taken into account for the purposes of establishing a Company Default;

- (l) a material breach by the Company of its obligation to take out and maintain Required Insurances;
- (m) a failure to commence substantially the New Works in accordance with the Construction Programme; or
- (n) a wilful breach by the Company of Clause 39 (Refinancing);

Company Notice of Change is the notice referred to in Clause 35.1;

Company Related Party means:

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- (a) an officer, servant or agent of the Company, or any Affiliate of the Company and any officer, servant or agent of such a person;
- (b) any sub-contractor of the Company of any tier and any of their officers, servants or agents; and
- (c) any person on or at any of the Sites at the express or implied invitation of the Company or its sub-contractors other than the Scottish Ministers;

Company's Conditions Precedent means those obligations of the Company set out in Part 2 of Schedule 1;

Company's Representative means XXX appointed by the Company in accordance with Clause 16;

Company's Share means the percentage figure corresponding to that part of the Cumulative Capital Expenditure at the relevant time, as shown in the first column of the table set out in Schedule 18 (Company's Share);

Compensation Event means:

- (a) a breach by the Scottish Ministers of any of their obligations under this Agreement; or
- (b) any suspension or restriction of the Access Rights under Clause 8 of this Agreement; or
- (c) the effect on the Operations (pursuant to Clause 12.7) of the discovery of Fossils and Antiquities at any of the Sites, subject always to the provisions of Clause 33.3A;

Conceptual Design means the drawings, specifications and other documents (including the Agreed Departures) as set out in Schedule 3A (Conceptual Design) under the exception of the New Works Quality Plan;

Conditions Precedent means the Scottish Ministers' Conditions Precedent and the Company's Conditions Precedent;

Confidential Information means:

- (a) information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988; and
- (b) Commercially Sensitive Information;

Consents means all permissions, consents, approvals, certificates, permits, licences and authorisations of the Scottish Ministers or any other Authority or Relevant Authority required for the performance of any of the Company's obligations under this Agreement;

Constructional Plant means all appliances or things of whatsoever nature required in or about the performance of the Operations but does not include materials or other things intended to form or forming part of the New Works;

Construction Programme means the construction programme contained in Schedule 3A (Conceptual Design) setting out the Company's programme for the New Works as may be amended in accordance with Clause 14 (Construction Programme);

Contract Month means a calendar month occurring during the Contract Period;

Contract Period means the period commencing on the Effective Date and ending on the earlier of the Expiry Date and the Termination Date;

Contract Year means each period of 12 calendar months during the Contract Period beginning on the 1 April provided that the first Contract Year shall commence on the Effective Date and end on the next 31 March and the final Contract Year shall commence on the 1 April immediately preceding the last day of the Contract Period and end on the last day of the Contract Period;

Corrective Action Request means a request raised as a result of any first party, second party or third party audit to rectify any non-conformance identified in relation to the Quality System, the Quality Plan, the Company's approved working methods and the requirements of this Agreement, including the O&M Requirements;

COSHH Register means the Control of Substances Hazardous to Health register;

CPO Compensation means any sums payable to landowners to satisfy compensation claims made under compulsory purchase law in particular in relation to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947, the Land Compensation (Scotland) Act 1963 and the Land Compensation (Scotland) Act 1973 except to the extent that such sums payable have been increased as a result of the act, omission, default or negligence of the Company;

Cumulative Capital Expenditure means the aggregate of:

- (a) all Capital Expenditure that has been incurred as a result of each General Change in Law that has come into effect during the Service Period; and
- (b) the amount of Capital Expenditure that is agreed, or determined to be required, as a result of a General Change in Law under Clause 37.3 (Change Agreed);

Cut-Off Date means the date which is five days after the Date of this Agreement;

Date of this Agreement means the last date of execution of this Agreement;

Default Interest means any increased margin that is payable to the Senior Lenders or which accrues as a result of any payment due to the Senior Lenders not being made on the date on which it is due;

Defects means any defect howsoever arising including without limitation:

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- (a) any defect that is the result of defective design or defective materials or defective workmanship;
- (b) in addition in the case of the New Works any failure of the New Works to meet, or to continue to meet, the New Works Requirements; and
- (c) any damage, destruction or other effect consequential on such defect;

Departure means one of, or a combination of, the following:

- (a) a departure from any of the standards or directives set out in the DMRB;
- (b) the use of technical design directives other than those in the DMRB;
- (c) the use of technical specifications for materials or workmanship other than those in the MCHW; and
- (d) the use of a technical design directive or technical specification in a manner or circumstance which is not permitted or provided for in such directive or specification;

Design means all work necessary for the preparation, verification and completion of the drawings, specifications and other documents from which the New Works are to be constructed and the O&M Works are to be carried out and includes the carrying out of all procedures and checks, the obtaining of all approvals and consents and the provision of all certificates required under this Agreement;

Design Agreement means the contracts listed in paragraphs 5 and 6 of Part 1 of Schedule 12 (Project Documents) for the Design;

Design Checker means any person who has entered into a Design Checker's Agreement with the Company or the New Works Contractor or such substitute as may be appointed in accordance with this Agreement;

Design Checker's Agreement means the contracts listed in paragraphs 3 and 4 of Part 1 of Schedule 12 (Project Documents) for the checking of the Design;

Design Checker's Direct Agreement means an agreement substantially in the form set out in Part 5 of Schedule 14 (Direct Agreements);

Design Data means all material calculations, Designs, Design information, specifications, plans, programmes (other than computer programs), drawings, graphs, sketches, models, engineering and other forms of material data in whatever medium prepared or to be prepared by or on behalf of the Company for the Operations;

Design Element means each distinct part of the Design, identified by reference to the equivalent part of the Conceptual Design, a non-exhaustive list of which is set out in Part 4 of Schedule 2 (New Works Requirements);

Designer means any person who has entered into a Design Agreement with the Company or the New Works Contractor or such substitute as may be appointed in accordance with this Agreement;

Designer's Direct Agreement means an agreement substantially in the form set out in Part 4 of Schedule 14 (Direct Agreements);

Direct Agreement means the direct agreement dated on or about the Date of this Agreement and made between the Scottish Ministers, the Company and the Agent;

Disclosed Data means all information relating to the Project disclosed to the Company including:

- (a) the Invitation to Participate in Dialogue dated 3 April 2008 issued by or on behalf of the Scottish Ministers to the Company;
- (b) the Invitation to Submit Final Tenders dated 14 April 2008 issued by or on behalf of the Scottish Ministers to the Company; and
- (c) the Information Room;

Discriminatory Change in Law means a Change in Law, the terms of which apply expressly to:

- (a) the Project and not to similar projects procured under the PFI/PPP;
- (b) the Company and not to other persons; and/or
- (c) PFI/PPP companies and not to other persons;

Dispute Resolution Procedure means the procedure for the resolution of disputes set out in Schedule 7 (Dispute Resolution Procedure);

Distribution means:

whether in cash or in kind, any:

- (i) dividend or other distribution in respect of share capital;
- (ii) reduction of capital, redemption or purchase of shares or any other reorganisation or variation to share capital;
- (iii) payments under the Subordinated Financing Agreements (whether of principal, interest, breakage costs or otherwise);
- (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms; or
- (v) the receipt of any other benefit which is not received in the ordinary course of business and on reasonable commercial terms;

Distributions Account has the meaning given to that term in the Common Terms Agreement;

Diversions Works means any works involving the diversion, change in level, protection or removal of Apparatus other than any such works as may have been instructed by the Scottish Ministers prior to the Date of this Agreement.

DMRB or **Design Manual for Roads and Bridges** means the Design Manual for Roads and Bridges published by The Stationery Office Limited on 31 May 2007 and including those interim amendments and advice notes as implemented by Transport Scotland and which are current at 31 May 2007;

DPA means the Data Protection Act 1998;

EEA means from time to time the European Economic Area as created by the Agreement on the European Economic Area 1992 or any successor or replacement body, association, entity or organisation which has assumed either or both the function and responsibilities of the European Economic Area;

Effective Date means the date on which the Conditions Precedent are satisfied or waived;

EIB Loan Facility Agreement means the agreement referred to at Paragraph 5 of Part 2 of Schedule 12 (Project Documents);

Environmental Assessment Documents means those documents listed in Schedule 8 (Environmental Assessment Documents) and contained in the Information Room;

Environmental Information (Scotland) Regulations means the Environmental Information (Scotland) Regulations 2004 together with any guidance and/or codes of practice issued by the Scottish Information Commissioner (as defined in the FOISA) or relevant governmental department in relation to such regulations;

Equity IRR means the projected blended rate of return to the Relevant Persons over the full term of the Agreement, having regard to Distributions made and projected to be made;

Establishment Period means the 5 year period following Final Completion during which the New Works Contractor shall be responsible for all landscape maintenance works including the replacement of failed plants;

Estimate has the meaning given in Clause 34.4.1;

Estimated Change in Project Costs means in relation to Clause 33 (Compensation Events), Clause 34 (Scottish Ministers Change), Clause 35 (Company Changes) and Clause 37 (Qualifying Change in Law), the aggregate of any estimated increase in design costs, construction costs, operating costs, insurance costs, management costs, financing costs and loss of revenue less the aggregate of any estimated reduction in design costs, construction costs, operating costs, insurance costs, management costs, financing costs and loss of revenue;

Exceptionally Adverse Weather Conditions means weather conditions affecting the Sites which are in excess of the average conditions encountered during the 6 years prior to the Effective Date;

Exceptional Cost means, for an Insurance Review Period, the extent to which there is an Insurance Cost Increase which exceeds in amount XXX of the Base Relevant Insurance Cost for that Insurance Review Period;

Exceptional Saving means, for an Insurance Review Period, the extent to which there is an Insurance Cost Decrease which exceeds in amount XXX of the Base Relevant Insurance Cost for that Insurance Review Period;

Excluded Seasonal Works means any landscape works and other agreed seasonally affected works which cannot be completed prior to Final Completion as a result of seasonal requirements;

Excluded Seasonal Works Retention means the sum estimated by a suitably qualified professional surveyor appointed jointly between the Parties as the cost of completing the Excluded Seasonal Works in accordance with the New Works Requirements;

Exempt Refinancing means:

- (a) any Refinancing that was fully taken into account in the calculation of the Unitary Charge;
- (b) a change in taxation or change in accounting treatment;
- (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of:
 - (i) breach of representations and warranties or undertakings;
 - (ii) movement of monies between the Project Accounts in accordance with the terms of the Senior Financing Agreements as at Financial Close;
 - (iii) late or non-provision of information, consents or licences;
 - (iv) amendments to Sub-Contracts;
 - (v) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Financing Agreements);
 - (vii) restrictions imposed by the Senior Lenders on the dates at which the Senior Debt can be advanced to the Company under the Senior Financing Agreements and/or amounts released from the Project Accounts during the Availability Period, each as defined in the Senior Financing Agreements and which are given as a result of any failure by the Company to ensure that the construction work is performed in accordance with the Construction Programme and which are notified in writing by the Company or the Senior Lenders to the Scottish Ministers prior to being given;

- (viii) changes to milestones for drawdown and/or amounts released from the Project Accounts during the Availability Period set out in the Senior Financing Agreements and which are given as a result of any failure by the Company to ensure that construction work is performed in accordance with the Construction Programme and which are notified in writing by the Company or the Senior Lenders to the Scottish Ministers prior to being given;
 - (ix) failure by the Company to obtain any consent by statutory bodies required by the Senior Financing Agreements; or
 - (x) voting by the Senior Lenders and the voting arrangements between the Senior Lenders in respect of the levels of approval required by them under the Senior Financing Agreements;
- (d) any amendment, variation or supplement of any agreement approved by the Scottish Ministers as part of any Qualifying Variation under this Agreement;
 - (e) any sale of shares in the Company or Holdco by the shareholders or securitisation of the existing rights and/or interests attaching to shares in the Company or Holdco provided that this paragraph (e) shall, in respect of shares in Holdco, only apply for so long as Holdco holds XXX of the issued share capital of the Company;
 - (f) any sale or transfer of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements or securitisation of the Subordinated Lenders' existing rights and/or interests under the Subordinated Financing Agreements; or
 - (g) any Qualifying Bank Transaction;

Expiry Date means 22nd September 2041;

Fees Regulations means the Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004;

Final Completion means completion of the New Works (other than the Excluded Seasonal Works and Road Safety Audits 4 and 5) in compliance with the New Works Requirements;

Final Completion Acceptance Notice means the notice issued by the Scottish Ministers in accordance with Clause 26.1;

Final Completion Certificate means a certificate in the form set out in Part 4 of Schedule 2 (New Works Requirements);

Financial Close has the meaning given to it in the Senior Financing Agreements;

Financial Model means the Base Case (as updated from time to time in accordance with the terms of this Agreement) for the purpose of calculating the Unitary Charge;

Financial Model Custody Agreement means the agreement so entitled in Agreed Form dealing with custody arrangements for the Financial Model among the Scottish Ministers, the Company, the Security Trustee and NCC Escrow International Limited;

Financing Agreements means all or any of the agreements or instruments entered into or to be entered into by the Company or any Affiliate relating to the financing of the Project (including the Initial Financing Agreements and any agreements or instruments to be entered into by the Company or any Affiliate relating to the rescheduling of their indebtedness or any Refinancing);

First Insurance Review Date means the first Business Day following the first anniversary of the Relevant Insurance Inception Date;

FOISA means the Freedom of Information (Scotland) Act 2002 and any subordinate legislation (as defined in the Freedom of Information (Scotland) Act 2002) made under this Act from time to time together with any guidance and/or codes of practice issued by the Scottish Information Commissioner (as defined in the Act) or relevant governmental department in relation to such legislation;

Force Majeure Event means the occurrence after the Date of the Agreement of:

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Company or its sub-contractors; or
- (c) pressure waves caused by devices travelling at supersonic speeds,

which directly causes either Party (the “**Affected Party**”) to be unable to comply with all or a material part of its obligations under this Agreement;

Force Majeure Termination Sum has the meaning given to that term in Schedule 11 (Termination Compensation);

Fossils and Antiquities means all fossils and antiquities and structures or other remains or things of archaeological or geological interest discovered within the Sites;

Full Services Commencement Date means the later of the date of issue of the Permit to Use in respect of Phase 1A, Phase 1B or Phase 2 and Full Services Commencement shall be construed accordingly;

General Change in Law means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;

Good Industry Practice means the exercise of an appropriate degree of skill, diligence, prudence and foresight being that which would reasonably and ordinarily be expected from a person skilled and experienced in the design, construction, operation and maintenance of roads similar in type to the Project Roads seeking in good faith to comply with the same contractual obligations as the obligations of the Company under this Agreement;

Guidance means any applicable guidance or directions with which the Company is bound to comply (excluding DMRB and MCHW);

Handback Assets means the Assets excluding:

- a) the Site Roads;
- b) books and records (including operating and maintenance manuals, health and safety manuals and other know-how);
- c) revenues and any other contractual rights; and
- d) any Intellectual Property Rights;

Handback Requirements means those requirements set out in Part 3 of Schedule 4 (O&M Works Requirements);

HSE means the Health and Safety Executive and any successor body or bodies;

Holdco means Highway Management (Scotland) Holding Limited, a company registered in England and Wales under the Companies Act 1985 having registered number 06682827 and whose registered address is at 3rd Floor, Braywick Gate, Braywick Road, Maidenhead, Berkshire, SL6 1DA;

Index means the index published in Table RPO 5 (RPI all items - excluding mortgage interest payments (RPIX)) reference CHMK published by the Office of National Statistics or failing such publication or in the event of a fundamental change to the index, such other index as the Parties may agree, or such adjustments to the index as the Parties may agree (in each case with the intention of putting the Parties in no better nor worse position than they would have been had the index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with Schedule 7 (Dispute Resolution Procedure);

Information has the meaning given under Section 73 of the FOISA;

Information Room means the electronic storage area, as at 6 August 2008, which was set up by the Scottish Ministers and which contained documents and the other information relating to the Project for inspection by the Company;

Initial Financing Agreements means the Financing Agreements put in place upon signature of this Agreement as set out in Part 2 of Schedule 12 (Project Documents) copies of which have been initialled by the Parties for the purposes of identification;

Insurance Broker's Letter means a letter in the form set out in Part 4 of Schedule 10 (Required Insurances) signed by the relevant insurance broker;

Insurance Cost Decrease means the Insurance Cost Differential if the value thereof is less than zero, multiplied by minus one;

Insurance Cost Differential shall, subject to the Insurance Review Procedure, be determined as follows:-

Insurance Cost Differential = XXX

where:

ARIC is the Actual Relevant Insurance Cost;

BRIC is the Base Relevant Insurance Cost; and

PIC is any Project Insurance Change;

Insurance Cost Increase means the Insurance Cost Differential if the value thereof is greater than zero;

Insurance Cost Index means any index introduced by the United Kingdom Government or the Office of National Statistics after the Date of this Agreement and which is anticipated to be published annually to provide an independent and objective measure of changes in prevailing market insurance costs;

Insurance Review Date means the First Insurance Review Date and, thereafter, each date falling on the second anniversary of the previous Insurance Review Date, except where such date lies beyond the end of the Contract Period, in which case the Insurance Review Date shall be the last renewal date of the Relevant Insurance prior to the end of the Contract Period;

Insurance Review Period means a 2 year period from the Relevant Insurance Inception Date and each subsequent 2 year period commencing on the second anniversary of the Relevant Insurance Inception Date except where the end of such period lies beyond the end of the Contract Period, in which case the Insurance Review Period shall be the period from the end of the penultimate Insurance Review Period to the last day of the Contract Period;

Insurance Review Procedure means the procedure set out in Clause 52 (Insurance Review Procedure);

Insurance Summary Sheet shall bear the meaning ascribed to it in Clause 52.2.3;

Insurance Term means any terms and/or conditions required to be included in a policy of insurance by Clause 51 (Insurance) and/or Schedule 10 (Required Insurances) but excluding any risk;

Insurance Term Saving means an amount equal to the amount paid for the particular Insurance Term in the preceding year (using a reasonable estimate of such amount where a precise figure is not available) less any annual amount paid or payable by the Company to maintain and/or procure the maintenance of any (whether full or partial) alternative or replacement insurance in respect of such Insurance Term pursuant to Clause 57.3;

Insurance Undertaking has the meaning given in the rules from time to time of the Financial Services Authority;

Intellectual Property Rights means any and all patents, trade marks, service marks, copyright, moral rights, rights in a design, know how, confidential information and all or any other intellectual or industrial property rights whether or not registered

or capable of registration and whether subsisting in the United Kingdom or any other part of the world together with all or any goodwill relating or attached thereto;

Joint Insurance Account means the joint bank account in the names of the Scottish Ministers and the Company, having account number 63166619 and sort code 207767 and held with Barclays Bank plc;

Joint Insurance Cost Report shall bear the meaning ascribed to it in Clause 52.2;

Junior Debt means all amounts outstanding at the Termination Date under the Subordinated Financing Agreements;

Lane means any delineated running lane or any hard shoulder of any Project Road and which is capable of carrying all permitted classes of vehicles except where it is preceded by 'Narrow' in which case such a Lane is capable of only carrying light vehicles as defined in Chapter 8 of the Traffic Signs Manual;

Latent Defect means any defect in any part of the Site (including for the avoidance of doubt any existing structures upon the Site) which could not reasonably have been ascertained by a competent person acting in accordance with Good Industry Practice from an analysis of all relevant information available to the Company prior to the date of this Agreement;

Legislation means any Act of Parliament (including the Scottish Parliament) or subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, any exercise of the Royal Prerogative, and any enforceable community right within the meaning of Section 2 of the European Communities Act 1972, in each case in the United Kingdom;

Liaison Committee means the committee established pursuant to Schedule 15 (Liaison Committee);

Liaison Officer means the person appointed in accordance with Part 7 of Schedule 2 and Part 9 of Schedule 4 as appropriate;

Liaison Procedure means the procedure detailed in Part 7 of Schedule 2 and Part 9 of Schedule 4 as appropriate;

Long-Stop Date means the date falling 18 months after the Planned Full Services Commencement Date;

Long Vehicles has the meaning given to that term in Part 1 of Schedule 6;

Losses means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses and including contractual entitlements for loss of profits), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands;

Major Works for Roads Purposes means both major works for roads purposes as defined in Section 145(3) of the 1991 Act and major bridge works as defined in Section 147(2) of the 1991 Act;

Maximum Amount means the maximum sum that the Company would be able to pay to the Scottish Ministers pursuant to Clause 48.5 (Retention Fund) while still maintaining a Debt Service Cover Ratio and a Forecast Annual Debt Service Cover Ratio at a level which is above that which would trigger an Event of Default under the Senior Financing Agreements;

MCHW or Manual of Contract Documents for Highway Works means the Manual of Contract Documents for Highway Works published by the Stationery Office Limited on 31 May 2007 and including those interim amendments and advice notes as implemented by Transport Scotland which are current at 31 May 2007;

Memorandum shall be construed with the Companies Act 1985;

Mineworking Failure means any incident, arising out of the existence of mineworkings under or adjacent to the Project Roads, which directly affects (a) the Project Roads and/or (b) the ability of the Company to perform the Operations;

Monthly Invoice means the invoice to be issued by the Company in accordance with Clause 31.2 (Monthly Invoice);

Monthly Unitary Charge means the Monthly Unitary Charge calculated in accordance with Paragraph 2 of Schedule 6 (Payment Mechanism);

NPV or Net Present Value means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Threshold Equity IRR;

New Access Roads / Tracks means the roads described under the heading 'New Access Roads / Tracks' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

New Footpaths and Cycle Tracks means the roads described under the heading 'New Footpaths and Cycle Tracks' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

New M80 – M73 Link Road means the roads described under the heading 'New M80-M73 Link Road' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

New Means of Access means the accesses described under the heading 'New Means of Access' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

New M80 Motorway means the roads described under the heading 'New M80 Motorway' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

New Roads means those roads for which O&M Works shall be required from the date of the issue of the relevant Permit to Use for either Phase 1A, Phase 1B or Phase 2 and shall include:

- (a) the New M80 Motorway;
- (b) the New M80 – M73 Link Road;

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- (c) the New Access Roads / Tracks; and
- (d) those Accommodation Works Access Tracks over which access is required to carry out the O&M Works;

New Supplier means any successor to the Company in the performance of services and/or activities which are equivalent or identifiably similar to the Operations upon the cessation of performance of the Operations by the Company, or upon the partial cessation of the performance of the Operations by the Company any successor to the Company in the performance of services and/or activities which are equivalent or identifiably similar to that part or those parts of the Operations which are to cease to be performed by the Company;

New Works means all activities and obligations to be carried out by the Company as described and specified in the New Works Requirements;

New Works Agreement means the contract so entitled in the Agreed Form to be entered into by the Company and the New Works Contractor in respect of the New Works;

New Works Contractor means Bilfinger Berger UK Limited, a company registered in England and Wales under the Companies Acts having registered number 02418086 and whose registered address is at 150 Aldersgate Street, London, EC1A 4EJ and Northstone (NI) Limited, a company registered in Northern Ireland having registered number NI004078 and whose registered address is at 99 Kingsway, Dunmurry, Belfast BT17 9NU and John Graham (Dromore) Limited, a company registered in Northern Ireland having registered number NI003503 and whose registered address is at Legan Mills, Dromore, County Down BT25 1AS trading jointly and severally together as HMC or such substitute as may be appointed by the Company for the time being in accordance with this Agreement;

New Works Direct Agreement means an agreement substantially in the form set out in Part 2 of Schedule 14 (Direct Agreements);

New Works Period means the period from the Effective Date to the Full Services Commencement Date;

New Works Period Insurance means the Required Insurances in respect of the period from the Date of this Agreement to the Full Services Commencement Date;

New Works Quality Plan means the quality plan in respect of the New Works developed by the Company in accordance with this Agreement, the form of which is set out in Schedule 3A (Conceptual Design);

New Works Requirements means the requirements forming Schedule 2 (New Works Requirements) as amended from time to time in accordance with this Agreement;

New Works Site means:

- (a) the areas of land shown hatched in pink including the pink line;

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- (b) the areas of land shown cross-hatched in dark blue including the dark blue line;
- (c) the areas of land shown cross-hatched in green including the green line with the exception of the local authority road and associated features being bounded by the outermost points of the verges on each side of the local authority road and to a depth under the local authority road to include associated drainage and road box;
- (d) the areas of land shown hatched in aqua including the aqua line but excluding Castlecary Viaduct and Network Rail property; and
- (e) the areas of land shown shaded in purple including the purple line

in each case, on the drawings listed in Appendix 0/4 of Part 3 of Schedule 2 (New Works Requirements) under the heading 'Land Made Available by the Scottish Ministers for the New Works'; and

- (f) any further land acquired by, or conveyed to, the Scottish Ministers (from any person including the Company) from time to time for the purposes of the New Works;

Notice Date has the meaning given to that term in Schedule 11 (Termination Compensation);

Notices means the Notices listed in Schedule 9 (Orders and Watercourse Notices);

Notifiable Financings means any Refinancing described in paragraph (a) or (c) of the definition of Refinancing and any other arrangement which has or would have a similar effect or which has or would have the effect of limiting the Company's or any Associated Company's ability to carry out any such arrangement;

O&M Manual means the manual set out in Schedule 3B (Plans and Manuals) as subsequently developed by the Company in accordance with this Agreement;

O&M Works means all activities and obligations to be carried out by the Company as described and specified in the O&M Works Requirements;

O&M Works Agreement means the contract so entitled in the Agreed Form entered into between the Company and the O&M Works Contractor in respect of the O&M Works;

O&M Works Contractor means BEAR Scotland Limited, a company registered under the Companies Acts (Registered number SC206139) and having its registered office at Bear House, Inveralmond Road, Inveralmond Industrial Estate, Perth PH1 3TW or such substitute as may be appointed by the Company for the time being in accordance with this Agreement;

O&M Works Direct Agreement means an agreement substantially in the form set out in Part 3 of Schedule 14 (Direct Agreements);

O&M Works Quality Plan means the quality plan in respect of the O&M Works developed by the Company in accordance with this Agreement, the form of which is set out in Schedule 3B (Plans and Manuals);

O&M Works Requirements means the requirements forming Schedule 4 (O&M Works Requirements), as amended from time to time in accordance with this Agreement;

O&M Works Site means:

- (a) the areas of land shown hatched in pink including the pink line;
- (b) the areas of land shown cross-hatched in green including the green line but from and after the time when responsibility for a local authority road is or has been transferred to the local authority such areas of land under exception of the local authority road and associated features being bounded by the outermost points of the verges on each side of the local authority road and to a depth under the local authority road to include associated drainage and road box;
- (c) the areas of land shown cross-hatched in dark blue including the dark blue line; and
- (d) the areas of land shown hatched in orange including the orange line;
- (e) the areas of land shown hatched in aqua including the aqua line but excluding Castlecary Viaduct and Network Rail property;
- (f) the areas of land shown hatched in purple including the purple line; and
- (g) the areas of land shown shaded in purple including the purple line;

in each case, on the drawings listed in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements) under the heading 'Land Made Available by the Scottish Ministers for the O&M Works'; and

- (h) any further land acquired by, or conveyed to, the Scottish Ministers (from any person including the Company) from time to time which is required by the Company in order to carry out the New Works and/or the O&M Works;

Ombudsman means the Scottish Public Services Ombudsman established pursuant to the Scottish Public Services Ombudsman Act 2002;

Operations means the activities of or required of the Company (and/or any of the Company's agents, employees, contractors or sub-contractors of any tier) in connection with the performance of any obligations of the Company under this Agreement, and the conduct of any works or operations of the Company (and/or any of the Company's agents, employees, contractors or sub-contractors of any tier) on or in relation to the Sites;

Orders means the Orders listed in Schedule 9 (Orders and Watercourse Notices) and contained in the Information Room;

Original Senior Commitment means the amount committed under the Senior Financing Agreements as at Financial Close (as adjusted to take into account any Qualifying Variation);

Other Vehicles has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

Party means a party to this Agreement and Parties shall be construed accordingly;

Payment Calculation Schedule means the excel worksheet in the form set out in Appendix 10 of Schedule 6 (Payment Mechanism) used to calculate the Unitary Charge for any Payment Month;

Payment Month has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

Payment Year has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

Performance Deductions means Unavailability Deductions and Service Shortfall Deductions in each case as defined in Part 1 of Schedule 6 (Payment Mechanism);

Permit to Use means the notice issued by the Scottish Ministers to the Company, in accordance with Clause 25, acknowledging the issue by the Company of a Substantial Completion Certificate in respect of a Phase and confirming that the Phase is to be made available for public use with immediate effect;

Permitted Borrowing means, without double counting, any:

- (a) advance to the Company under the Senior Financing Agreements;
- (b) Additional Permitted Borrowing; and
- (c) interest and, in respect of the original Senior Financing Agreements only (as entered into at the Date of this Agreement, prior to any subsequent amendment), other amounts accrued or payable under the terms of such original Senior Financing Agreements,

except where the amount referred to in paragraphs (a) to (c) above is or is being used to fund a payment of Default Interest on any Additional Permitted Borrowing;

Persistent Breach means a breach for which a Persistent Breach Final Notice has been issued which has continued for more than 20 Business Days or recurred in 3 or more months within the 6 months after the date on which such Persistent Breach Final Notice is served on the Company;

Persistent Breach Final Notice means the notice to be served by the Scottish Ministers in accordance with Clause 43.2;

Persistent Breach Warning Notice has the meaning given in Clause 43.1;

Personal Data means personal data as defined in the DPA which is supplied to the Company by the Scottish Ministers or obtained by the Company in the course of performing the Operations;

PFI/PPP means the Government's Private Finance Initiative/Public Private Partnership approach or any similar or replacement initiative or approach;

PFI/PPP Company means a person that has contracted with the Government, a local authority or other public or statutory body to provide services under the PFI/PPP;

Phase means each and any of the following parts of the New Works:

- (a) that section of the New Works comprising all roads and associated works between Reference Point R79 and Reference Point R80 including Low Wood Interchange to Reference Points R20, R78 and R76 but excluding the A80 Improvements ("**Phase 1**");
- (b) that section of the New Works comprising Phase 1 with the exception of:
 - (i) the New M80 Motorway between Reference Point R03 and Reference Point R80 which will have three lanes eastbound and two lanes westbound under traffic management, running on the New M80 Motorway;
 - (ii) the Hornshill Westbound Diverge between Reference Point R12 and Reference Point R13;
 - (iii) the southside of Hornshill Roundabout between the southern parapets of Structure ST01 and Structure ST02;
 - (iv) M73 Northbound Diverge Slip Road between Reference Point R58 and Reference Point R59;
 - (v) M73 Eastbound Merge Slip Road between Reference Point R60 and Reference Point R61;
 - (vi) M73 Westbound Merge Slip Road between Reference Point R62 and Reference Point R63;
 - (vii) New Mollinsburn Roundabout between Reference Points S16, B28, R63, R64, S17 and S16;
 - (viii) New Main Road between Reference Point S17 and Reference Point S18;
 - (ix) New M80-M73 Link Road between Reference Point R52 and Reference Point R53;
 - (x) New North Road between Reference Point S19 and Reference Point S20; and

(xi) The A80 Roundabout between Reference Point S10, S11, R60, B18, R59 and S10;

("Phase 1A");

(c) that section of the New Works comprising Phase 1 with the exception of Phase 1A ("Phase 1B");

(d) that section of the New Works comprising all roads and associated works between Reference Point R80 and Reference Point R66 ("Phase 2"); and

(e) the A80 Improvements ("Phase 3");

Physical Damage Policies means the policies referred to in paragraph 1 of both Parts 1 and 2 of Schedule 10 (Required Insurances);

Planned Excluded Seasonal Works Completion Date means the date which falls 9 months after the earlier of the Planned Final Completion Date and the date of the Final Completion Acceptance Notice;

Planned Final Completion Date means 31 December 2011 or such later date as is:

(a) required to ensure that it falls on a date which is at least 3 months and 8 days after the Planned Full Services Commencement Date from time to time; and/or

(b) agreed or determined in accordance with the terms of this Agreement;

Planned Full Services Commencement Date means 22nd September 2011 (subject to Clause 32.3.1) or such later date as the Parties may agree;

Plant means machinery, equipment, apparatus, materials and things of all kinds intended to form or forming part of the New Works, but not including any Constructional Plant;

Portfolio Cost Saving means any insurance cost saving which arises from the Company changing the placement of the Required Insurances from being on a standalone project-specific basis assumed at Financial Close and reflected in the Base Cost, to being on the basis of a policy (or policies) also covering risks on other projects or other matters which are outside the scope of the Project so as to benefit from portfolio savings. A Portfolio Cost Saving is defined to be a positive sum and cannot be less than zero;

Pre-Refinancing Equity IRR means the nominal post-tax (i.e. post-tax with respect to the Company, pre-tax with respect to the Shareholders) Equity IRR calculated immediately prior to the Refinancing;

Pre-Start Works Agreement means the contract entered into by the Scottish Ministers and the New Works Contractor dated 4th, 7th and 9th July 2008 as subsequently extended;

Prescribed Rate means the rate of interest payable in terms of Clause 8.2 of the Term Loan Facility Agreement plus 1% provided that for the purposes of this

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definition 1) the Margin where it appears in Clause 8.2 shall be deemed to be XXX above LIBOR the Margin applicable at that time; and 2) the Mandatory Costs shall be deemed to be the highest Mandatory Cost applicable at that time in terms of Schedule 5 (Mandatory Cost Formula) of the Term Loan Facility Agreement

Prohibited Act means:

- (a) offering, giving or agreeing to give to any servant of the Crown (which term shall include any successor entity to the Scottish Ministers) any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Crown; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Crown;
- (b) entering into this Agreement or any other contract with the Crown in connection with which commission has been paid or has been agreed to be paid by the Company or on its behalf, or to its knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Scottish Ministers;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889–1916;
 - (ii) under Legislation creating offences in respect of fraudulent acts, or
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Crown; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Crown;

Project means the M80 Stepps to Hags DBFO Contract in relation to the design and construction of the New Works, the performance of the O&M Works and the conduct of any other Operations and the financing of such activities;

Project Accounts means accounts referred to in and required to be established under the Senior Financing Agreements;

Project Data means:

- (a) all Design Data;
- (b) all drawings, reports, documents, plans, formulae, calculations and other data relating to the provision of the Operations; and
- (c) any other materials, documents or data acquired, brought into existence or used in relation to the Operations or this Agreement;

Project Documents means the agreements which are listed in Part 1 of Schedule 12 (Project Documents) copies of which have been initialled by the Parties for the purposes of identification;

Project Insurance Change means any net increase or net decrease in the Actual Relevant Insurance Cost relative to the Base Relevant Insurance Cost, arising from:

- (a) the claims history or re-rating of the Company or any Company Related Party;
- (b) the effect of any change in deductible unless the following applies:
 - (i) such change is attributable to circumstances generally prevailing in the Relevant Insurance Market; and
 - (ii) the deductible, further to such change, is either greater than or equal to the maximum in Schedule 10 (Required Insurances);
- (c) any other issue or factor than circumstances generally prevailing in the Relevant Insurance Market, except for any Portfolio Cost Saving.

For the purpose of determining the Insurance Cost Differential, in the event that there is a net increase, the Project Insurance Change shall have a positive value. In the event that there is a net decrease the Project Insurance Change shall have a negative value.

