



(1) TRANSPORT INITIATIVES EDINBURGH LIMITED

- and -

(2) TRANSDEV EDINBURGH TRAM LIMITED

**DEVELOPMENT
PARTNERING AND
OPERATING FRANCHISE
AGREEMENT
relating to the

EDINBURGH TRAM
NETWORK**

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DEVELOPMENT PARTNERING AND OPERATING FRANCHISE AGREEMENT

BETWEEN

- (1) **TRANSPORT INITIATIVES EDINBURGH LIMITED** a company incorporated in Scotland under number SC230949 and having its registered office at City Chambers, High Street, Edinburgh, EH1 1YJ ("**tie**"); and
- (2) **TRANSDEV EDINBURGH TRAM LIMITED** a company incorporated in Scotland under number SC267598 and having its registered office at Level 2, Saltire Court, 20 Castle Terrace, Edinburgh EH1 2ET (the "**Operator**").

WHEREAS

- A **tie** requires project development assistance and services for the subsequent commissioning and operation of a light rapid transit system in Edinburgh, known as the Edinburgh Tram Network .
- B Pursuant to a notice published in the Official Journal of the European Communities on 11 June 2003 with reference 2003/S 110-099040, **tie** invited expressions of interest from appropriately qualified parties for the development and subsequent operation of the System.
- C By competitive procurement process, conducted in accordance with law, **tie** has selected the Operator to support promotion of the Scottish Private Bills through the Scottish Parliament and to develop (under partnering arrangements with **tie**) and operate the System subject to the terms and conditions of this Agreement applicable to each phase of the Project.
- D It is acknowledged that this Agreement aims to achieve a project vision (the "Project Vision") for the Edinburgh Tram Network. This Project Vision involves the development of a System which will stand favourable comparison with the best in Europe. The quality of the System and the Transport Services provided will be appropriate to Edinburgh's status and role as a European capital city and its city centre's designation as a World Heritage Site. The System will integrate as far as possible with other transport modes to serve the existing fabric of the City of Edinburgh, and promote appropriate development and social inclusion.

It is intended that this goal be achieved in a spirit of partnership, utilising modern design methods and standards.

PART I - PRELIMINARY MATTERS

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. DEFINITIONS AND INTERPRETATION

Schedule 1 (*Definitions and Interpretation*) to this Agreement shall govern all matters concerning definitions and interpretation.

2. TERM OF AGREEMENT

2.1 This Agreement shall come into effect on the Effective Date and shall continue in effect until the earlier of:

2.1.1 the Expiry Date; and

2.1.2 the Termination Date.

2.2 **tie** may serve a notice on the Operator not less than 180 days before the fifteenth anniversary of the Effective Date requiring an extension of the Term of this Agreement for a period of up to five years commencing from the original Expiry Date. If **tie** serves such a notice under this Clause 2.2, the original Expiry Date shall be extended to such date as may be specified in such notice, and with effect from the day after the fifteenth anniversary of the Effective Date, in consideration of the continued grant to the Operator of the right to operate the Transport Services, the Operator shall continue to perform its obligations under the terms of this Agreement.

2.3 **tie** may serve a notice on the Operator not less than 90 days before the fifteenth anniversary of the Effective Date proposing an extension of the Term of this Agreement, on such terms, and until such date, as **tie** may specify in such notice. If **tie** serves such a notice under this Clause 2.3:

2.3.1 **tie** and the Operator will negotiate in good faith in relation to:

(a) the terms of this Agreement to apply with effect from the day after the fifteenth anniversary of the Effective Date; and

(b) the period of the extension to the Term of this Agreement; and

- 2.3.2 if **tie** and the Operator agree the matters referred to in Clause 2.3.1 prior to the date when this Agreement would otherwise have expired, the original Expiry Date shall be extended to such date as may be agreed between **tie** and the Operator, and with effect from the day after the fifteenth anniversary of the Effective Date, in consideration of the continued grant to the Operator of the right to operate the Transport Services, the Operator shall perform its obligations under the terms of this Agreement as amended pursuant to this Clause 2.3.
- 2.4 The date specified by **tie** in a notice under Clause 2.2 or the date agreed between the Operator and **tie** pursuant to Clause 2.3 shall not be less than 30 days after the date which was the original Expiry Date before service of such notice nor more than 20 years after the Effective Date.
- 2.5 It shall be a condition precedent to the effectiveness of this Agreement that **tie** shall have received written confirmation that the Scottish Executive has confirmed an appropriate level of funding.

PART II - DEVELOPMENT PHASE

3. PROJECT PARTNERING APPROACH

- 3.1 The Parties agree to work in mutual cooperation to fulfil their agreed roles and responsibilities and apply their expertise in relation to the Project to achieve the Project Development Objectives in accordance with the terms of this Agreement.
- 3.2 **tie** and the Operator shall procure that each **tie** Party and each Operator Party (as appropriate) shall work in accordance with the principles set out in Clause 3.1 above.
- 3.3 Subject to Clause 3.4 each Party ("**First Party**") undertakes to co-operate with the other ("**Second Party**") in order to facilitate the performance of this Agreement and in particular will:
- 3.3.1 approach all pricing, estimating and budgeting functions on a collaborative and Open Book Basis;
 - 3.3.2 use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;
 - 3.3.3 comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims with or against the Second Party;
 - 3.3.4 not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights; and
 - 3.3.5 take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 3.3.2 to 3.3.4 (inclusive).
- 3.4 Nothing in Clause 3.3 shall:
- 3.4.1 interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit (in compliance with Law) in order to exercise its rights and perform its obligations under this Agreement (in compliance with Law) and, in the case of **tie**, its duties and functions as a wholly owned subsidiary of CEC; or

- 3.4.2 relieve either Party from any obligation contained in this Agreement or from any obligation to pay any debt due and payable under this Agreement.
- 3.5 Senior representatives from the Parties shall meet on a quarterly basis (or as may be otherwise agreed by the Parties) to review:
- 3.5.1 any matters outwith the Operator's control and not caused by an Operator Default or other breach of the Agreement by the Operator which have adversely affected or may adversely affect:
- (a) the achievement of the Project Development Objectives;
 - (b) the performance of the System;
 - (c) the Operator's ability to perform its obligations in terms of the Agreement;
 - (d) the generation of revenue; and/or
 - (e) the maintenance of the Operator's costs within the Capped Fees, the Fixed Costs, the Target Costs for Project Phase C2 or the Target Operating Costs (as appropriate); and
- 3.5.2 any proposals from either Party to:
- (a) maximise revenue;
 - (b) minimise costs; and/or
 - (c) optimise the performance of the System.
- 3.6 Either Party may propose measures to address the matters set out in Clause 3.5.1 and a determination of what measures (if any) should be undertaken by the Operator and/or **tie** to address such matters shall be considered in accordance with and subject to each Party's existing rights, obligations and the existing contractual mechanisms under this Agreement including but not restricted to the rights, obligations and contractual mechanisms set out in Clause 22 (*Relief Events*), Clause 23 (*Performance and Financial Adjustments*), Clause 24 (*tie Changes*), Clause 25 (*Operator Changes*), Clause 26 (*Roads Changes*) and Clause 27 (*Qualifying Change in Law*) of the Operating Appendix.

- 3.7 Any proposal from either Party in terms of Clause 3.5.2 shall be reviewed in accordance with Clause 24 (*tie Changes*) or Clause 25 (*Operator Changes*) of the Operating Appendix (as appropriate).

4. THE PROJECT DEVELOPMENT SERVICES

- 4.1 The Operator shall assist **tie** with the promotion of the Project and the achievement of the Project Development Objectives by providing the Project Development Services during Project Phase A, Project Phase B and Project Phase C in relation to each Line in accordance with:

4.1.1 Schedule 2 (*Project Development Output Specification*); and

4.1.2 the requirements and directions of **tie** from time to time in accordance with the terms of this Agreement.

- 4.2 The Operator shall (each as a distinct and separate obligation) perform the Project Development Services and its other obligations under this Agreement:

4.2.1 in accordance with the terms of this Agreement;

4.2.2 in accordance with Good Industry Practice from time to time for the activity concerned;

4.2.3 in such manner so as not wilfully to detract from the image and reputation of **tie**, CEC or the Project;

4.2.4 in accordance with all applicable Law governing the provision of the Project Development Services and the element of the Project Development Objectives which those Project Development Services are directed towards achieving;

4.2.5 in a manner that is not likely to be injurious to persons or property;

4.2.6 in a manner consistent with the Project Development Objectives;

4.2.7 in a timely and efficient manner and in accordance with the Partnering Methodology and Programme, and Project Programme and otherwise as directed by **tie** in accordance with the terms of this Agreement; and

- 4.2.8 using the Key Personnel and such other Project Development Staff as may be approved by **tie** for that type of work; and
- 4.2.9 save as **tie** may have directed to the contrary.
- 4.3 The Operator shall, and shall procure that the Operator Parties shall, participate in such publicity, forums and meetings as are considered by **tie** to be reasonably required to garner support of all sections of the Edinburgh populace for the Project.
- 4.4 The Operator must comply at all times with Law, in particular the provisions of the Health & Safety At Work etc Act 1974 ("HS Act") and the CDM Regulations insofar as they affect the Operator's obligations under this Agreement and without prejudice to the generality of the foregoing:
- 4.4.1 where for the purposes of the Project, the Operator is a "designer" as defined in the CDM Regulations, the Operator shall comply with the obligations of a designer under the CDM Regulations;
- 4.4.2 the Operator shall co-operate fully with the planning supervisor and the principal contractor appointed under the CDM Regulations;
- 4.4.3 the Operator shall allocate adequate resources to enable it to comply with its obligations in this Agreement and the CDM Regulations;
- 4.4.4 the Operator shall co-operate with all other persons involved in the Project as designers to consider the prevention of risk and protection of persons who may be exposed to risks; and
- 4.4.5 the Operator must not by any act or omission do anything that would cause **tie** to be prosecuted under the HS Act.

5. PROJECT TEAM AND KEY PERSONNEL

- 5.1 The Operator and **tie** shall agree from time to time the structure of the joint team (comprising representatives of **tie**, the **tie** Advisers and the Project Development Staff) which shall be the forum for partnering, liaison, co-operation and coordination of the Project.

- 5.2 The Operator shall ensure that:
- 5.2.1 the Key Personnel shall be available for meetings in Edinburgh at such times as **tie** may, in its sole discretion, direct; and
 - 5.2.2 in addition to the Key Personnel, there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) available for the provision of the Project Development Services in accordance with the Project Development Output Specification. This obligation shall include ensuring that there are sufficient Project Development Staff to cover periods of holiday, sickness and other absences and anticipated and actual peaks in servicing **tie's** requirements for the Project Development Services.
- 5.3 The Operator shall locate Project Development Staff at such locations as the Operator considers convenient for the Project, provided that:
- 5.3.1 the Operator acknowledges that pursuant to Clause 15 (*Project Development Costs*), it will not be entitled to any reimbursement from **tie** during Project Phases A, B and C1 in excess of any sum included in the Core Staff Fixed Rates and/or the Non-Core Staff Fixed Rates of the Project in relation to the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh;
 - 5.3.2 pursuant to Clause 5.2.1, **tie** will require the Operator to make the Key Personnel available for meetings in Edinburgh at such times as **tie** may, in its sole discretion, direct; and
 - 5.3.3 pursuant to Clause 6.8, the Operator Project Manager shall be required to be located in Edinburgh during Project Phase C2 and Project Phase D.
- 5.4 The Operator shall ensure that the Project Development Staff referred to in Clause 5.2.2 shall:
- 5.4.1 have the level of skill and experience appropriate (i) to the tasks and Project Development Objectives to which such staff are allocated and (ii) the standards to be achieved pursuant to this Agreement; and
 - 5.4.2 receive such training and supervision as is necessary to ensure the proper performance of this Agreement and compliance with all health and safety

rules, procedures and requirements. All training shall be in accordance with the Training Plan once that plan has been agreed between **tie** and the Operator pursuant to the Project Development Output Specification.