Project Quality Manager means Hugh O'Connor or such other person as may be appointed by the Company in accordance with this Agreement;

Project Roads means the New Roads and the Site Roads;

Protestor means any person or persons engaged in Protestor Action;

Protestor Action means any action taken or threatened to be taken by any person or persons protesting against the carrying out of any part of the Operations including construction of the New Works (or any part thereof) or of roads in general which directly or indirectly affects performance of the Operations including without limitation action or threatened action which results in:

- (a) increases in the cost of performing the Operations (including increased security costs); and/or
- (b) delays in performing the Operations;

Qualifying Bank Transaction means:

- (a) the syndication by a Senior Lender, in the ordinary course of its business, of any of its rights or interests in the Senior Financing Agreements;
- (b) the grant by a Senior Lender of any rights of participation, or the disposition by a Senior Lender of any of its rights or interests (other than as specified in paragraph (a) above), in respect of the Senior Financing Agreements in favour of (i) any other Senior Lender (ii) any institution which is recognised or permitted under the law of any member state of the EEA to carry on the

business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other EEA member state (iii) a local authority or public authority (iv) a trustee of a charitable trust which has (or has had at any time during the previous 2 years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) (v) a trustee of an occupational pension scheme or stakeholder pension scheme where the trust has (or has had at any time during the previous 2 years) at least 50 members and assets under management of at least XXX (or its equivalent in any other currency at the relevant time) (vi) an EEA or Swiss Insurance Undertaking (vii) a Regulated Collective Investment Scheme (viii) any Qualifying Institution or (ix) any other institution in respect of which the prior written consent of the Scottish Ministers has been given; and/or

- (c) the grant by a Senior Lender of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of the Company or Holdco whether by way of security or otherwise, in favour of (i) any other Senior Lender (ii) any institution specified in paragraphs (b)(ii) to (vii) above (iii) any Qualifying Institution or (iv) any other institution in respect of which the prior written consent of the Scottish Ministers has been given;

Qualifying Change in Law means:

- (a) a Discriminatory Change in Law;
- (b) a Specific Change in Law; and/or
- (c) a General Change in Law which comes into effect during the Service Period and which involves Capital Expenditure,

which is not foreseeable at the Date of this Agreement;

Qualifying Institution means a Qualifying Lender as defined in the Common Terms Agreement;

Qualifying Refinancing means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

Qualifying Variation means either

- (a) a change in the New Works and/or the O&M Works in respect of which either a Scottish Ministers Notice of Change or a Company Notice of Change has been served and:
- (i) in the case of a Scottish Ministers Notice of Change, the Scottish Ministers have confirmed the Estimate and, where the Company is not funding all or part of the required Capital Expenditure, the Scottish Ministers have agreed to meet all or the remaining part (as appropriate) of such Capital Expenditure; and
- (ii) in the case of a Company Notice of Change, has been accepted by the Scottish Ministers; or

(b) a Qualifying Change in Law

and in respect of which any documents or amendments to the Project Documents which are required to give effect to such change in the New Works and/or the O&M Works have become unconditional in all respects;

Quality Plan means the New Works Quality Plan and the O&M Works Quality Plan;

Quality System means the quality management systems required in accordance with Schedule 5 (Quality Assurance);

Rectification and Maintenance Costs means the cost of the rectification and/or maintenance work notified to the Company pursuant to Clause 48.4.1, as such cost has been quantified by the survey carried out under Clause 48.1;

Reference Point has the meaning ascribed to it in paragraph 1.6 of Part 1 of Schedule 2 (New Works Requirements);

Refinancing means:

- (a) any amendment, variation, novation, supplement or replacement of any Financing Agreement (other than any Subordinated Financing Agreement);
- (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement (other than any Subordinated Financing Agreement);
- (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Financing Agreements (other than the Subordinated Financing Agreements) or the creation or granting of any other form of benefit or interest in either the Financing Agreements (other than the Subordinated Financing Agreements) or the contracts, revenues or assets of the Company whether by way of security or otherwise; or
- (d) any other arrangement put in place by the Company or another person which has an effect which is similar to any of (a)-(c) above or which has the effect of limiting the Company's or any Associated Company's ability to carry out any of (a)-(c) above;

Refinancing Gain means an amount equal to the greater of zero and $(A - B) - C$, where:

A = the Net Present Value of the Distributions projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing;

B = the Net Present Value of the Distributions projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Base Case as updated (including as to the performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Relevant Person over the remaining term of the Agreement following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Threshold Equity IRR;

Regulations means regulations issued pursuant to Part IV of the 1991 Act;

Regulated Collective Investment Scheme has the meaning given in the rules from time to time of the Financial Services Authority;

Relevant Assumptions has the meaning given to that term in Schedule 11 (Termination Compensation);

Relevant Authority means any person whose authority or approval is or may be required for the carrying out of all or any part of the Operations other than the Scottish Ministers;

Relevant Insurance means the Required Insurances and any other insurances as may be required by law other than:

- (a) New Works Period Insurance; and
- (b) Business Interruption Cover except to the extent that it relates to Unavoidable Fixed Costs;

Relevant Insurance Inception Date means the date on which the Relevant Insurance is first providing active insurance cover to the Company, being a date no earlier than the Full Services Commencement Date;

Relevant Insurance Market means the insurance market which insures the majority of all PFI projects across all of the PFI sectors (as determined by the number of PFI projects), and as at the Date of this Agreement the Relevant Insurance Market is in the United Kingdom;

Relevant Person means a Shareholder and any of its Affiliates;

Relief Event means:

- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
- (b) failure by any Undertaker, utility company, local authority (other than the Scottish Ministers) or other like body to carry out works or provide services;
- (c) any Exceptionally Adverse Weather Conditions affecting the Sites;
- (d) any accidental loss or damage to the Project Roads;
- (e) any failure or shortage of power, fuel or transport;
- (f) any blockade or embargo which does not constitute a Force Majeure Event;
- (g) any:
 - (i) official or unofficial strike;

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- (ii) lockout;
- (iii) go–slow; or
- (iv) other dispute,

generally affecting the roads construction or roads operation and maintenance industries or a significant sector of either of them,

unless any of the events listed in paragraphs (a) to (g) inclusive arises (directly or indirectly) as a result of any wilful default or wilful act of the Company or any of its Sub-Contractors;

Renewal Programme has the meaning given to that term in Part 3 of Schedule 4 (O&M Works Requirements);

Renewal Works has the meaning given to that term in Part 3 of Schedule 4 (O&M Works Requirements);

Requests for Information shall have the meaning set out in the FOISA or the Environmental Information (Scotland) Regulations as relevant (where the meaning set out for the term "request" shall apply);

Required Action has the meaning given to that term in Clause 40.3.1;

Required Amount means:

- (a) prior to the final repayment date for Senior Debt, the lesser of (i) the Rectification and Maintenance Costs and (ii) the Maximum Amount; and
- (b) on or after the final repayment date for Senior Debt, sums amounting in aggregate to the outstanding Rectification and Maintenance Costs;

Required Insurances means the insurances which the Company is required to take out and maintain pursuant to Clauses 51.1 and 51.2;

Restricted Services means the activities listed in Appendix A to Part 11 of Schedule 4 (O&M Works Requirements);

Restricted Services Commencement Date means the later of:

- (a) 60 days after the Effective Date; or
- (b) the date of issue (or deemed issue) by the Scottish Ministers of the Restricted Services Commencement Notice in accordance with Clause 24.3;

Restricted Services Commencement Notice means the notice issued by the Scottish Ministers pursuant to Clause 24.3;

Restricted Services Payments means the payments calculated in accordance with Schedule 6 (Payment Mechanism);

Restricted Services Period means the period from the Restricted Services Commencement Date to the date of issue of a Permit to Use for the relevant Phase;

Restricted Services Readiness Certificate means a certificate in the form set out in Part 4 of Schedule 2 (New Works Requirements);

Restricted Services Readiness Criteria means the criteria listed on the Restricted Services Readiness Certificate;

Restricted Share Transfer means a proposed transfer of shares in the Company or Holdco to:

- (a) any person directly engaged in gambling, gaming, the production or sale of alcoholic drinks, the production or sale of products containing or derived from tobacco or the manufacture or sale of arms and weapons; or
- (b) any person to whom the provisions of Regulations 23(1) and 23(4) of the Public Contracts (Scotland) Regulations 2006 would apply;

Retention Fund Account has the meaning given to it in Clause 48.5 (Retention Fund);

Revised Senior Debt Termination Amount means, subject to Clause 5.3 (Changes to Financing Agreements and Project Documents):

- (a) all amounts outstanding at the Termination Date, including interest and (other than in respect of Additional Permitted Borrowing) Default Interest accrued as at that date, from the Company to the Senior Lenders in respect of Permitted Borrowing;
- (b) all amounts including costs of early termination of interest rate hedging arrangements, other hedging arrangements and other breakage costs, payable by the Company to the Senior Lenders as a result of a prepayment in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this Agreement, subject to the Company and the Senior Lenders mitigating all such costs to the extent reasonably possible,

less, to the extent it is a positive amount, the aggregate of (without double counting in relation to the calculation of the Revised Senior Debt Termination Amount or the amounts below):

- (i) all credit balances on any bank accounts (but excluding the Joint Insurance Account and the Distributions Account) held by or on behalf of the Company on the Termination Date which the Senior Lenders may apply in repayment or prepayment of the Senior Debt;
- (ii) all amounts, including costs of early termination of interest rate hedging arrangements and other breakage costs, payable by the Senior Lenders to the Company as a result of prepayment of amounts outstanding in respect of Permitted Borrowing, or, in the case of early termination or interest rate hedging arrangements only, as a result of termination of this Agreement;
- (iii) all other amounts (except insurance proceeds in respect of liabilities) received by the Senior Lenders on or after the Termination Date and

before the date on which any compensation is payable by the Scottish Ministers to the Company as a result of enforcing any other rights they may have; and

- (iv) all APB Distributions;

Road Safety Audit Stage 3 has the meaning given to it in the DMRB;

Road Safety Auditor means Colin Buchanan and Partners Limited, Newcombe House, 45 Notting Hill Gate, London W11 3PB or such substitute as may be appointed in accordance with this Agreement;

Road Safety Auditor's Agreement means the contract dated on or around the date hereof between (i) the Company or the New Works Contractor and (ii) the Road Safety Auditor;

Road Safety Auditor's Direct Agreement means an agreement substantially in the form set out in Part 6 of Schedule 14 (Direct Agreements);

Road Works Authority has the meaning given in Section 108(1) of the 1991 Act;

Routine Maintenance means management, maintenance, inspection and survey work carried out on a routine or cyclic basis in accordance with the O&M Works Requirements;

Sample Inspections has the meaning given to it in the Code of Practice entitled Code of Practice for Inspections;

Scottish Ministers Change means a change in the Scottish Ministers' Requirements at any time;

Scottish Ministers Consent means any agreement, certificate, consent, permission, expression of satisfaction or other approval given by the Scottish Ministers or any person on their behalf under the terms of this Agreement;

Scottish Ministers Default means one of the following events:

- (a) an expropriation, sequestration or requisition of a material part of the Assets and/or shares of the Company or Holdco by the Scottish Ministers or other Authority;
- (b) a failure by the Scottish Ministers to make payment of any amount of money equal to or exceeding the Scottish Ministers Default Amount (multiplied by the Indexation Factor in accordance with Schedule 6) that is due and payable by the Scottish Ministers under this Agreement within 20 Business Days of service of a formal written demand by the Company, where that amount fell due and payable one (or more) months prior to the date of service of the written demand;
- (c) a breach by the Scottish Ministers of their obligations under this Agreement which substantially frustrates or renders it impossible for the Company to perform its obligations under this Agreement for a continuous period of 2 months; or

(d) a breach by the Scottish Ministers of Clause 64.1 (Restrictions on Transfer of the Agreement by the Scottish Ministers) occurs;

Scottish Ministers Default Amount means the Scottish Ministers Default Amount set out in the Supplement;

Scottish Ministers Default Termination Sum has the meaning given to that term in Schedule 11 (Termination Compensation);

Scottish Ministers Notice of Change is the notice referred to in Clause 34.3;

Scottish Ministers Related Parties means the Scottish Ministers' contractors, sub-contractors, agents, consultants and employees (excluding the Company and Company Related Parties) in each case acting in connection with their relevant contract, appointment or employment and not as Users;

Scottish Ministers Property has the meaning given in Clause 50.1.2;

Scottish Ministers' Conditions Precedent means those obligations of the Scottish Ministers set out in Part 1 of Schedule 1 (Conditions Precedent);

Scottish Ministers' Representative means the person authorised as such under Clause 17 being, as at the Date of this Agreement, Ainslie Mclaughlin;

Scottish Ministers' Requirements means the New Works Requirements and the O&M Works Requirements;

Scottish Ministers' Site Representative means the person authorised as such under Clause 17A being, as at the Date of this Agreement, Robert Cairnduff;

Senior Debt means the financing provided by the Senior Lenders under the Senior Financing Agreements;

Senior Debt Rate has the meaning given to that term in Schedule 11 (Termination Compensation);

Senior Financing Agreements means the Common Terms Agreement, those agreements listed at paragraphs 1, 2, 3 and 5 of Part 2 of Schedule 12 (Project Documents), the interest rate hedging agreement, the security documents and any agreements relating to the provision of mezzanine finance as at the date of the Agreement or as amended with the prior written approval of the Scottish Ministers pursuant to Clause 5.3.2(a) or as a result of a Qualifying Variation;

Senior Lender means a person providing finance to the Company under the Senior Financing Agreements;

Senior Lenders' Financial Model means the financial model delivered to the Senior Lenders pursuant to the terms of the Senior Financing Agreements;

Service Period means the period specified in Clause 2.2;

Shareholder means any person from time to time holding share capital in the Company or Holdco;

Side Roads means the roads described under the heading 'Side Roads' in Appendix A to Part 2 of Schedule 2 (New Works Requirements);

Site Roads means all roads within the Sites (excluding New Roads), whether temporary or permanent and whether or not constructed under this Agreement for which Final Completion has not been achieved;

Sites means the New Works Site, the O&M Works Site and the Accommodation Works Site;

South East Management Unit means any company employed by the Scottish Ministers from time to time to operate and manage the trunk road network in south eastern Scotland;

South West Management Unit means any company employed by the Scottish Ministers from time to time to operate and manage the trunk road network in south western Scotland;

Specific Change in Law means any Change in Law which specifically refers to the provision of operations the same as or similar to the Operations or to the holding of shares in companies whose main business is providing operations the same as or similar to the Operations;

Specification means the 'Specification for Highway Works', published by HMSO as Volume 1 of the Manual of Contract Documents for Highway Works 31 May 2007, as modified and extended by Part 3 of Schedule 2 (New Works Requirements) and Part 5 of Schedule 4 (O&M Works Requirements) and as implemented by Transport Scotland as at 31 May 2007;

Sub-Contractors means any person engaged by the Company from time to time as may be permitted by this Agreement to procure the provision of the New Works and/or the O&M Works (or any of them);

Sub-Contractor Breakage Costs has the meaning given to that term in Schedule 11 (Termination Compensation);

Sub-Contracts means the contracts entered into between the Company and the Sub-Contractors;

Subordinated Financing Agreements means the Shareholders Agreement, the Shareholder Contributions Agreement, the Shareholder Subordinated Loan Note Instrument, the Borrower Loan Note Instrument and the Bilfinger Berger Equity Loan Agreement each as defined in the Common Terms Agreement as at the Date of this Agreement or as amended with the prior written approval of the Scottish Ministers or as a result of a Qualifying Variation;

Subordinated Lender means a person providing finance under a Subordinated Financing Agreement;

Substantial Completion means completion of the construction of a Phase in accordance with the New Works Requirements including satisfactory completion of the Road Safety Audit Stage 3 for the Phase except in all cases for incomplete items

which in the opinion of the Scottish Ministers do not prejudice the operation and safe use by Users of the Phase;

Substantial Completion Certificate means a certificate in the form set out in Part 4 of Schedule 2 (New Works Requirements);

Supplement means the financial supplement to this Agreement signed on or about the Date of this Agreement;

Tax means any kind of tax, duty, levy or other charge (other than VAT) whether or not similar to any in force at the Date of this Agreement and whether imposed by a local, governmental or other Authority in the United Kingdom or elsewhere;

Temporary Traffic Management Scheme (“TTMS”) means any traffic management arrangement which facilitates the temporary diversion of traffic in respect of any Project Road including, but not limited to:

- (a) a temporary carriageway onto which vehicular traffic is diverted from a public road;
- (b) a temporary footpath or cycle track onto which non motorised User traffic is diverted from a public road;
- (c) a combination of (a) and (b) or a temporary carriageway as in (a) with associated non motorised User traffic;
- (d) a temporary private means of access onto which traffic is diverted from a private new means of access; or
- (e) a diversion of traffic onto Phase1A prior to 27th May 2011.

Term Loan Facility Agreement means the agreement referred to at Paragraph 1 of Part 2 of Schedule 12 (Project Documents);

Termination Date means any date of early termination of this Agreement in accordance with Clauses 41 (Termination on Company Default), 42 (Termination on Scottish Ministers Default), 44 (Force Majeure), 45 (Corrupt Gifts and Fraud) or 46 (Voluntary Termination by the Scottish Ministers);

Termination Notice means a termination notice served by the Scottish Ministers on the Company in accordance with Clause 41.1;

Termination Sum has the meaning given to that term in Schedule 11 (Termination Compensation);

Third Party means:

- (a) any Relevant Authority;
- (b) any party listed in Part 6 of Schedule 2 (New Works Requirements) or Part 8 of Schedule 4 (O&M Works Requirements); and

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- (c) any other person or group who may be affected by the Operations or who are duly authorised by Legislation to review or otherwise take an interest in the Project;

Third Party Rights means any servitudes, way leaves, easements, public or private rights of way, title conditions, burdens, leases or any other overriding interest, formal or informal over or affecting any of the land over which the Access Rights are granted;

Threshold Equity IRR means XXX

Traffic Scotland means that branch of Transport Scotland which is associated with trunk road communications;

Traffic Signs Manual means the Traffic Signs Manual published by the Stationery Office Limited;

Transfer Date means the date on which any cessation or partial cessation of the Operations by the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) takes effect so as to transfer the contracts of employment of the Transferring Employees by virtue of TUPE;

Transferring Employee Employment Liabilities means any costs, claims, liabilities and expenses (including legal expenses) relating to or arising out of the employment of the Transferring Employees (or the termination thereof) including, without prejudice to the foregoing generality, negligence claims, unfair dismissal, redundancy, unlawful discrimination, breach of contract, claims in relation to pension entitlement, unlawful deduction of wages and equal pay;

Transferring Employees means those employees of the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) who are wholly or mainly assigned to the performance of those part(s) of the Operations which are to cease to be performed immediately prior to the cessation of performance of such part(s);

Transfer Assistance Period means (a) the period (i) from 6 months prior to the Expiry Date to the Expiry Date or (ii) if longer, from the date the Company received notice in writing from the Scottish Ministers that performance of the Operations is to cease until such cessation; and/or (b) the period or periods (if any) from the date or dates the Company receives notice in writing from the Scottish Ministers that performance of a part only of the Operations is to cease until such cessation;

Trunk Roads means those parts of trunk roads within the New Works Site as are managed and maintained by Scottish Ministers listed under Section 2 of the Road (Scotland) Act 1984 as a 1 May 2008;

TSCC means the Traffic Scotland Control Centre, currently located at Atlantic Quay, Glasgow;

TUPE means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No. 246);

Unavailability has the meaning given to that term in Part 1 of Schedule 6 (Payment Mechanism);

Unavoidable Fixed Costs has the meaning given to that term in Part 5 (Definitions) of Schedule 10 (Required Insurances);

Undertaker means any undertaker for the purposes of the 1991 Act;

Uninsurable means, in relation to a risk, either that:

- (a) insurance is not available to the Company in respect of the Project in the worldwide insurance market with reputable insurers of good standing in respect of that risk; or
- (b) the insurance premium payable for insuring that risk is at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom;

Unitary Charge has the meaning given to that term in Schedule 6 (Payment Mechanism);

Unitary Charge Adjustment means an adjustment to the Unitary Charge made in accordance with the Unitary Charge Adjustment Procedure;

Unitary Charge Adjustment Procedure means the procedure set out in Part 6 of Schedule 6 (Payment Mechanism);

Users means users of the Project Roads;

VAT means any value added taxes;

VFM Report means the report of the result of the VFM Review to be submitted to the Scottish Ministers by the Company in accordance with Clause 36.1;

VFM Review means the review of the operations to be carried out by the Company in accordance with Clause 36.1;

VFM Review Date means each of the 5th, 10th, 20th and 25th anniversary of the Planned Full Services Commencement Date or the date of issue of the final Permit to Use, whichever is earlier;

Works for Road Purposes has the meaning given in Section 145(2) of the 1991 Act;

1.2 Interpretation

1.2.1 In this Agreement, except where the context otherwise requires:

- (a) the masculine includes the feminine and vice-versa;
- (b) the singular includes the plural and vice-versa;
- (c) a reference in this Agreement to any clause, sub-clause, paragraph, schedule or annex is, except where it is expressly stated to the

contrary, a reference to such clause, sub-clause, paragraph, schedule or annex of this Agreement;

- (d) save where stated to the contrary any reference to this Agreement or to any other document shall include any permitted variation, amendment, supplement or successor to such document;
- (e) any reference to any enactment, order, regulation or other similar instrument shall be construed as a reference to the enactment, order, regulation or instrument (including any EU instrument) as amended, replaced, consolidated or re-enacted;
- (f) references to any documents being “in the Agreed Form” means such documents have been initialled by or on behalf of each of the Parties for the purpose of identification and/or entered into on or about the Date of this Agreement or the Effective Date;
- (g) the words “include” and “including” shall be construed without limitation;
- (h) a reference to a person includes firms, partnerships and corporations and their successors and permitted assignees or transferees; and
- (i) headings and words in parentheses and italics after a clause reference or a reference to a Schedule are for convenience of reference only.

1.2.2 This Agreement is entered into under PFI/PPP. This Agreement is excluded from Part II of the Housing Grants, Construction and Regeneration Act 1996 by operation of paragraph 4 of the Construction Contracts (Scotland) Exclusion Order 1998 (S.I. 1998/686). The Company acknowledges that the operation of the Housing Grants, Construction and Regeneration Act 1996 upon any Project Document shall not affect the Parties’ rights or obligations under this Agreement.

1.2.3 References to amounts expressed to be “Indexed” are references to such amounts multiplied by $\text{Index1}/\text{Index2}$ where Index1 is the value of the Index most recently published prior to the relevant calculation date and Index2 is the value of the Index on 30 June 2008.

1.2.4 Not used.

1.2.5 The right of a Party to give or withhold its approval, consent, agreement or analogous endorsement shall in each case (unless otherwise stated) be subject to an obligation to act reasonably in the giving of and/or not to unreasonably withhold or delay the giving or withholding of any such approval, consent, agreement or analogous endorsement.

1.2.6 Subject to the provisions of clause 11.6 of the Direct Agreement, in the event of a conflict between this Agreement and any of the Project Documents, the provisions of this Agreement will prevail.

1.2.7 Accounts referred to in this Agreement shall be dealt with in accordance with this Agreement.

2. DURATION OF AGREEMENT

2.1 Commencement

Subject to Clause 3.1, this Agreement and the rights and obligations of the Parties shall take effect on the Date of this Agreement.

2.2 Expiry/Termination

The Service Period will commence on the Full Services Commencement Date and terminate on the earlier of:

2.2.1 the Expiry Date; and

2.2.2 the Termination Date.

3. CONDITIONS PRECEDENT AND EFFECT ON DOCUMENTS

3.1 Conditionality

This Agreement (other than the provisions of Clauses 1, 2, 3, 16, 17, 17A, 49.5, 58, 59, 60, 62, 64, 67, 68, 69, 70, 71, 72, 75, 77, 78) is conditional on the satisfaction of the Conditions Precedent in accordance with this Clause 3.

3.2 Termination

If the Conditions Precedent have not been satisfied or waived in relation to the Company's Conditions Precedent by the Scottish Ministers and in relation to the Scottish Ministers' Conditions Precedent by the Company in each case by the Cut-Off Date, this Agreement shall terminate on the Cut-Off Date and, subject to Clause 49.5 (Accrued Rights), be without further effect.

3.3 Scottish Ministers' obligation to satisfy

The Scottish Ministers shall use their reasonable endeavours to ensure that the Scottish Ministers' Conditions Precedent are satisfied by the Cut-Off Date.

3.4 Company's obligation to satisfy

The Company shall use its reasonable endeavours to ensure that the Company's Conditions Precedent are satisfied by the Cut-Off Date.

3.5 Satisfaction of Conditions Precedent

A Condition Precedent shall be deemed to be satisfied on the date on which notice of satisfaction or waiver:

3.5.1 in the case of a Scottish Ministers' Condition Precedent, is received by the Scottish Ministers from the Company; and

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3.5.2 in the case of a Company's Condition Precedent, is received by the Company from the Scottish Ministers.

3.6 Project Documents

The Company shall deliver to the Scottish Ministers within 5 days of the Date of this Agreement a certified copy of each of the Project Documents to which the Scottish Ministers are not a party.

3A PRE-START WORKS AGREEMENT**3A.1 Pre-Start Works**

On the Effective Date:

3A.1.1 all work performed by the New Works Contractor under the Pre-Start Works Agreement shall be deemed to have been performed under this Agreement and the Pre-Start Works Agreement shall terminate; and

3A.1.2 any claims which the New Works Contractor may have against the Scottish Ministers under the Pre-Start Works Agreement (except claims relating to payment under clause 4 of the Pre-Start Works Agreement) shall be deemed to be claims available to the Company under this Agreement.

3A.2 No Relief

Neither Party shall be entitled to any relief or compensation (whether financial, relating to time or otherwise), under this Agreement in respect of circumstances for which that Party has already been compensated in full (whether financial, relating to time or otherwise) under the Pre-Start Works Agreement.

3B MAINTENANCE PRIOR TO THE RESTRICTED SERVICES COMMENCEMENT DATE

3B.1 From the Date of this Agreement until the Restricted Services Commencement Date the Scottish Ministers shall ensure that all Trunk Roads are managed and maintained in a condition consistent with the Third Generation Term Contract for Management and Maintenance of the Scottish Trunk Road Network South East Unit between the Scottish Ministers and BEAR Scotland Limited dated 24 November 2006.

4. WARRANTIES AND INFORMATION**4.1 Company Warranties**

The Company warrants, represents and undertakes to the Scottish Ministers that as at the Date of this Agreement:

4.1.1 it is properly constituted and incorporated under the laws of Scotland and has all necessary authority, power and capacity to enter into this Agreement, to execute and deliver the Financing Agreements to which it is a party and to exercise its rights under them;

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- 4.1.2 the information relating to the Company and its Affiliates set out in Schedule 16 (Company's Details) is true and accurate;
- 4.1.3 there are no material facts or circumstances in relation to the financial position or operational constitution of the Company which have not been fully and fairly disclosed to the Scottish Ministers and which if disclosed might reasonably have been expected to affect the decision of the Scottish Ministers to enter into this Agreement;
- 4.1.4 neither the performance nor the functionality of any computer or any automatically controlled or imbedded system used by the Company in support of the performance of this Agreement is affected by any date change;
- 4.1.5 it has not traded since incorporation or incurred any liabilities other than in terms of this Agreement, the Project Documents and the Financing Agreements or otherwise in relation to the Project;
- 4.1.6 the Financing Agreements set out the full basis on which the Company will obtain Senior Debt and Junior Debt;
- 4.1.7 the Project Documents referred to in this Agreement are the only agreements which would materially affect interpretation or application of any of the Project Documents;
- 4.1.8 it is not aware of any claims against the Scottish Ministers existing under the Pre-Start Works Agreement;
- 4.1.9 the Company is solvent and that no litigation or other proceedings are pending, threatened or have been entered into against it or any of its assets; and
- 4.1.10 no security interests exist over the Assets other than as created by or pursuant to (1) the Financing Agreements or (2) contractual arrangements which are industry standard relating to the supply of Assets (other than the Project Roads) and regulating retention of title,

and the Scottish Ministers rely upon such warranties, representations and undertakings.

4.2 Undertakings of the Company

The Company undertakes to the Scottish Ministers that the Company will not without the prior consent of the Scottish Ministers:

- 4.2.1 engage in any business other than the entry into and implementation of this Agreement and the Project Documents and any related and consequential transactions;
- 4.2.2 amend its Memorandum and Articles of Association, adopt new Articles of Association or fail to abide by any restrictions in them;
- 4.2.3 form or acquire or dispose of any subsidiary or subsidiary undertaking;

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- 4.2.4 consolidate or merge with any other person, or acquire any business or undertaking or sell or dispose of the business or undertaking or any substantial part thereof of the Company or any of its subsidiaries or subsidiary undertakings;
- 4.2.5 incur any indebtedness, other than its obligations under any Financing Agreement and any other Project Documents, or assume or guarantee any indebtedness of any other person; and/or
- 4.2.6 create or permit to subsist any security interests other than as created by or pursuant to (1) the Financing Agreements or (2) contractual arrangements which are industry standard relating to the supply of Assets (other than the Project Roads) and regulating retention of title.

4.3 Status of Warranties

All warranties, representations, undertakings, indemnities and other obligations made, given or undertaken by the Company in this Agreement are cumulative and none shall be given a limited construction by reference to any other.

4.4 No warranty by Scottish Ministers

The Scottish Ministers do not give any warranty or undertaking as to the relevance, completeness, accuracy or fitness for any purpose of any of the Disclosed Data.

4.5 No liability to Company

Subject to Clause 4.7, the Scottish Ministers shall not be liable to the Company in contract, delict (including negligence or breach of statutory duty), statute or otherwise as a result of:

- 4.5.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Disclosed Data; or
- 4.5.2 any failure to make available to the Company any materials, documents, drawings, plans or other information relating to the Project.

4.6 Disclosed Data

The Company warrants and represents to the Scottish Ministers that it has conducted its own analysis and review of the Disclosed Data and that it has satisfied itself as to the accuracy, completeness and fitness for purpose of any Disclosed Data on which it places reliance.

4.7 Fraudulent Statements

Nothing in this Clause 4 shall exclude any liability which the Scottish Ministers would otherwise have to the Company in respect of any statements made fraudulently prior to the date of the Agreement.

4.8 Company's Due Diligence

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Subject to the provisions of Clauses 9A and 33.3A, the Company shall be deemed to have:

- 4.8.1 satisfied itself as to the assets to which it will acquire rights and the nature and extent of the risks assumed by it under this Agreement; and
- 4.8.2 gathered all information necessary to perform its obligations under this Agreement and other obligations assumed, including:
 - (a) information as to the nature, location and condition of the land (including hydrological, geological, geo-technical, environmental and sub-surface conditions), any environmental contamination or existence of asbestos; and
 - (b) information relating to archaeological finds, areas of archaeological, scientific, historic or natural interest, local conditions and facilities and the quality of existing structures; and
 - (c) information relating to Apparatus.

4.9 No Relief

The Company shall not in any way be relieved from any obligation under this Agreement nor shall it be entitled to claim against the Scottish Ministers on grounds that any information, whether obtained from the Scottish Ministers or otherwise (including information made available by the Scottish Ministers) is incorrect or insufficient and shall make its own enquiries as to the accuracy and adequacy of that information.

5. PROJECT DOCUMENTS**5.1 Project Documents**

The Company shall perform its obligations under, and observe all of the provisions of, the Project Documents to which it is a party and shall not:

- 5.1.1 terminate or agree to the termination of all or part of any Project Document (other than in accordance with its terms where necessary to avoid a potential Company Default or an Event of Default under the Senior Financing Agreements and provided that (i) the Company has used reasonable endeavours to discuss the matter with the Scottish Ministers before such termination; (ii) such termination has been notified by the Company to the Scottish Ministers and (iii) the Scottish Ministers are kept fully informed of the remedial action to be taken by the Company);
- 5.1.2 make or agree to any material variation of any Project Document;
- 5.1.3 in any material respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights such others may have in a material respect), under any Project Document; or

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- 5.1.4 enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document,

unless the proposed course of action (and any relevant documentation) has been submitted to the Scottish Minister's Representative for review and there has been no objection made by the Scottish Ministers within 15 Business Days of receipt by the Scottish Ministers of such submissions, or such shorter period as may be agreed by the Parties, and provided, in the circumstances specified in Clause 5.1.1, that the Company has complied with the provisions of Clause 18.

5.2 Delivery

Without prejudice to Clause 5.1 or 5.3 or to the definition of Senior Financing Agreements, if at any time:

- 5.2.1 an amendment is made to any Project Document or Financing Agreement;
or
- 5.2.2 the Company or any Sub-Contractor is granted a waiver or release of any of its obligations under any Project Document or Financing Agreement; or
- 5.2.3 the Company enters into a contract in place of any Project Document or Financing Agreement (or any agreement which affects the interpretation or application of any Project Document or Financing Agreement);

the Company shall deliver to the Scottish Ministers a copy of each such amendment, release, waiver, agreement or replacement agreement together with a conformed copy of the relevant Project Document or Financing Agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of the Company.

5.3 Changes to Financing Agreements and Project Documents

- 5.3.1 Without prejudice to Clauses 5.2 (Delivery), 5.3.2 and 39 (Refinancing) the Company shall not, without the prior written consent of the Scottish Ministers, enter into new Financing Agreements or terminate, amend, waive its rights or otherwise deal with the Financing Agreements if the same may reasonably be expected to have a material adverse effect on the ability of the Company to perform its obligations under the Project Documents or this Agreement.

- 5.3.2 No amendment, waiver or exercise of a right under any Financing Agreement or Project Document shall have the effect of increasing the Scottish Ministers' liabilities on early termination of this Agreement unless:

- (a) the Company has obtained the prior written consent of the Scottish Ministers to such increased liability for the purposes of this Clause 5.3; or
- (b) it is an Additional Permitted Borrowing.

5.4 Financial Model

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5.4.1 Immediately on execution of this Agreement the Company shall lodge 2 copies of the Base Case (to be provided by the Company after verification of the identity of the same on behalf of the Scottish Ministers) with NCC Escrow International Limited to be held in custody upon the terms set out in the Financial Model Custody Agreement. The Parties shall agree a substitute custodian in the event that such person ceases to act as custodian.

5.4.2 The Company shall in addition promptly, and in any event within 5 Business Days, lodge with NCC Escrow International Limited (or the substitute custodian) 2 copies of any revisions to the Base Case (or, if subsequently amended, the Financial Model) in accordance with this Agreement, to be held in custody upon the terms set out in the Financial Model Custody Agreement.

5.4.3 The cost of these custody arrangements shall be met by the Company.

6. ACCESS FOR OPERATIONS**6.1 Access for New Works**

Subject to Clauses 8 (Suspension of Access Rights or Progress) and 9 (Extent of Access Rights and Warranties Relating Thereto) and to Paragraph 8 of Part 1 of Schedule 2 (New Works Requirements), the Scottish Ministers grant to the Company and those authorised by the Company the right to occupy the New Works Site for the purposes of carrying out the New Works until Final Completion.

6.2 Access for O&M Works

Subject to Clauses 8 (Suspension of Access Rights) and 9 (Extent of Access Rights and Warranties Relating Thereto) the Scottish Ministers grant to the Company and those authorised by the Company the right to occupy the O&M Works Site when, and to the extent, reasonably required to carry out the O&M Works in accordance with the terms of this Agreement for the period from the Restricted Services Commencement Date until the Expiry Date or the Termination Date as the case may be provided that the right to occupy that part of the O&M Works Site shown hatched in orange including the orange line shall cease on Final Completion.