- 5.5 The Operator shall ensure that the Key Personnel have day to day responsibility for the implementation of the Project Development Services and that each of them performs the role in relation to the Project specified against his or her name in the Project Development and Operating Costs.
- 5.6 The Operator shall ensure that:
- 5.6.1 there are no changes to the Key Personnel without **tie's** prior written consent (such consent not to be unreasonably withheld or delayed in the case of a change necessitated by sickness or reasonable annual, maternity, paternity or compassionate leave or where one of the Key Personnel's employment ceases) and that any replacement persons shall be of at least equivalent status and ability to the person whom they replace; and
- 5.6.2 all other Project Development Staff shall be available in accordance with the requirements set out in the Partnering Methodology and Programme.
- 5.7 The Operator shall use all reasonable endeavours to ensure the continuity of the personnel assigned to perform the Project Development Services and shall select Key Personnel having careful regard to those persons' existing work load and other planned commitments.
- 5.8 If **tie** gives the Operator notice that any member of the Project Development Staff should be removed from involvement in the Project Development Services, the Operator shall immediately comply with such notice.
- 5.9 The Operator shall (and shall procure that the Operator Parties shall) comply with all relevant statutory health and safety requirements in respect of Project Development Staff, and any rules, regulations and any safety and security instructions from the **tie** Project Manager.
- 5.10 During Project Phases A, B and C1, **tie** shall provide office accommodation for the Project Development Staff within **tie's** own offices. If such accommodation is not available within **tie's** own offices, **tie** shall require the Operator to find alternative accommodation as soon as reasonably practicable and such requirement shall be

considered in accordance with Clause 24 (*tie Changes*) and Clause 23 (*Performance and Financial Adjustments*) of the Operating Appendix.

6. MANAGEMENT OF THE PROJECT

6.1 **tie** shall appoint a project manager ("**tie Project Manager**") by notice in writing to the Operator who (subject to Clause 6.12) will:

6.1.1 be responsible for managing the day to day conduct of the Project during Project Phases A, B, C and D;

6.1.2 be responsible for the day to day direction of the tasks to be performed by the Operator during Project Phases A, B, C and D;

6.1.3 exercise the functions and powers of **tie** in relation to the Project which are identified in this Agreement as functions or powers to be carried out by him/her (including during Project Phase D);

6.1.4 exercise such other functions and powers of **tie** under this Agreement as **tie** may notify to the Operator from time to time (including during Project Phase D); and

6.1.5 be the primary point of contact for the Operator with **tie** (including during Project Phase D);

and the Operator shall observe, and shall procure that the Project Development Staff observe, all reasonable directions of the **tie** Project Manager in relation to the Project.

6.2 The **tie** Project Manager shall be entitled at any time, by notice in writing to the Operator, to authorise any other persons to exercise the functions and powers of **tie** delegated to him pursuant to Clause 6.1, either generally or specifically. Until further notice from **tie**, any act of any such person shall, for the purposes of this Agreement, constitute an act of the **tie** Project Manager and all references to the "**tie** Project Manager" in this Agreement (apart from this Clause 6) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.

6.3 **tie** may by notice in writing to the Operator change the identity of the **tie** Project Manager. **tie** shall (as far as reasonably practicable) consult with the Operator prior

to the appointment of any replacement for the **tie** Project Manager, taking account of the need for liaison and continuity in respect of the Project. Such change shall have effect on the date specified in the written notice.

- 6.4 During any period when a **tie** Project Manager has not been appointed (or when the **tie** Project Manager is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement), **tie** shall carry out the functions which would otherwise be performed by the **tie** Project Manager.
- 6.5 No decision, act or omission of **tie**, the **tie** Project Manager or any **tie** Party shall, except as otherwise expressly provided in this Agreement:
- 6.5.1 in any way relieve or absolve the Operator from, modify, or act as a waiver or personal bar of, any liability, responsibility, obligation or duty under this Agreement;
- 6.5.2 in the absence of an express written instruction or authorisation issued by **tie** under Clause 24 (***tie** Changes*) of the Operating Appendix, constitute or authorise a **tie** Change; or
- 6.5.3 be construed as restricting or binding **tie** in any way save with regard to the specific project matters to which it relates.
- 6.6 Except as previously notified in writing before such act or omission by **tie** to the Operator, the Operator and the Operator Project Manager shall be entitled to treat any act or omission of the **tie** Project Manager which is authorised by this Agreement as being expressly authorised by **tie** and the Operator and the Operator Project Manager shall not be required to determine whether an express authority has in fact been given.
- 6.7 The Operator shall appoint a project manager ("**Operator Project Manager**") who shall:
- 6.7.1 act as the principal point of contact for **tie**, the **tie** Project Manager and the **tie** Advisers in relation to all matters related to the Project;
- 6.7.2 have full authority to act on behalf of the Operator for all purposes of this Agreement;

- 6.7.3 manage and co-ordinate the provision of the Project Development Services by the Project Development Staff and the integration of provision of the Project Development Services with the tasks being performed by **tie**'s internal team and the **tie** Advisers; and
- 6.7.4 liaise with the **tie** Project Manager in relation to the matters referred to in Clause 6.12 including, without limitation, the scope of the Project Development Services to be carried out from time to time.
- 6.8 During Project Phase C2 and Project Phase D, the Operator Project Manager shall be:
- 6.8.1 located in Edinburgh; and
- 6.8.2 engaged on the Project full time.
- 6.9 Except as previously notified in writing before such act or omission by the Operator to **tie**, **tie** and the **tie** Project Manager shall be entitled to treat any act or omission of the Operator Project Manager in connection with this Agreement as being expressly authorised by the Operator, and **tie** and the **tie** Project Manager shall not be required to determine whether any express authority has in fact been given.
- 6.10 The Operator may by written notice to **tie** change the identity of the Operator Project Manager. Where the Operator wishes to do so it shall by written notice to **tie** propose a substitute for approval, taking account of the need for liaison and continuity in respect of the Project and the Project Phase when the change is proposed. Such appointment shall be subject to the prior written approval of **tie** (not to be unreasonably withheld or delayed).
- 6.11 The Operator shall also nominate a deputy to the Operator Project Manager. During any period when the Operator Project Manager is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement, such deputy shall carry out the functions which would otherwise be performed by the Operator Project Manager.
- 6.12 Major decisions in relation to the Project Development Objectives during all Project Phases, will be taken by **tie**, such decisions to include:
- 6.12.1 the terms on which all Necessary Consents are applied for and the manner in which any proceedings necessary to obtain such Necessary Consents are

conducted (including the terms of all applications and notices and evidence to be presented in support of such applications and of any commitments and undertakings to be given in the course of such proceedings), always provided that this Clause 6.12.1 shall not apply to any Operator Necessary Consent. In relation to the Operator Necessary Consents, the Operator shall be solely responsible for determining the terms on which such Operator Necessary Consents are applied for and the manner in which any proceedings necessary to obtain such Operator Necessary Consents are conducted;

6.12.2 the terms on which public sector funding and local contributions for the Project (or any part of it) are applied for or agreed and the manner in which any proceedings necessary to obtain such funding are conducted;

6.12.3 the terms offered, or to be agreed with regard to all third party agreements, commitments and undertakings proposed to be entered into in respect of any Line before the Service Commencement Date in respect of the Line to which such agreement or undertaking relates;

6.12.4 the land or rights over land to be acquired for the purposes of the Project (other than offices or temporary work sites required by the Operator) and the manner and terms of such acquisition;

6.12.5 any application or representation or agreement or arrangement with any public authority, roads authority or highway authority, including CEC, Network Rail, statutory undertakers or other public or regulatory body in relation to the Project;

6.12.6 any change to the Partnering Methodology and Programme, Project Programme, Affordability Limits or Operating Appendix; and

6.12.7 the scope of the Project Development Services to be provided by the Operator from time to time, and all other matters specified in Clause 15 (*Project Development Costs*).

6.13 Save as directed in writing by **tie** or the **tie** Project Manager, the Operator shall not, and shall procure that the Operator Parties shall not, have any discussions or dealings with any person:

- 6.13.1 from whom any Necessary Consent (other than any Operator Necessary Consents) or public sector funding is sought, in relation to such Necessary Consent or funding or otherwise relating to any aspect of the Project which is not in the public domain;
- 6.13.2 whose land is or may be required for the purposes of the Project, in relation to such land or otherwise relating to any aspect of the Project which is not in the public domain;
- 6.13.3 who has objected to the Project or a proposed Scottish Private Bill, in relation to the undertakings or commitments which might be offered to him/her, or any other matter relating to any aspect of the Project which is not in the public domain; or
- 6.13.4 with or to whom any commitment or undertaking may need to be given or agreement entered into to facilitate the Project, in relation to any such commitment or undertaking, or otherwise relating to any aspect of the Project which is not in the public domain;
- 6.13.5 who may seek compensation in respect of nuisance, injurious affection, use of his/her land, loss of benefit from his/her land in relation to such compensation or otherwise relating to any aspects of the Project which are not in the public domain; or
- 6.13.6 who is a member of CEC or any employee of tie who is not part of a project team referred to in Clause 5.1, in relation to any aspect of the Project not in the public domain; or
- 6.13.7 who is involved in any venture or undertaking similar to the Project which may be in competition with the Project as regards resourcing capacity or funding availability.

7. QUALITY ASSURANCE

- 7.1 The Operator shall procure that all aspects of the Project Development Services are the subject of quality management systems at all times.
- 7.2 The quality management systems referred to in Clause 7.1 above shall be reflected in appropriate quality plans which shall:

- 7.2.1 for the period from the Effective Date until the agreement of the Quality Management Plan between **tie** and the Operator during Project Phase B (pursuant to Schedule 2 (*Project Development Output Specification*)), reflect the Operator's outline quality management plan set out in the Inception Report;
 - 7.2.2 be set out in the Quality Management Plan when agreed between the Operator and **tie**; and
 - 7.2.3 in any event, be consistent with BS EN ISO 9001:2000 or any equivalent standard which is generally recognised as having replaced it.
- 7.3 The Operator shall appoint (or shall procure the appointment of) a Quality Manager as soon as reasonably practicable following the Effective Date. The identity of the Quality Manager (and any replacement) shall be subject to the approval of the **tie** Project Manager (such approval not to be unreasonably withheld or delayed).
- 7.4 During Project Phases A to C, the Quality Manager may (without limitation) be the Operator Project Manager or one of the Key Personnel. During Project Phase D in respect of any Line, the identity of the Quality Manager shall comply with the requirements of Clause 14 (*Quality Assurance*) of the Operating Appendix.
- 7.5 During all Project Phases, the Quality Manager shall:
- 7.5.1 ensure the effective operation of the quality systems described in this Clause 7 (*Quality Assurance*) or Clause 14 (*Quality Assurance*) of the Operating Appendix (as appropriate);
 - 7.5.2 audit the quality systems at regular intervals and report the findings of such audit to the **tie** Project Manager;
 - 7.5.3 review all quality systems at intervals agreed with the **tie** Project Manager to ensure their continued suitability and effectiveness;
 - 7.5.4 liaise with the **tie** Project Manager on all matters relating to quality management; and
 - 7.5.5 report to the Operator in relation to the matters mentioned in Clauses 7.5.1 to 7.5.4 (inclusive).

8. OPERATOR'S PERFORMANCE SECURITY

- 8.1 Not less than 7 days after the Operator requests the issue of the first Certificate of Service Commencement by **tie** pursuant to Clause 3.1 (*Satisfaction of Requirements for Service Commencement*) of the Operating Appendix the Operator shall provide to **tie** a Performance Bond in the form of Schedule 14 (*Performance Bond*) to this Agreement and issued by a surety acceptable to **tie**.
- 8.2 The performance bond shall be for an amount of £5,000,000 (Five Millions Pounds Sterling) and shall be callable by **tie** on demand. The parties shall review the amount secured by the Performance Bond (i) at the commencement of Phase C2 for each subsequent Line or Network Expansion following the first Line in operation; and (ii) on the third anniversary of Full Service Commencement and annually thereafter. Any amendment required by **tie** to the amount secured by the Performance Bond shall be considered in accordance with Clause 24 (*tie Changes*) and Clause 23 (*Performance and Financial Adjustments*) of the Operating Appendix.
- 8.3 In the event the credit rating of the surety is downgraded to A- or a lower rating by Standard & Poors, **tie** shall be entitled to request the Operator to procure a substitute performance bond on identical terms from a surety acceptable to **tie**.
- 8.4 In the event that **tie** has made a demand on the Performance Bond and the costs, expenses, liabilities, loss of profits and damages incurred by **tie** as a result of:
- 8.4.1 the circumstances in respect of which the Performance Bond was called;
 - 8.4.2 the procurement of a replacement operator;
 - 8.4.3 **tie** operating the System at greater cost than the operation of the System by the Operator; and
 - 8.4.4 the costs of maintaining the Performance Bond in previous years which have already been reimbursed to the Operator;

are less than the amount called under the Performance Bond and paid to **tie**, **tie** shall reimburse the Operator such amount as **tie** determines by reconciliation represents any surplus. Any such reconciliation shall be carried out by **tie** no earlier than 6 months and no later than 2 years from the date of payment under the Performance

Bond. For the avoidance of doubt, **tie** shall not be liable to the Operator for any interest in respect of surplus reimbursed, subject to Clause 8.5 below.