6.3 Access for Accommodation Works

The Company shall make its own arrangements for access to the Accommodation Works Sites with the owners of such sites for carrying out of the Accommodation Works, provided that if the Company having used reasonable endeavours cannot get access to an Accommodation Works Site, then the Accommodation Works to be carried out on that Accommodation Works Site will be removed from the Operations by way of a Scottish Ministers Change.

6.4 Limitations

The rights of access referred to in this Clause 6 shall subsist for the purposes of carrying out the Operations and for no other purposes. Any access given under Clauses 6.1 or 6.2 shall be by way of licence for the relevant part of the Operations only and shall not grant or be deemed to grant any other interest in the land.

7. SITE BOUNDARIES

7.1 Boundaries of Sites

7.1.1 Within 60 Business Days after the date of Final Completion, the Company shall by notice to the Scottish Ministers specify any area of land falling within the boundaries of the O&M Works Site which is not required for the Project. The Scottish Ministers shall be entitled in their absolute discretion (as between the Scottish Ministers and the Company) to maintain or dispose of such area of land in accordance with Scottish Ministers' procedures and requirements.

7.1.2 If the Scottish Ministers exercise the right referred to in Clause 7.1.1 in respect of any area of land, then such area of land shall be excluded from the definition of the O&M Works Site with effect from the effective date of such exercise. The Parties shall use their reasonable endeavours to agree any revisions to the drawings set out in Appendix 0/4 of Part 5 of Schedule 4 (O&M Works Requirements) necessary to reflect such exclusion and if they are unable to reach agreement within 60 Business Days of the effective date of such exercise then either Party may refer the matter for resolution under the Dispute Resolution Procedure.

7.1.3 If and so long as the Scottish Ministers do not exercise the right referred to in Clause 7.1.1 in respect of any such area of land, then such area shall remain part of the O&M Works Site and the terms of this Agreement shall continue to apply in respect of such area of land.

8. SUSPENSION OF ACCESS RIGHTS

Without prejudice to Clause 33 (Compensation Events), the Scottish Ministers on giving notice to the Company shall be entitled to suspend or restrict the Access Rights or any part of them at their discretion for such period or periods as they may require.

9. EXTENT OF ACCESS RIGHTS AND WARRANTIES RELATING THERETO

9.1 Third Party Rights

No warranty is given by the Scottish Ministers that the Company shall have exclusive, peaceable and uninterrupted possession of the Access Rights or any of them, but if:

9.1.1 the Scottish Ministers take or expressly authorise third parties to take access to or occupation of any of the land over which the Access Rights are granted for any purpose, or dispose of any of such land, other than (i) as provided for or allowed for in or under this Agreement (including without limitation the exercise of the Scottish Ministers' rights under this Agreement), (ii) pursuant to the Pre-Start Works Agreement or (iii) pursuant to any request therefor by the Company; or

9.1.2 subject to Clause 9.2 there are in existence at any time any Third Party Rights other than as provided for, allowed for or identified in or under this Agreement, or in the case of public rights of way or passage only as would be reasonably apparent on an inspection of such land; and

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9.1.3 such access, occupation, disposal or Third Party Rights materially prejudices performance of the Operations or any of them by the Company,

such access, occupation, disposal or the existence of such Third Party Rights shall, if it occurs prior to Final Completion, be deemed to be a Compensation Event or, if it occurs after Final Completion, be equivalent to the making of a Scottish Ministers Change requiring the Company to allow for such interference in the performance of the Operations.

9.2 Restrictions on Access Rights

The Access Rights over those parts of the New Works Site and the O&M Works Site shown cross-hatched in dark blue including the dark blue line shall be restricted to servitude rights or wayleaves for the purposes of construction and maintenance of drainage works and associated works only.

The Access Rights over those parts of the New Works Site and the O&M Works Site shown shaded in purple including the purple line shall be restricted to servitude rights or wayleaves for the purposes of grouting of the sub-surface only.

The Access Rights over those parts of the O&M Works Site shown hatched in purple including the purple line shall be restricted to servitude rights or wayleaves for the purposes of construction and maintenance of bridge works and associated works only with no construction access to the purple shaded area.

9.3 Access Rights for Auchenkilns Contractor

9.3.1 The Company shall liaise directly with the Auchenkilns Contractor and afford the Auchenkilns Contractor all reasonable access to the Site to enable the Auchenkilns Contractor to fulfil its obligations under the Auchenkilns Contract.

9.3.2 The Company may request that the Scottish Ministers exercise any rights they may have pursuant to the Auchenkilns Contract to restrict the Auchenkilns Contractor's access to the Sites where the Company can demonstrate to the reasonable satisfaction of the Scottish Ministers that the Auchenkilns Contractor is refusing to comply with reasonable restrictions placed on its access to the Sites by the Company.

9.3.3 As soon as reasonably practicable following any request in accordance with Clause 9.3.2, the Scottish Ministers shall notify the Company whether the Scottish Ministers intend to provide any assistance as the Scottish Ministers (acting reasonably) consider reasonable and appropriate in restricting the Auchenkilns Contractor's access to the Site.

9.3.4 Where the Company is given assistance by the Scottish Ministers in accordance with Clause 9.3.3 then the Company will indemnify the Scottish Ministers in respect of any costs, losses, liabilities, expenses and claims suffered by them as a result of or in connection with the provision of such assistance.

9.4 Use of Sites

The Company is deemed, subject to Clauses 9.1 and 10.1:

- 9.4.1 to have inspected and examined the Sites and their surroundings and to have satisfied itself in relation to:
- (a) means of access to and through the Sites, the possibility of interference by any person with such access and the times and methods of working necessary to prevent any nuisance whether public or private to any third party;
 - (b) the boundaries of the Sites;
 - (c) the rights exercisable over or in relation to the Sites;
 - (d) the information disclosed in the Information Room in respect of the Sites;
 - (e) the extent and nature of work and materials necessary for conducting and completing the Operations; and
 - (f) subject to Clause 23, the risks of interference by Protestors or others trespassing on the Sites;
- 9.4.2 in general to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may influence, delay or affect the Operations; and
- 9.4.3 subject to the provisions of Clauses 9A, 9B and 33.3A, to accept entire responsibility (including any financial or other consequences which result whether directly or indirectly) for ascertaining and dealing with the matters detailed in Clauses 9.4.1 and 9.4.2.

9.5 Safety and Security

The Company shall procure, at all times while carrying out the New Works, that the New Works Sites are maintained in an orderly, safe and secure state and without prejudice to such generality in accordance with the Scottish Ministers' Requirements, shall have full regard for the safety of all persons entitled to be upon the New Works Site, and shall, in connection with the New Works, provide and maintain at the Company's own costs, including, but not limited to, all lights, guards, fencing, warning signs and watching when and where necessary or required by this Agreement or by any Authority or Relevant Authority for the protection of the New Works or for the safety and convenience of the public or others. No act or omission on the part of the Scottish Ministers shall result in the Company being in breach of the provisions of this Clause.

9.6 Latent Defects and the Sites

Subject to Clauses 9A and 9B, In respect of the Sites the Company accepts entire responsibility (including any financial or other consequences which result whether directly or indirectly) for the ascertainment of and rectification of Latent Defects so as to meet the requirements of Clause 12.2 (Standard of Performance).

9.7 Compliance with Scottish Ministers Notices

- 9.7.1 The Company shall comply with and/or procure compliance with any notice issued by the Scottish Ministers from time to time prior to the Full Services Commencement Date requiring the removal from any of the Sites of any person employed or engaged thereon in the carrying out of the Operations who in the reasonable opinion of the Scottish Ministers is prejudicial to the performance by the Scottish Ministers of their duties, obligations or functions or the exercise by the Scottish Ministers of their powers. The Scottish Ministers shall give reasons for their decision in such notice. Where the Company wishes to dispute any such notice, the relevant individual shall not attend any Site pending the outcome of the dispute; and
- 9.7.2 Where the Scottish Ministers have acted unreasonably in the exercise of their rights under clause 9.7.1 the Scottish Ministers shall be liable to the Company for all of the Company's costs, losses and expenses properly and reasonably incurred in connection with the notice and the removal of such person.

9A. AUCHENKILNS DEFECTS

9A.1 Notify

If during the Auchenkilns Defects Liability Period the Company identifies any Auchenkilns Defect which it reasonably considers may cause it to incur cost or suffer loss or delay, then the Company shall give notice to the Scottish Ministers of such Auchenkilns Defect ("Auchenkilns Claim Notice").

9A.2 Notice

The Auchenkilns Claim Notice shall be in writing and shall contain all relevant information including:

- 9A.2.1 the nature, location and extent of the Auchenkilns Defect;
- 9A.2.2 a description of the impact of the Auchenkilns Defect on the ability of the Company to perform the Operations;
- 9A.2.3 the Company's detailed estimate of the cost of rectifying such Auchenkilns Defect together with its estimate of the loss of revenue and/or delay which said Auchenkilns Defect is likely to cause; and
- 9A.2.4 any other information reasonably required by the Scottish Ministers to enable them to make an election in accordance with Clause 9A.3.

9A.3 Scottish Ministers Election

9A.3.1 The Scottish Ministers shall within 30 Business Days of receiving an Auchenkilns Claim Notice elect by notice in writing to the Company either to require:

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- (a) the Auchenkilns Contractor to remedy the Auchenkilns Defect to the standard contained in the Auchenkilns Contract, in which case the provisions of Clause 9A.4 shall apply; or
- (b) the Company to remedy the Auchenkilns Defect to the standard contained in this Agreement in which case the terms of Clause 9A.5 shall apply.

9A.3.2 If the Scottish Ministers do not consider that the Auchenkilns Claim Notice is either valid or appropriate, they shall notify the Company accordingly and either Party may refer the matter for resolution under the Dispute Resolution Procedure.

9A.4 Remediation by Auchenkilns Contractor

9A.4.1 If the Scottish Ministers elect to proceed in accordance with Clause 9A.3.1(a) then:

- (a) the Scottish Ministers shall require the Auchenkilns Contractor to remedy the Auchenkilns Defect in accordance with the Auchenkilns Contract and the Scottish Ministers shall or shall procure that the Auchenkilns Contractor shall provide the Company with all information it may reasonably require in relation to the Auchenkilns Contractor's proposals for remedying such Auchenkilns Defect (including the programme for completion thereof); and
- (b) the Company shall afford the Auchenkilns Contractor all reasonable access in accordance with Clause 9.3 to remedy the Auchenkilns Defect.

9A.4.2 For the avoidance of doubt, while the Company is expressly relieved from its obligation to remedy the Auchenkilns Defect pursuant to Clause 9A.4.1(a) the Company shall mitigate any effects of such Auchenkilns Defect and/or its remediation by the Auchenkilns Contractor such that the Project Roads remain open to Users in accordance with the Scottish Ministers Requirements.

9A.4.3 To the extent that the Company suffers delay or incurs increased costs as a result of any Auchenkilns Defect or the remediation thereof by the Auchenkilns Contractor pursuant to this Clause 9A.4 such delay or increased costs shall be deemed to be a Compensation Event and the provisions of Clause 33 shall apply.

9A.5 Remediation by the Company

9A.5.1 If the Auchenkilns Contractor fails to remedy the Auchenkilns Defect in accordance with the Auchenkilns Contract (as determined by the Scottish Ministers) or the Scottish Ministers elect to proceed in accordance with Clause 9A.3.1(b) then the Scottish Ministers shall instruct the Company to remedy the Auchenkilns Defect in accordance with the Scottish Ministers Requirements and the terms of this Agreement and such Auchenkilns Defect and instruction related thereto shall constitute a Compensation Event.

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9A.5.2 The Company shall carry out or procure the carrying out of such works as are necessary to comply with Clause 9A.5.1 as soon as reasonably practicable after receipt of such instruction.

9A.5.3 If and to the extent that the Company fails to carry out such works to the required standard in accordance with Clause 9A.5.1, the Scottish Ministers shall be entitled to carry out or procure the carrying out of those works itself and the costs incurred by the Scottish Ministers in so doing shall be taken into account when any request for a Compensation Event arising in connection with Clause 9A.5.1 is submitted by the Company.

9A.6 Survey on Expiry of Auchenkilns Defect Liability Period

9A.6.1 Prior to the expiry of the Auchenkilns Defect Liability Period the Scottish Ministers shall or shall procure the carrying out of a survey of the Auchenkilns Site (the "Auchenkilns Final Survey") to assess whether any remedial work is required to ensure that the Auchenkilns Site complies with the standards set out in the Auchenkilns Contract.

9A.6.2 The Auchenkilns Final Survey shall be carried out at such time or times and in such manner so as to minimise disruption to the operation of the Project Roads. The Company shall afford the surveyor (free of charge) all reasonable assistance required during the carrying out of the Auchenkilns Final Survey.

9A.6.3 The Scottish Ministers shall give the Company reasonable prior notice of the date of the Auchenkilns Final Survey and the Company shall be entitled to attend the Auchenkilns Final Survey and make representations to the surveyor.

9A.7 Necessary Works

9A.7.1 If the Auchenkilns Final Survey shows that the Auchenkilns Site does not comply with the Auchenkilns Contract the Scottish Ministers shall elect by notice in writing to the Company either to require:

- (a) the Auchenkilns Contractor to carry out the necessary remedial works in order to ensure that the Auchenkilns Site complies with the standards contained in the Auchenkilns Contract, in which case the provisions of Clause 9A.4 shall apply *mutatis mutandis*; or
- (b) the Company to carry out the necessary remedial works, in which case the Scottish Ministers shall notify the Company of the remedial work necessary to bring the condition of the Auchenkilns Site to the standard required by the New Works Requirements and such notification shall be deemed to constitute a Compensation Event.

9A.7.2 If Clause 9A.7.1(b) applies the Company shall carry out or procure the carrying out of such remedial works as soon as reasonably practicable.

9A.7.3 If and to the extent that the Company fails to carry out such remedial works to the required standard in accordance with Clause 9A.7.2, the Scottish Ministers shall be entitled to carry out or procure the carrying out of those

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remedial works themselves and the costs incurred by the Scottish Ministers in so doing shall be taken into account when any request for a Compensation Event arising in connection with Clause 9A.7.1(b) is submitted by the Company.

9A.8 No Obligation

For the avoidance of doubt, the Scottish Ministers shall not be obliged to exercise any right in respect of any Auchenkilns Defect against the Auchenkilns Contractor.

9A.9 Maintenance

The provisions of this Clause 9A are without prejudice to the Company's obligations to carry out Routine Maintenance throughout the Auchenkilns Defects Liability Period on the Auchenkilns Site in accordance with Schedule 4 (O&M Works Requirements) but only to the extent that said Routine Maintenance is not required as the result of an Auchenkilns Defect.

9A.10 Indemnity

The Scottish Ministers shall be responsible for, and shall release and indemnify the Company, their employees, agents and contractors on demand from and against, all liability for:

9A.10.1 death or personal injury; or

9A.10.2 loss of or damage to property (including property belonging to the Company or for which they are responsible);

which may arise out of, or in consequence of, the presence on the Auchenkilns Site of the Auchenkilns Contractor or the Scottish Ministers pursuant to this Clause 9A.

9B. MINeworkINGS

9B.1 Where as the consequence of a Mineworking Failure the Scottish Ministers become entitled to make or levy Lane Occupation Charges, Service Shortfall Deductions, Unavailability Deductions or Lane Availability Failure Charges ("Mineworking Deductions") in accordance with Schedule 6 (Payment Mechanism) the following provisions shall apply.

9B.2 Within 10 Business Days of the later of the occurrence of a Mineworking Failure or the Company becoming aware of the occurrence of that Mineworking Failure the Company shall (at all times acting in accordance with Good Industry Practice):

9B.2.1 institute such traffic management measures as are appropriate in the circumstances so as to ensure the availability of an equivalent number of Lanes as were available immediately prior to the occurrence of the Mineworking Failure, provided always that where the Company proposes to use Narrow Lanes the requirement for such shall be demonstrated to the Scottish Ministers' reasonable satisfaction; and

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9B.2.2 submit to the Scottish Ministers a programme of action which will, when performed, mitigate the consequences of and remedy or rectify or otherwise resolve (to the extent reasonably practicable in the context of the Operations) the Mineworking Failure to the reasonable satisfaction of the Scottish Ministers within such period as is reasonable in the circumstances (the “Mineworking Rectification Plan”);

and provided always that the Company has acted in accordance with Good Industry Practice when carrying out the Operations in the vicinity of any mineworkings then during that 10 Business Day period the Scottish Ministers shall not be entitled to make or levy any Mineworking Deductions.

9B.3 The Company shall implement the Mineworking Rectification Plan timeously and in accordance with its terms. The Company shall be relieved of liability for Mineworking Deductions during the period in which the Company is diligently implementing the Mineworking Rectification Plan or such other period as is appropriate in the circumstances.

9B.4 If at any time the Scottish Ministers (acting reasonably) are not satisfied with the implementation of the Mineworking Rectification Plan by the Company timeously and in accordance with its terms then the Scottish Ministers may by notice to the Company declare that the (other than for reasons or circumstances beyond the reasonable control of the Company) Scottish Ministers are forthwith entitled to make Mineworking Deductions.

10. SUFFICIENCY OF ORDERS AND ACCESS RIGHTS**10.1 Sufficiency of Orders and Access Rights**

10.1.1 The Scottish Ministers warrant that the Orders have been validly made, so as to validly grant to the Scottish Ministers the rights which they purport to grant.

10.1.2 The Scottish Ministers do not warrant the sufficiency or adequacy of the Access Rights or of the Orders to allow performance of the Operations in accordance with this Agreement. The Company shall not be relieved of any obligation under this Agreement on the grounds of such insufficiency or inadequacy, irrespective of whether or not any aspect of the Conceptual Design or the Design is or will be based on, or incorporates or will incorporate, or is or will be dependent on Disclosed Data.

10.2 Insufficiency of Access Rights

Without prejudice to Clause 10.1.1 if the Access Rights prove insufficient for the Company to perform the Operations the Company shall (except in the case of rights in land required to implement a Scottish Ministers Change which shall be the Scottish Ministers' responsibility to provide) take all reasonable steps to acquire on the Scottish Ministers' behalf at the Company's expense, such additional rights in land as may be necessary to enable the Company to perform the Operations (“Additional Land Rights”). Title to Additional Land Rights shall be taken in the name of the Scottish Ministers. The Company shall not be required to carry out any of the Operations on the land which is the subject of the Additional Land Rights until the

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Scottish Ministers have a valid marketable title to the Additional Land Rights containing nothing prejudicial to the carrying out of the Operations.

10.3 Exercise of Statutory Powers

10.3.1 If the Company believes that the exercise by the Scottish Ministers or any other Relevant Authority of any statutory power (except to the extent delegated to the Company by the Scottish Ministers in accordance with the terms of this Agreement) would be necessary to enable performance of the Operations by the Company, the Company may give notice to that effect to the Scottish Ministers. Any such notice shall:

- (a) clearly specify the action requested of the Scottish Ministers or any other Relevant Authority, the part of the Operations in respect of which such action is requested and the reasons why such action is requested;
- (b) specify the date by which the requested action is required; and
- (c) set out any recommendation by the Company in respect of the requested action.

10.3.2 Within 20 Business Days after receipt of a notice given in accordance with Clause 10.3.1, the Scottish Ministers shall acknowledge receipt of such notice and shall give its good faith estimate of the date on which it will respond to the request, provided that no such estimate shall be binding on the Scottish Ministers.

10.3.3 Without in any way limiting the discretion of the Scottish Ministers, the Scottish Ministers shall give reasonable consideration on its merits and in accordance with its statutory duties to the request contained in the notice given in accordance with Clause 10.3.1 and shall respond to such notice as soon as reasonably practicable in the circumstances (taking into consideration inter alia, the requirement to liaise with any Relevant Authority any requirement for consultation with the public or other interested parties in connection with the request contained in the notice). The Scottish Ministers and any other Relevant Authority shall be entitled to decline to take the requested action at their absolute discretion. The decision of the Scottish Ministers on the merits of the requested action shall not be subject to review under the Dispute Resolution Procedure or otherwise.

10.4 Non-Exercise of Statutory Powers

10.4.1 Subject to Clause 10.4.2, if the Scottish Ministers or any Relevant Authority decline, or are unable, to take an action requested in a notice under Clause 10.3.1 which is necessary to enable the performance of the Operations by the Company, this shall be deemed to be a Scottish Ministers Change either:

- (a) requiring the Company to carry out such additional works as may be appropriate in the circumstances as a consequence of the requested action not being taken (the Company being obliged to take all

reasonable steps to limit the costs and extent of such additional works); or

- (b) deleting the requirement to perform the part of the Operations to which the action requested relates.

10.4.2 Clause 10.4.1 shall not apply if:

- (a) the requested action is required due to an act or omission of the Company or a Company Related Party;
- (b) the requested action is the acquisition of land (other than for the purposes of implementing a Scottish Ministers Change);
- (c) the requested action relates to a request for a Departure or the implementation of a Company Change; or
- (d) the Scottish Ministers do not take the requested action on the basis of any of the grounds set out in Clause 10.4.3.

10.4.3 The grounds referred to in Clause 10.4.2(d) are:

- (a) the Scottish Ministers or any Relevant Authority, as the case may be, have no statutory power to take the action requested or are otherwise legally unable or prevented from taking such action;
- (b) there is an alternative course of action available to the Company which is not at an unreasonable or disproportionate cost and which would not require action by the Scottish Ministers or any Relevant Authority, as the case may be;
- (c) the requested action would have a material and adverse effect on the interest of any Third Parties;
- (d) there are reasonable objections from any Third Parties or other persons with whom the Scottish Ministers or any Relevant Authority, as the case may be, require to consult, being objections which in the opinion of the Scottish Ministers or any Relevant Authority, as the case may be, are reasonable grounds, having regard to their statutory responsibilities and obligations, for declining to take the requested action;
- (e) the timing and substance of the request is insufficient to enable the Scottish Ministers or any Relevant Authority, as the case may be, properly to consider the merits of the request in compliance with their statutory and administrative responsibilities taking into account (where appropriate) the necessity or desirability of consultation with other interested parties;
- (f) the action requested would have adverse implications for the safety of Users or any Third Parties; or

- (g) the taking of such action would otherwise be likely to be successfully challenged, or is successfully challenged, on an application for judicial review.

10.5 Company not in Default while Decision Pending

Where the Company has given notice to the Scottish Ministers under Clause 10.3.1, failure by the Company to perform that part of the Operations affected by the requested action, where the requested action is necessary to enable performance of that part of the Operations by the Company, shall not be a breach of this Agreement pending the decision of the Scottish Ministers or any Relevant Authority under Clause 10.3.3.

10.6 Scottish Ministers' Costs

The Company shall reimburse the reasonable costs incurred by the Scottish Ministers and/or any other Relevant Authority in considering any request under this Clause 10 and in taking any action in pursuance of such request.

11. CONSENTS BY THE SCOTTISH MINISTERS

11.1 Withdrawal of Consents

The Scottish Ministers shall be entitled to withdraw without liability to the Company a Consent which was given by the Scottish Ministers:

- 11.1.1 on the basis of materially inaccurate or misleading facts, information or calculations provided to the Scottish Ministers by or on behalf of the Company or a Company Related Party; or
- 11.1.2 without all relevant material facts, information or calculations having been given to the Scottish Ministers which were known or which should reasonably have been known at the time of seeking the Consent by the Company or a Company Related Party.

11.2 Disclaimers regarding Consents

None of the:

- 11.2.1 giving of any Consent;
- 11.2.2 failure to withdraw a Consent;
- 11.2.3 withdrawing of a Consent;
- 11.2.4 knowledge of the terms of any contract or document (including without limitation the Project Documents);
- 11.2.5 review of any document or course of action pursuant to the Certification Procedure in connection with the giving of a Consent; or
- 11.2.6 carrying out of or taking of (or failure to carry out or take) any inspection or sample,

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by or on behalf of the Scottish Ministers shall relieve the Company of any of its obligations under this Agreement or be deemed to constitute acceptance by the Scottish Ministers except where expressly provided in this Agreement or notified by the Scottish Ministers to the Company.

- 11.3 Notwithstanding the provisions of Clause 11.1, once the Restricted Services Commencement Notice, Permits to Use or the Final Completion Certificate have been issued, these shall be final and binding and shall not be subject to the terms of Clause 11.1 other than in the cases of fraud.

12. THE OPERATIONS**12.1 The Operations**

The Company shall:

- 12.1.1 carry out the New Works in accordance with and subject to the provisions of this Agreement;
- 12.1.2 carry out the O&M Works in accordance with and subject to the provisions of this Agreement;
- 12.1.3 subject to 12.1A remedy to the Scottish Ministers' reasonable satisfaction, and within such reasonable time as the Scottish Ministers may specify having regard to the nature of the Defect, all Defects occurring in:
- (a) the Accommodation Works, insofar as notified to the Company by the Scottish Ministers within 60 months of Final Completion;
 - (b) the A80 Improvements, insofar as notified to the Company by the Scottish Ministers within 12 months of Final Completion; and
 - (c) all other parts of the New Works not included in the Company's obligations in respect of the O&M Works, insofar as identified to the Company by the Scottish Ministers within 60 months of Final Completion,

provided that the Company shall in no circumstances be required to remedy such Defect to a standard higher than the standard specified in this Agreement, and

- 12.1.4 finance the activities referred to in Clauses 12.1.1 to 12.1.3 at its own cost and risk.
- 12.1A If the Company having used reasonable endeavours, cannot get access to an Accommodation Works Site to rectify any Defects in the Accommodation Works relative to that Accommodation Works Site, then the Company will be relieved of its relevant obligations to remedy any such Defects pursuant to Clause 12.1.3.

12.2 Standard of Performance

The Company shall (or shall procure that its Sub-Contractors shall):

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- 12.2.1 achieve Full Services Commencement on or before the Planned Full Services Commencement Date or, in the case of delay beyond the Planned Full Services Commencement Date, as soon as reasonably practicable thereafter and in any event before the Long-Stop Date;
- 12.2.2 achieve Final Completion as soon as practicable following the Full Services Commencement Date;
- 12.2.3 from the Restricted Services Commencement Date, carry out the Restricted Services on each Phase up to the date of issuance of the Permit to Use in respect thereof and thereafter carry out the O&M Works Requirements on the relevant section or sections of the Project Roads;
- 12.2.4 perform all the Company's obligations under this Agreement in such a manner as fully to comply with and meet all the requirements of:
- (a) Legislation;
 - (b) all Orders, Notices and Consents;
 - (c) the Scottish Ministers' Requirements
 - (d) all Guidance;
 - (e) Good Industry Practice; and
 - (f) the Conceptual Design, the Quality Plan and the O&M Manual,
- and in the event of conflict between the requirements of (a) to (f) the requirements shall have precedence in the order set out above;
- 12.2.5 ensure that the appropriate number of Lanes are available to Users throughout the Contract Period in accordance with the Scottish Ministers' Requirements;
- 12.2.6 ensure so far as reasonably practicable that all persons employed in connection with the performance of the Operations will be careful, skilled and experienced in their several professions, trades and callings taking into account their roles and responsibilities;
- 12.2.7 ensure that all aspects of the Operations will be supervised by sufficient numbers of persons having adequate knowledge of such matters for the satisfactory and safe performance of the Operations in accordance with this Agreement and having regard to the activities which are carried on at the Sites;
- 12.2.8 be entirely responsible for the adequacy, stability and safety of all site operations and methods of construction; and
- 12.2.9 give all notices and pay all fees required to be given or paid by Legislation in relation to the execution of the Operations and by the rules and regulations of all Relevant Authorities whose property or rights are or may be affected in

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any way by the Operations provided always that the Company shall not be obliged to pay any CPO Compensation.

12.3 Health and Safety Legislation

The Company acknowledges:

12.3.1 that the Scottish Ministers have an interest in ensuring that the Company conducts or procures the conduct of all of its obligations under this Agreement in accordance with all Legislation relating to health and safety; and

12.3.2 that the Scottish Ministers may make such reports to the HSE as the Scottish Ministers see fit should the Scottish Ministers perceive any breach by the Company of its obligation to comply or procure compliance with Legislation relating to health and safety.

12.4 Construction Traffic

12.4.1 The Company shall use every reasonable means to prevent any of the roads, accesses or bridges communicating with or on the routes to the New Works Site from being subjected to extraordinary traffic within the meaning of Section 96 of the Roads (Scotland) Act 1984 by any traffic of the Company and in particular shall select routes and use vehicles and restrict and distribute loads so that any such extraordinary traffic as shall arise from the moving of Constructional Plant and material or manufactured or fabricated articles from and to the New Works Site shall be limited as far as reasonably possible and so that no unnecessary damage or injury may be occasioned to such roads and bridges.

12.4.2 Save insofar as this Agreement otherwise provides the Company shall be responsible for and shall pay the costs of strengthening any bridges or altering or improving any road communicating with the New Works Site to facilitate the movement of Constructional Plant, equipment or temporary New Works or other items or vehicles required in the execution of the New Works and the Company shall negotiate and pay all claims arising out of any damage to any roads or bridges caused by such movement without recourse to the Scottish Ministers.

12.5 Nuisance during Operations

12.5.1 The Company shall at all times take all necessary steps to ensure that the Operations and any testing, investigation and surveys in connection therewith are carried out in such manner as to minimise so far as reasonably practicable (taking into account the Company's obligations under this Agreement) nuisance, interference or material disturbance to proprietors or users of property adjacent to, or in the vicinity of, the Sites.

12.5.2 All operations necessary for the execution of the Operations shall, so far as compliance with the requirements of this Agreement permits and so far as reasonably practicable (taking into account the Company's obligations under this Agreement), be carried on so as not to interfere unnecessarily or improperly with the public convenience or the access to or use or occupation

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of public or private roads and footpaths to or of properties whether in the possession of the Scottish Ministers or any other person.

12.5.3 The Company shall take all reasonable measures necessary to prevent damage loss injury or nuisance caused by mud, dirt, stones or other material used or generated whilst carrying out the Operations.

12.5.4 The Company shall take all reasonable measures necessary to prevent damage loss injury or nuisance caused by smoke or dust generated whilst carrying out the Operations.

12.6 Completion of New Works

On the completion of the New Works the Company shall clear away and remove from the New Works Site all Constructional Plant, surplus material, rubbish and the temporary New Works of every kind and leave the whole of the Sites clean and in a workmanlike condition in accordance with the provisions of this Agreement.

12.7 Fossils and Antiquities

12.7.1 The Company shall have no entitlement to any Fossils and Antiquities which may be found on, in or under any Site or in connection with the Operations. The Company shall immediately when an object which is, or might be, a Fossil or Antiquity is discovered:

- (a) cease work, if to continue the Operations would further endanger or disturb the object or impede its excavation or removal;
- (b) take all steps which may be necessary to preserve the object in the exact position and condition in which it was found and carry out examination, excavation or removal as detailed in Schedule 2 (New Works Requirements) in consultation with Historic Scotland; and
- (c) inform the Scottish Ministers of such discovery and precise location of the object.

12.7.2 Where the Company has ceased work pursuant to Clause 12.7.1(a) the Company shall not recommence work until the circumstances set out in Clause 12.7.1(a) have ceased to exist or the Company has agreed with Historic Scotland that work may continue.

13. PRECEDENCE OF DOCUMENTS

13.1 New Works Requirements

In the event of any conflict or inconsistency between:

13.1.1 the New Works Requirements and the Conceptual Design; or

13.1.2 the New Works Requirements and any documents incorporated by reference therein,

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the New Works Requirements shall prevail provided always that where the Agreed Departures and/or the Agreed Non-Compliances (as the case may be) conflict with the New Works Requirements the Agreed Departures and/or the Agreed Non-Compliances (as the case may be) shall prevail.

13.1A The Scottish Ministers confirm that, if implemented by the Company, the design solutions for mineworkings, settlement and controlled modulus columns shown on drawings P0000370510/02/TD/EART/0650 (F), P0000370510/02/TD/EART/0651 (D), P0000370510/02/TD/EART/0652A (O), P0000370510/02/TD/EART/0653 (D), P0000370510/02/TD/EART/0654 (B), P0000370510/02/TD/EART/0655 (A), P0000370510/02/TD/EART/0618 (C) and P0000370510/02/TD/EART/0649 (B) do not conflict with the New Works Requirements. For the avoidance of doubt, any design solution referred to in this Clause 13.1A shall be deemed to form part of the Design.

13.2 O&M Works Requirements

In the event of any conflict or inconsistency between:

13.2.1 the O&M Works Requirements and the O&M Works Quality Plan; or

13.2.2 the O&M Works Requirements and the O&M Manual,

the O&M Works Requirements shall prevail.

14. CONSTRUCTION PROGRAMME**14.1 Company to follow Construction Programme**

Insofar as the carrying out of the New Works affects or may affect the exercise by the Scottish Ministers of their duties and/or powers in connection with the Project or cause the Scottish Ministers to incur material additional costs the Company shall procure that the New Works are carried out in all material respects in accordance with the Construction Programme and so as to minimise any disruption to the exercise by the Scottish Ministers of their duties and/or powers in connection with the Project or any additional costs incurred by the Scottish Ministers. The Scottish Ministers may notify the Company if in their opinion at any time the actual progress of the New Works does not conform in any material respect with the Construction Programme. Where the Scottish Ministers and the Company agree or it is determined pursuant to the Dispute Resolution Procedure that such progress does not so conform, the Scottish Ministers may require (acting reasonably) the Company either:

14.1.1 to submit to the Scottish Ministers a report identifying the reasons for the delay;

14.1.2 to produce and submit to the Scottish Ministers a revised Construction Programme showing the manner in which the New Works will be carried out and (if possible) the periods necessary to ensure Full Services Commencement occurs by the Planned Full Services Commencement Date; and/or

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14.1.3 to produce and submit to the Scottish Ministers a revised Construction Programme showing the steps which the Company intends to take to eliminate or reduce any delay in reaching the Planned Full Services Commencement Date.

14.2 Variations to the Construction Programme

14.2.1 The Company may amend or revise the Construction Programme from time to time save in respect of its obligations under Clause 12.2.1. The Company shall consult with the Scottish Ministers and have due regard to the Scottish Ministers' comments in relation to any material amendments to the Construction Programme.

14.2.2 Any revised Construction Programme shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail to enable the Scottish Ministers to monitor progress including all commissioning activities and future progress of the New Works.

14.2.3 The Company shall promptly and in any event within 5 Business Days of receipt of comments from the Scottish Ministers submit to the Scottish Ministers a copy of any revised Construction Programme.

14.3 No relief for Company

No report submitted to the Scottish Ministers on the Construction Programme in accordance with Clause 14.1 nor any comment thereon nor any amendment or review thereof by the Scottish Ministers shall relieve the Company of any of its obligations under this Agreement, except as regards any extension of time to which the Company is entitled under Clause 32 (Relief Events) and Clause 33 (Compensation Events).

15. DESIGN DEVELOPMENT

15.1 Development of Conceptual Design

The Company shall prepare the Design by developing the Conceptual Design in accordance with the New Works Requirements, the Certification Procedures and the provisions of this Clause 15 and having regard to the Clarifications.

15.1A Development of the O&M Manual

The Company shall develop the O&M Manual in accordance with the Scottish Ministers' Requirements and having regard to the Clarifications.