8.5 **tie** shall notify the Operator when the reconciliation has been carried out pursuant to Clause 8.4 and **tie** shall pay any surplus to the Operator within 30 days of such notification. The Parties agree that **tie's** calculation of the Bonded Costs shall be binding and not subject to challenge or dispute by the Operator under any circumstances. Reimbursement of the surplus under this Clause 8.5 shall carry interest at the Default Interest Rate from the due date of payment until payment occurs.

9. SPECIAL EVENTS

To the extent that there are any Special Events during Project Phase C2 in respect of any Line that may affect the performance of the Project Development Services, **tie** and the Operator shall comply with the provisions of Clause 8 (*Special Events*) of the Operating Appendix.

10. AMENDMENTS TO THE OPERATING APPENDIX, THE OPERATOR FINANCIAL MODEL AND THE OPERATING OUTPUT SPECIFICATION, AND THE SETTING OF FIXED COSTS AND RATES

10.1 **tie** acknowledges that the Operator has agreed:

10.1.1 the Operator Financial Model as at the Effective Date; and

10.1.2 the terms of the Operating Appendix;

on the basis of the Base Case Assumptions and the Law as at the Effective Date;

10.2 Subject to Clause 10.6, in accordance with the Project Development Output Specification, during Project Phase A and B in respect of a Line, **tie** and the Operator shall review and agree any appropriate amendments to the Operating Appendix and/or the Operator Financial Model and/or the Operating Output Specification as a result of any Base Case Assumptions becoming Inappropriate Base Case Assumptions, or as a result of a Change in Law.

10.3 If pursuant to Clause 10.2, amendments are requested by the Operator to the Operating Appendix, the Base Case Assumptions, the Financial Proposals, the Operator Financial Model, the Project Development and Operating Costs and/or the

Operating Output Specification during Project Phases A or B, the Operator and **tie** shall discuss, and seek to agree the relevant changes which will leave the Operator in No Better and No Worse a position than it would have been in had (i) the relevant Base Case Assumption not become an Inappropriate Base Case Assumption or (ii) the relevant Change in Law not occurred.

10.4 To the extent that there are any further developments to the Project during Project Phase C and/or Project Phase D which either the Operator or **tie** consider require amendment to the Base Case Assumptions, the Financial Proposals, the Operator Financial Model, the Project Development and Operating Costs, the terms of the Operating Appendix, and/or the Operating Output Specification such amendments shall be considered by the Operator and **tie** in accordance with Clause 23 (*Performance and Financial Adjustments*) and Clause 24 (*tie Changes*) or Clause 25 (*Operator Changes*) in the Operating Appendix.

10.5 If **tie** and the Operator are unable to agree:

10.5.1 whether any of the Base Case Assumptions is an Inappropriate Base Case Assumption; or

10.5.2 whether a Change in Law has occurred; or

10.5.3 what amendments to the Operating Appendix, the Base Case Assumptions, the Financial Proposals, the Operator Financial Model, the Project Development and Operating Costs and/or the Operating Output Specification pursuant to Clause 10.3 would leave the Operator in No Better and No Worse a position,

then either Party may refer the disagreement to the Dispute Resolution Procedure.

10.6 The Category One Fixed Costs, the Category Five Fixed Costs, the Core Staff Fixed Rates and the Non-Core Staff Fixed Rates are set as at the Effective Date and shall not be subject to adjustment pursuant to Clause 10.2 except in relation to any Changes in Law.

10.7 The unit cost in respect of any Category Two Fixed Costs shall be set as at the Effective Date and the total cost of any Category Two Fixed Costs shall be set by reference to the Base Case Assumptions by the end of Project Phase B in accordance with this Clause 10 (*Amendments to the Operating Appendix, the Operator Financial*

Model and the Operating Output Specification, and the Setting of Fixed Costs and Rates) in the same way as the Target Operating Costs shall be set at the end of Project Phase B.

- 10.8 The Category Three Fixed Costs shall be set by agreement between **tie** and the Operator by the end of Project Phase C1 in accordance with the procedure set out in Part A of Schedule 17 (*Setting of Fixed Costs*).
- 10.9 The Category Four Fixed Costs shall be set by agreement between **tie** and the Operator by the end of Project Phase C2 in accordance with the procedure set out in Part B of Schedule 17 (*Setting of Fixed Costs*).
- 10.10 **tie** and the Operator may agree from time to time to treat other costs or rates payable in accordance with this Agreement as fixed costs or fixed rates. These additional fixed costs or fixed rates may be treated as fixed costs or fixed rates within one of the already defined categories of costs or rates, and set accordingly, or may be treated otherwise and set in a manner agreed by **tie** and the Operator.
- 10.11 Fixed Costs shall not be treated as Target Operating Costs or Target Costs for Project Phase C2, and if the actual costs for an item which is a Fixed Cost exceed the amount stated in the Project Development and Operating Costs (as Indexed), then **tie** shall not be liable to make payment to the Operator in respect of any excess above the Fixed Costs in accordance with this Agreement. Notwithstanding the actual costs for an item which is a Fixed Cost may be less than the amount stated in the Project Development and Operating Costs, **tie** shall be liable to pay the relevant Fixed Cost to the Operator in accordance with this Agreement.
- 10.12 All information on the actual costs associated with any Fixed Costs or Fixed Rates shall be made available to **tie** on an Open Book Basis.
- 10.13 All Fixed Costs and Fixed Rates which are applicable during Project Phase D (except for the Category Five Fixed Costs and any costs which the Parties agree are to be paid by **tie** to the Operator on a one-off basis) shall be subject to reset in accordance with Clause 21 (*Reset of the Fixed Costs, the Target Operating Costs and the Target Revenue*) of the Operating Appendix.
- 10.14 At the start of each Year, **tie** and the Operator shall agree a profile for the payment of Fixed Costs, Profit Element and Target Operating Costs, and the payment of any