15.2 Scottish Ministers' Access

The Company shall allow the Scottish Ministers at all times reasonable opportunities to view any items of Design Data, which shall be made available to the Scottish Ministers as soon as practicable following receipt of a written request from the Scottish Ministers.

15.3 Design Liability

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All liability attaching to the Design (whether pursuant to Legislation, the provisions of this Agreement or otherwise) shall remain with the Company and shall not in any way be affected by:

- 15.3.1 any element of the Design set out in the Scottish Ministers' Requirements;
- 15.3.2 any design carried out at the request of the Scottish Ministers by or on behalf of the Company; or
- 15.3.3 the agreement to or approval by the Scottish Ministers of any design proposal made by the Company whether before, on or after the Effective Date.

15.4 Material Design Changes

In preparing the Design the Company will not be entitled to make any material change to the Conceptual Design (other than in accordance with Clause 15.6 or where necessitated by a Specific Change in Law, a Discriminatory Change in Law or a Compensation Event or as a direct consequence of a variation to the Conceptual Design which is implemented at the request of the Scottish Ministers) without the consent of the Scottish Ministers.

15.5 Company Change

Any material change proposed by the Company to the Conceptual Design shall be considered a Company Change and the provisions of Clause 35 (Company Changes) shall apply.

15.6 Landscaping Design Development

- 15.6.1 The Company shall prepare that part of the Design which relates to the landscaping design by developing the Indicative Landscape Proposals listed in Appendix 0/4 of Part 3 of Schedule 2 (New Works Requirements).
- 15.6.2 Any alterations, material or otherwise, required to be made to the Indicative Landscape Proposals which are necessitated by the preparation of the Design and the development of the Conceptual Design shall be carried out by the Company and shall not constitute a Change and the Company shall be obliged to carry out the landscaping works in accordance with the Design as so altered.

16. COMPANY'S REPRESENTATIVE**16.1 Appointment**

The Company shall appoint the Company's Representative to act on its behalf in connection with this Agreement. Such appointment (and the appointment of any replacement) shall be subject to the Scottish Ministers' consent, which consent shall not be unreasonably withheld or delayed in respect of the appointment of an individual suitably qualified and competent to discharge the functions of the Company's Representative under this Agreement.

16.2 Powers and Authority

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The Company's Representative shall be deemed to have full power and authority to act on behalf of the Company (but shall have no personal liability to the Scottish Ministers) for the purposes of this Agreement only where and to the extent that this Agreement expressly so provides or where subsequently authorised by the Company in accordance with this Clause 16.

16.3 Authorisation

The Company, acting reasonably, may from time to time authorise (or amend or withdraw such authorisation) the Company's Representative to exercise any of the Company's powers and rights under this Agreement on the Company's behalf. With effect from the Effective Date (without prejudice to the Company's rights under this Clause 16) the Parties agree that the Company's Representative shall be authorised to exercise the rights and powers specified in Schedule 13 (Authority of Representatives). Any such authorisation (or withdrawal or amendment of such authorisation) shall take effect from the date on which notice thereof is received by the Scottish Ministers or such later date as may be specified in such notice.

16.4 Replacement

If at any time there is no Company's Representative:

16.4.1 the Company shall use its best endeavours to replace the Company's Representative as soon as practicable; and

16.4.2 from the date of receipt by the Scottish Ministers of notice from the Company to that effect until the Company appoints a replacement in accordance with Clause 16.1, any notification to be made by the Scottish Ministers to the Company's Representative shall be made to the Company and any action which requires to be taken by the Company's Representative shall be taken by the Company.

17. SCOTTISH MINISTERS' REPRESENTATIVE**17.1 Authority**

The Scottish Ministers' Representative has authority to act on behalf of the Scottish Ministers under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently authorised by the Scottish Ministers in terms of this Clause 17. In the absence of such express provision or authorisation, the Scottish Ministers' Representative shall have no authority to act on behalf of, or to bind the Scottish Ministers under this Agreement.

17.2 Powers and Authority

The Scottish Ministers may from time to time authorise (or amend or withdraw such authorisation) the Scottish Ministers' Representative to exercise any of the Scottish Ministers' powers and rights under this Agreement on the Scottish Ministers' behalf. With effect from the Effective Date (without prejudice to the Scottish Ministers' rights under this Clause 17) the Parties agree that the Scottish Ministers' Representative shall be authorised to exercise the powers and rights specified in Schedule 13 (Authority of Representatives). Any such authorisation (or withdrawal or amendment

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of such authorisation) shall take effect from the date on which notice thereof is received by the Company or such later date as may be specified in such notice.

17.3 Liability

In the discharge of his functions under this Agreement the Scottish Ministers' Representative shall not owe any personal duty to the Company and shall incur no personal liability to it.

17.4 Replacement

If at any time there is no Scottish Ministers' Representative appointed, pending appointment of a replacement, any notification to be made by the Company to the Scottish Ministers' Representative shall be made to the Scottish Ministers and any action which is required to be taken by the Scottish Ministers' Representative shall be taken by the Scottish Ministers.

17A. SCOTTISH MINISTERS' SITE REPRESENTATIVE**17A.1 Authority**

The Scottish Ministers' Site Representative has authority to act on behalf of the Scottish Ministers under this Agreement only where, and to the extent that, this Agreement expressly so provides or where subsequently authorised by the Scottish Ministers in terms of this Clause 17A.

17A.2 Powers and Authority

As at the Date of this Agreement, the Scottish Ministers' Site Representative shall be authorised to exercise the powers set out in Part 1 of Schedule 13 (Authority of Representatives). The Scottish Ministers may from time to time:

17A.2.1 authorise the Scottish Ministers' Site Representative to exercise any of the Scottish Ministers' other powers under this Agreement (other than those conferred by Schedule 11 (Termination Compensation)) on the Scottish Ministers' behalf; and/or

17A.2.2 amend or withdraw any authorisation given to the Scottish Ministers' Site Representative at any time,

and any such authorisation, amendment or withdrawal (as the case may be) shall take effect from the date on which notice thereof is received by the Company or such later date as may be specified in such notice.

17A.3 Liability

In the discharge of his functions under this Agreement the Scottish Ministers' Site Representative shall not owe any personal duty to the Company and shall incur no personal liability to the Company.

17A.4 Replacement

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If at any time there is no Scottish Ministers' Site Representative appointed (or where the Scottish Ministers' Site Representative is unable through illness, incapacity or any other reason to carry out his duties and obligations under this Agreement) then pending appointment of a replacement, any notification to be made by the Company to the Scottish Ministers' Site Representative shall be made to the Scottish Ministers' Representative and any action which is required to be taken by the Scottish Ministers' Site Representative shall be taken by the Scottish Ministers' Representative.

17A.5 The respective roles of the Scottish Ministers' Representative and the Scottish Ministers' Site Representative are mutually exclusive. In the event that both the Scottish Ministers' Representative and the Scottish Ministers' Site Representative have authority to act on behalf of the Scottish Ministers, the Company shall be entitled to disregard the Scottish Ministers' Site Representative's authority to so act and rely solely on the authority of the Scottish Ministers' Representative.

18. SUBCONTRACTING OPERATIONS AND DIRECT AGREEMENTS**18.1 Sub-Contractors**

The Company shall:

- 18.1.1 sub-contract the New Works to the New Works Contractor;
- 18.1.2 sub-contract the O&M Works to the O&M Works Contractor; and
- 18.1.3 sub-contract or procure that the New Works Contractor subcontracts:
 - (a) the Design to the Designers;
 - (b) the checking of the Design to the Design Checkers; and
 - (c) all work in connection with safety audits to the Road Safety Auditor.

18.2 Changes to Sub-Contractors

The Company shall not change any Sub-Contractor and shall procure that the New Works Contractor shall not change a Designer, a Design Checker or the Road Safety Auditor without the Scottish Ministers' consent. The Scottish Ministers shall not withhold such consent if the Company can demonstrate to the Scottish Ministers' reasonable satisfaction:

- 18.2.1 that the contract (the "Proposed Contract") with the proposed replacement New Works Contractor, the proposed replacement O&M Works Contractor, the proposed replacement Designer, the proposed replacement Design Checker or the proposed replacement Road Safety Auditor (a "Proposed Contractor") is in terms sufficient to procure the satisfaction of the Company's obligations relating to the New Works and O&M Works (as the case may be), and in all other respects is not inconsistent with the provisions of this Agreement;

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18.2.2 the Proposed Contractor has sufficient experience, qualifications, expertise and resources to properly perform its obligations under the Proposed Contract and is independent from any existing Sub-Contractor;

18.2.3 the Proposed Contractor:

(a) is of sound financial standing (having regard to the obligations to be performed by the Proposed Contractor); and

(b) has the financial capability to properly perform its obligations under the Proposed Contracts; and

18.2.4 where the Proposed Contractor is assuming a design responsibility in respect of the New Works or the O&M Works, that the Proposed Contractor has an appropriate level of professional indemnity insurance to cover its contractual obligations under the Proposed Contract, and that the terms of the Proposed Contract require such insurance to be maintained in force for an appropriate period, in each case in accordance with good industry practice.

18.3 Engagement of Sub-Contractors

The Company shall procure that the New Works Contractor, the O&M Works Contractor, the Designer, the Design Checker or the Road Safety Auditor or any Proposed Contractor shall not commence the provision of services without first having delivered to the Scottish Ministers:

18.3.1 in the case of any New Works Contractor, a New Works Direct Agreement executed by the Company and the New Works Contractor;

18.3.2 in the case of any O&M Contractor, an O&M Works Direct Agreement executed by the Company and the O&M Works Contractor;

18.3.3 in the case of a Designer, a Designer's Direct Agreement executed by the Designer and the Company or the New Works Contractor (as the case may be);

18.3.4 in the case of a Design Checker, a Design Checker's Direct Agreement executed by the Design Checker and the Company or the New Works Contractor(as the case may be); and

18.3.5 in the case of the Road Safety Auditor, a Road Safety Auditor's Direct Agreement executed by the Road Safety Auditor and the Company or the New Works Contractor (as the case may be),

in each case substantially in the form of the relevant direct agreement contained in Schedule 14 (Direct Agreements), together with certified true copies of the appointments and contracts referred to in each such direct agreement.

19. DELAY**19.1 Notice**

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If at any time the Company becomes aware that there will be or is likely to be a delay in achieving the Planned Full Services Commencement Date the Company shall as soon as reasonably practicable and in any event within 5 Business Days of becoming so aware give notice to the Scottish Ministers to that effect specifying:

19.1.1 the reason for the delay or likely delay; and

19.1.2 an estimate of the likely effect of the delay on achieving the Planned Full Services Commencement Date (taking into account any measures that the Company proposes to adopt to mitigate the consequences of the delay in accordance with Clause 19.3).

19.2 Supply of Information

Following service of a notice by the Company pursuant to Clause 19.1 the Company shall supply to the Scottish Ministers:

19.2.1 promptly, and in any event within 3 Business Days of receipt, any further information relating to the delay which is received by the Company; and

19.2.2 promptly, and in any event within 3 Business Days of request, any further information relating to the delay which is a reasonable request by the Scottish Ministers.

19.3 Duty to Mitigate

The Company shall take all reasonable steps to mitigate the consequences of any delay to the Construction Programme.

19.4 Time for Completion of the Operations

If any anticipated failure to meet the Planned Full Services Commencement Date is directly attributable to:

19.4.1 a Compensation Event, then the provisions of Clause 33 (Compensation Events) shall apply; or

19.4.2 a Relief Event, then the provisions of Clause 32 (Relief Events) shall apply; or

19.4.3 a Force Majeure Event, then the provisions of Clause 44 (Force Majeure) shall apply.

20. CDM REGULATIONS**20.1 Company as Client**

The Company shall act as the only client in respect of the Project for the purposes of the CDM Regulations. The Company hereby elects and the Scottish Ministers hereby agree that the Company will act as the only client in relation to the Operations for all the purposes of the CDM Regulations save on termination of this Agreement. The Company shall ensure that the New Works Contractor and the O&M Works Contractor are aware of such election and consent. The Company shall not prior to

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the completion of the Operations withdraw, terminate or in any manner derogate from its election that it will act as the only client for all the purposes of the CDM Regulations nor will it seek to do any such act.

20.2 Duties under CDM Regulations

The Company shall observe, perform and discharge and/or, as the case may be, shall procure the observance, performance and discharge of all the obligations, requirements and duties arising under the CDM Regulations in connection with the Project except the duties in regulations 5(1)(b), 10(1), 15 and 17(1) of the CDM Regulations insofar as those duties relate to information in the possession of the Scottish Ministers.

20.3 Health and Safety File

The Company shall, on request by the Scottish Ministers, provide the Scottish Ministers with a complete copy of the health and safety file (as such term is used in the CDM Regulations) as amended or updated from time to time. The Company shall forthwith on expiry or termination of this Agreement deliver to the Scottish Ministers the said health and safety file as amended or updated.

20.4 Indemnity

The Company hereby indemnifies the Scottish Ministers and shall keep the Scottish Ministers indemnified in full from and against all direct, indirect or consequential liability, losses, damages, injury, claims, costs and expenses (including management and legal expenses) awarded against or incurred or paid by the Scottish Ministers as a result of or in connection with the breach by the Company of its obligations under this Clause 20.

21. 1991 ACT**21.1 For the purposes of this Clause 21:**

“affected” or “affecting” shall be regarded as including the meaning given to “affected” in Section 164(4) of the 1991 Act; and

“Direction” shall mean any direction made or given pursuant to the 1991 Act.

21.2 Delegation of Statutory Functions

21.2.1 The Company is authorised to exercise and shall exercise all the statutory functions of the Scottish Ministers specified in Appendix G to Part 1 of Schedule 4 (O&M Works) of this Agreement (“Appendix G”) for a period of 10 years from the Date of this Agreement. An authorisation in respect of any of the said statutory functions shall for the purposes of this Clause 21.2 be referred to as an “Authorisation”.

21.2.2 The Company shall notify any interested parties in writing of each such Authorisation.

21.2.3 The Company shall not sub-contract or delegate responsibility for any Authorisation.

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- 21.2.4 On each and every occasion when the Company exercises functions pursuant to an Authorisation the Company shall prepare and maintain appropriate records and registers including but not limited to record drawings, estimates and health and safety records.
- 21.2.5 Not less than 6 months prior to the expiry of any Authorisation the Company shall request in writing that the Scottish Ministers issue a new authorisation on similar terms for a further period of 10 years or for such shorter period as may be agreed between the Parties and the Scottish Ministers shall either issue such new authorisation on similar terms and for a similar period to those contained in this Clause 21 or shall issue a Scottish Ministers Change removing the relevant delegated powers from the scope of the Company's obligations under this Agreement.
- 21.2.6 If any Authorisation is withdrawn or revoked by the Scottish Ministers then:
- (a) the Company shall co-operate with the Scottish Ministers as necessary to facilitate a transfer of any relevant delegated functions to the Scottish Ministers or a third party nominated by them as soon as possible; and
 - (b) (unless such withdrawal or revocation is due to an act or omission of the Company) the Scottish Ministers shall issue a Scottish Ministers Change removing the relevant delegated powers from the scope of the Company's obligations under this Agreement.
- 21.2.7 The Company shall comply with all requirements set out in Appendix J to Part 1 of Schedule 4 (O&M Works Requirements).
- 21.3 The 1991 Act
- 21.3.1 In performing the Operations, the Company shall comply with the 1991 Act, the Regulations, the Codes of Practice and any requirements of Undertakers where so notified to the Company or the Scottish Ministers pursuant to the 1991 Act. In particular, the Company shall comply *inter alia* with such directions as to the co-ordination of the Works as the Scottish Ministers may give from time to time under sections 118 (4) and 118 (5) of the 1991 Act.
- 21.3.2 The Company shall notify the Scottish Ministers of all proposed Major Works for Road Purposes, Diversionary Works and Works for Road Purposes necessary in connection with the Operations and except where otherwise agreed between the Company and the appropriate Undertaker the Company shall employ the appropriate Undertaker in respect of Diversionary Works and the Company shall be responsible for all relevant costs recoverable under the 1991 Act and shall make all payments due to Undertakers in connection with Diversionary Works.
- 21.3.3 In the event that any Undertaker declines to enter into a contract with the Company in respect of any of the Diversionary Works the Scottish Ministers shall enter into a contract with the appropriate Undertaker and when reasonably requested by the Company shall enforce the relevant contractual rights for the benefit of the Company provided that the Company shall reimburse to the Scottish Ministers on demand all sums paid or payable

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under such contract and/or all sums reasonably incurred in connection with the enforcement of any rights under such contract.

- 21.3.4 Neither the employment by the Company of any Undertaker, nor the entering into of any such contract by the Scottish Ministers (even where the Undertaker delays in performing such contract or performs same negligently) shall relieve the Company of any of its obligations under this Agreement and the Company shall not be entitled to any extension of time (except to the extent that such extensions of time constitute a Compensation Event, a Relief Event or a Force Majeure Event) or additional payment and the Company shall indemnify the Scottish Ministers against all losses or claims of any person arising out of or in connection with Diversionary Works.
- 21.3.5 The Scottish Ministers shall pay to the Company within 20 Business Days of receipt any monies actually received by the Scottish Ministers from any Undertaker in respect of the Project Roads and the local roads network pursuant to any provision of the 1991 Act, the Regulations or the Codes of Practice, other than fees relating to Sample Inspections.
- 21.3.6 If a contribution is made to the Scottish Ministers pursuant to Section 137 of the 1991 Act then payment shall only be made to the Company if the contribution relates to costs actually incurred or likely to be incurred by the Company during the Contract Period and the Company shall pay to the Scottish Ministers any contribution received if the contribution relates to costs incurred or likely to be incurred outside the Contract Period.
- 21.3.7 At the request of the Company, and subject to an indemnity for all costs, including administrative costs, the Scottish Ministers shall endeavour to recover all possible charges, fees, contributions and costs due to the Scottish Ministers, as Road Works Authority, in respect of the Project Roads and the local roads network pursuant to the 1991 Act, the Regulations or Codes of Practice.
- 21.3.8 The Company shall provide to such person as may be nominated from time to time by the Scottish Ministers such information as may be prescribed pursuant to Section 112B of the 1991 Act and such other information of which it becomes aware which is eligible for registration and shall make such payment or payments to such party as the Scottish Ministers may require pursuant to Section 112A of the 1991 Act. The Company shall maintain at all times a computer linked to the road works register for the purposes of giving and receiving notices and information affecting the Project Roads and the local road network.
- 21.3.9 The Company shall notify the Scottish Ministers of any possible offence committed or likely to be committed by any Undertaker under the 1991 Act of which the Company is or should reasonably be aware and shall provide such information relating to such offence as may be reasonably specified by the Scottish Ministers.
- 21.3.10 The Company shall, in performing the Operations, at all times assist and facilitate the Scottish Ministers in carrying out, and shall take all steps necessary to ensure that the Scottish Ministers and/or any other relevant

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Road Works Authority are able to comply with, their duties under the 1991 Act, the Regulations and the Codes of Practice.

21.4 Apparatus

- 21.4.1 The Company shall consult and comply with the requirements of Undertakers and other owners of Apparatus in connection with Apparatus.
- 21.4.2 The Company shall arrange for procurement, construction and completion of all Diversionary Works necessary for the design, construction and completion of the New Works and will be responsible for all costs of the same.
- 21.4.3 In respect of existing Apparatus which is not owned by an Undertaker the Company shall raise, lower or relocate the covers of existing manholes, chambers, catchpits, gullies or otherwise where necessary resulting from the design, construction, completion and maintenance of the New Works.
- 21.4.4 All Apparatus owned by an Undertaker shall be diverted to a standard equivalent to that which would be provided by an equivalent Undertaker or to a higher standard where this existed prior to the commencement of the Operations.
- 21.4.5 All Apparatus which is not owned by an Undertaker shall be diverted to a standard equivalent to that which would be provided by an Undertaker or to a higher standard where this existed prior to the commencement of the Operations.
- 21.4.6 Ducting, chambers and drawpits shall be provided as required to allow the service, supply or otherwise to be accessed and maintenance from points wholly outwith the Operations wherever possible.

21.5 Management of Operations affecting Apparatus

- 21.5.1 The Company shall manage any works in relation to the Sites in respect of or affecting Apparatus and in particular on behalf of the Scottish Ministers and/or any other relevant Road Works Authority:
- (a) identify measures and settle specifications with Undertakers in connection with Diversionary Works;
 - (b) notify the Scottish Ministers of the need for any notices, consents or directions to Undertakers which may be required pursuant to Sections 113(4), 115(1), 115(1A), 115A, 117(1), 117(5), 120(1), 121(2), 121(4), 124(2), 125(3), 131(3), 133(3) and 133(4) of the 1991 Act and to give such notices, consents or directions to Undertakers as the Scottish Ministers may instruct the Company to issue in regard thereto;
 - (c) seek to recover directly from Undertakers the costs incurred by the Company in connection with obtaining any orders pursuant to the Road Traffic Regulation Act 1984;

- (d) if Section 133 of the 1991 Act is brought into force, and then subject to any applicable regulations, seek to recover directly from Undertakers any charge specified by the Scottish Ministers for the occupation of the Project Roads where works carried out by Undertakers have been unreasonably prolonged;
- (e) notify the Scottish Ministers in reasonable detail of all Major Works for Roads Purposes affecting the Sites and the local roads network and where instructed to do so by the Scottish Ministers to notify Undertakers, persons to whom Apparatus belongs and the Road Works Authorities for roads adjacent to the Sites of any proposed Major Works for Roads Purposes or Works for Road Purposes;
- (f) carry out such inspections or investigatory works on the Project Roads and the local roads network as may be necessary to ascertain whether Undertakers have complied with their duties under the 1991 Act; provided always that no charge shall be made for any Sample Inspections;
- (g) carry out any necessary remedial works required either for the reinstatement of the Project Roads following works by Undertakers or for the emergency maintenance of Apparatus and to seek to recover directly from Undertakers and other owners of Apparatus any costs reasonably incurred;
- (h) notify the Scottish Ministers of any works which may be required pursuant to Sections 124(5) and 125(4) of the 1991 Act and to carry out any works necessary pursuant to said Sections as may be instructed by the Scottish Ministers and seek to recover directly from Undertakers any costs reasonably incurred;
- (i) notify the Scottish Ministers of any obstructions to the Project Roads by Undertakers or Apparatus and to give such notices as may be instructed by the Scottish Ministers requiring Undertakers to mitigate or discontinue obstructions to the Project Roads, take any steps instructed by the Scottish Ministers if Undertakers fail to comply with such notices and to seek to recover directly from Undertakers any costs reasonably incurred;
- (j) notify the Scottish Ministers of any unauthorised Apparatus in the Project Roads and to remove same if instructed to do so by the Scottish Ministers; and
- (k) notify to the Scottish Ministers of any necessary works, operations or actions in respect of or affecting Apparatus as are ancillary to the general management of the Project Roads and to carry out such works, operations or actions as may be instructed by the Scottish Ministers.

21.5.2 The Company shall not contract with, enter into binding commitments with, compromise with, give a notice of intention to proceed to, impose obligations upon, issue licences or permissions to, permit the placing of Apparatus in the Sites or to seek to recover costs from Undertakers or carry out works

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affecting Undertakers unless instructed so to do by the Scottish Ministers, which instructions shall not be unreasonably withheld or delayed.

21.5.3 Any instructions issued to the Company in terms of this Clause 21 shall not be deemed to be a Scottish Ministers Change.

21.5.4 Subject to Clause 21.6.3, where it is provided in this Clause 21 that the Company is to seek to recover costs, it shall have no right of recovery against the Scottish Ministers in the event it is unable to recover such costs.

21.6 The Scottish Ministers' Responsibilities

21.6.1 The Scottish Ministers shall:

- (a) at the request of the Company notify Undertakers that the Company shall be managing the Project Roads on the terms and conditions set out in this Clause 21; and
- (b) notify the Company promptly of any Undertakers' requirements or notices or any notices from Road Works Authorities which the Scottish Ministers receive pursuant to the 1991 Act, any Direction, the Regulations or the Codes of Practice.

21.6.2 If works are necessary to the Sites or the Project Roads as a consequence of an event described in Section 141(2) of the 1991 Act then the Company shall, at its own cost, carry out and complete all such works in such manner as shall be consistent with its other obligations under this Agreement.

21.6.3 The Scottish Ministers shall be responsible for and shall indemnify the Company against:

- (a) any amount which the Company is obliged to pay to the Undertakers which exceeds the amount which would have been payable had the relevant discount pursuant to Regulation 3 of the Roads Works (Sharing of Costs of Works) Regulations 2003 (the "Cost Sharing Regulations") applied to such Diversionary Works; and/or
- (b) any amount which is payable by the Undertakers in respect of the Diversionary Works (or would have been payable had the Scottish Ministers been instructing the Diversionary Works) pursuant to Regulation 4 of the Cost Sharing Regulations which the Company (having used reasonable endeavours) fails to recover from such Undertakers.

22. MONITORING

22.1 Right to Monitor

The Company shall procure that the Scottish Ministers and any Authority or Relevant Authority and any other representative of the Scottish Ministers or of an Authority or Relevant Authority shall have, on reasonable written notice from the Scottish Ministers:

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22.1.1 the right to enter any of the New Works Sites in order to monitor and view the state and progress of the New Works and to ascertain whether they are being executed in accordance with this Agreement and for all other purposes related to the Project; and

22.1.2 the right to enter upon any property used by the Company as training or workshop facilities and places where work is being prepared or materials being obtained for the Project,

in all cases subject to compliance with health and safety requirements and subject to an obligation not to delay or impede the progress of the Operations.

22.2 Supply of Information

The Company shall promptly (and in any event within 5 Business Days of request) supply to the Scottish Ministers and any representative or adviser of the Scottish Ministers visiting any of the New Works Sites pursuant to Clause 22.1 (Right to Monitor) such information in respect of the New Works as may reasonably be required.

22.3 Safety and Security

The Company shall procure at all times that the O&M Works Sites are maintained in an orderly, safe and secure state and without prejudice to such generality in accordance with the Scottish Ministers' Requirements, shall have full regard for the safety of all persons entitled to be upon the O&M Works Site, and shall, in connection with the O&M Works, provide and maintain at the Company's own costs, including, but not limited to, all lights, guards, fencing, warning signs and watching when and where necessary or required by this Agreement or by any Authority or Relevant Authority for the protection of the O&M Works or for the safety and convenience of the public or others. No act or omission on the part of the Scottish Ministers shall result in the Company being in breach of the provisions of this Clause.

23. PROTESTOR ACTION**23.1 Responsibility**

Without prejudice to Clause 32 (Relief Events), the management of any Protestor Action shall be the responsibility of the Company.

23.2 Company's Obligations

If the Sites or any part thereof are occupied by Protestors at any time during the Contract Period, then the Company shall:

23.2.1 notify the Scottish Ministers as soon as reasonably practicable; and

23.2.2 use any legal remedies available to the Company to remove such Protestors.

23.3 Request

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The Company may request the assistance of the Scottish Ministers to remove Protestors where the Company can demonstrate to the Scottish Ministers' reasonable satisfaction that the legal remedies available to the Company have been exhausted or are not suitable in the circumstances (whether by reason of timescale or otherwise).

23.4 Decision

Within 10 Business Days of any request in accordance with Clause 23.3, the Scottish Ministers shall notify the Company whether the Scottish Ministers can provide any assistance as the Scottish Ministers (acting reasonably) consider reasonable and appropriate in relation to the removal of such Protestors.

23.5 Relief Event

Where the conditions set out in Clause 23.3 are satisfied and the Scottish Ministers are legally able to assist the Company in relation to the removal of Protestors but elect not to assist pursuant to Clause 23.4 then, provided always that the Protestor Actions has not arisen (directly or indirectly) as a result of any wilful default or wilful act of the Company or any of its Sub-Contractors, the Protestor Action shall be deemed to be a Relief Event.

23.6 Legal Action

If, in accordance with Clause 23.4, the Scottish Ministers have notified the Company that the Scottish Ministers are willing to instigate and conduct legal action to secure the lawful eviction of Protestors, then such legal action will be reasonably and properly conducted on the basis of any legal advice given to the Scottish Ministers by their legal advisers.

23.7 Costs

Where the Company is given assistance by the Scottish Ministers in accordance with Clause 23.4 or legal action is raised in accordance with Clause 23.6, then the Company will indemnify the Scottish Ministers in respect of any costs, losses, liabilities, expenses and claims suffered by them as a result of or in connection with the provision of such assistance and/or the raising of such legal action.

23.8 Expedition

Where it is in the interests of the Project to deal expeditiously with any Protestor Action, the Scottish Ministers will use all reasonable endeavours to expedite their decision making process under Clause 23.4 and their action under Clause 23.6.

24. RESTRICTED SERVICE READINESS CERTIFICATE**24.1 Notice**

When the Company is of the opinion that it has achieved the Restricted Services Readiness Criteria it shall give notice to that effect to the Scottish Ministers accompanied by a completed and signed Restricted Services Readiness Certificate.

24.2 Review

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Following issue of such notice the Company shall give the Scottish Ministers such reasonable opportunities as the Scottish Ministers may require to confirm the validity of the notice.

24.3 Scottish Ministers' Obligations

The Scottish Ministers shall within 10 Business Days of receipt of a Restricted Services Readiness Certificate either:

24.3.1 issue a notice to the Company confirming that they accept that the Restricted Service Readiness Criteria have been met (a "Restricted Services Commencement Notice"); or

24.3.2 notify the Company that in their opinion, notwithstanding the issue of the Restricted Services Readiness Certificate, the Company has not met the Restricted Services Readiness Criteria. In that event the Scottish Ministers shall state in such notice which of the Restricted Services Readiness Criteria the Company has not satisfied.

24.4 Failure to Serve Notice

Subject to compliance by the Company with Clause 24.2, if the Scottish Ministers fail to serve a notice under Clause 24.3.2, they shall be deemed to have issued a Restricted Services Commencement Notice in accordance with Clause 24.3.1 on expiry of the 10 Business Days referred to in Clause 24.3.

24.5 Further Works

If the Scottish Ministers notify the Company under Clause 24.3.2, the Company shall carry out such further works or other measures necessary or appropriate to meet the Restricted Services Readiness Criteria and on their completion, the Company shall give notice to the Scottish Ministers that such further works have been carried out or measures taken. The provisions of Clauses 24.2, 24.3 and 24.4 shall then apply mutatis mutandis as if receipt by the Scottish Ministers of such notice were receipt of a Restricted Services Readiness Certificate.

24.6 Disputes

In the event of a dispute between the Parties in regard to a notice under Clause 24.3.2 the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Company has met the Restricted Services Readiness Criteria, the Dispute Resolution Procedure shall determine the date on which the Restricted Services Commencement Notice should properly have been issued under Clause 24.3.1 and the failure by the Scottish Ministers to have issued the Restricted Services Commencement Notice on that date shall be deemed to be a Compensation Event.

25. PERMITS TO USE**25.1 Phases**

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The New Works shall be carried out in four Phases which may be completed in any order provided always that the commencement of Phase 3 is conditional on the issuance of either:

25.1.1 a Permit to Use for Phase 1A; or

25.1.2 a notice by the Scottish Ministers pursuant to Clause 25.1A below.

25.1A TTMS for Phase 1A

25.1A.1 Where at any time prior to 27th May 2011 the Company wishes to use Phase 1A for a TTMS it may issue a written notice to the Scottish Ministers. Such a notice shall only be issued if:

(a) for the duration of such TTMS:

(i) the Company intends to divert all classes of vehicular traffic permitted to run on a special road onto Phase 1A from Phase 3 in each direction, but only where such traffic commences its journey at or prior to Reference Point R01 and completes its journey at or beyond Reference Point S10; and

(ii) the Company can ensure that 2 Lanes are open on the TTMS diversion on Phase 1A at all times in each direction (provided always that one Lane in each direction may be a Narrow Lane) and the traffic management complies with the New Works Requirements .

(b) a Road Safety Audit Stage 3 for the TTMS has been completed and any recommendations of the Safety Audit Team have been implemented prior to the opening of the TTMS for Phase 1A ;

(c) no New Works are incomplete which would prevent the requirements of Clause 25.1A.1 (a) being met.

25.1A.2 Provided a valid notice has been served under Clause 25.1A.1, the Scottish Ministers shall serve a notice on the Company within 10 Business Days of receipt of the Company's notice approving a TTMS being put in place on Phase 1A.

25.1A.3 Where a TTMS for Phase 1A has been approved in accordance with Clause 25.1A.2, then from the commencement of such TTMS until the issue of a Permit to Use for Phase 1A:

(a) the Restricted Services set out in row 1 of the table contained in Appendix 7 to Schedule 6 shall be deemed to include a reference to Phase 1A;

(b) section 4 and 5.2 of Schedule 6 shall apply to Phase 1A, save that:

(i) in the definition of "Lane Availability Failure" in section 1 of Schedule 6, the words "between the hours of 0600 and 2000 Monday to Friday" shall be deemed to be deleted and a Lane

Availability Failure shall be deemed to have occurred if the number of Lanes provided has been reduced in accordance with paragraph 4.2 of Appendix 1/17 of Part 3 of Schedule 2;

- (ii) the amount of £5000 in paragraph 5.2.1 (ii) and (iii) shall be replaced with £1500 where the Lane Availability Failure occurs between the hours of 0600 and 2000;
 - (iii) the amount of £5000 in paragraph 5.2.1 (ii) and (iii) shall be replaced with £300 where the Lane Availability Failure occurs between the hours of 2000 and 0600; and
 - (iv) the Company shall under no circumstances be subject to Lane Availability Failure Charges in terms of Schedule 6 (*Payment Mechanism*) and this Clause 25.1 in respect of Phase 1A where the cause of the Lane Availability Failure was the carrying out of Restricted Services;
- (c) the diverted traffic will continue uninterrupted on Phase 1A and will not be redirected back to Phase 3 at any time; and
- (d) notwithstanding the provisions of Schedule Part 6 (*Payment Mechanism*) the Company shall in no circumstances be subject to Lane Occupation Charges in respect of Phase 1A.
- 25.1A.4 Where the Company wishes to revise a TTMS for Phase 1A approved under Clause 25.1A.2 then the provisions of this Clause 25.1A shall apply to such revision.

25.2 Substantial Completion

The following provisions shall apply to Substantial Completion and the issue of a Permit to Use for each Phase:

- 25.2.1 no Permit to Use shall be issued on or before 27th May 2011;
- 25.2.2 the Company shall give the Scottish Ministers 5 Business Days notice of the Road Safety Audit Stage 3 for a Phase and the Scottish Ministers shall be entitled to attend such Road Safety Audit Stage 3;
- 25.2.3 not later than 20 Business Days prior to the date upon which the Company expects issue of a Substantial Completion Certificate for a Phase the Company shall issue to the Scottish Ministers a notice to that effect, and the Company shall deliver to the Scottish Ministers such Substantial Completion Certificate as soon as it is available;
- 25.2.4 following issue of a Substantial Completion Certificate (which shall not be issued before 13th May 2011) the Company will afford to the Scottish Ministers such reasonable opportunities as the Scottish Ministers may require to confirm the validity of the notice; and
- 25.2.5 the Scottish Ministers shall within 10 Business Days of the receipt of such a Substantial Completion Certificate either:

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- (a) subject to clause 25.2.1, issue a Permit to Use; or
- (b) notify the Company that in its opinion notwithstanding issue of the Substantial Completion Certificate the relevant Phase has not reached Substantial Completion which notice shall state the respects in which the relevant Phase has not reached Substantial Completion.