Fixed Costs, Profit Element and any Target Operating Costs shall be made by **tie** to the Operator in accordance with the agreed profile. The agreed profile shall take account of the following matters (where relevant):

10.14.1 one-off annual payments:

10.14.2 amounts spread evenly over set periods;

10.14.3 amounts which will vary seasonally or otherwise;

10.14.4 fluctuations in service levels including bank holidays;

10.14.5 one-off payments; and

10.14.6 any methodology to be agreed by the Parties.

10.15 Either Party may refer any Dispute about the categorisation or setting of Fixed Costs or Fixed Rates to the Dispute Resolution Procedure.

10.16 The Operator shall update the Operator Financial Model in the following circumstances:

10.16.1 after the Target Costs for Project Phase C2, the Target Operating Costs and the Category Two Fixed Costs have been set in accordance with this Clause 10 (*Amendments to the Operating Appendix, the Operator Financial Model and the Operating Output Specification, and the Setting of Fixed Costs and Rates*);

10.16.2 after the Category Three Fixed Costs have been set in accordance with this Clause 10 (*Amendments to the Operating Appendix, the Operator Financial Model and the Operating Output Specification, and the Setting of Fixed Costs and Rates*);

10.16.3 after the Category Four Fixed Costs have been set in accordance with this Clause 10 (*Amendments to the Operating Appendix, the Operator Financial Model and the Operating Output Specification, and the Setting of Fixed Costs and Rates*);

- 10.16.4 on each Reset Decision Date or following agreement or determination of reset pursuant to Clause 21 (*Reset of the Fixed Costs, the Target Operating Costs and the Target Revenue*) ;
- 10.16.5 after the setting or adjustment of Target Revenues by the Joint Revenue Committee;
- 10.16.6 after any financial adjustment pursuant to Clause 20 (*Adjustment of Fixed Costs, Target Operating Costs and Target Revenues*) of the Operating Appendix; and
- 10.16.7 as may be otherwise agreed by **tie** and the Operator.
- 10.17 When the Operator Financial Model is updated in the circumstances set out in Clause 10.16, any update shall be subject to **tie's** approval (such approval not to be unreasonably withheld). The updating of the Operator Financial Model shall be done on an Open Book Basis, and the Operator shall also respond as soon as reasonably practicable to any reasonable request from **tie** to provide any information associated with the Operator Financial Model on an Open Book Basis. If required, the Operator shall also update the Financial Proposals and the Project Development and Operating Costs at the same time as updating the Operator Financial Model.
- 10.18 The Operator shall supply to **tie** an electronic copy of any updated Base Case Assumptions, Operator Financial Model, Financial Proposals and Project Development and Operating Costs within 10 Business Days of **tie's** approval in accordance with Clause 10.17.
- 10.19 During Project Phases A to C1, when the Operator Financial Model is updated in the circumstances set out in Clause 10.16, the costs of such updating by the Operator shall be paid by **tie** to the Operator on the basis of the Non-Core Staff Fixed Rates and in accordance with Clause 15 (*Project Development Costs*). During Project Phases C2 to D, when the Operator Financial Model is updated in the circumstances set out in Clause 10.16, the costs of such updating by the Operator shall be paid by **tie** to the Operator on the basis of actual costs agreed on the basis of an estimate provided by the Operator to **tie**. During each Project Phase, the Operator shall minimise as far as reasonably practicable, the costs associated with the updating of the Operator Financial Model.

11. NETWORK EXPANSIONS

- 11.1 **tie** and the Operator will keep opportunities for Network Expansion under review throughout the Term, consistent with the objectives of the Integrated Transport Initiative and any other relevant public transport initiatives of CEC or **tie** from time to time.
- 11.2 From time to time during the Term, **tie** may propose to the Operator a Network Expansion for development. To the extent that **tie** requests assistance from the Operator in relation to the development of such Network Expansion:
- 11.2.1 the Operator will provide Project Development Services during the development of that Network Expansion, and the provisions of this Agreement and the Project Development Output Specification shall apply to the development of that Network Expansion as if it were a Line; and
- 11.2.2 the terms of payment for the Network Expansion in respect of Project Development Services and Project Operations shall be the same as those set out in this Agreement. Following **tie**'s request pursuant to Clause 11.2 above, the Operator shall present for **tie**'s approval its proposals for capped fees for the Development Phase for the Network Expansion and the relevant workstreams in the Project Development Output Specification.
- 11.3 If **tie** and the Operator are unable to agree the fees for the Project Development Services in respect of any Network Expansion pursuant to Clause 11.2.2, **tie** may withdraw its request for the Operator to provide the Project Development Services and **tie** may continue with the development of such Network Expansion, either by itself or in conjunction with third parties.
- 11.4 Whether or not **tie** requests the Operator to provide Project Development Services in relation to a proposed Network Expansion:
- 11.4.1 the Operator shall provide access to such information, documents and records as may be reasonably requested by **tie** or the **tie** Advisers in relation to the development of the proposed Network Expansion, and the provisions of Clause 48 (*Information and Audit Access*) shall apply (*mutatis mutandis*) to such access;
- 11.4.2 **tie** and the Operator will negotiate in good faith in relation to agreeing:

- (i) the Target Costs for Project Phase C2 (*Testing and Commissioning*) and any Fixed Costs relative to Project Phase C2 for the Network Expansion;
- (ii) the Interim Target Operating Costs, Interim Fixed Costs and the Interim Target Revenues for the System including such Network Expansion (if it is proposed that there be a time interval between the Service Commencement Date and the Full Service Commencement Date for such Network Expansion);
- (iii) the Target Operating Costs, the Target Revenues and any Fixed Costs for the System including such Network Expansion;
- (iv) amendments to the Operating Output Specification, the Operating Method Statements (and the Operating Appendix to the extent necessary) to take effect from the Service Commencement Date of the Network Expansion; and
- (v) any other amendments to this Agreement that are necessary in respect of the Network Expansion,

on the basis that the Operator should be in a No Better and No Worse position following the implementation and Service Commencement of the Network Expansion. **tie** and the Operator shall have regard to, but not be bound by, the costing assumptions prepared by the Operator which are set out in Schedule 19 (*Additional Costing Assumptions*).