25.3 No Entitlement to Withhold

The following matters shall not constitute sufficient grounds for the Scottish Ministers to assert that a Phase has not reached Substantial Completion nor to withhold the issuance of a Permit to Use:

- 25.3.1 delay to the Operations arising as a result of any Auchenkilns Defect notified to the Scottish Ministers during the Auchenkilns Defects Liability Period in respect of which the Scottish Ministers have made an election pursuant to Clause 9A.3; and/or
- 25.3.2 the Traffic Scotland communications system not being operational because, for reasons outwith the control of the Company:
 - (a) the equipment to be supplied by Traffic Scotland has not been provided on time which results in a delay to the Operations;
 - (b) the equipment to be supplied by Traffic Scotland is not provided to the appropriate specification; or
 - (c) the equipment to be supplied by Traffic Scotland has been tested and commissioned but the interface with existing Traffic Scotland equipment is not operational,

provided always that the Company shall demonstrate to the Scottish Ministers' satisfaction that the Phase is in a safe condition and is suitable for use prior to the issuance of a Permit to Use, which will include as a minimum the requirement that emergency telephones are available to road users.

25.4 Further Works

In the event of the service of a notice by the Scottish Ministers under Clause 25.2.5(b) and unless the matter has been referred to the Dispute Resolution Procedure in terms of Clause 25.4 following completion by the Company of such further works or other measures necessary or appropriate to remedy or remove the cause of the refusal to accept a Substantial Completion Certificate, the Company may give notice to the Scottish Ministers that such further works have been completed or measures taken. The provisions of this Clause 25 shall then apply mutatis mutandis as if receipt by the Scottish Ministers of such notice were receipt of a Substantial Completion Certificate.

25.5 Disputes

In the event of a dispute between the Parties in regard to a notice under Clause 25.2.4(b) the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Phase has

reached Substantial Completion, the Dispute Resolution Procedure shall determine the date on which the Permit to Use for the Phase should have been issued under Clause 25.2.4(a) and the failure by the Scottish Ministers to have issued the Permit to Use on that date shall be deemed to be a Compensation Event.

25.6 Effect of Issue of Permit to Use

As from the date of issue (or deemed issue under Clause 25.4) of a Permit to Use, the Phase of the Operations to which the Permit to Use relates shall be opened as a road (or, as the case may be, part of a road) within the meaning of the Roads (Scotland) Act 1984.

26. FINAL COMPLETION OF THE NEW WORKS

26.1 Acceptance

The Scottish Ministers shall within 15 Business Days of the receipt of the Final Completion Certificate for the Operations either:

26.1.1 acknowledge receipt of the Final Completion Certificate (a "Final Completion Acceptance Notice"); or

26.1.2 notify the Company that in their opinion the Operations have not reached Final Completion. In that event the Scottish Ministers shall state in such notice the respects in which the Operations have not reached Final Completion.

26.2 Failure to Serve Notice

If the Scottish Ministers fail to serve a notice in accordance with Clause 26.1.2 they shall be deemed to have issued a Final Completion Acceptance Notice on expiry of the 15 Business Days referred to in Clause 26.1.

26.3 No Entitlement to Withhold

The following matters shall not constitute sufficient grounds for the Scottish Ministers to assert that the Operations have not reached Final Completion nor to withhold the issuance of the Final Completion Acceptance Notice:

26.3.1 delay to the Operations arising as a result of any Auchenkilns Defect notified to the Scottish Ministers during the Auchenkilns Defects Liability Period in respect of which the Scottish Ministers have made an election pursuant to Clause 9A.3; and/or

26.3.2 the Traffic Scotland communications system not being operational because, for reasons outwith the control of the Company:

(a) the equipment to be supplied by Traffic Scotland has not been provided on time which results in a delay to the Operations;

(b) the equipment to be supplied by Traffic Scotland is not provided to the appropriate specification; or

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- (c) the equipment to be supplied by Traffic Scotland has been tested and commissioned but the interface with existing Traffic Scotland equipment is not operational,

provided always that the Company shall demonstrate to the Scottish Ministers' satisfaction that the New Roads are in a safe condition and are suitable for use prior to the issuance of the Final Completion Acceptance Notice, which will include as a minimum the requirement that emergency telephones are available to road users.

26.4 Further Works

In the event of service of a notice by the Scottish Ministers under Clause 26.1.2 and following completion by the Company of such further works or other measures necessary to achieve Final Completion, the Company shall give notice to the Scottish Ministers that such further works have been completed and the Scottish Ministers shall inspect such further works within 5 Business Days of receipt of such notice by the Company. The provisions of this Clause 26 shall thereafter apply to such notice mutatis mutandis as if such further notice by the Company were a Final Completion Certificate except that the time limit in Clause 26.1 shall be 5 Business Days.

26.5 Final Completion

Subject to Clause 26.6 the date of Final Completion shall be:

- 26.5.1 where no notice is given by the Scottish Ministers in accordance with Clause 26.1.2, the date of issue or deemed issue of the Final Completion Acceptance Notice in accordance with Clauses 26.1 and 26.2; or
- 26.5.2 where a notice under Clause 26.1.2 is given by the Scottish Ministers, the date of receipt by the Scottish Ministers of any further notice in accordance with Clause 26.4 in respect of which no further notice is given by the Scottish Ministers under Clause 26.1.2.

26.6 Excluded Seasonal Works

- 26.6.1 If the Excluded Seasonal Works are not completed in accordance with the New Works Requirements by the Planned Excluded Seasonal Works Completion Date the Company shall lodge the Excluded Seasonal Works Retention into an interest bearing account in the name of the Scottish Ministers (the "Seasonal Works Account").
- 26.6.2 If the Excluded Seasonal Works are not completed in accordance with the New Works Requirements by the date falling 3 months after the Planned Excluded Seasonal Works Completion Date the Scottish Ministers shall be entitled at their discretion on written notice to the Company to carry out or procure the carrying out of the Excluded Seasonal Works by a third party, in which event:
- a) if the Excluded Seasonal Works Retention is insufficient to meet the cost of the Excluded Seasonal Works, the Scottish Ministers shall be entitled to deduct the excess amount from the next following Monthly

Unitary Charge (or any subsequent Monthly Unitary Charge, at the Scottish Ministers' discretion); or

- b) if the cost of the Excluded Seasonal Works is less than the Excluded Seasonal Works Retention, the balance shall be remitted to the Company within 20 Business Days of completion of the Excluded Seasonal Works by or on behalf of the Scottish Ministers.

26.6.3 If:

- (a) the Excluded Seasonal Works have been completed in accordance with the New Works Requirements;
- (b) the Excluded Seasonal Works have been paid for by the Company or by making deductions from the Seasonal Works Account; and
- (c) no termination notice given under this Agreement is outstanding;

the Scottish Ministers shall pay any credit balance on the Seasonal Works Account to the Company as soon as reasonably practicable.

26.7 Indemnity

The Scottish Ministers shall indemnify the Company and keep the Company indemnified in full from and against all liability, losses, damages, injury, claims, costs and expenses which may arise out of the Scottish Ministers carrying out Excluded Seasonal Works pursuant to Clause 26.6.2 where, in so doing, the Scottish Ministers have failed to act in accordance with Good Industry Practice.

26.8 Disputes

If there is a dispute between the Parties in regard to a notice under Clause 26.1.2 the dispute will be referred for determination under the Dispute Resolution Procedure. If the Dispute Resolution Procedure determines that the Company has achieved Final Completion, the Dispute Resolution Procedure shall determine the date on which the Final Completion Acceptance Notice should properly have been issued under Clause 26.1.1 and the failure by the Scottish Ministers to have issued the Notice on that date shall be deemed to be a Compensation Event.

27. QUALITY ASSURANCE

The Company shall develop, maintain and implement the Quality System and the Quality Plan in accordance with the procedures set out in Schedule 5 (Quality Assurance).

28. HAZARDOUS SUBSTANCES

28.1 Storage

The Company shall ensure that any hazardous materials or equipment used or intended to be used in the provision of the Operations are kept under control and in safe keeping in accordance with all relevant Legislation and Good Industry Practice and shall ensure that all such materials or equipment are properly and clearly

labelled on their containers, and shall promptly and in any event within 5 Business Days of bringing such materials or equipment onto the Sites inform the Scottish Ministers of all such materials or equipment being used or stored at the Sites and shall comply with any reasonable requirement of the Scottish Ministers in respect thereof.

28.2 COSHH Register

The Company shall maintain a COSHH Register for each Site and shall ensure that a copy of each register is held at the relevant Site and at the Company's registered office and that a copy thereof is given to the Scottish Ministers, including copies of any changes when made.

29. PERFORMANCE MONITORING

29.1 Company Monitoring

The Company shall monitor its performance in the delivery of the O&M Works in accordance with the procedures set out in Part 7 of Schedule 4 (O&M Works Requirements).

29.2 Scottish Ministers Monitoring

The Scottish Ministers may elect, at their own cost, to undertake their own performance monitoring at any time during the Contract Period for any purpose including in order to ensure that the O&M Works are being provided in accordance with this Agreement. The Company shall use all reasonable endeavours to assist the Scottish Ministers in such an exercise but without being required to disrupt the proper delivery of the O&M Works in accordance with this Agreement. The Scottish Ministers may notify the Company of the outcome of the performance monitoring exercise, and the Company shall have due regard to the Scottish Ministers' comments in relation to the future provision of the O&M Works.

30. EMPLOYEES

30.1 Application of TUPE

The Scottish Ministers and the Company agree that by virtue of the cessation or partial cessation of the Operations by the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors), whether or not on the Expiry Date or earlier termination of this Agreement, TUPE may apply so that (i) the contracts of employment between the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) and each Transferring Employee (excluding any benefits for old age, invalidity or survivors provided under an occupational pension scheme) and (ii) any collective agreement between the Company and any trade union recognised by the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) in respect of each Transferring Employee may have effect after such cessation as if originally made between a New Supplier or the Scottish Ministers and each Transferring Employee to whom such cessation is relevant or between the New Supplier or the Scottish Ministers and the relevant trade union (as the case may be). Save for this Clause 30.1 and the provisions of Clauses 30.5 and 30.9, the Parties

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agree that the provisions of this Clause 30 shall apply only if TUPE does apply as anticipated in this Clause 30.1.

30.2 Apportionment

All remuneration, expenses and outgoings in relation to each Transferring Employee (including, but not limited to salaries, wages, bonus (even if not due and payable at that time) but subject always to each Party exercising any discretion reasonably in respect of any bonus award it makes which is payable by the other Party in accordance with this Clause 30.2, National Insurance Contributions, pension contributions, PAYE remittances and payments in respect of any other emoluments) (together referred to in this clause as "Charges") shall be apportioned on a time basis so that the part of the Charges accruing in the period on and before the Transfer Date applicable to any Transferring Employee shall be borne and discharged by the Company and the part of the Charges accruing in the period after the Transfer Date applicable to any Transferring Employee shall be borne and discharged by the New Supplier or the Scottish Ministers.

30.3 Employment Liability Indemnity

The Company will indemnify and keep indemnified the Scottish Ministers on demand and/or, on demand by the Scottish Ministers, any New Supplier from and against any Transferring Employee Employment Liabilities which relate to or arise out of any act or omission by the Company (and/or by any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) or any other event or occurrence in each case on or before the Transfer Date applicable to any Transferring Employee for which the Scottish Ministers and/or any New Supplier is or becomes liable by reason of the operation of TUPE or otherwise and/or any judicial decision interpreting the same.

30.4 TUPE Indemnity

The Company will indemnify and keep indemnified the Scottish Ministers on demand from and against any costs, claims, liabilities and expenses (including legal expenses) suffered or incurred by the Scottish Ministers as a result of any failure by the Company (and/or by any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) to comply with its obligations under Regulations 13 and/or 14 of TUPE, unless such costs, claims, liabilities and expenses (including legal expenses) arise as a result of the Scottish Ministers' failure to comply with their obligations under Regulation 13 and/or 14 of TUPE.

30.5 Company Undertaking

The Company undertakes that in respect of any Transfer Assistance Period it shall not (and it shall procure that any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors shall not) without the prior written consent of the Scottish Ministers:

- 30.5.1 materially vary the terms and conditions of any of the Assigned Employees to whom the Transfer Assistance Period applies (including without limitation remuneration, benefits and other perquisites and collective agreements which relate to the employment of such employees);

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- 30.5.2 increase the numbers of any of the Assigned Employees to whom the Transfer Assistance Period applies;
- 30.5.3 transfer any of the Assigned Employees to whom the Transfer Assistance Period applies to different roles;
- 30.5.4 replace any of the Assigned Employees to whom the Transfer Assistance Period applies save where the Company replaces any such individuals with individuals of equivalent levels of skills and experience; or
- 30.5.5 dismiss any of the Assigned Employees by reason of redundancy without the consent of the Scottish Ministers.

30.6 Employee Information

During any Transfer Assistance Period the Company shall within 5 Business Days of its receipt of a request in writing by the Scottish Ministers supply in writing to the Scottish Ministers or to its nominee:

- 30.6.1 full, complete and accurate information as to the terms and conditions of employment of all Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same, whether contractual or otherwise (including without limitation remuneration, benefits and other perquisites), collective agreements which relate to the employment of such employees and any written or unwritten express obligations on the Company (and/or on any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) or any reasonably well known custom or practice of the Company whether or not such custom or practice is legally binding (and/or of any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) to increase or otherwise vary such remuneration, benefits and other perquisites;
- 30.6.2 the job title, role, length of service and age of all Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same;
- 30.6.3 details of any outstanding disputes between the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) and any of the Assigned Employees to whom the Transfer Assistance Period applies or their representatives; and
- 30.6.4 such other information relating to Assigned Employees to whom the Transfer Assistance Period applies at the time of a request for the same which is in the possession of the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) or which can reasonably be obtained by the Company (and/or any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors) from any other third party as may reasonably be required by the Scottish Ministers.

30.7 Transferring Employee Information

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On any Transfer Date the Company shall supply in writing to the Scottish Ministers or its nominee all of the information and details referred to in Clauses 30.6.1 to 30.6.4 (inclusive) but in respect of the Transferring Employees to whom such Transfer Date is applicable instead of the Assigned Employees.

30.8 Employee Meeting

At any time during the Transfer Assistance Period, the Company shall (and shall procure that any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors shall) allow the Scottish Ministers and/or a New Supplier to meet the Assigned Employees at their place of work within 5 Business Days of receiving a request in writing by the Scottish Ministers to meet such employees and the Company shall (and shall procure that any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors shall) do what is reasonably required by the Scottish Ministers at such time to facilitate such meetings with such employees.

30.9 Personnel Records

The Company shall (and shall procure that any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors shall) during the Service Period maintain complete personnel records in the format normally adopted by it regarding the service of each of the Assigned Employees including all personnel records required to be maintained by law and the Company shall (and shall procure that any sub-contractor of any tier of the Company, the Sub-Contractor or any of its sub-contractors shall) within 5 Business Days of receiving a request in writing by the Scottish Ministers deliver the personnel records referred to in this clause as the Scottish Ministers may direct at any time.

30.10 Employee Negotiations

The Company shall use all reasonable endeavours to ensure that there will not, at any Transfer Date, be any current or pending negotiations with or offers to the Transferring Employees to whom such Transfer Date is applicable (or any of them) concerning either the terms and conditions of their employment, whether contractual or otherwise, (including without limitation remuneration, benefits and other perquisites) or collective agreements which relate to the employment of such employees.

30.11 Indemnity to New Supplier

The Company acknowledges and agrees that the Scottish Ministers shall grant an indemnity in favour of each and any New Supplier to the same extent that the Company is undertaking to indemnify the Scottish Ministers in terms of Clauses 30.3 and 30.4 and agrees that in the event of a claim on any indemnity in terms of Clauses 30.3 and 30.4 for loss incurred by the Scottish Ministers, that loss shall include the amount, if any, which the Scottish Ministers have paid or are required to pay to any New Supplier by virtue of any indemnity granted by the Scottish Ministers in favour of any New Supplier in accordance with the provisions of this Clause 30.11. For the avoidance of doubt, to the extent to which the Company has made payment to a New Supplier under Clause 30.3 then the Company shall not be liable to make any corresponding payment in respect of the same Transferring Employee Employment Liabilities to the Scottish Ministers under this Clause 30.11.

31. PAYMENT PROVISIONS**31.1 Payment of Unitary Charge**

In consideration for the provision of the Operations, the Scottish Ministers shall pay to the Company the Restricted Services Payments and the Monthly Unitary Charge in accordance with Schedule 6 (Payment Mechanism) and this Clause 31.

31.2 Monthly Invoices

Within 10 Business Days of the beginning of each Payment Month the Company shall issue a Monthly Invoice accompanied by the relevant Payment Calculation Schedule. The Monthly Invoice shall show the following amounts separately and in aggregate:

- 31.2.1 the Monthly Unitary Charge and/or the Restricted Services Payment, in each case, for that Payment Month;
- 31.2.2 as a negative figure, any reimbursement of step-in costs incurred by the Scottish Ministers;
- 31.2.3 any amount owed by either Party to the other in accordance with Clauses 34 (Scottish Ministers Change), 35 (Company Changes) or 37 (Qualifying Change in Law) (and where owed by the Company, appearing as a negative figure);
- 31.2.4 any undisputed amounts owed by either Party to the other in accordance with Clause 50 (Indemnity) (and where owed by the Company, appearing as a negative figure);
- 31.2.5 any amounts owed by the Company under Clause 48 (Surveys on Expiry);
- 31.2.6 any interest due in accordance with Clause 31.4 (Disputed Amounts);
- 31.2.7 any other amounts agreed or determined to be due and payable under the Agreement by one Party to the other (and where owed by the Company, appearing as a negative figure);
- 31.2.8 as a negative figure, any reimbursement of an overpayment of Monthly Unitary Charge arising in any previous Payment Month; and
- 31.2.9 any VAT payable on amounts due.

31.3 Payments

- 31.3.1 The Monthly Invoice shall be paid by the Scottish Ministers on the later of 10 Business Days after the end of the Payment Month in respect of which that Monthly Invoice is issued or within 20 Business Days of receipt of that Monthly Invoice and the Payment Calculation Schedule therefor.
- 31.3.2 Except where otherwise provided all other payments under this Agreement shall be due and payable by the later of:

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- (a) the date specified for payment in this Agreement, or where no such date is specified, 20 Business Days after the date on which the amount of the payment is agreed or determined; or
- (b) 20 Business Days after the date of issue of an invoice for the payment (or VAT invoice where VAT is payable).

31.3.3 Except where otherwise provided, all payments under this Agreement shall be made in pounds sterling by electronic transfer or equivalent instantaneous transfer of funds for value on the day in question to the bank account of the recipient (located in the United Kingdom) specified in the invoice for such payment, quoting the invoice number against which payment is made.

31.4 Disputed Amounts

31.4.1 Either Party shall have the right to dispute, in good faith, any amount specified in an invoice referred to in this Agreement. The Party disputing any such amount shall pay such amount of the invoice in question as is not in dispute and shall be entitled to withhold the balance pending resolution of the dispute.

31.4.2 The Parties shall use all reasonable endeavours to resolve the dispute in question within 15 Business Days of the dispute arising. If they fail to resolve it, either Party may refer the matter to the Dispute Resolution Procedure.

31.4.3 Following resolution of the dispute, any amount agreed or adjudged to be due shall promptly on demand be paid, together with interest thereon at a rate per annum equal to the Prescribed Rate from the day after the date on which payment became properly due to (and including) the date of payment.

31.5 Late Payments

Save where otherwise specifically provided, where any payment or sum of money due from the Company to the Scottish Ministers or from the Scottish Ministers to the Company under any provision of this Agreement is not paid on the due date it shall bear interest thereon at the Prescribed Rate from the due date (whether before or after any judgement) until actual payment and it is agreed between the Parties that the Prescribed Rate and the provisions of this Agreement relating to the payment of compensation on termination of this Agreement following the occurrence of a Scottish Ministers Default provide the Company with a substantial remedy pursuant to Sections 8 and 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

31.6 Set-off

31.6.1 The Company shall not be entitled to retain or set off any amount due to the Scottish Ministers by it, but the Scottish Ministers may retain or set off any amount owed to them by the Company under this Agreement which has fallen due and payable against any amount due to the Company under this Agreement.

31.6.2 If the payment or deduction of any amount referred to in Clause 31.6.1 above is disputed then any undisputed element of that amount shall be paid

and the disputed element shall be dealt with in accordance with Schedule 7 (Dispute Resolution Procedure).

31.7 VAT

31.7.1 All amounts due under this Agreement are exclusive of VAT.

31.7.2 If any supply made or referred to in this Agreement is or becomes chargeable to VAT then the person receiving the supply (the "Recipient") shall in addition pay the person making the supply (the "Supplier") the amount of that VAT against receipt by the Recipient from the Supplier of a valid VAT invoice in respect of that supply.

31.7.3 Where under this Agreement any amount is calculated by reference to any sum which has or may be incurred by any person, the amount shall include any VAT in respect of that amount only to the extent that such VAT is not recoverable as input tax by that person (or a member of the same VAT group), whether by set-off, refund or repayment.

31.7.4 The Company shall provide the Scottish Ministers with any information reasonably requested by the Scottish Ministers in relation to the amount of VAT chargeable in accordance with the Agreement and payable or repayable by the Scottish Ministers to the Company.

31.7.5 In the event that the Scottish Ministers assign, novate or otherwise transfer their obligations and rights under this Agreement in accordance with Clause 64.1, the Scottish Ministers shall procure that such assignee, novatee or transferee (as the case may be) is registered for VAT in order that the Company remains entitled to recovery of input VAT in accordance with the Value Added Tax Act 1994.

32. RELIEF EVENTS

32.1 Occurrence

If and to the extent that a Relief Event:

32.1.1 is the direct cause of a delay in achieving the Full Services Commencement Date; and/or

32.1.2 adversely affects the ability of the Company to perform any of its obligations under this Agreement,

then the Company is entitled to apply for relief from any rights of the Scottish Ministers arising under Clause 41 (Termination on Company Default) and its obligations under this Agreement.

32.2 Relief

To obtain relief, the Company must:

32.2.1 as soon as practicable, and in any event within 10 Business Days after it becomes aware that the Relief Event has caused or is likely to cause delay

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and/or adversely affect the ability of the Company to perform its other obligations, give to the Scottish Ministers a notice of its claim for relief from its obligations under the Agreement, including full details of the nature of the Relief Event, the date of occurrence and its likely duration;

32.2.2 within 5 Business Days of receipt by the Scottish Ministers of the notice referred to in Clause 32.2.1 above, give full details of the relief claimed; and

32.2.3 demonstrate to the reasonable satisfaction of the Scottish Ministers that:

- (a) the Company and its Sub-Contractors could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material expenditure;
- (b) the Relief Event directly caused the delay to the Planned Full Services Commencement Date or, following the Planned Full Services Commencement Date, delay in achieving Full Services Commencement by the Long-Stop Date or the need for relief from other obligations under the Agreement;
- (c) the time lost and/or relief from the obligations under the Agreement claimed could not reasonably be expected to be mitigated or recovered by the Company acting in accordance with Good Industry Practice, without incurring material expenditure; and
- (d) the Company is using reasonable endeavours to perform its obligations under the Agreement.

32.3 Consequences

In the event that the Company has complied with its obligations under Clause 32.2 above, then:

32.3.1 the Planned Full Services Commencement Date or, following the Planned Full Services Commencement Date, the Long-Stop Date shall be postponed by such time as shall be reasonable for such a Relief Event, taking into account the likely effect of delay; and/or

32.3.2 the Scottish Ministers shall not be entitled to exercise their rights to terminate the Agreement under Clause 41 (Termination on Company Default) and subject to Clause 32.4 below, shall give such other relief as has been requested by the Company.

32.4 Performance Deductions

Nothing in Clause 32.3 above shall affect any entitlement to make Performance Deductions or any deductions made as a result of Schedule 6 (Payment Mechanism) during the period in which the Relief Event is subsisting.

32.5 Information

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In the event that information required by Clause 32.2 above is provided after the dates referred to in that Clause 32.2, then the Company shall not be entitled to any relief during the period for which the information is delayed.

32.6 Notify

The Company shall notify the Scottish Ministers if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

32.7 Disputes

If the Parties cannot agree the extent of the relief required, or the Scottish Ministers disagree that a Relief Event has occurred or that the Company is entitled to any extension of the Planned Full Services Commencement Date or the Long-Stop Date and/or relief from other obligations under this Agreement the Parties shall resolve the matter in accordance with Schedule 7 (Dispute Resolution Procedure).

33. COMPENSATION EVENTS**33.1 Occurrence**

If, at any time, as a direct result of the occurrence of a Compensation Event:

33.1.1 the Company is or is likely to be unable to achieve Full Services Commencement on or before the Planned Full Services Commencement Date, or, following the Planned Full Service Commencement Date, the Long-Stop Date;

33.1.2 the Company is or is likely to be unable to comply with its obligations under this Agreement; and/or

33.1.3 the Company incurs or is likely to incur costs or lose revenue,

then the Company is entitled to apply for relief from its obligations and/or claim compensation under this Agreement.

33.2 Relief

Subject to Clause 33.4 below, to obtain relief and/or claim compensation the Company must:

33.2.1 as soon as practicable, and in any event within 15 Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Company to incur costs or lose revenue, give to the Scottish Ministers a notice of its claim for an extension of time for Full Services Commencement, payment of compensation and/or relief from its obligations under the Agreement;

33.2.2 within 10 Business Days of receipt by the Scottish Ministers of the notice referred to in Clause 33.2.1 above, give full details of the Compensation

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Event and the extension of time and/or any Estimated Change in Project Costs; and

33.2.3 demonstrate to the reasonable satisfaction of the Scottish Ministers that:

- (a) the Compensation Event was the direct cause of the Estimated Change in Project Costs and/or any delay in the achievement of the Planned Full Services Commencement Date and/or breach of the Company's obligations under this Agreement, or, following the Planned Full Services Commencement Date, delay in achieving Full Services Commencement before the Long-Stop Date; and
- (b) the Estimated Change in Project Costs, time lost, and/or relief from the obligations under the Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Company acting in accordance with Good Industry Practice.

33.3 Consequences

In the event that the Company has complied with its obligations under Clause 33.2 above, then:

33.3.1 in the case of a delay, the Planned Full Services Commencement Date or following the Planned Full Services Commencement Date the Long-Stop Date shall be postponed by such time as shall be reasonable for such a Compensation Event, taking into account the likely effect of delay;

33.3.2 in the case of an additional cost being incurred or revenue being lost by the Company:

- (a) on or before the Full Services Commencement Date; or
- (b) as a result of Capital Expenditure being incurred by the Company at any time,

the Scottish Ministers shall compensate the Company for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred and, without double counting, for revenue actually lost (to the extent it could not reasonably have been mitigated), within 20 Business Days of receipt of a written demand by the Company supported by all relevant information;

33.3.3 in the case of payment of compensation for the Estimated Change in Project Costs that does not result in Capital Expenditure being incurred by the Company as referred to in Clause 33.3.2 above but which reflects a change in the costs being incurred by the Company after the Full Services Commencement Date, the Scottish Ministers shall compensate the Company in accordance with Clause 33.6 below by an adjustment to the Unitary Charge; and/or

33.3.4 the Scottish Ministers shall give the Company such relief from its obligations under the Agreement, as is reasonable for such a Compensation Event.

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33.3A In the event of any discovery of Fossils and Antiquities at the Sites:

33.3A.1 the Company (provided it has complied with its obligations under Clause 33.2) shall be entitled to relief only under Clause 33.3.1 and for the avoidance of doubt not under Clauses 33.3.2, 33.3.3 and/or 33.3.4; and

33.3A.2 the Expiry Date shall be postponed by a period equivalent to the period of postponement of the Planned Full Services Commencement Date or the Long-Stop Date (as the case may be) pursuant to Clause 33.3.1.

33.4 Information

In the event that information is provided after the dates referred to in Clause 33.2 above, then the Company shall not be entitled to any extension of time, compensation, or relief from its obligations under the Agreement in respect of the period for which the information is delayed.

33.5 Disputes

If the Parties cannot agree the extent of any compensation, delay incurred, relief from the Company's obligations under the Agreement, or the Scottish Ministers disagree that a Compensation Event has occurred (or as to its consequences), or that the Company is entitled to any relief under this Clause 33, the Parties shall resolve the matter in accordance with Schedule 7 (Dispute Resolution Procedure).

33.6 Unitary Charge Adjustment

Any payment of compensation referred to in Clause 33.3.3 above shall be calculated in accordance with the Unitary Charge Adjustment Procedure, excluding double counting from the Indexation Factor.

34. SCOTTISH MINISTERS CHANGE

34.1 Change in Service

The Scottish Ministers have the right to propose Scottish Ministers Changes in accordance with this Clause.

34.1A If the Scottish Ministers wish to:

34.1A.1 proceed with a material variation or change to the Project Roads; or

34.1A.2 proceed with a Scottish Ministers Notice of Change by instructing works or services other than by or through the Company,

and such variation, change or additional works or services will or are likely to have a material adverse impact on the performance by the Company of its obligations under this Agreement or to materially increase the costs to the Company of performing such obligations, the Scottish Ministers shall instruct a Scottish Ministers Change to assess such impact or cost (as the case may be).

34.2 Limitations

The Scottish Ministers shall not propose a Scottish Ministers Change which:

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- 34.2.1 requires to be performed in a way that infringes any law or is inconsistent with Good Industry Practice;
 - 34.2.2 would cause any Consent to be revoked (or a new Consent required to implement the relevant Scottish Ministers Change to be unobtainable);
 - 34.2.3 would, if implemented, result in a change in the nature of the Project;
 - 34.2.4 would materially and adversely affect the Company's ability to deliver the Operations;
 - 34.2.5 would materially and adversely affect the health and safety of any person;
 - 34.2.6 requires the Company to implement the Scottish Ministers Change in an unreasonable period of time;
 - 34.2.7 would represent a departure from Good Industry Practice; or
 - 34.2.8 the Scottish Ministers do not have the legal power or capacity to require the Company to implement.
- 34.3 Scottish Ministers Notice of Change
- If the Scottish Ministers require a Scottish Ministers Change, they must serve a Scottish Ministers Notice of Change on the Company.
- 34.4 Details in Scottish Ministers Notice of Change
- The Scottish Ministers Notice of Change shall:
- 34.4.1 set out the Scottish Ministers Change required in sufficient detail to enable the Company to calculate and provide the Estimated Change in Project Costs in accordance with Clause 34.5 below (the "Estimate");
 - 34.4.2 in the event that the Scottish Ministers Change will require Capital Expenditure, state whether the Scottish Ministers intend to pay to the Company the costs involved in implementing the Scottish Ministers Change or whether the Scottish Ministers require the Company to use its reasonable efforts to obtain funding in accordance with Clause 34.12 below; and
 - 34.4.3 require the Company to provide the Scottish Ministers within 15 Business Days (or such longer period as is reasonable in the circumstances) of receipt of the Scottish Ministers Notice of Change with the Estimate.
- 34.4A Cost of Estimate
- 34.4A.1 The Scottish Ministers may require the Company to provide a reasonable estimate of the Company's cost and time for the preparation of an Estimate in accordance with Clause 34.4 and on receipt thereof the Scottish Ministers may at their discretion modify or withdraw their Notice of Change.
- 34.5 Estimate

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As soon as practicable and in any event within 21 days (or such longer period as is reasonable in the circumstances) after having received the Scottish Ministers Notice of Change, the Company shall deliver to the Scottish Ministers the Estimate. The Estimate shall include the opinion of the Company on:

- 34.5.1 whether relief from compliance with obligations is required, including the obligations of the Company to achieve the Planned Full Services Commencement Date, during the implementation of the Scottish Ministers Change;
- 34.5.2 any impact on the provision of the Operations;
- 34.5.3 any amendment required to this Agreement and/or any Project Document as a result of the Scottish Ministers Change;
- 34.5.4 any Estimated Change in Project Costs that results from the Scottish Ministers Change;
- 34.5.5 any Capital Expenditure that is required or no longer required as a result of the Scottish Ministers Change;
- 34.5.6 the programme for implementing the Scottish Ministers Change;
- 34.5.7 any regulatory approvals or Consents which are required; and
- 34.5.8 the proposed method of certification of any construction or operational aspects of the Operations required by the Scottish Ministers Change if not covered by the procedures specified in Clause 25 (Permits to Use) and Clause 26 (Final Completion of the New Works) and the Scottish Ministers' Requirements.

34.6 Parties to Discuss

As soon as practicable after the Scottish Ministers receive the Estimate, the Parties shall discuss and agree the issues set out in the Estimate, including:

- 34.6.1 providing evidence that the Company has used reasonable endeavours (including (where practicable) the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
- 34.6.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred, foreseeable Changes in Law at that time have been taken into account by the Company; and
- 34.6.3 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Scottish Ministers Change concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 34.5.4, 34.5.5 and/or 34.5.6 above.

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In such discussions the Scottish Ministers may modify the Scottish Ministers Notice of Change and (if the estimated increase in Capital Expenditure in respect of the Scottish Ministers Change is expected to exceed XXX (Indexed) and it is practicable for the Company to do so), the Scottish Ministers may require the Company to seek and evaluate competitive tenders for the relevant capital works. In each case the Company shall, as soon as practicable, and in any event not more than 10 Business Days after receipt of such modification, notify the Scottish Ministers of any consequential changes to the Estimate.

34.7 Company Procuring Work and Services

If the Company does not intend to use its own resources to implement any Scottish Ministers Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Company should not be worse off as a result of the implementation of the Scottish Ministers Change) when procuring any work, services, supplies, materials or equipment required in relation to the Scottish Ministers Change.

34.8 Disputes

If the Parties cannot agree on the contents of the Estimate then the dispute will be determined in accordance with Schedule 7 (Dispute Resolution Procedure).

34.9 Confirmation or Withdrawal of Scottish Ministers Change

As soon as practicable after the contents of the Estimate have been agreed or otherwise determined pursuant to Schedule 7 (Dispute Resolution Procedure), the Scottish Ministers shall:

34.9.1 confirm in writing the Estimate (as modified); or

34.9.2 withdraw the Scottish Ministers Notice of Change.

34.10 Deemed Withdrawal of Scottish Ministers Notice of Change

If the Scottish Ministers do not confirm in writing the Estimate (as modified) within 20 Business Days of the contents of the Estimate having been agreed in accordance with Clause 34.6 above or determined pursuant to Clause 34.8 above, then the Scottish Ministers Notice of Change shall be deemed to have been withdrawn. Where there is such a withdrawal (either pursuant to this Clause 34.10 or Clause 34.9 above) the Scottish Ministers shall pay to the Company the reasonable additional third party costs incurred by the Company in preparing such Estimate provided that:

34.10.1 the Company has used all reasonable endeavours to submit a reasonable priced Estimate;

34.10.2 the Company has made available to the Scottish Ministers a cost breakdown of the Estimate including an estimate of third party costs to be incurred by the Scottish Ministers if the Scottish Ministers Notice of Change is withdrawn or deemed to be withdrawn;

34.10.3 the Scottish Ministers have:

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- (a) approved the estimate of third-party costs referred to in Clause 34.10.1 above and the type of third party prior to any third party costs being incurred; and
- (b) agreed that, given the nature of the proposed Change, it is reasonable to expect the relevant third party to incur costs in preparing the Estimate on the basis of the extent of the proposed change to the O&M Works or the New Works and the work required in submitting an accurate Estimate in compliance with this Clause 34; and

34.10.4 the Company has provided the Scottish Ministers with such evidence as it may reasonably require in order to verify the additional third party costs incurred by the Company.

34.11 Capital Expenditure

In the event that the Estimate (as modified) involves estimated Capital Expenditure in excess of XXX Indexed then (unless the Scottish Ministers have elected to fund such costs in accordance with Clause 34.4.2) the Company shall use its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, on terms reasonably satisfactory to it and the Senior Lenders.

34.12 Funding Unavailable for Capital Expenditure

If the Estimate (as modified) involves estimated Capital Expenditure of less than XXX Indexed or the Company has used its reasonable endeavours to obtain funding for the whole of the estimated Capital Expenditure, but has been unable to do so within 40 Business Days of the date that the Scottish Ministers confirmed the Estimate, then the Company shall have no obligation to carry out the Scottish Ministers Change, unless the Scottish Ministers agree within 15 Business Days of the end of such period to pay the costs for which funding is not available on the basis provided in Clause 34.15 (Capital Expenditure Payment Procedure) below.

34.13 Scottish Ministers Payment of Capital Expenditure

The Scottish Ministers may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Company has obtained funding for part of the Capital Expenditure, the remaining part of the estimated Capital Expenditure.

34.14 Unitary Charge Adjustment

In the event that the Estimate has been confirmed by the Scottish Ministers, then the adjustment to the Unitary Charge shall be made in accordance with the Unitary Charge Adjustment Procedure.

34.15 Capital Expenditure Payment Procedure

Where the Scottish Ministers agree to pay the costs for which funding is not available pursuant to Clause 34.12 (Funding Unavailable for Capital Expenditure) above:

34.15.1 the Scottish Ministers and Company shall agree:

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34.15.2 a payment schedule in respect of the payment of such sum reflecting the amount and timing of the costs to be incurred by Company in carrying out the Scottish Ministers Change to the extent borne by the Scottish Ministers; and

34.15.3 where payment for part of the Scottish Ministers Change reflects the carrying out of, or specific progress towards, an element within the Scottish Ministers Change, an objective means of providing evidence confirming that the part of the Scottish Ministers Change corresponding to each occasion when payment is due under the payment schedule appears to have been duly carried out,

(such payment schedule and evidence to be determined in accordance with Schedule 7 (Dispute Resolution Procedure) in the event of the Scottish Ministers and the Company failing to agree as to its terms);

34.15.4 the Scottish Ministers shall make a payment to the Company within 20 Business Days of receipt by the Scottish Ministers of invoices presented to the Scottish Ministers (in all material respects) in accordance with the agreed payment schedule (as the case may be, varied by agreement from time to time) accompanied by the relevant evidence (where applicable) that the relevant part of the Scottish Ministers Change has been carried out; and

34.15.5 if payment is not made in accordance with Clause 34.15.4 above, the Scottish Ministers shall pay interest to the Company on the amount unpaid from the date 15 Business Days after receipt of the relevant invoice until paid at the default rate set out in Clause 31.5 (Late Payments).

34.16 Implementation of Scottish Ministers Change

In the event that the Estimate has been confirmed by the Scottish Ministers the relevant Scottish Ministers Change shall be implemented by the Company generally in accordance with the programme for implementing the proposed change included in the Estimate. As soon as reasonably practicable and in any event within 20 Business Days of confirmation of the Estimate the Parties shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to such change.

35. COMPANY CHANGES**35.1 Company Notice of Change**

Subject to Clause 35.8 (Departures), if the Company wishes to introduce a Company Change or if the provisions of Clause 36 (Value for Money) apply it must serve a Company Notice of Change on the Scottish Ministers.

35.2 Details of Company Notice of Change

The Company Notice of Change must:

35.2.1 set out the proposed Company Change in sufficient detail to enable the Scottish Ministers to evaluate it in full including the programme for implementing the Company Change;

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- 35.2.2 specify the Company's reasons for proposing the Company Change;
- 35.2.3 request the Scottish Ministers to consult with the Company with a view to deciding whether to agree to the Company Change and, if so, what consequential changes the Scottish Ministers require as a result;
- 35.2.4 indicate any implications of the Company Change;
- 35.2.5 indicate, in particular, whether a variation to the Unitary Charge is proposed (and, if so, give a detailed cost estimate of such proposed change); and
- 35.2.6 indicate if there are any dates by which a decision by the Scottish Ministers is critical.

35.3 Evaluation of Company Notice of Change

The Scottish Ministers shall evaluate the Company Change in good faith, taking into account all relevant issues, including whether:

- 35.3.1 a change in the Unitary Charge will occur;
- 35.3.2 the Company Change affects the quality of the Operations or the likelihood of successful delivery of the Operations;
- 35.3.3 the Company Change will interfere with the relationship of the Scottish Ministers with third parties;
- 35.3.4 the financial strength of the Company is sufficient to perform the Company Change;
- 35.3.5 the residual value of the Assets is reduced; or
- 35.3.6 the Company Change materially affects the risks or costs to which the Scottish Ministers are exposed.

35.4 Parties to Discuss

As soon as practicable after receiving the Company Notice of Change, the Parties shall meet and discuss the matter referred to in it. During their discussions the Scottish Ministers may propose modifications to or accept or reject the Company Notice of Change.

35.5 Acceptance of Company Notice of Change

If the Scottish Ministers accept the Company Notice of Change (with or without modification), the relevant Company Change shall be implemented by the Company generally in accordance with the programme for implementing the proposed change as set out in the Company Notice of Change (as the same may have been amended). As soon as practicable, the Parties shall consult and agree the remaining details and shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Company Change.

35.6 Rejection of Company Notice of Change

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If the Scottish Ministers reject the Company Notice of Change, they shall not be obliged to give their reasons for such a rejection.

35.7 No Increase in the Unitary Charge

Unless the Scottish Ministers' acceptance specifically agrees to an increase in the Unitary Charge, there shall be no increase in the Unitary Charge as a result of the Company Change.

35.8 Departures

35.8.1 The Company shall not propose a Company Change which requires a Departure unless such Departure has first been approved by the Scottish Ministers acting in their capacity as Road Works Authority.

35.8.2 For the avoidance of doubt, the approval of a Departure by the Scottish Ministers shall not constitute an acceptance of a Company Change for the purpose of this Agreement.

35.9 Savings to be Shared

If the Company Change causes or will cause the Company's costs or those of a Sub-Contractor to decrease, there shall be a decrease in the Unitary Charge equivalent to 50% of the difference between: (i) the Unitary Charge immediately prior to implementation of any decrease; and (ii) the nominal Unitary Charge calculated in accordance with Part 6 of Schedule 6 (Payment Mechanism) to give effect to 100% of such decrease.

35.10 Change in Law

The Scottish Ministers cannot reject a Company Change which is required in order to conform to a Change in Law. The costs of introducing a Company Change resulting from a Qualifying Change in Law (including any resulting variation in the Unitary Charge) shall be dealt with in accordance with Clause 37 (Qualifying Change in Law) and to the extent not dealt with shall be borne by the Company.

36. VALUE FOR MONEY**36.1 VFM Review**

The Company shall carry out a VFM Review in accordance with this Clause 36 (Value for Money) on each VFM Review Date.

36.2 Review Mandate

The VFM Review shall consider and report on:

36.2.1 any material innovations in technology which have come to the attention of the Company and which could enhance the Operations; and

36.2.2 the O&M Works Requirements jointly with the Scottish Ministers in order to assess whether any alteration in the O&M Works Requirements would represent increased value for money for both Parties.

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36.3 Methodology

The Company shall, no later than 2 (two) Months before each VFM Review Date, submit to the Scottish Ministers its proposed methodology for undertaking the VFM Review.

36.4 Comments

The Scottish Ministers shall, not later than 1 (one) Month before the VFM Review Date, comment on the methodology referred to in Clause 36.3 and the Company shall have reasonable regard to such comments in finalising such methodology.

36.5 VFM Report

On or before the date falling 3 Months after the VFM Review Date the Company shall submit to the Scottish Ministers the VFM Report setting out:

36.5.1 the methodology of the review;

36.5.2 any material innovations in technology or material efficiencies in best working practices relevant to the delivery of the Operations which represent value for money; and

36.5.3 any proposed changes to the O&M Works Requirements.

36.6 Changes to O&M Works Requirements

If a VFM Report proposes changes to the O&M Works Requirements, either Party may propose a Change in accordance with Clauses 34 (Scottish Ministers Change) and 35 (Company Changes) and if such Change is implemented substantially as proposed in the VFM Report then, notwithstanding anything to the contrary in Clauses 34 (Scottish Ministers Change) and 35 (Company Changes) the cost savings (if any) shall be shared between the Parties in such proportion as the Parties may agree, or, in the absence of such agreement, as the Dispute Resolution Procedure may determine having fair regard to the value to the Scottish Ministers of such Change and to the degree of innovation and originality of the Change proposed in the VFM Report.

37. QUALIFYING CHANGE IN LAW**37.1 Change in Law**

If a Qualifying Change in Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects, giving details of its opinion of:

37.1.1 any necessary change in the Operations;

37.1.2 whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;

37.1.3 whether relief from compliance with obligations is required, including the obligation of the Company to achieve the Planned Full Services

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Commencement Date and/or comply with the Scottish Ministers' Requirements during the implementation of any relevant Qualifying Change in Law;

37.1.4 any Estimated Change in Project Costs that directly results from the Qualifying Change in Law; and

37.1.5 any Capital Expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the Service Period,

in each case giving in full detail the procedure for implementing the Change. Responsibility for the costs of implementation (and any resulting variation to the Unitary Charge) shall be dealt with in accordance with Clauses 37.2 to 37.5 below.

37.2 Parties to Discuss

As soon as practicable after receipt of any notice from either Party under Clause 37.1, the Parties shall discuss and agree the issues referred to in Clause 37.1 and any ways in which the Company can mitigate the effect of the Qualifying Change of Law, including:

37.2.1 providing evidence that the Company has used reasonable endeavours (including, where practicable, the use of competitive quotes) to oblige its Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;

37.2.2 demonstrating how any Capital Expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Company;

37.2.3 giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the Project, including similar businesses in which the Shareholders or their Affiliates carry on business; and

37.2.4 demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 37.1.4 and/or 37.1.5 above.

37.3 Change Agreed

If the Parties agree or it is determined under Schedule 7 (Dispute Resolution Procedure) that the Company is required to incur additional Capital Expenditure due to a Qualifying Change in Law (excluding the Company's Share of any Capital Expenditure agreed or determined to be required as a result of a General Change in Law under this Clause), then the Company shall use its reasonable endeavours to obtain funding for such Capital Expenditure on terms reasonably satisfactory to it and the Senior Lenders.

37.4 Company's Share

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The Company's Share shall be solely for the account of the Company.

37.5 Financing

If the Company has used reasonable endeavours to obtain funding for Capital Expenditure referred to in Clause 37.3 (Change Agreed), but has been unable to do so within 40 Business Days of the date that the agreement or determination in Clause 37.3 (Change Agreed) occurred, then the Scottish Ministers shall pay to the Company an amount equal to that Capital Expenditure on or before the date falling 20 Business Days after the Capital Expenditure has been incurred.

37.6 Additional Costs or Savings

The Scottish Ministers shall meet any additional operating costs, finance costs, insurance costs and management costs of the Operations and loss of revenue of the Company agreed pursuant to Clause 37.2 which result directly from a Discriminatory Change in Law and/or a Specific Change in Law by means of a Unitary Charge Adjustment.

The Scottish Ministers shall be entitled to any savings in the operating costs, finance costs, insurance costs and management costs of the Operations which result directly from a Discriminatory Change in Law and/or a Specific Change in Law by means of a Unitary Charge Adjustment.

37.7 Unitary Charge Adjustment

Any compensation payable under this Clause by means of an adjustment to or reduction in the Unitary Charge shall be paid in accordance with the Unitary Charge Adjustment Procedure.

37.8 Payment of Irrecoverable VAT

The Scottish Ministers shall pay to the Company from time to time as the same is incurred by the Company sums equal to any Irrecoverable VAT but only to the extent that it arises as a result of a Change in Law. Any such payment shall be made within 20 Business Days of the delivery by the Company to the Scottish Ministers of written details of the amount involved accompanied by details as to the grounds for and computation of the amount claimed. For the purposes of this Clause 37.8 "Irrecoverable VAT" means input VAT incurred by the Company on any supply which is made to it which is used or to be used exclusively in performing the New Works or the O&M Works or any of the obligations or provisions under the Agreement (together with input VAT incurred as part of its overhead in relation to such activities) to the extent that the Company is not entitled to repayment or credit from HM Revenue & Customs in respect of such input VAT.

38. IMPLEMENTATION OF CHANGES**38.1 Implementation**

The Company shall implement any Scottish Ministers Change, Company Change or Qualifying Change in Law in accordance with:

38.1.1 Legislation;

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38.1.2 Consents;

38.1.3 the Scottish Ministers' Requirements as amended in accordance with Clauses 34, 35 or 37 as applicable;

38.1.4 Good Industry Practice; and

38.1.5 the proposal in respect of the Scottish Ministers Change, Company Change or Qualifying Change in Law (including any further Company proposals) agreed or determined in accordance with Clauses 34, 35 or 37 as applicable.

38.2 Precedence

In the event of a conflict between the requirements of Clauses 38.1.1 to 38.1.5 the requirements shall have precedence in the numerical order in Clause 38.1, provided always that where such further Company proposals provide greater benefit to the Scottish Ministers, of which the Scottish Ministers shall be sole judge, there shall be deemed to be no conflict.

39. REFINANCING

39.1 Company to Obtain Scottish Ministers' Consent

The Company shall obtain the Scottish Ministers' prior written consent to any Qualifying Refinancing and both the Scottish Ministers and the Company shall at all times act in good faith with respect to any Refinancing.

39.2 Scottish Ministers' Share

The Scottish Ministers shall be entitled to receive a XXX per cent share of any Refinancing Gain arising from a Qualifying Refinancing.

39.3 Scottish Ministers not to Withhold or Delay Consent

The Scottish Ministers shall not withhold or delay their consent to a Qualifying Refinancing to obtain a greater than 50 per cent share of the Refinancing Gain.

39.4 Company to Provide Full Details

The Company shall promptly and in any event within 10 Business Days provide the Scottish Ministers with full details of any proposed Qualifying Refinancing, including a copy of the proposed financial model relating to it (if any) and the basis for the assumptions used in the proposed financial model. The Scottish Ministers shall (before, during and at any time after any Refinancing) have unrestricted rights of audit over any financial model and documentation (including any aspect of the calculation of the Refinancing Gain) used in connection with that Refinancing (whether that Refinancing is a Qualifying Refinancing or not).

39.5 Scottish Ministers' Election for Payment of Share

The Scottish Ministers shall have the right to elect to receive their share of any Refinancing Gain as:

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- 39.5.1 a single payment in an amount less than or equal to any Distribution made on or about the date of the Refinancing;
- 39.5.2 a reduction in the Unitary Charge over the remaining term of the Agreement;
or
- 39.5.3 a combination of any of the above.

39.6 Negotiations in Good Faith

The Scottish Ministers and the Company will negotiate in good faith to agree the basis and method of calculation of the Refinancing Gain and payment of the Scottish Ministers' share of the Refinancing Gain (taking into account how the Scottish Ministers have elected to receive their share of the Refinancing Gain under Clause 39.5 (Scottish Ministers' Election for Payment of Share) above). If the Parties fail to agree the basis and method of calculation of the Refinancing Gain or the payment of the Scottish Ministers' share, the dispute shall be determined in accordance with Schedule 7 (Dispute Resolution Procedure).

39.7 Professional Cost

The Refinancing Gain shall be calculated after taking into account the reasonable and proper professional costs that each Party directly incurs in relation to the Qualifying Refinancing and on the basis that all reasonable and proper professional costs incurred by the Scottish Ministers will be paid to the Scottish Ministers by the Company within 20 Business Days of any Qualifying Refinancing.

39.8 Notification

Without prejudice to the other provisions of this Clause 39, the Company shall (a) notify the Scottish Ministers of all Notifiable Financings on becoming aware of the same and again when they are entered into and provide full details of the same and (b) include a provision in the Financing Agreements whereby it is entitled to be informed of any proposals which the Senior Lenders may have to refinance the Financing Agreements.

40. SCOTTISH MINISTERS STEP-IN**40.1 Reason for Step-In**

If the Scottish Ministers reasonably believe that they need to take action in connection with the O&M Works:

- 40.1.1 because a serious risk exists to the health or safety of persons or property or to the environment; and/or
- 40.1.2 to discharge a statutory duty,

then the Scottish Ministers shall be entitled to take action in accordance with Clauses 40.2 (Notify Company) to 40.5 (Company in Breach) below.

40.2 Notify Company

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If Clause 40.1 (Reason for Step-In) applies and the Scottish Ministers wish to take action, the Scottish Ministers shall notify the Company in writing of the following:

- 40.2.1 the action it wishes to take;
- 40.2.2 the reason for such action;
- 40.2.3 the date it wishes to commence such action;
- 40.2.4 the time period which it believes will be necessary for such action; and
- 40.2.5 to the extent practicable, the effect on the Company and its obligation to carry out the O&M Works during the period such action is being taken.

40.3 Action by Scottish Ministers

40.3.1 Following service of such notice, the Scottish Ministers shall take such action as notified under Clause 40.2 (Notify Company) above and any consequential additional action as it reasonably believes is necessary (together, the "Required Action") and the Company shall give all reasonable assistance to the Scottish Ministers while they are taking such Required Action.

40.3.2 In carrying out the Required Action, the Scottish Ministers shall act in accordance with Good Industry Practice.

40.4 Company Not in Breach

If the Company is not in breach of its obligations under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Company from carrying out any part of the O&M Works:

- 40.4.1 the Company shall be relieved from its obligations to carry out such part of the O&M Works; and
- 40.4.2 in respect of the period in which the Scottish Ministers are taking the Required Action and provided that the Company provides the Scottish Ministers with reasonable assistance (such assistance to be at the expense of the Scottish Ministers to the extent incremental costs are incurred), the Unitary Charge due from the Scottish Ministers to the Company shall equal the amount the Company would receive if it were satisfying all its obligations and providing the O&M Works affected by the Required Action in full over that period.

40.5 Company in Breach

If the Required Action is taken as a result of a breach of the obligations of the Company under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Company from providing any part of the O&M Works:

- 40.5.1 the Company shall be relieved of its obligations to provide such part of the O&M Works; and

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40.5.2 in respect of the period in which the Scottish Ministers are taking Required Action, the Unitary Charge due from the Scottish Ministers to the Company shall equal the amount the Company would receive if it were satisfying all its obligations and providing the O&M Works affected by the Required Action in full over that period, less an amount equal to all the Scottish Ministers' costs of operation in taking the Required Action.

40.6 Step-Out

40.6.1 The Scottish Ministers shall give the Company such notice as is reasonable in the circumstances if the Scottish Ministers consider that the Required Action is no longer required or has been completed.

40.6.2 The Scottish Ministers shall ensure that on the expiry of the notice served under Clause 40.6.1 the Sites and the Project Roads shall be in no worse condition than they were immediately before the Required Action was taken.

40.7 Indemnity

The Scottish Ministers shall indemnify the Company and keep the Company indemnified in full from and against all liability, losses, damages, injury, claims, costs and expenses which may arise out of the Scottish Ministers taking any Required Action where in taking the Required Action the Scottish Ministers have failed to act in accordance with Good Industry Practice.

41. TERMINATION ON COMPANY DEFAULT**41.1 Termination Notice**

If a Company Default has occurred and the Scottish Ministers wish to terminate the Agreement, they must serve a Termination Notice on the Company.

41.2 Detail in Termination Notice

The Termination Notice must specify:

41.2.1 the type and nature of Company Default that has occurred, giving reasonable details; and

41.2.2 that in the case of any Company Default falling within the limbs (a), (g), (h) and (l) of the definition of Company Default this Agreement will terminate on the day falling 40 Business Days after the date the Company received the Termination Notice, unless:

(a) in the case of a breach under limb (a) of the definition of Company Default the Company puts forward an acceptable rectification programme within 20 Business Days after the Company receives the Termination Notice (and implements such programme in accordance with its terms and rectifies the Company Default in accordance with the rectification programme); or

(b) in the case of any Company Default falling with the limbs (a), (g), (h) and (l) of the definition of Company Default the Company rectifies the

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Company Default within 40 Business Days after the date the Company receives the Termination Notice; or

41.2.3 that in the case of any other Company Default (not being limbs (a), (g), (h) or (l)), this Agreement will terminate on the date falling 20 Business Days after the date the Company receives the Termination Notice.

41.3 Revocation of Termination Notice

If the Company either rectifies the Company Default within the time period specified in the Termination Notice, or implements the rectification programme, if applicable, in accordance with its terms, the Termination Notice will be deemed to be revoked and the Agreement will continue.

41.4 Termination on Failure to Rectify;

If:

- (i) in the case of a Company Default within limb (a) of the definition of that term no acceptable rectification programme has been put forward pursuant to Clause 41.2.2 (a) and the Company fails to rectify the Company Default within the time period specified in the Termination Notice; or
- (ii) in the case of a Company Default falling within limbs (g), (h) or (l) of the definition of Company Default, the Company fails to rectify the Company Default within the time period specified in the Termination Notice,

the Scottish Ministers may give notice stating that the Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling 7 days after the date of receipt of such notice.

41.5 Termination on Failure to Implement Rectification Programme

If the Company fails to implement any rectification programme in accordance with its terms, the Agreement will, subject to the terms of the Direct Agreement, terminate on the date falling 7 days after the date of notification by the Scottish Ministers to the Company of such failure to implement the rectification programme in accordance with its terms.

41.6 No Event of Default

No Company Default shall be deemed to have occurred and the Scottish Ministers shall have no right to terminate this Agreement to the extent that the acts or omissions of the Company are directly attributable to a Compensation Event, a Relief Event, or a Force Majeure Event.

42. TERMINATION ON SCOTTISH MINISTERS DEFAULT**42.1 Termination Notice**

If a Scottish Ministers Default has occurred and the Company wishes to terminate the Agreement, it must serve a termination notice on the Scottish Ministers within 30 Business Days of becoming aware of the Scottish Ministers Default.

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42.2 Detail in Termination Notice

The termination notice must specify the type of Scottish Ministers Default which has occurred entitling the Company to terminate.

42.3 Termination Date

The Agreement will terminate on the day falling 30 Business Days after the date the Scottish Ministers receive the termination notice, unless the Scottish Ministers rectify the Scottish Ministers Default within 20 Business Days of receipt of the termination notice.

42.4 Compensation on Termination for Scottish Ministers Default

On termination of the Agreement under this Clause 42, the Scottish Ministers shall pay to the Company the Scottish Ministers Default Termination Sum in accordance with Schedule 11 (Termination Compensation).

43. PERSISTENT BREACH**43.1 Persistent Breach Warning Notice**

If during the Service Period a particular breach (other than one for which Performance Deductions could have been made) has continued for more than 20 Business Days or has occurred more than 4 times in any 12 month period then the Scottish Ministers may serve a notice ("Persistent Breach Warning Notice") on the Company:

43.1.1 specifying that it is a formal warning notice;

43.1.2 giving reasonable details of the breach; and

43.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

43.2 Persistent Breach Final Notice

If, following service of a Persistent Breach Warning Notice, the breach specified has continued beyond 20 Business Days or recurred in 3 or more months (discounting any recurrences which occur before the end of a reasonable period for rectification of the particular breach taking into account its cause) within the 6 month period after the date of service, then the Scottish Ministers may serve a Persistent Breach Final Notice on the Company:

43.2.1 specifying that it is a Persistent Breach Final Notice;

43.2.2 stating that the breach specified has been the subject of a warning notice served within the twelve month period prior to the date of service of the Persistent Breach Final Notice; and

43.2.3 stating that if such breach continues for more than 20 Business Days or recurs in 3 or more months (discounting any recurrences which occur before the end of a reasonable period for rectification of the particular breach taking

into account its cause) within the 6 month period after the date of service of the Persistent Breach Final Notice, the Agreement may be terminated.

43.3 Limitation on Service of Persistent Breach Warning Notice

A Persistent Breach Warning Notice or Persistent Breach Final Notice may not be served in respect of any breach which has previously been counted in the making of a separate Persistent Breach Warning Notice or Persistent Breach Final Notice.

43A. PERSISTENT BREACH DURING THE NEW WORKS PERIOD

43A.1 Definitions

For the purposes of this Clause 43A:

“New Works Persistent Breach Notice” means a notice to the Company which:

- (a) specifies that it is a notice being given for the purposes of Clause 43A.4.1;
- (b) states which sub-clause of Clause 43A.4.1 is relevant;
- (c) identifies the obligation that the Scottish Ministers consider the Company is neglecting persistently to comply with; and
- (d) identifies the dates of the relevant number of occasions (determined by reference to Clause 43A.4.1) upon which Penalty Notices have been issued in respect of such failure to perform such obligation in accordance with Clause 43A.3 (Penalty Notices);

“New Works Persistent Breach Plan” means the plan to be issued by the Company pursuant to Clause 43A.4.3; and

“Relevant Obligation” means the exhaustive list of obligations to be performed by the Company during the New Works Period set out in Schedule 19 (Relevant Obligations).

43A.2 Relevant Obligations

43A.2.1 The Company shall notify the Scottish Ministers of any failure to perform a Relevant Obligation as soon as practicable after it becomes aware of that failure but in any case within 5 Business Days of that failure becoming apparent to the Company or, if earlier, of the date upon which the same ought reasonably to have become apparent to the Company.

43A.2.2 If at any time the Scottish Ministers are of the opinion that the Company has failed to perform any Relevant Obligation (whether or not notice has been served pursuant to Clause 43A.2.1) and such failure is capable of remedy, then the Scottish Ministers may serve a notice (a "Remedial Notice") on the Company requiring the Company (subject to any other provision of this Agreement to the contrary, at its own cost and expense) to remedy such failure and any damage resulting from such failure within a reasonable period (the "Remedial Period").

43A.3 Penalty Notices

43A.3.1 If at any time:

- (a) the Scottish Ministers are notified or otherwise become aware that the Company has failed to perform any Relevant Obligation which failure is incapable of remedy;
- (b) the Scottish Ministers serve a Remedial Notice and the Company fails to remedy the failure within the Remedial Period; or
- (c) the Company fails to perform any Relevant Obligation which failure (i) is capable of remedy and (ii) relates to safety, health or security or constitutes an emergency and the Scottish Ministers do not serve a Remedial Notice in respect thereof;

then the Scottish Ministers may (without prejudice to any other right or remedy available to the Scottish Ministers) issue a notice to the Company advising the Company to that effect and detailing which limb of Clause 43A.3.1 is applicable (a "Penalty Notice").

43A.3.2 The Parties acknowledge and agree that if a single act or a single failure to act by or on behalf of the Company results in a breach of more than one Relevant Obligation in respect of which the Scottish Ministers would be entitled to serve a Penalty Notice, the Scottish Ministers shall only be entitled to serve one Penalty Notice in respect of such single act or single failure.

43A.3.3 The Company may, within 20 Business Days of receipt of any Penalty Notice, object to such Penalty Notice. If the Scottish Ministers and the Company are unable to reach agreement on any such matter within 10 Business Days of such objection by the Company, either Party may refer the dispute for resolution under the Dispute Resolution Procedure.

43A.4 New Works Persistent Breach Notice

43A.4.1 If the Scottish Ministers reasonably consider that the Company is failing persistently to comply with any Relevant Obligation and provided that the Scottish Ministers have issued a Penalty Notice in respect of each of such failure:

- (a) on at least 3 separate occasions within the previous 36 months where the Relevant Obligation in question only falls to be performed once per year;
- (b) on at least 3 separate occasions within the previous 18 month period where the Relevant Obligation in question only falls to be performed twice per year;
- (c) on at least 4 separate occasions within the previous 15 month period where the Relevant Obligation in question falls to be performed quarterly;

- (d) on at least 9 separate occasions within the previous 12 month period where the Relevant Obligation in question falls to be performed monthly;
- (e) on at least 9 separate occasions within the previous 6 month period where the Relevant Obligation in question falls to be performed fortnightly;
- (f) on at least 9 separate occasions within the previous 3 month period where the Relevant Obligation falls to be performed weekly;
- (g) on at least 15 separate occasions within the previous month (provided that each such occasion relates to a failure occurring on a different day within such month) where the Relevant Obligation falls to be performed on a daily or continuous basis; or
- (h) where the frequency of performance of an obligation falls between any categories listed in Clause 43A.4.1(a) to (g), on the number of occasions and within the period determined in accordance with Clause 43A.4.2;

then the Scottish Ministers may (without prejudice to any other right or remedy available to the Scottish Ministers under this Agreement) issue a New Works Persistent Breach Notice in respect of such persistent failure.

43A.4.2 Where the frequency of performance of a Relevant Obligation falls between the categories listed in Clause 43A.4.1(a) to (g), then for the purposes of Clause 43A.4.1(h) the number of occasions upon which Penalty Notices shall have been issued and the period during which such Penalty Notices shall have been issued in respect of such Relevant Obligation in order for the Scottish Ministers to issue a New Works Persistent Breach Notice shall each be determined on a pro rata basis (rounded up to the nearest whole number) by reference to frequencies of performance, the numbers of Penalty Notices and periods referred to in Clause 43A.4.1(a) to (g) and the frequency with which the Relevant Obligation falls to be performed.

43A.4.3 Within 10 Business Days of receipt of a New Works Persistent Breach Notice the Company shall issue to the Scottish Ministers a New Works Persistent Breach Plan which shall contain a programme of action which will, if performed, cure or remedy or otherwise resolve (to the reasonable satisfaction of the Scottish Ministers) the relevant breach including *inter alia*:

- (a) an undertaking to the Scottish Ministers that the Company will use reasonable endeavours to ensure that such non-compliance will not subsequently recur;
- (b) the steps which the Company will take to ensure that the non-compliance will not subsequently recur; and
- (c) where the New Works Persistent Breach Notice relates to breach of a Relevant Obligation which is capable of remedy, a programme for the Company to remedy such breach within a reasonable time including the latest date by which it is intended that such breach be remedied.

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43A.4.4 Within 10 Business Days of receipt of a New Works Persistent Breach Plan, the Scottish Ministers shall notify the Company whether or not they consider the New Works Persistent Breach Plan to be reasonable provided always that if such notification is not given the New Works Persistent Breach Plan shall be deemed to be agreed.

43A.4.5 Where the Scottish Ministers notify the Company that they do not consider the New Works Persistent Breach Plan to be reasonable then the Parties shall use their reasonable endeavours to agree any necessary amendments to the New Works Persistent Breach Plan. In the absence of agreement within 5 Business Days of the Scottish Ministers' notification under Clause 43A.4.4 then either Party may refer the matter for resolution under the Dispute Resolution Procedure.

43A.4.6 The Company shall implement any New Works Persistent Breach Plan agreed or determined in accordance with Clause 43A.4.5.

43A.5 Replacement of New Works Contractor

43A.5.1 Where the Company fails to implement a New Works Persistent Breach Plan in accordance with its terms the Scottish Ministers shall be entitled to serve a notice (a "New Works Persistent Breach Warning Notice") on the Company.

43A.5.2 If the breach which was the subject of the New Works Persistent Breach Plan continues for more than 3 months or recurs in 3 or more months within the 6 month period after the date of the New Works Persistent Breach Warning Notice, then the Scottish Ministers shall be entitled by written notice (a "Substitute New Works Contractor Notice") to request that the Company use all reasonable endeavours to procure a replacement New Works Contractor in accordance with the provisions of Clause 18 (Subcontracting Operations and Direct Agreements) and the provisions of Clause 43A.5.4 shall apply.

43A.5.3 If the Company is unable to procure a replacement New Works Contractor within 9 months of the date of the Substitute New Works Contractor Notice (or such other period as the Parties may agree from time to time) a Company Default shall be deemed to have occurred.

43A.5.4 Following the appointment of a replacement New Works Contractor pursuant to a Substitute New Works Contractor Notice:

- (a) any accrued Remedial Notices, Penalty Notices, New Works Persistent Breach Notices and New Works Persistent Breach Warning Notices issued or accrued prior to the date of the new New Works Agreement shall be deemed to have been cancelled for the purposes of establishing whether a subsequent Company Default has occurred; and
- (b) the provisions of Clauses 43A.1 to 43A.4.6 and 43A.5.5 shall apply *mutatis mutandis*.

43A.5.5 A New Works Persistent Breach Notice or New Works Persistent Breach Warning Notice may not be served in respect of any breach which has previously been counted in the making of a New Works Persistent Breach Notice or New Works Persistent Breach Warning Notice.

44. FORCE MAJEURE

44.1 No Claims

No Party shall be entitled to bring a claim for a breach of obligations under the Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses 44.5 or 44.7), the Scottish Ministers shall not be entitled to terminate this Agreement for a Company Default if such Company Default arises from a Force Majeure Event.

44.2 Performance Deductions

Nothing in Clause 44.1 above shall affect any entitlement to make Performance Deductions or any Performance Deductions made in the period during which the Force Majeure Event is subsisting.

44.3 Notify

On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

44.4 Parties to Discuss

As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the Agreement.

44.5 Ability to Terminate

If no such terms are agreed on or before the date falling 85 Business Days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this Agreement for a period of more than 130 Business Days, then, subject to Clause 44.7, either Party may terminate the Agreement by giving 20 Business Days' written notice to the other Party.

44.6 Consequences of Termination

If the Agreement is terminated under Clause 44.5 (Ability to Terminate) or Clause 44.7:

44.6.1 compensation shall be payable by the Scottish Ministers in accordance with Part 3 of Schedule 11 (Termination Compensation); and

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44.6.2 the Scottish Ministers may require the Company to transfer its title, interest and rights in and to any Assets to the Scottish Ministers.

44.7 Company Notice of Termination

If the Company gives notice to the Scottish Ministers under Clause 44.5 that it wishes to terminate the Agreement, then the Scottish Ministers have the option either to accept such notice or to respond in writing on or before the date falling 7 Business Days after the date of its receipt stating that they require the Agreement to continue. If the Scottish Ministers give the Company such notice, then:

44.7.1 the Scottish Ministers shall pay to the Company the Unitary Charge from the day after the date on which the Agreement would have terminated under Clause 44.5 as if the Operations were being fully provided; and

44.7.2 the Agreement will not terminate until expiry of written notice (of at least 30 days) from the Scottish Ministers to the Company that they wish the Agreement to terminate.

44.8 Mitigation

The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the Company shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with Good Industry Practice to overcome or minimise the consequences of the Force Majeure Event.

44.9 Cessation of Force Majeure Event

The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification the Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

45. CORRUPT GIFTS AND FRAUD**45.1 Company Warranty**

The Company warrants that in entering the Agreement it has not committed any Prohibited Act.

45.2 Powers of the Scottish Ministers

If the Company or any Sub-Contractor (or anyone employed by or acting on behalf of any of them) or any of its or their agents or shareholders commits any Prohibited Act, then the Scottish Ministers shall be entitled to act in accordance with Clauses 45.3 to 45.7 below.

45.3 Termination Following Action of Company

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If a Prohibited Act is committed by the Company or by an employee not acting independently of the Company, then the Scottish Ministers may terminate the Agreement by giving notice to the Company.