- 11.5 To the extent that **tie** and the Operator are unable to agree the matters listed in Clause 11.4.2 by the end of Project Phase B for the Network Expansion (or the equivalent stage of development if the Operator is not providing the Project Development Services), **tie** shall be entitled to terminate this Agreement pursuant to Clause 31.5.

PART III - OPERATIONS PHASE

12. TRANSITION TO PROJECT PHASE D

- 12.1 The Operating Appendix shall come into effect in accordance with its terms and this Agreement (including such Operating Appendix) will govern the performance of the Project Operations for each of the Lines and/or any Network Expansion.
- 12.2 The Service Commencement Date (and the Full Service Commencement Date, if different) for each Line or Network Expansion shall be determined in accordance with the Project Programme, the terms of the Project Development Output Specification and the Operating Output Specification.

13. EDINBURGH TRAM NETWORK INTEGRATION

- 13.1 The Operator shall be responsible for maintaining and implementing the System Integration Plan, and shall liaise with the Infrastructure Provider(s) accordingly.
- 13.2 The Operator shall exercise such management authority (in respect of the performance of the System Integration Plan) pursuant to **tie's** rights under the Infrastructure Delivery Agreements as **tie** may direct from time to time in accordance with Clause 11 (*Operation and Maintenance Procedures*) of the Operating Appendix.
- 13.3 During the Term, the Operator shall remain responsible for maintaining and implementing the Service Integration Plan, including maintaining arrangements with other local transport providers which ensure the integration of the Edinburgh Tram Network with other local public transport for the benefit of passengers and the realisation of the objectives of the Integrated Transport Initiative, the Project Vision and **tie's** other transportation objectives. This responsibility extends to any adjustment to arrangements required to respond to incremental expansion of the Core Network, including regulatory approvals.
- 13.4 In the event that the Operator is unable to sustain the arrangements put in place to achieve integration in relation to the Core Network in accordance with the Service Integration Plan, the Operator shall report the reasons to **tie** and the Parties shall consult in order to explore solutions. If no solution is available to the Operator after a period of 60 days, **tie** may terminate this Agreement pursuant to Clause 37.1.1.

14. PERSONNEL ISSUES

- 14.1 The Operator shall at all times during the Term (including the Development Phase):
- 14.1.1 follow recruitment good practice to ensure that appropriately high quality staff are engaged, suitable for the posts to be filled, taking into account the level of responsibility involved;
 - 14.1.2 procure that there are set up and maintained by the Operator and all contractors with whom the Operator contracts in respect of the Project, personnel policies and procedures covering all relevant matters (including discipline, grievance, benefits, equal opportunities and health and safety). The Operator shall procure that the terms and the implementation of such policies and procedures comply with Law (which for the purposes of this Clause 14.1.2 shall exclude Guidance which only **tie** or a public sector body and not the Operator is bound to comply with) and Good Industry Practice, and that such policies and procedures are approved by the relevant authorised party within the Operator and are published in appropriate media and that copies of such policies and procedures (and any revisions and amendments to them) are issued to **tie** as soon as reasonably practicable after production;
 - 14.1.3 provide, and shall procure that all contractors with whom the Operator contracts in respect of the Project provide, to **tie** upon request written details of their respective management organisations;
 - 14.1.4 not (and the Operator shall insert a clause to this effect in each contract with contractors with whom the Operator contracts in respect of the Project) unlawfully discriminate within the meaning and scope of the provisions of the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003; and
 - 14.1.5 have in place and implement appropriate equal opportunities and equality policies and comply with all applicable Law (which for the purposes of this Clause 14.1.5 shall exclude Guidance which only **tie** or a public sector body and not the Operator is bound to comply with) regarding employment of or recruitment of the Operator's employees.

- 14.2 The Operator shall during Project Phase C2 and Project Phase D:
- 14.2.1 comply with paragraph 7 of Schedule 4 (*Operating Output Specification*) to the Operating Appendix in relation to personnel issues; and
 - 14.2.2 comply with the Training Plan.
- 14.3 In accordance with Clause 5.4.2, the Operator shall comply with the Training Plan during Project Phase B once that plan has been agreed between **tie** and the Operator pursuant to the Project Development Output Specification.
- 14.4 During Project Phase C2 or Project Phase D, the **tie** Project Manager (acting properly and reasonably) may notify the Operator in writing if any employee of the Operator or any Operator Party (in accordance with the terms and conditions of employment of the employee concerned) misconducts himself or is incompetent or negligent in his duties or whose conduct in relation to the Project Operations is considered by the **tie** Project Manager to be undesirable and/or not in accordance with the Operator's obligations under this Agreement. **tie** shall co-operate with any disciplinary proceedings instigated by the Operator and shall be advised in writing by the Operator of the outcome in respect of such notification.
- 14.5 During Project Phase C2 or Project Phase D, if **tie**, acting fairly and having reasonable grounds to believe that a member of the Project Operations Staff:
- 14.5.1 has been or is under the influence of alcohol or drugs whilst performing any duties in connection with the Project Operations; or
 - 14.5.2 has been convicted of any offence concerning sexual offences on children, theft, corruption or fraud; or
 - 14.5.3 has, in the case of a Tram driver, been convicted of any offence involving alcohol or drugs,

requires the Operator (by notice in writing) to do so, the Operator shall (or shall procure that the relevant Operator Party shall) at the Operator's cost, immediately remove such employee from the Project Operations. Such employee may only be returned to the Project Operations if the matter or matters referred to in Clauses 14.5.1, 14.5.2 and/or 14.5.3 which is/are the subject of **tie's** reasonable grounds is/are established to be incorrect.

PART IV - FINANCIAL PROVISIONS

15A. INDEXATION

15A.1 Indexation shall be applied on an annual basis on 1 April of each year to the costs set out in Clauses 15A.2 and 15A.3 below.