45.4 Termination Following Action of Company's Employee Acting Independently

If the Prohibited Act is committed by an employee of the Company acting independently of the Company, then the Scottish Ministers may give notice to the Company of termination and the Agreement will terminate, unless within 20 Business Days of receipt of such notice the Company terminates the employee's employment and (if necessary) procures the performance of such part of the Operations by another person.

45.5 Termination Following Action of Sub-Contractor

If the Prohibited Act is committed by a Sub-Contractor or by an employee of that Sub-Contractor not acting independently of that Sub-Contractor, then the Scottish Ministers may give notice to the Company of termination and the Agreement will terminate, unless within 30 days of receipt of such notice the Company terminates the relevant Project Document and procures the performance of such part of the Operations by another person.

45.6 Termination Following Action of Sub-Contractor's Employee Acting Independently

If the Prohibited Act is committed by an employee of a Sub-Contractor acting independently of that Sub-Contractor, then the Scottish Ministers may give notice to the Company of termination and the Agreement will terminate, unless within 20 Business Days of receipt of such notice the Sub-Contractor terminates the employee's employment and (if necessary) procures the performance of such part of the Operations by another person.

45.7 Termination Following Action of Third Party

If the Prohibited Act is committed by any other person specified in Clause 45.2 above (but excluding those persons specified in Clauses 45.3 to 45.6 above), then the Scottish Ministers may give notice to the Company of termination and the Agreement will terminate unless within 20 Business Days of receipt of such notice the Company procures the termination of such person's employment and of the appointment of their employer (where not employed by the Company or the Sub-Contractors) and (if necessary) procures the performance of such part of the Operations by another person.

45.8 Termination Notice

Any notice of termination under this Clause shall specify:

- 45.8.1 the nature of the Prohibited Act;
- 45.8.2 the identity of the party whom the Scottish Ministers believe has committed the Prohibited Act;
- 45.8.3 the date on which the Agreement will terminate, in accordance with the applicable provisions of this Clause; and

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45.8.4 the Scottish Ministers' chosen option under Clause 45.9.

45.9 Compensation on Termination for Corrupt Gifts and Fraud

45.9.1 On termination of the Contract in accordance with this Clause 45, then the Scottish Ministers shall pay the Company an amount equal to the Revised Senior Debt Termination Amount.

45.9.2 Such amount shall be determined and paid in accordance with Schedule 11 (Termination Compensation).

If termination occurs then the Scottish Ministers may require the Company to transfer its rights, title and interest in and to the Assets to the Scottish Ministers.

46. VOLUNTARY TERMINATION BY THE SCOTTISH MINISTERS**46.1 Scottish Ministers Ability to Terminate**

The Scottish Ministers may terminate the Agreement at any time before its Expiry Date by complying with their obligations under Clauses 46.2 to 46.4 below.

46.2 Notice of Termination

If the Scottish Ministers wish to terminate the Agreement under this Clause, they must give notice to the Company stating:

46.2.1 that the Scottish Ministers are terminating the Agreement under this Clause 46;

46.2.2 that the Agreement will terminate on the date specified in the notice, which must be a minimum of 20 Business Days after the date of receipt of the notice; and

46.2.3 whether the Scottish Ministers have chosen to exercise their option under Clause 46.3 below.

46.3 Assets

On termination, the Scottish Ministers shall have the option to require the Company to transfer its right, title and interest in and to the Assets to the Scottish Ministers or as directed by the Scottish Ministers.

46.4 Termination Date

The Agreement will terminate on the date specified in the notice referred to in Clause 46.2 above.

46.5 Compensation on Voluntary Termination

On termination under Clause 46.4 above, the Scottish Ministers shall pay the Company an amount equal to the amount payable under Clause 42.4 in accordance with Schedule 11 (Termination Compensation).

47. CONSEQUENCES OF TERMINATION**47.1 Handover**

Without prejudice to any other provision of this Agreement, including without limitation the provisions of Schedule 4 (O&M Works Requirements) on the termination of this Agreement (irrespective of the cause) the Company shall:

47.1.1 within 20 Business Days of the date of termination remove from the Sites all Plant not then incorporated in the New Works, materials, Constructional Plant, temporary buildings, vehicles, and other property belonging to the Company, its agents, contractors (including the New Works Contractor and the O&M Works Contractor) and sub-contractors and over which they have power of disposal, failing which the Scottish Ministers shall be entitled to remove and sell any such property subject to paying to the Company any sale proceeds less all costs and expenses reasonably incurred by the Scottish Ministers in such removal and sale;

47.1.2 thereafter immediately vacate the Sites (insofar as occupied by the Company or its contractors or sub-contractors at the date of termination) and leave the Sites (to the extent that the Company is entitled to occupy them at the date of termination):

- (a) at the Expiry Date in a condition consistent in all respects with performance of the Company's obligations under this Agreement relating thereto; or
- (b) in the event of termination of this Agreement prior to the Expiry Date, in a condition consistent in all respects with Good Industry Practice; and

47.1.3 deliver to the Scottish Ministers:

- (a) all outstanding records, drawings and information which the Company is obliged to deliver to the Scottish Ministers from time to time under this Agreement up to the date of termination including without limitation (to the extent that the New Works have been completed) "as built" drawings of all New Works carried out in the performance of the Operations and all O&M Manuals, only in so far as the Company has or can reasonably obtain the same;
- (b) keys to all traffic sign housings held by the Company; and
- (c) lifting keys for all types of chamber covers held by the Company.

For the avoidance of any doubt, the Company shall not be required to perform the Operations after the date of termination of this Agreement.

47.2 Legal Effect of Termination

On termination of this Agreement (irrespective of the cause) the obligations of the Company and the Scottish Ministers hereunder shall cease, other than under Clauses 30.6 (Late Payments), 50 (Indemnity), 58 (Confidentiality), 63 (Intellectual

Property Rights) and Schedule 11 (Termination Compensation) and any other Clauses which expressly or necessarily provide for continuing obligations or which are required to give effect to such termination or the consequences of such termination, and in any case subject to the accrued rights and liabilities (including the right to refer disputes to the Dispute Resolution Procedure) of the Scottish Ministers and the Company in respect of any antecedent breaches as at the date of termination.

47.3 Assignment of Agreements

To the extent required by the Scottish Ministers by notice given not later than 10 Business Days after the date of termination, the Company shall forthwith assign, or procure the assignment of any of the Company's interests, in any of the following agreements to the Scottish Ministers:

- 47.3.1 any agreement for the supply of any goods or materials and/or for the execution of any work or provision of any services in connection with performance of the Operations which the Company may have entered into insofar as such agreement is capable of assignment; or
- 47.3.2 any warranties or guarantees in respect of any works carried out by the Company as part of the Operations insofar as such warranties or guarantees are capable of assignment.

This Clause 47.3 shall not apply in respect of the New Works Agreement and the O&M Works Agreement.

48. SURVEYS ON EXPIRY

48.1 Final Survey

30 months prior to the Expiry Date, the Scottish Ministers shall be entitled to carry out or procure the carrying out of a final survey of the Handback Assets to assess whether they have been and are being maintained by the Company in accordance with the Handback Requirements. The final survey shall be carried out by a suitably qualified and experienced surveyor employed jointly by the Parties.

48.1A Seasonal Survey

Where the final survey includes any inspection of mature trees, areas of tree and shrub planting, areas of grassland or areas of habitat creation the Parties shall have regard to the provisions of paragraph 2.4.3 of Part 3 of Schedule 4 (O&M Works Requirements).

48.2 Notification of Survey

The Scottish Ministers shall notify the Company in writing a minimum of 5 Business Days in advance of the date they wish to carry out the final survey and shall afford the Company reasonable opportunity to attend. The Scottish Ministers shall consider in good faith any reasonable request by the Company for the final survey to be carried out on a different date if such request is made at least 2 Business Days prior to the notified date and the Company (acting reasonably) is able to demonstrate that

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carrying out the final survey on the notified date would materially prejudice the Company's ability to provide the O&M Works.

48.3 Minimise Disruption

When carrying out the final survey, the Scottish Ministers shall use reasonable endeavours to minimise any disruption caused to the provision of the O&M Works by the Company. The Company shall afford the Scottish Ministers (free of charge) any reasonable assistance required by the Scottish Ministers during the carrying out of the final survey. The cost of the final survey shall be borne by the Scottish Ministers.

48.4 Results of Survey

If the final survey shows that the Company has not complied with or is not complying with the Handback Requirements, the Scottish Ministers shall:

48.4.1 issue a notice to the Company containing the information set out in paragraph 2.4.1 of Part 3 of Schedule 4 (O&M Works Requirements); and

48.4.2 recover the cost of the survey from the Company by means of a withdrawal from the Retention Fund Account or a deduction from the next Unitary Charge.

48.5 Retention Fund

If the Company has been notified under Clause 48.4.1 that Renewal Works are required and those Renewal Works have not been carried out to the Scottish Ministers' reasonable satisfaction, then 24 months prior to the Expiry Date the Scottish Ministers shall deduct the Required Amount from the next following instalment (or, where such deduction is insufficient, from the next instalments as necessary) of Unitary Charge and pay such amount into an interest bearing account (the "Retention Fund Account").

48.6 Handback Certificate

When the Company is of the opinion that it has complied with all the Handback Requirements and carried out the Renewal Works it shall issue a certificate to the Scottish Ministers stating that it considers that the Handback Requirements have been met (a "Handback Certificate"). The Company shall afford the Scottish Ministers such reasonable opportunities as they may require to confirm the validity of the Handback Certificate in accordance with paragraph 2.5 of Part 3 of Schedule 4.

48.7 Costs

If and to the extent that the Company carries out the Renewal Works to the Scottish Ministers' reasonable satisfaction within the period specified in the revised Renewal Programme produced in accordance with paragraph 2.4.2 of Part 3 of Schedule 4, the Scottish Ministers shall reimburse the Company's costs of so doing no later than 10 Business Days after the date of agreement of the Handback Certificate by withdrawing amounts from the Retention Fund Account. If the amount in the Retention Fund Account is insufficient to cover the Company's costs, the Company shall bear the balance of its costs itself.

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48.8 Failure to Carry Out Work

If and to the extent that the Company fails to carry out the Renewal Works to the Scottish Ministers' reasonable satisfaction within the period specified in the revised Renewal Programme referred to in Clause 48.7, the Scottish Ministers shall be entitled to carry out themselves, or procure, the Renewal Works at the Company's expense and shall make withdrawals from the Retention Fund Account to pay for such Renewal Works or, where there are insufficient funds in the Retention Fund Account, make deductions from the Unitary Charge to pay for such.

48.9 Balance of Fund

If:

48.9.1 the Renewal Works identified by the Scottish Ministers have been carried out to the Scottish Ministers' reasonable satisfaction;

48.9.2 all such work has been paid for by the Company or, where the Scottish Ministers have carried out or procured the carrying out of the works pursuant to Clause 48.8, by the Scottish Ministers; and

48.9.3 no termination notice given in accordance with this Agreement is outstanding,

then the Scottish Ministers shall pay any credit balance on the Retention Fund Account to the Company as soon as practicable and in any event within 15 Business Days.

49. TRANSITION TO ANOTHER COMPANY**49.1 Duty to Co-operate**

During the final 12 months of the Contract Period (where this expires by effluxion of time) or during the period of any notice of termination of this Agreement or termination of any of the Operations, and in any case for a period of 12 months thereafter, the Company shall co-operate fully with the transfer of responsibility for the Operations (or any of the Operations) to any new contractor of such operations the same or similar to the Operations ("New Company"), and for the purposes of this Clause 49 the meaning of the term "co-operate" shall include:

49.1.1 liaising with the Scottish Ministers and/or any New Company, and providing reasonable and timely assistance and advice concerning the Operations and their transfer to the Scottish Ministers or to such New Company;

49.1.2 allowing any such New Company access (at reasonable times and on reasonable notice) to the Project Roads but not so as to interfere with or impede the provision of the Operations;

49.1.3 providing to the Scottish Ministers and/or to any New Company, all and any information concerning the Sites and the Operations which is required for the efficient transfer of responsibility for their performance; and

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49.1.4 making its sub-contractors like bound by the provision of Clauses 49.1 and 49.2 with a third party right of direct enforcement by the Scottish Ministers.

49.2 Transfer of Responsibility

The Company shall use all reasonable endeavours so as to facilitate the smooth transfer of responsibility for the Operations to a New Company or to the Scottish Ministers, as the case may be, and the Company shall take no action at any time during the Contract Period or thereafter which is calculated or intended, directly or indirectly, to prejudice or frustrate or make more difficult such transfer.

49.3 Minimise Disruption

The Company shall take all reasonable steps and shall co-operate fully with the Scottish Ministers and any New Company so that any continuation in the Operations is achieved with the minimum of disruption and so as to prevent or mitigate any inconvenience or risk to health and safety of the employees of the Scottish Ministers and members of the public.

49.4 Treatment of Assets at Expiry Date

49.4.1 On or before a date falling no later than 12 months prior to the Expiry Date the Scottish Ministers shall notify the Company in writing whether they wish to retender the provision of the Operations.

49.4.2 If the Scottish Ministers wish to retender the provision of the Operations then:

- (a) the Company shall do all necessary acts (including entering into any contracts) to ensure that the successor contractor obtains all of its rights, title and interest in and to the Assets with effect on and from the Expiry Date; and
- (b) the Scottish Ministers will bear all costs of any retendering of the Agreement on expiry.

49.4.3 If the Scottish Ministers do not wish to retender the Operations then the Assets shall transfer to the Scottish Ministers on the Expiry Date and the Company shall do any necessary acts (including entering into any contracts) to ensure that the Scottish Ministers obtains all of their rights, title and interest in the Assets with effect on and from the Expiry Date.

49.5 Accrued Rights

The termination of this Agreement howsoever arising is without prejudice to the rights, duties and liabilities of either Party accrued prior to the events giving rise to termination. The Clauses of this Agreement which expressly or impliedly have effect after termination will continue to be enforceable notwithstanding termination.

50. INDEMNITY**50.1 Company's Indemnity**

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The Company shall, subject to Clause 50.2, be responsible for, and shall release and indemnify the Scottish Ministers, their employees, agents and contractors on demand from and against, all liability for:

- 50.1.1 death or personal injury;
- 50.1.2 loss of or damage to property under the exception of the Project Roads (including property belonging to the Scottish Ministers or for which they are responsible) ("Scottish Ministers Property");
- 50.1.3 breach of statutory duty which may arise out of or in consequence of a breach by the Company of its obligations under this Agreement to the extent that there are no other remedies available to the Scottish Ministers under this Agreement; and
- 50.1.4 actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis),

which (save in respect of Clause 50.1.3) may arise out of, or in consequence of, the Operations or maintenance of any Assets or the performance or non-performance by the Company of its obligations under this Agreement or the presence on the Scottish Ministers' property of the Company, a Sub-Contractor of the Company, their employees or agents.

50.2 Company Not Responsible under Clause 50.1

The Company shall not be responsible or be obliged to indemnify the Scottish Ministers under Clause 50.1 for:

- 50.2.1 any of the matters referred to in Clauses 50.1.1 to 50.1.4 above which arises as a direct result of the Company acting on the instruction of the Scottish Ministers;
- 50.2.2 any injury, loss, damage, cost and expense caused by the negligence or wilful misconduct of the Scottish Ministers, their employees, agents or contractors or by the breach by the Scottish Ministers of their obligations under this Agreement; or
- 50.2.3 any claims made under:
 - (a) Clause 50.1.2 in excess of £50 million (Indexed); or
 - (b) Clause 50.1.4 in excess of £50 million (Indexed).

50.3 No Limitation

An indemnity by either Party under any provision of this Agreement shall be without limitation to any indemnity by that Party under any other provision of this Agreement.

50.4 Notification of Claims

Where either Party (the "Indemnified Party") wishes to make a claim under this Agreement against the other (the "Indemnifying Party"), the Indemnified Party shall

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give notice of the relevant claim as soon as reasonably practicable setting out full particulars of the claim.

50.5 Conduct of Claims

The Indemnifying Party may at its own expense and with the assistance and co-operation of the Indemnified Party have the conduct of the claim including its settlement and the Indemnified Party shall not, unless the Indemnifying Party has failed to resolve the claim within a reasonable period, take any action to settle or prosecute the claim.

50.6 Costs of Claims

The Indemnifying Party shall, if it wishes to have conduct of any claim, give reasonable security to the Indemnified Party for any cost or liability arising out of the conduct of the claim by the Indemnifying Party.

50.7 Mitigation of Losses

Each Party shall take all reasonable steps to mitigate any losses which are the subject matter of an indemnity under this Agreement.

50.8 Human Rights

50.8.1 The Scottish Ministers and the Company shall at all times comply, and the Company shall procure the compliance of the Company Related Parties respectively, with the requirements of the Human Rights Act 1998 (“the 1998 Act”) to the extent applicable to the Party in question and (subject to Clause 37 (Qualifying Change in Law) with any subsequent amendment or re-enactment thereof and all secondary legislation made under the 1998 Act or any subsequent amendment thereto or re-enactment thereof.

50.8.2 Each Party (the “first party”) shall indemnify the other against all losses, costs, expenses, damages, liabilities, demands, claims, actions or proceedings which may be incurred arising out of a breach of this Clause by the first party.

51. INSURANCE**51.1 Requirement to Maintain Prior to Services Commencement**

The Company shall, prior to the Full Services Commencement Date, take out and maintain or procure the maintenance of: (i) the insurances described in Part 1 of Schedule 10 (Required Insurances); and (ii) any other insurances as may be required by law. These insurances must be effective in each case not later than the date on which the relevant risk commences. The Company shall provide to the Scottish Ministers the Insurance Broker’s Letter in respect of such insurances within 5 Business Days of the requirement to take out such insurances coming into effect.

51.2 Requirement to Maintain during Service Period

The Company shall during the Service Period take out and maintain or procure the maintenance of the insurances described in Part 2 of Schedule 10 (Required

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Insurances) and any other insurances as may be required by law. The Company shall provide to the Scottish Ministers the Insurance Broker's Letter in respect of such insurances within 5 Business Days of the requirement to take out such insurances coming into effect.

51.3 Obligation on Parties

No Party shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured or additional insured person.

51.4 Nature of Insurances

With the exception of any insurances required by law the insurances referred to in Clauses 51.1 and 51.2 shall:

- 51.4.1 subject to Clause 51.5 below, name the Company as co-insured with any other party maintaining the insurance;
- 51.4.2 provide for non-vitiation protection in respect of any claim made by the Scottish Ministers as co-insured in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);
- 51.4.3 contain a clause waiving the insurers' subrogation rights against the Scottish Ministers, their employees and agents in accordance with Endorsement 2 in Part 3 of Schedule 10 (Required Insurances);
- 51.4.4 provide for 20 Business Days prior written notice of their cancellation, non-renewal or amendment to be given to the Scottish Ministers in accordance with Endorsement 1 in Part 3 of Schedule 10 (Required Insurances); and
- 51.4.5 in respect of the Physical Damage Policies provide for payment of any proceeds received by the Company to be applied in accordance with Clause 55 (Reinstatement).

51.5 Co-Insured

Wherever possible, the insurances referred to in Schedule 10 (Required Insurances) which are stated to include the Scottish Ministers as co-insured shall name the Scottish Ministers as a co-insured for their separate interest.

51.6 Evidence of Policies

The Company shall provide to the Scottish Ministers:

- (a) copies on request of all insurance policies referred to in Clauses 51.1 and 51.2 (together with any other information reasonably requested by the Scottish Ministers relating to such insurance policies) and the Scottish Ministers shall be entitled to inspect them during ordinary business hours; and

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- (b) evidence that the premiums payable under all insurance policies have been paid and that the insurances are in full force and effect in accordance with the requirements of this Clause 51 and Schedule 10 (Required Insurances).

51.7 Renewal Certificates

Renewal certificates in relation to the insurances referred to in Clauses 51.1 and 51.2 shall be obtained as and when necessary and copies (certified in a manner acceptable to the Scottish Ministers) shall be forwarded to the Scottish Ministers as soon as possible but in any event on or before the renewal date.

51.8 Breach

If the Company is in breach of Clauses 51.1 and 51.2 above, the Scottish Ministers may pay any premiums required to keep such insurance in force or themselves procure such insurance and may in either case recover such amounts from the Company on written demand.

51.9 Notification of Claims

51.9.1 The Company shall give the Scottish Ministers notification within 20 Business Days after any claim in excess of XXX on any of the insurance policies referred to in this Clause accompanied by full details of the incident giving rise to the claim.

51.9.2 At the expiry of every 12 month period following Financial Close the Company shall give the Scottish Ministers notification of any claim on any of the insurance policies referred to in this clause which has arisen within the previous 12 month period.

51.10 Limit of Liability

Neither failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Company of its liabilities and obligations under this Agreement.

51.11 Premiums

The insurance premiums in respects of the insurances referred to in Clauses 51.1 and 51.2 shall be the responsibility of the Company.

51.12 Scottish Ministers Approval

The insurance policies referred to in this Clause shall be effected with insurers approved by the Scottish Ministers, such approval not to be unreasonably withheld or delayed.

51.13 Risk Management

With effect from the Date of this Agreement, the Scottish Ministers and the Company shall each designate or appoint an insurance and risk manager and notify details of the same to the other Party. Such persons shall:

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51.13.1 be responsible for dealing with all risk management matters on behalf of their appointing or designating Party including (without limitation) ensuring compliance by that Party with this Clause 51;

51.13.2 advise and report to its appointing or designating Party on such matters; and

51.13.3 ensure that any report provided or survey conducted by any insurer of any relevant procedures in relation to the Project is disclosed to the Parties.

52. INSURANCE REVIEW PROCEDURE**52.1 Purpose**

This procedure shall be used to determine whether the Scottish Ministers shall bear any increase or benefits from any decrease in Relevant Insurance costs.

52.2 Joint Insurance Cost Report

The Company's insurance broker shall prepare a report on behalf of both the Company and the Scottish Ministers (the "Joint Insurance Cost Report"). The Report is to be prepared at the Company's expense, and should, as a minimum, contain the following information or the relevant Insurance Review Period:

52.2.1 A full breakdown of the Actual Relevant Insurance Cost;

52.2.2 A full breakdown of the Base Relevant Insurance Cost;

52.2.3 A spreadsheet (the "Insurance Summary Sheet") detailing separately:

- (a) the sum(s) insured / limit of indemnity (i.e. rateable factor) for each of the Relevant Insurances;
- (b) the premium rate for each of the Relevant Insurances;
- (c) the net premium paid (or to be paid) for each of the Relevant Insurances (i.e. excluding both insurance premium tax and brokers fees and commissions);
- (d) the deductible(s) for each Relevant Insurance;
- (e) details of any claims (paid or reserved) (including incident date, type and quantum) in excess of XXX, being the amount stated in Clause 51.9;

52.2.4 An assessment and quantification of each Project Insurance Change together with the reasons therefore;

52.2.5 Full details of any Portfolio Cost Saving;

52.2.6 Any other reasons that the Company believes may have caused a change (by way of increase or decrease relative to the Base Relevant Insurance Costs) in the Actual Relevant Insurance Cost;

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- 52.2.7 The opinion of the Company's insurance broker as to the reasons why the Actual Relevant Insurance Cost has varied from the Base Relevant Insurance Cost, specifying the impact of each of the factors and quantifying the amount attributable to each factor specified above;
- 52.2.8 The calculation of the Insurance Cost Differential and any Exceptional Cost or Exceptional Saving arising from this calculation;
- 52.2.9 Evidence satisfactory to the Scottish Ministers (acting reasonably) of any changes to circumstances generally prevailing in the Relevant Insurance Market that are claimed to account for the Insurance Cost Differential; and
- 52.2.10 Details of movements in the CBS Private Capital non marine index plus, if available from other appropriate sources, details of changes in insurance cost across the PFI market as a whole.

52.3 Delivery

The Company shall procure that the Broker, no later than the date which is 10 Business Days after the Insurance Review Date, delivers to the Scottish Ministers, at the same time as it delivers to the Company, at least 2 copies of the Joint Insurance Cost Report. At the same time the Company should send a copy of the Insurance Summary Sheet to HM Treasury private finance unit or its nominee. Following receipt of the Joint Insurance Cost Report, the Scottish Ministers shall notify the Company in writing within 15 Business Days whether or not they accept the Joint Insurance Cost Report including full details of any disagreement. If the Scottish Ministers do not provide such notification and/or details of any disagreement to the Company within 15 Business Days, the Scottish Ministers shall be deemed to have accepted the Joint Insurance Cost Report. If the Scottish Ministers disagree with any item in the Joint Insurance Cost Report, the Parties shall use their respective reasonable endeavours acting in good faith to agree the contents of the Joint Insurance Cost Report. If the Parties fail to agree the contents of the Joint Insurance Cost Report within 35 Business Days from the date it was delivered to the Scottish Ministers, the matter shall be resolved pursuant to Schedule 7 (Dispute Resolution Procedure), provided always that references in Schedule 7 (Dispute Resolution Procedure) to an expert shall be construed as references to an independent insurance expert agreed by the Parties or, in the absence of agreement, appointed by the President for the time being of the Chartered Institute of Arbitrators.

52.4 Report Availability

The Scottish Ministers may make the Joint Insurance Cost Report available to any of their or HM Treasury's agents or advisers or other body or bodies nominated by HM Treasury for insurance cost verification, benchmarking or similar purpose.

53. SHARING OF EXCEPTIONAL COST AND EXCEPTIONAL SAVING**53.1 Scottish Ministers' Payments**

If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Cost, the Scottish Ministers shall within 20 Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Company equal to XXX of the Exceptional Cost.

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53.2 Company's Payments

If, following the completion of the Insurance Review Procedure, it is agreed or determined that there is an Exceptional Saving, the Company shall within 20 Business Days of completion of the Insurance Review Procedure make a one-off lump-sum payment to the Scottish Ministers equal to XXX of the Exceptional Saving.

53.3 No Exceptional Cost or Saving

Following the completion of the Insurance Review Procedure, if it is agreed or determined that there is neither an Exceptional Cost nor an Exceptional Saving, any Insurance Cost Differential shall be borne by or benefit the Company.

54. INSURANCE COST INDEX

If at any time an Insurance Cost Index is published and intended for use in PFI contracts of a similar nature to this Agreement, the Parties shall meet with a view to agreeing (a) its application to the Project, taking into account any relevant guidance issued by HM Treasury and (b) how a Portfolio Cost Saving may be accounted for when the index is in use.

55. REINSTATEMENT**55.1 Application of Proceeds**

All insurance proceeds received under any of the Physical Damage Policies shall be applied to repair, reinstate and replace each part or parts of the Assets in respect of which the proceeds were received.

55.2 Joint Account

All insurance proceeds paid under any Physical Damage Policy in respect of a single event (or a series of related events) in an amount in excess of XXX (Indexed) shall be paid into the Joint Insurance Account.

55.3 Reinstatement Obligations

Where a claim is made or proceeds of insurance are received or are receivable under any Physical Damage Policy in respect of a single event (or a series of related events) (the "Relevant Incident") in an amount in excess of XXX (Indexed):

55.3.1 the Company shall deliver as soon as practicable and in any event within 20 Business Days after the making of the claim a plan prepared by the Company for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace (the "Reinstatement Plan") the assets which are the subject of the relevant claim or claims in accordance with Clause 55.4 (Works Carried Out) below. The Reinstatement Plan shall set out:

- (a) if not the New Works Contractor, the identity of the person proposed to effect the Reinstatement Works, which shall be subject to the prior written approval of the Scottish Ministers; and

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- (b) the proposed terms and timetable upon which the Reinstatement Works are to be effected (including the date that the Project will become fully operational), the final terms of which shall be subject to the prior written approval of the Scottish Ministers, which approval shall not be unreasonably delayed;
- 55.3.2 provided that the Scottish Ministers are satisfied that the Reinstatement Plan will enable the Company to comply with Clause 55.4 below within a reasonable timescale:
- (a) the Reinstatement Plan will be adopted;
- (b) the Company shall enter into contractual arrangements to effect the Reinstatement Works with the person identified in the Reinstatement Plan approved by the Scottish Ministers;
- (c) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Joint Insurance Account (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Company from the Joint Insurance Account as required to enable it to make payments in accordance with the terms of the contractual arrangements referred to in Clause 55.3.2(b) above, and to meet any other reasonable costs and expenses of the Company for the sole purpose of funding the Reinstatement Works and the Parties shall operate the signatory requirements of the Joint Insurance Account in order to give effect to such payments. Following the earlier to occur of the Termination Date and the Expiry Date, the Scottish Ministers may withdraw amounts standing to the credit of the Joint Insurance Account for the purposes of funding any Reinstatement Works;
- (d) the Scottish Ministers agree and undertake that, subject to compliance by the Company with its obligations under this Clause, and provided that the Company procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in Clause 55.3.2(b), they shall not exercise any right which they might otherwise have to terminate this Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;
- (e) the Scottish Ministers undertake to use reasonable endeavours to assist the Company in the carrying out of the Reinstatement Plan; and
- (f) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Scottish Ministers and in accordance with Clause 55.4 (Works Carried Out) below the Scottish Ministers shall permit withdrawal by the Company of any Relevant Proceeds then held in the Joint Insurance Account that have not been paid under Clause 55.3.2(c) above, in respect of the Relevant Incident, together with any interest accrued; and

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- (g) subject to the provisions of Clause 50 (Indemnity) the Company shall be solely responsible for the payment of any deficiency.

55.4 Works Carried Out

55.4.1 Where insurance proceeds are to be used, in accordance with this Agreement, to repair, reinstate or replace any Asset, the Company shall carry out the work in accordance with the Scottish Ministers' Requirements so that on completion of the work, the provisions of this Agreement are complied with.

56. UNINSURABLE RISKS

Nothing in Clause 51 shall oblige the Company to take out insurance in respect of a risk which is Uninsurable save where the predominant cause of the risk being Uninsurable is any act(s) or omission(s) of the Company or a Company Related Party.

56.1 Risks Become Uninsurable

If a risk usually covered by contractor's 'all risks' insurance, property damage insurance, third party liability insurance, delay in start up and business interruption insurance (but not loss of profits) or statutory insurances becomes Uninsurable then:

56.1.1 the Company shall notify the Scottish Ministers of any risk becoming Uninsurable within 5 Business Days of becoming aware of the same and in any event at least 5 Business Days before expiry or cancellation of any existing insurance in respect of that risk; and

56.1.2 if both Parties agree, or it is determined in accordance with Schedule 7 (Dispute Resolution Procedure) that the risk is Uninsurable and that:

- (a) the risk being Uninsurable is not caused by the actions of the Company or a Sub-Contractor; and
- (b) the Company has demonstrated to the Scottish Ministers that the Company and a prudent board of directors of a company operating the same or substantially similar PFI/PPP businesses in the United Kingdom to that operated by the Company would in similar circumstances (in the absence of the type of relief envisaged by this Clause) be acting reasonably and in the best interests of the company if they resolved to cease to operate such businesses as a result of that risk becoming Uninsurable, taking into account inter alia (and without limitation) the likelihood of the Uninsurable risk occurring (if it has not already occurred), the financial consequences for such company if such Uninsurable risk did occur (or has occurred) and other mitigants against such consequences which may be available to such company;

the Parties shall meet to discuss the means by which the risk should be managed or shared (including considering the issue of self-insurance by either Party).

56.2 Management of Risk

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If the requirements of Clause 56.1 are satisfied, but the Parties cannot agree as to how to manage or share the risk, then:

- 56.2.1 in respect of such third party liability insurance only the Scottish Ministers shall (at the Scottish Ministers' option) either pay to the Company an amount equal to the amount calculated in accordance with Clause 44.10 (Compensation on Termination for Force Majeure) and the Agreement will terminate, or elect to allow the Agreement to continue and Clause 56.2.2 below shall thereafter apply in respect of such risk;
- 56.2.2 in respect of such contractor's 'all risks' insurance, property damage insurance, third party liability insurance (if the Scottish Ministers elect to allow the Agreement to continue in accordance with Clause 56.2.1) delay in start up and business interruption insurance (but not loss of profits) or statutory insurances the Agreement shall continue and on the occurrence of the risk (but only for as long as such risk remains Uninsurable) the Scottish Ministers shall (at the Scottish Ministers' option) either pay to the Company an amount equal to insurance proceeds that would have been payable had the relevant insurance continued to be available and the Agreement will continue, or an amount equal to the amount calculated in accordance with Clause 44.6.1 plus (in relation to third party liability insurance only) the amount of insurance proceeds that would have been payable whereupon the Agreement will terminate;
- 56.2.3 where pursuant to Clauses 56.2.1 and/or 56.2.2 this Agreement continues then the Unitary Charge shall be reduced in each year for which the relevant insurance is not maintained by an amount equal to the premium paid (or which would have been paid) by the Company in respect of the relevant risk in the year prior to it becoming Uninsurable (Indexed from the date that the risk becomes Uninsurable). Where the risk is Uninsurable for part of a year only the reduction in the Unitary Charge shall be pro rated to the number of months for which the risk is Uninsurable; and
- 56.2.4 where pursuant to Clause 56.2.1 and/or 56.2.2 this Agreement continues the Company shall approach the insurance market at least every 4 months to establish whether the risk remains Uninsurable. As soon as the Company is aware that this risk is no longer Uninsurable, the Company shall take out and maintain or procure the taking out and maintenance of such insurance (to be incepted as soon as it is reasonably practicable) for such risk in accordance with this Agreement.

56.3 Company's Option

If, pursuant to Clause 56.2.2, the Scottish Ministers elect to make payment to the Company (such that the Agreement will terminate) (the "Relevant Payment"), the Company shall have the option (exercisable in writing within 20 Business Days of the date of such election by the Scottish Ministers (the "Option Period")) to pay to the Scottish Ministers on or before the end of the Option Period, an amount equal to the insurance proceeds that would have been payable had the relevant risk not become Uninsurable, in which case the Agreement will continue (and the Relevant Payment will not be made by the Scottish Ministers), and the Company's payment shall be applied for the same purpose and in the same manner as insurance proceeds would have been applied had the relevant risk not become Uninsurable.

57. TERMS AND CONDITIONS WHICH BECOME UNAVAILABLE**57.1 Occurrence**

If, upon the renewal of any insurance which the Company is required to maintain or to procure the maintenance of pursuant to this Agreement:

57.1.1 any Insurance Term is not available to the Company in the worldwide insurance market with reputable insurers of good standing; and/or

57.1.2 the insurance premium payable for insurance incorporating such Insurance Term is such that the Insurance Term is not generally being incorporated in insurance procured in the worldwide insurance market with reputable insurers of good standing by contractors in the United Kingdom,

(other than, in each case, by reason of one or more actions of the Company and/or any Sub-Contractor (of any tier)) then Clause 57.2 shall apply.

57.2 Waiver

If it is agreed or determined that Clause 57.1 applies then the Scottish Ministers shall waive the Company's obligations in Clause 51 (Insurance) and/or Schedule 10 (Required Insurances) in respect of that particular Insurance Term and the Company shall not be considered in breach of its obligations regarding the maintenance of insurance pursuant to this Agreement as a result of the failure to maintain insurance incorporating such Insurance Term for so long as the relevant circumstances described in Clause 57.1 continue to apply to such Insurance.

57.3 Alternative or Replacement Insurance

To the extent that the Parties agree (acting reasonably), or it is determined pursuant to the Dispute Resolution Procedure, that an alternative or replacement term and /or condition of insurance is available to the Company in the worldwide insurance market with reputable insurers of good standing which if included in the relevant insurance policy would fully or partially address the Company's inability to maintain or procure the maintenance of insurance with the relevant Insurance Term, at a cost which contractors in the UK are (at such time) generally prepared to pay, the Company shall maintain or procure the maintenance of insurance including such alternative or replacement term and/or condition. Notwithstanding any other provision of this Agreement, the costs of such insurance shall be subject to the premium costs sharing mechanism set out at Clauses 52 to 54.

57.4 Insurance Term Saving

Where the Scottish Ministers have exercised the waiver pursuant to Clause 57.2 the Insurance Term Saving shall be apportioned between the Scottish Ministers and the Company in a manner which equitably reflects the increase in risk to which each of the Parties will be exposed as a result of that particular Insurance Term being unavailable, the amount apportioned to the Company being the "Company Amount".

57.5A Adjusted Amount

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Where the Scottish Ministers have exercised the waiver pursuant to Clause 57.2 they shall be entitled to deduct the Adjusted Amount from the annual Unitary Charge.

57.5 Unitary Charge Reduction

While Clause 57.1 applies, the annual Unitary Charge shall be reduced each Contract Year by the Adjusted Amount, Indexed from the date that the particular Insurance Term is no longer available.

57.6 Notify

The Company shall notify the Scottish Ministers as soon as reasonably practicable and in any event within 3 Business Days of becoming aware that Clause 57.1.1 and/or Clause 57.1.2 are likely to apply or (on expiry of the relevant insurance then in place) do apply in respect of an Insurance Term (irrespective of the reason for the same). The Company shall provide the Scottish Ministers with such information as the Scottish Ministers reasonably request regarding the unavailability of the Insurance Term and the Parties shall meet to discuss the means by which such unavailability should be managed as soon as is reasonably practicable.

57.7 Market Review

In the event that Clause 57.1.1 and/or Clause 57.1.2 apply in respect of an Insurance Term, (irrespective of the reason for the same) the Company shall approach the insurance market at least every 4 months to establish whether Clause 57.1.1 and/or Clause 57.1.2 remain applicable to the Insurance Term. As soon as the Company is aware that Clause 57.1.1 and/or Clause 57.1.2 has ceased to apply to the Insurance Term, the Company shall take out and maintain or procure the taking out and maintenance of insurance (to be incepted as soon as is reasonably practicable) incorporating such Insurance Term in accordance with this Agreement.

58. CONFIDENTIALITY**58.1 Agreement Not Confidential**

The Parties agree that provisions of this Agreement and each Project Document shall, subject to Clause 58.2 below, not be treated as Confidential Information and may be disclosed without restriction.

58.2 Commercially Sensitive Information

Clause 58.1 shall not apply to provisions of this Agreement or a Project Document designated as Commercially Sensitive Information and listed in Part I of Schedule 17 (Commercially Sensitive Information) to this Agreement which shall, subject to Clause 58.4, be kept confidential for the periods specified in that Part.

58.3 Confidential Information

The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Agreement and Project Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

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58.4 Permitted Disclosure

Clauses 58.2 and 58.3 shall not apply to:

- 58.4.1 any disclosure of information that is reasonably required by any person engaged in the performance of its obligations under the Agreement for the performance of those obligations;
- 58.4.2 any matter which a Party can demonstrate is already generally available and in the public domain otherwise than as a result of a breach of this Clause;
- 58.4.3 any disclosure to enable a determination to be made under Schedule 7 (Dispute Resolution Procedure) or in connection with a dispute between the Company and any of its Sub-Contractors;
- 58.4.4 any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the Party making the disclosure or the rules of any stock exchange or governmental or regulatory authority having the force of law or if not having the force of law, compliance with which is an accordance with the general practice of persons subject to the stock exchange or governmental or regulatory authority concerned;
- 58.4.5 any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- 58.4.6 any provision of information to the Parties' own professional advisers or insurance advisers or to the Senior Lenders or the Senior Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Company to enable it to carry out its obligations under the Agreement, or may wish to acquire shares in the Company and/or Holdco in accordance with the provisions of this Agreement to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal;
- 58.4.7 any disclosure by the Scottish Ministers of information relating to the design, construction, operation and maintenance of the Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to:
 - (a) any proposed new contractor, its advisers and lenders, should the Scottish Ministers decide to retender the Agreement;
 - (b) any registration or recording of the Consents and property registration required;
- 58.4.8 any disclosure of information by the Scottish Ministers to any other department, office or agency of the government or their respective advisers or to any person engaged in providing services to the Scottish Ministers for any purpose related to or ancillary to the Agreement;

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58.4.9 any disclosure for the purpose of:

- (a) the examination and certification of the Scottish Ministers' or the Company's accounts; or
- (b) any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Scottish Ministers have used their resources; or
- (c) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or
- (d) without prejudice to the generality of Clause 58.4.4 compliance with the FOISA and/or the Environmental Information (Scotland) Regulations,

provided that, for the avoidance of doubt, neither Clauses 58.4.9(d) nor 58.4.4 shall permit disclosure of Confidential Information otherwise prohibited by Clause 58.3 above where that information is exempt from disclosure under section 36 of the FOISA.

58.5 Obligations Preserved

Where disclosure is permitted under Clause 58.4, other than Clauses 58.4.2, 58.4.4, 58.4.5, 58.4.7(b) and 58.4.9, the party providing the information shall procure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this Agreement.

58.6 Audit

For the purposes of the National Audit Act 1983 Audit Scotland may examine such documents as it may reasonably require which are owned, held or otherwise within the control of the Company and any Sub-Contractor and may require the Company and any Sub-Contractor to produce such oral or written explanations as it considers necessary. For the avoidance of doubt it is hereby declared that the carrying out of an examination under Section 6(3)(d) of the National Audit Act 1983 in relation to the Company is not a function exercisable under this Agreement.

58.7 Exploitation of Information

The Company shall not make use of the Agreement or any Confidential Information issued or provided by or on behalf of the Scottish Ministers in connection with the Agreement otherwise than for the purpose of the Agreement, except with the written consent of the Scottish Ministers.

58.8 Information Relating to People or Users

Where the Company, in carrying out its obligations under the Agreement, is provided with information relating to any Users, the Company shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Company has sought the prior written consent of that person and has obtained the prior written consent of the Scottish Ministers.

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58.9 Expiry

On or before the Expiry Date, the Company shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to the Scottish Ministers' customers including any documents in the possession, custody or control of a Sub-Contractor, are delivered up to the Scottish Ministers.

58.10 Disclosure by Audit Scotland

The Parties acknowledge that Audit Scotland has the right to publish details of the Agreement (including Commercially Sensitive Information) in its relevant reports to Parliament.

58.11 Official Secrets

The provisions of this Clause are without prejudice to the application of the Official Secrets Acts 1911 to 1989.

59. FREEDOM OF INFORMATION**59.1 FOISA and Environmental Information (Scotland) Regulations**

The Company acknowledges that the Scottish Ministers are subject to the requirements of the FOISA and the Environmental Information (Scotland) Regulations and shall facilitate the Scottish Ministers' compliance with their Information disclosure requirements pursuant to the same in the manner provided for in Clauses 59.2 to 59.7 (inclusive).

59.2 Request for Information

Where the Scottish Ministers receive a Request for Information in relation to Information that the Company is holding on its behalf and which the Scottish Ministers do not hold themselves the Scottish Ministers shall refer to the Company such Request for Information that they receive as soon as practicable and in any event within 5 Business Days of receiving a Request for Information and the Company shall:

59.2.1 provide the Scottish Ministers with a copy of all such Information in the form that the Scottish Ministers require as soon as practicable and in any event within 10 Business Days (or such other period as the Scottish Ministers acting reasonably may specify) of the Scottish Ministers' request; and

59.2.2 provide all necessary assistance as reasonably requested by the Scottish Ministers in connection with any such Information, to enable the Scottish Ministers to respond to a Request for Information within the time for compliance set out in Section 10 of the FOISA or Regulation 5 of the Environmental Information (Scotland) Regulations.

59.3 Representations by the Company

Following notification under Clause 59.2 and up until such time as the Company has provided the Scottish Ministers with all the Information specified in Clause 59.2.1, the

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Company may make representations to the Scottish Ministers as to whether or not or on what basis Information requested should be disclosed, and whether further information should reasonably be provided in order to identify and locate the information requested, provided always that the Scottish Ministers shall be responsible for determining at their absolute discretion:

59.3.1 whether Information is exempt from disclosure under the FOISA and the Environmental Information (Scotland) Regulations;

59.3.2 whether Information is to be disclosed in response to a Request for Information, and

in no event shall the Company respond directly, or allow its Subcontractors to respond directly, to a Request for Information unless expressly authorised to do so by the Scottish Ministers.

59.4 Retention of Information

The Company shall ensure that all Information held on behalf of the Scottish Ministers is retained for disclosure for at least 5 years (from the date it is acquired) and shall permit the Scottish Ministers to inspect such information as requested from time to time upon giving reasonable prior written notice to the Company having regard to the nature of the information requested.

59.5 Transfer of Request for Information

The Company shall transfer to the Scottish Ministers any Request for Information received by the Company as soon as practicable and in any event within 5 Business Days of receiving it.

59.6 Disclosure of Confidential Information

The Company acknowledges that any lists provided by it listing or outlining Confidential Information are of indicative value only and that the Scottish Ministers may nevertheless be obliged to disclose Confidential Information in accordance with the requirements of the FOISA and the Environmental Information (Scotland) Regulations.

59.7 Costs of Compliance

In the event of a request from the Scottish Ministers pursuant to Clause 59.2 above, the Company shall as soon as practicable, and in any event within 5 Business Days of receipt of such request, inform the Scottish Ministers of the Company's estimated costs of complying with the request to the extent those would be recoverable if incurred by the Scottish Ministers under Section 12(1) of the FOISA and the Fees Regulations. Where such costs (either on their own or in conjunction with the Scottish Ministers' own such costs in respect of such Request for Information) will exceed the appropriate limit referred to in Section 12(1) of the FOISA and as set out in the Fees Regulations (the "Appropriate Limit") the Scottish Ministers shall inform the Company in writing whether or not they still require the Company to comply with the request and where they do require the Company to comply with the request the 10 Business Days period for compliance shall be extended by such number of additional days for compliance as the Scottish Ministers are entitled to under Section

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10 of the FOISA. In such case, the Scottish Ministers shall notify the Company of such additional days as soon as practicable after becoming aware of them and shall reimburse the Company for such costs as the Company incurs in complying with the request to the extent they themselves are entitled to reimbursement of such costs in accordance with their own FOISA policy from time to time.

59.8 Disclosure of Information

The Company acknowledges that (notwithstanding the provisions of Clause 58) the Scottish Ministers may, acting in accordance with the Scottish Ministers' Code of Practice on the Discharge of Functions of Public Authorities under the Freedom of Information (Scotland) Act 2002 (the "Code"), be obliged under the FOISA or the Environmental Information (Scotland) Regulations to disclose Information concerning the Company or the Project:

59.8.1 in certain circumstances without consulting with the Company; or

59.8.2 following consultation with the Company and having taken their views into account,

provided always that where Clause 59.8.1 above applies the Scottish Ministers shall, in accordance with the recommendations of the Code, draw this to the attention of the Company prior to any disclosure.

60. DISPUTE RESOLUTION PROCEDURE

Any dispute arising in relation to any aspect of the Agreement shall be resolved in accordance with Schedule 7 (Dispute Resolution Procedure).

61. LIAISON COMMITTEE

The Parties shall give effect to Schedule 15 (Liaison Committee).

62. DATA PROTECTION**62.1 Compliance with DPA**

In relation to all Personal Data, the Company shall at all times comply with the DPA as a data controller if necessary, including maintaining a valid and up to date registration or notification under the DPA covering the data processing to be performed in connection with the Operations.

62.2 Permitted Processing

The Company and any Sub-Contractor shall only undertake processing of Personal Data reasonably required in connection with the Operations and shall not transfer any Personal Data to any country or territory outside the European Economic Area.

62.3 No Disclosure

The Company shall not disclose Personal Data to any third parties other than:

62.3.1 to employees and Sub-Contractors to whom such disclosure is reasonably necessary in order for the Company to carry out the Operations; or

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62.3.2 to the extent required under a court order,

provided that disclosure under Clause 62.3.1 is made subject to written terms substantially the same as, and no less stringent than, the terms contained in this Clause 62 (Data Protection) and that the Company shall give notice in writing to the Scottish Ministers of any disclosure of Personal Data it or a Sub-Contractor is required to make under Clause 62.3.2 immediately it is aware of such a requirement.

62.4 Required Measures

The Company shall bring into effect and maintain all technical and organisational measures to prevent unauthorised or unlawful processing of Personal Data and accidental loss or destruction of, or damage to, Personal Data including but not limited to taking reasonable steps to ensure the reliability of staff having access to the Personal Data.

62.5 Scottish Ministers Requests for Details of Measures

The Scottish Ministers may, at reasonable intervals, request a written description of the technical and organisational methods employed by the Company and the Sub-Contractors referred to in Clause 62.4 (Required Measures). Within 20 Business Days of such a request, the Company shall supply written particulars of all such measures detailed to a reasonable level such that the Scottish Ministers can determine whether or not, in connection with the Personal Data, it is compliant with the DPA.

62.6 Indemnity

The Company shall indemnify and keep indemnified the Scottish Ministers against all losses, claims, damages, liabilities, costs and expense (including reasonable legal costs) incurred by it in respect of any breach of this Clause 62 by the Company and/or any act or omission of any Sub-Contractor.

63. INTELLECTUAL PROPERTY RIGHTS**63.1 Company to Make Available Project Data**

The Company shall make available to the Scottish Ministers free of charge (and hereby irrevocably licences the Scottish Ministers to use) all Project Data that might reasonably be required by the Scottish Ministers and the Company shall ensure that the Company obtains all necessary licences, permissions and consents to ensure that the Company can make the Project Data available to the Scottish Ministers on these terms, for the purposes of:

63.1.1 the Scottish Ministers discharging their obligations under this Agreement and/or any statutory duties which the Scottish Ministers may have; and

63.1.2 following termination of this Agreement, the design, construction, operation, maintenance or improvement of the Project Roads and/or the provision of services the same as, or similar to, the Operations,

(together, the "Approved Purposes") and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or

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incorporating them with other materials and the term “the right to use” shall be construed accordingly. The licence granted pursuant to this Clause 63.1 shall be free of charge and non-exclusive.

63.2 Licence to Use Intellectual Property Rights

The Company:

63.2.1 hereby grants to the Scottish Ministers, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under this Agreement or upon or at any time following termination of this Agreement) licence (carrying the right to grant sub-licences) to use all the Intellectual Property Rights which are or become vested in the Company; and

63.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, use its reasonable endeavours to procure the grant of a like licence to that referred to in Clause 63.2.1 above to the Scottish Ministers,

in both cases, solely for the Approved Purposes.

63.3 Intellectual Property Rights to Vest in Company

The Company shall use all reasonable endeavours to ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of this Agreement vest, and remain vested throughout the term of this Agreement, in the Company and the Company shall enter into appropriate agreements with any Company Related Party (or other third parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights. The provisions of this Clause 63.3 shall not apply to moral rights, which are not transferable.

63.4 Licence to Use Software

63.4.1 To the extent that any of the Project Data are generated by or maintained on a computer or similar system, the Company shall:

- (a) use all reasonable endeavours to procure for the benefit of the Scottish Ministers, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant software (other than common and off the shelf software) to enable the Scottish Ministers or their nominee to access and otherwise use (subject to the payment by the Scottish Ministers of the relevant fee, if any) such Project Data for the Approved Purposes. As an alternative, the Company may provide such Project Data in a format which may be read by software generally available in the market at the relevant time or in hard copy format; and
- (b) where the Company owns the relevant software and has the source code, enter into NCC Group plc’s then current multi-licensee escrow deposit agreement or standard single licensee escrow deposit agreement as appropriate in each case.

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63.4.2 The Scottish Ministers hereby grant to the Company a licence (but with no right to grant sub-licences except to any Company Related Party and any sub-contractor of them) to use for the purposes of performance of the Operations only, all and any Intellectual Property Rights and Project Data which is or becomes vested in the Scottish Ministers for any purpose relating to the Operations.

63.5 Safe Storage Data

The Company shall ensure the back-up and storage in safe custody of the Project Data referred to in Clause 63.4 (Licence to Use Software) in accordance with Good Industry Practice. Without prejudice to this obligation, the Company shall from time to time on reasonable request submit to the Scottish Ministers for approval of its proposals for the back-up and storage in safe custody of the data, materials and documents and the Scottish Ministers shall be entitled to object if the same is not in accordance with Good Industry Practice. The Company shall comply, and shall cause all Company Related Parties to comply, with all procedures to which the Scottish Ministers have given their approval. The Company may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Scottish Ministers, who shall be entitled to object on the basis set out above.

63.6 Infringement of Rights

Where a claim or proceeding is made or brought against the Scottish Ministers by a third party on grounds that the Scottish Ministers' use of any Intellectual Property Rights in the Project Data (other than any Disclosed Data) infringes any rights in or to such Intellectual Property Rights of that third party then, unless such infringement has arisen out of the use of such Intellectual Property Rights by or on behalf of the Scottish Ministers otherwise than in accordance with the terms of this Agreement or the relevant licence, the Company shall indemnify the Scottish Ministers at all times from and against all such claims and proceedings and the provisions of Clause 50.5 (Conduct of Claims) shall apply.

63.7 Traffic Data

63.7.1 Without prejudice to any rights which the Company may have in any traffic data collected by the Company in connection with the Project, the Scottish Ministers shall be entitled without further consent from the Company:

- (a) to use such traffic data for the purposes of exercising their rights or carrying out their duties under this Agreement or carrying out any statutory function; and
- (b) to incorporate such traffic data in any traffic or other statistics prepared by or on behalf of the Scottish Ministers and to publish such statistics of the traffic data either generally or to a limited category of persons and whether or not in return for any fee.

63.7.2 Without prejudice to any rights which the Scottish Ministers may have in any traffic data collected by the Scottish Ministers in connection with the Project, the Company shall be entitled without further consent from the Scottish Ministers:

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- (a) to use such traffic data for the purposes of exercising its rights or carrying out its duties under this Agreement; and
- (b) to incorporate such traffic data in any traffic or other statistics prepared by or on behalf of the Company and to publish such statistics of the traffic data either generally or to a limited category of persons and whether or not in return for any fee.

64. ASSIGNATION AND SUB-CONTRACTING**64.1 Restrictions on transfer of the Agreement by the Scottish Ministers**

The rights and obligations of the Scottish Ministers under this Agreement shall not be assigned, novated or otherwise transferred (whether by virtue of any Legislation or any scheme pursuant to any Legislation or otherwise) to any person other than to any public body (being a single entity) acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Scottish Ministers under this Agreement being:

64.1.1 a Minister of the Crown pursuant to an Order under the Ministers of the Crown Act 1975; or

64.1.2 any other public body whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Company) by the Scottish Ministers or a Minister of the Crown having the legal capacity, power and authority to perform the obligations under the guarantee and the obligations of the Scottish Ministers under this Agreement.

64.2 Restriction on the Company

Subject to Clause 64.3 and subject always to the provisions of the Direct Agreement the Company shall not assign, sublet, charge, sell, bargain or otherwise deal in any way with the benefit of this Agreement in whole or in part except with the prior written consent of the Scottish Ministers (which the Scottish Ministers may in their absolute discretion refuse). The provisions of this Clause 64.2 shall not apply to any Assignment or other dealing by the Company by way of security in accordance with the Financing Agreements or by way of enforcement of any such security.

64.3 Exception

Subject to the provisions of Clauses 5 and 18, nothing in this Clause 64 shall prohibit the Company from providing or procuring the provision of the New Works or the O&M Works from a sub-contractor of sound financial standing and good repute and whose identity and the terms and conditions of contract have been notified to the Scottish Ministers by the Company and approved by the Scottish Ministers prior to the appointment of such Sub-Contractor, provided that the Company shall remain primarily and directly liable for the Company's obligations under this Agreement.

64.4 Company's Obligations

The Company shall perform its obligations under and observe all the terms of any Sub-Contract.

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64.5 Sub-Contractors

Nothing in this Agreement shall prohibit or prevent any Sub-Contractor employed by the Company from being employed by the Scottish Ministers.

65. AUDIT AND REGULATORY ACCESS

Notwithstanding the provisions of Clause 76 (Co-operation), the Company shall co-operate fully and in a timely manner with any reasonable request from time to time of any auditor (whether internal or external) of the Scottish Ministers or regulator and at the expense of the Company to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

66. CORPORATE STRUCTURES**66.1 Obligation to Inform**

66.1.1 The Company represents and warrants to the Scottish Ministers that at the Date of this Agreement, the legal and beneficial ownership of the Company and Holdco is as set out in Schedule 16 (Company's Details) and that, other than any Shareholder pre-emption rights and security granted to the Senior Lender under the Senior Financing Agreements, no arrangements are in place that have or may have or result in any sale, transfer or disposal of any legal, beneficial, equitable or other interest in any or all of the shares in the Company or Holdco.

66.1.2 The Company shall inform the Scottish Ministers as soon as reasonably practicable (and, in any event, within 20 Business Days) of any Change of Ownership of the Company and/or Holdco.

66.1.3 The Scottish Ministers may, not more than twice in any Contract Year, or at any time when a Company Default is outstanding, request that the Company inform them as soon as reasonably practicable and in any event within 20 Business Days of receipt of the Scottish Ministers' request for details of any Change of Ownership.

66.1.4 The Company's obligations under Clauses 66.1.2 and 66.1.3 shall, except where a legal transfer of shares has occurred, be limited to the extent of the Company's awareness having made all reasonable enquiry.

66.2 No Change of Ownership

The Company shall not and shall procure that Holdco shall not register any person as a member where such registration would result in a Change of Ownership occurring prior to the first anniversary of the Full Services Commencement Date.

66.3 Change of Ownership

66.3.1 The Company shall obtain the Scottish Ministers' prior written consent (which may be given subject to conditions) to any Restricted Share Transfer of the Company. Further the Company shall procure that Holdco shall not

register any person as a member of Holdco as a result of a Restricted Share Transfer without the prior written consent of the Scottish Ministers.

66.3.2 For the purposes of Clause 66.2:

- (a) any change in beneficial or legal ownership of any shares that are listed on a recognised investment exchange (as defined in Section 285 of the Financial Services and Markets Act 2000);
- (b) any transfer of shares or of any interest in shares by a Shareholder to its Affiliate; and
- (c) any transfer of shares or of any interest in shares by way of security pursuant to the Financing Agreements or by way of enforcement of such security; or
- (d) the exercise by the Senior Lenders of their rights in respect of shares of the Company granted in any document conferring security over any of the shares of the Company, provided that any document conferring security over any shares has been approved by the Scottish Ministers (such approval not to be unreasonably withheld or delayed),

shall be disregarded.

Where sub-paragraph (b) applies and subsequent to any such transfer (the "Original Transfer") the transferee ceases to be an Affiliate of the original transferor, it shall be a breach of this Clause 66.3 if the shares or interests which were the subject of the Original Transfer are not within 20 Business Days of the transferee ceasing to be an Affiliate of the original transferor transferred to that original transferor or any Affiliate of such transferor.

67. NO AGENCY

67.1 No Partnership

Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Scottish Ministers and the Company.

67.2 No Agency

Save as expressly provided otherwise in this Agreement, the Company will not be, or be deemed to be, an agent of the Scottish Ministers and the Company shall not hold itself out as having authority or power to bind the Scottish Ministers in any way.

67.3 Company's Deemed Knowledge

Without limitation to its actual knowledge, the Company shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Company Related Party.

68. ENTIRE AGREEMENT

68.1 Agreement Supersedes Prior Communications

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Except where expressly provided in this Agreement, this Agreement, the Direct Agreement and the other Project Documents to which both Parties are party constitute the entire agreement between the Parties in connection with their subject matter and supersede all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement, the Direct Agreement and the other Project Documents.

68.2 Acknowledgement of the Parties

Each of the Parties acknowledges that:

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

68.2.2 this Clause 68.2 shall not apply to any statement, representation or warranty made fraudulently in association with this Agreement, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the law governing this Agreement.

69. NOTICES**69.1 Notice Requirements**

All notices under this Agreement shall be in writing and all certificates, notices or written instructions to be given under the terms of this Agreement shall be served by sending the same by first class recorded delivery post or by hand, leaving the same at:

If to the Company	XXX 3rd Floor Braywick Gate Braywick Road Maidenhead Berkshire SL6 1DA
If to the Scottish Ministers	XXX Transport Scotland, Buchanan House, 58 Port Dundas Road, Glasgow G4 0HG

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69.2 Submission of Information

Where any information or documentation is to be provided or submitted to the Scottish Ministers' Representative or the Company's Representative it shall be provided or submitted by sending the same by first class recorded delivery post or by hand, leaving the same at:

If to the Company's Representative

XXX
3rd Floor
Braywick Gate
Braywick Road
Maidenhead
Berkshire
SL6 1DA

If to the Scottish Ministers' Representative

XXX
Transport Scotland,
Buchanan House,
58 Port Dundas Road,
Glasgow G4 0HG

If to the Scottish Ministers' Site Representative

XXX
Jacobs Consultancy,
95 Bothwell Street,
Glasgow G2 7HX

(copied in each case to the Scottish Ministers).

69.3 Change of Nominated Address

Either Party (and either Representative) may change its nominated address by prior notice to the other Party.

69.4 Effective Notices

Notices given by recorded delivery post shall be effective upon the earlier of (i) actual receipt and (ii) 2 Business Days after mailing. Notices delivered by hand shall be effective upon delivery.

69.5 Effective Notices

In proving posting of a notice sent by recorded delivery post it shall be sufficient to prove that the envelope containing the notice was duly addressed in accordance with the provisions of this Clause 69 and posted to the place to which it was addressed.

70. PUBLIC RELATIONS, PUBLICITY AND ADVERTISING**70.1 Company communication with press**

The Company shall not by itself, its employees or agents and shall procure that its Sub-Contractors shall not communicate with representatives of the press, television,

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radio or other communications media on any matter concerning the Agreement without the prior written approval of the Scottish Ministers.

70.2 Filming and Photography

No facilities to photograph or film in or upon any property used in relation to the Project shall be given or permitted by the Company unless the Scottish Ministers have given their prior written approval.

70.3 Reputation of the Scottish Ministers

The Company shall procure that its employees, agents and Sub-Contractors shall use all reasonable endeavours not to do anything which has the intention of bringing the standing or reputation of the Scottish Ministers into disrepute or attracting adverse publicity to the Scottish Ministers.

70.4 Advertisements

The Company shall not exhibit or attach to any part of the Sites or the Project Roads any notice or advertisement without the prior written permission of the Scottish Ministers, save where otherwise required to comply with Legislation.

71. WAIVER**71.1 Waiver**

No term or provision of this Agreement shall be considered as waived by any Party unless a waiver is given in writing by that Party.

71.2 No Future Waiver

No waiver under Clause 71.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Agreement unless (and then only to the extent) expressly stated in that waiver.

71.3 Writing

71.3.1 Amendments to this Agreement shall only bind the Parties if they are agreed in writing by both Parties.

71.3.2 All consents, agreements and decisions required to be given pursuant to this Agreement shall be given in writing.

72. SEVERABILITY

If any term, condition or provision contained in this Agreement shall be held to be invalid, unlawful or unenforceable to any extent, such term, condition or provision shall not affect the validity, legality or enforceability of the remaining parts of this Agreement.

73. LANGUAGE**73.1 All:**

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- 73.1.1 correspondence, Design Data, test reports, certificates, specifications and all other information to be provided to the Scottish Ministers in accordance with this Agreement;
 - 73.1.2 operating and maintenance instructions, identification labels appearing on plant and equipment; and
 - 73.1.3 other written and printed matter required for the Operations,
- shall be in English.

74. COMPANY'S RECORDS**74.1 Provision of Information to Scottish Ministers**

The Company shall at all times:

- 74.1.1 maintain a full record of particulars of the costs of performing the Operations, including those relating to the design, construction, maintenance, operation and finance;
- 74.1.2 when requested by the Scottish Ministers, provide a summary of any of the costs referred to in Clause 74.1.1, including details of any funds held by the Company specifically to cover such costs, in such form and detail as the Scottish Ministers may reasonably require to enable the Scottish Ministers to monitor the performance by the Company of its obligations under this Agreement; and
- 74.1.3 provide such facilities as the Scottish Ministers may reasonably require for their representatives to visit any place where the records are held and examine the records maintained under this Clause 74.

74.2 Standard of Records

Compliance with the above shall require the Company to keep (and where appropriate to procure that the Sub-Contractors shall keep) books of account in accordance with best accountancy practice with respect to the Agreement showing in detail:

- 74.2.1 administrative overheads;
- 74.2.2 payments made to Sub-Contractors and to sub-contractors;
- 74.2.3 capital and revenue expenditure;
- 74.2.4 such other items as the Scottish Ministers may reasonably require to conduct cost audits for verification of cost expenditure or estimated expenditure, for the purpose of Clause 33 (Compensation Events), Clauses 34-35 (Changes) and Clause 37 (Qualifying Change in Law),

and the Company shall have (and procure that the Sub-Contractors shall have) the books of account evidencing the items listed in Clauses 74.2.1 to 74.2.4 available for

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inspection by the Scottish Ministers (and any expert) upon reasonable notice, and shall present a report of these to the Scottish Ministers as and when requested.

74.3 Health and Safety and Maintenance Records

The Company shall maintain or procure that the following are maintained:

74.3.1 a full record of all incidents relating to health, safety and security which occur during the term of the Agreement; and

74.3.2 full records of all maintenance procedures carried out during the term of the Agreement,

and the Company shall have the items referred to in Clauses 74.3.1 and 74.3.2 available for inspection by the Scottish Ministers upon reasonable notice, and shall present a report of them to the Scottish Ministers as and when requested.

74.4 Audit Access

The Company shall permit records referred to in this Clause 74 to be examined and copied by the Scottish Ministers' auditor and other representatives of the Scottish Ministers, and by Audit Scotland.

74.5 Period of Retention

The records referred to in this Clause shall be retained for a period of at least 5 years after the Company's obligations under the Agreement have come to an end.

74.6 Provision of Information upon Termination

Upon termination of the Agreement, and in the event that the Scottish Ministers wish to enter into another contract for the operation and management of the Project the Company shall (and shall ensure that the Sub-Contractors will) comply with all reasonable requests of the Scottish Ministers to provide information relating to the Company's costs of operating and maintaining the Project.

74.7 Freedom of Information

All information referred to in this Clause is subject to the obligations set out in Clauses 58 (Confidentiality) and 59 (Freedom of Information).

74.8 Provision of Financial Information

The Company shall:

74.8.1 provide to the Scottish Ministers on 31 March, 30 June, 30 September and 31 December each year a document listing all information provided by it to the Senior Lenders during the preceding 3 month period and, at the request of the Scottish Ministers, provide to the Scottish Ministers any information provided by it to the Senior Lenders during the term of the Agreement and any other information relating to the Project that the Scottish Ministers may reasonably require;

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- 74.8.2 provide to the Scottish Ministers copies of its annual report and accounts within 20 Business Days of publication;
- 74.8.3 provide to the Scottish Ministers a copy of the Senior Lenders' Financial Model at Financial Close and (as the same may be amended) within 20 Business Days of any amendment thereto;
- 74.8.4 promptly upon the occurrence of an Event of Default (as defined in the Senior Financing Agreements) notify the Scottish Ministers of such Event of Default; and
- 74.8.5 use all reasonable endeavours to assist the Scottish Ministers in its preparation of any report required by the Scottish Executive or HM Treasury, from time to time.

74.9 Interim Project Report

The Scottish Ministers may, in the circumstances referred to in Clause 74.8.4 above (regardless of whether the Senior Lenders have exercised any enforcement or similar rights under the Senior Financing Agreements) require the Company to provide an Interim Project Report and to attend, and use all reasonable endeavours to ensure that the Senior Lenders attend, such meetings as the Scottish Ministers may convene to discuss such Interim Project Report and the circumstances giving rise to it.

75. PARTIES NOT TO PREVENT**75.1 Scottish Ministers not to Hinder Company**

Save to the extent that it is entitled to do so in terms of this Agreement, the Scottish Ministers shall not and shall use reasonable endeavours to procure that a Scottish Ministers Related Party shall not deliberately do or omit to do any act which will prevent or hinder the Company from carrying out its obligations under this Agreement.

75.2 Company not to Hinder Scottish Ministers

Save to the extent that it is entitled to do so in terms of this Agreement or otherwise obliged or entitled to do so by Legislation, the Company shall not and shall use reasonable endeavours to procure that any Company Related Party shall not do or omit to do any act which will prevent the Scottish Ministers:

- 75.2.1 using any of the Project Roads;
- 75.2.2 from discharging their duties or functions; or
- 75.2.3 carrying out their obligations under this Agreement.

75.3 Minor Infringements

Neither Party shall invoke the provisions of this Clause in respect of minor infringements of it by the other Party.

75.4 Interactive Nature of Activities

The phrase “deliberately do or omit to do any act” shall be construed in this Clause 75 having regard to the interactive nature of the activities of the Scottish Ministers and the Company, but shall exclude any acts or omissions carried out in the ordinary course of the Scottish Ministers’ activities including acting as statutory authority, or which were within the contemplation of the Parties, or which are otherwise permitted in this Agreement save to the extent that the Scottish Ministers are expressly precluded from acting in such a manner by another provision of this Agreement.

76. CO-OPERATION

The Company shall co-operate fully and in a timely manner with any request from time to time of any auditor (whether internal or external) of the Scottish Ministers or the Ombudsman to provide documents, or to procure the provision of documents, relating to the Project, and to provide, or to procure the provision of, any oral or written explanation relating to the same.

77. EXCLUSIVE REMEDIES

77.1 Termination

Neither Party shall have the right to terminate this Agreement in whole or in part for breach of contract save as expressly set out in this Agreement.

77.2 Common Law Rights

Save as otherwise provided for in this Agreement, the Company will not be entitled to any common law rights including (but not limited to) rights to damages or any other rights under contract, delict or otherwise (other than specific performance, interim specific performance, injunction or interim injunction (or their equivalent in any jurisdiction)) in relation to any breach of this Agreement by the Scottish Ministers.

77.3 Payment Mechanism: No Double Remedy

77.3.1 Subject to any other express right of the Scottish Ministers pursuant to this Agreement, the sole remedy of the Scottish Ministers in respect of a failure to provide the Operations in accordance with this Agreement shall be the operation of Schedule 6 (Payment Mechanism).

77.3.2 Nothing in this Clause 77.3 shall prevent or restrict the right of the Scottish Ministers to seek injunctive relief or a decree of specific performance or other discretionary remedies of the court.

78. LAW OF THE AGREEMENT AND JURISDICTION

The Agreement shall be governed by the laws of Scotland and subject to Schedule 7 (Dispute Resolution Procedure), the Parties submit to the exclusive jurisdiction of the courts of Scotland:

IN WITNESS WHEREOF these presents consisting of this and the preceding [•] pages together with the Schedules signed and attached as relative hereto are executed as follows:-

SIGNED for and on behalf of SCOTTISH MINISTERS at _____ on the
day of _____ 2009

..... Authorised Signatory

..... Full Name

before this witness:

..... Witness

..... Full name

..... Address

.....

SIGNED for and on behalf of HIGHWAY MANAGEMENT (SCOTLAND) LIMITED at _____
on the _____ day of _____ 2009

..... Director

..... Full Name

and

..... Director

..... Full name