15A.2 The following costs shall be Indexed:

15A.2.1 Target Costs for Project Phase C2;

15A.2.2 Target Operating Costs;

15A.2.3 Interim Target Costs;

15A.2.4 Profit Element;

15A.2.5 any amount which is expressed to be "Indexed" in this Agreement; and

15A.2.6 any other amount which is agreed by the Parties to be Indexed.

15A.3 The following costs shall be Indexed at Premium:

15A.3.1 Fixed Costs;

15A.3.2 Interim Fixed Costs;

15A.3.3 Fixed Rates;

15A.3.4 any amount which is expressed to be "Indexed at Premium" in this Agreement; and

15A.3.5 any other amount which is agreed by the Parties to be Indexed at Premium.

15. PROJECT DEVELOPMENT COSTS

15.1 During the Development Phase of this Agreement, the ~~tie~~ Project Manager and the Operator Project Manager shall meet:

- (a) no later than 7 days before the end of each Quarter during Project Phases A, B and C1 to agree the provision of Project Development Services by the Operator's Core Team for the forthcoming Quarter; and
- (b) no later than 7 days before the end of each month during Project Phases A, B and C1 to agree the provision of Project Development Services by the Operator's Non-Core Staff, and
- (c) no later than 7 days before the end of each month during Project Phase C2 to agree the provision of Project Development Services during Project Phase C2

to:

- 15.1.1 review the partnering tasks required in the next Quarter or (as appropriate) month ;
- 15.1.2 specify the Project Development Services required from the Operator which will be provided by the Operator's Core Team to perform or assist in the performance of those partnering tasks. **tie** shall determine whether or not such Project Development Services fall outwith the Project Development Services to be provided by the Operator's Core Team within the relevant Capped Fee. If it is agreed that such Project Development Services would fall outwith this Capped Fee, then if **tie** still require these Project Development Services, **tie** shall require the Operator's Core Team to perform these additional Project Development Services as if these Project Development Services were being provided by the Operator's Non-Core Staff. Any additional Project Development Services required on this basis shall be specified in accordance with Clause 15.1.3 and budgeted on a monthly basis in accordance with Clause 15.1.5;
- 15.1.3 specify the Project Development Services required from the Operator which will be provided by the Operator's Non-Core Staff to perform or assist in the performance of those partnering tasks;
- 15.1.4 agree amendments to the Partnering Methodology and Programme setting out the plan and timetable for the performance of those tasks;
- 15.1.5 agree a forward budget for such month or Quarter (as appropriate) in respect of the services specified by **tie** pursuant to Clauses 15.1.2 and 15.1.3 for the

Project Development Costs to be incurred by the Operator in performing those tasks, and such budget shall also include any agreed Profiled Fixed Costs and any agreed Profiled Profit Element (where appropriate); and

- 15.1.6 review progress on delivery of Project Development Services against programme and agreed budget during the immediately preceding month or Quarter (as appropriate) .

provided that:

- 15.1.7 if any of the matters referred to in Clauses 15.1.1 to 15.1.5 cannot be so agreed, either Party may refer the matter to the Dispute Resolution Procedure;
- 15.1.8 **tie** shall not be required to reimburse the Operator at more than the Core Staff Fixed Rates and the Non-Core Staff Fixed Rates in respect of the Operator's Core Team and the Operator's Non-Core Staff for the services to be provided pursuant to Clauses 15.1.2 and 15.1.3, notwithstanding that any Operator Party who makes Operator's Non-Core Staff available to the Operator for the purpose of the Project may make a greater charge to the Operator and, for the avoidance of doubt, no such greater charge shall be included within the Project Development Costs;
- 15.1.9 **tie** shall not be required to make any reimbursement for Project Development Costs in excess of that provided for in a budget agreed pursuant to Clause 15.1.5 unless and until (and to the extent only that) any such excess is approved by the **tie** Project Manager;
- 15.1.10 during Project Phases A, B and C1, **tie** shall not be required to reimburse the Operator for the travel of any person to or from Edinburgh, or for the accommodation or subsistence of any person visiting Edinburgh in excess of any sum included in the Core Staff Fixed Rates or the Non-Core Staff Fixed Rates ;
- 15.1.11 **tie** shall not be required to reimburse the Operator for any costs or expenses incurred or time spent by the Operator or any Operator Party in relation to the negotiation or the procurement, preparation or negotiation of contracts or arrangements with third parties engaged by the Operator and, for the

avoidance of doubt, no such charge shall be included within the Project Development Costs; and

15.1.12 any specific Project Development Services to be provided by the Operator in relation to the support for the parliamentary process relating to the Scottish Private Bills shall be agreed on the basis of the Fixed Non-Core Staff Rates, budgeted, invoiced (quarterly) and paid for in accordance with this Clause 15 (*Project Development Costs*).

15.2 In accordance with **tie's** requirements pursuant to Clause 15.1.3, the Operator shall supply the Operator's Non-Core Staff provided that the Operator shall be obliged to provide Operator's Non-Core Staff who are employed by an Operator Party only if the required Operator's Non-Core Staff are available and can perform the required Project Development Services in accordance with the Partnering Methodology and Programme or otherwise in accordance with any timescale required by **tie** and/or the **tie** Project Manager.

15.3 The Operator shall submit to the **tie** Project Manager no later than 14 days after the end of each Quarter in respect of Project Development Services provided by the Operator's Core Team or no later than 14 days after the end of each month in respect of Project Development Services provided by the Operator's Non-Core Staff an application for payment in respect of the Project Development Costs and the Fixed Costs claimed for that Quarter or month (as appropriate) . Such application for payment shall set out the following details:

15.3.1 the total Project Development Costs incurred by the Operator and/or budgeted for that Quarter or month (as appropriate) in accordance with Clause 15.1.5;

15.3.2 a breakdown of those Project Development Costs by activity and by Line (where practicable);

15.3.3 a breakdown of those Project Development Costs between Project Development Costs relative to the Operator's Core Team and Project Development Costs relative to the Operator's Non-Core Staff;

- 15.3.4 the timesheets of each member of the Operator's Non-Core Staff engaged in performing the Project Development Services, certified as true and accurate by that person; and
- 15.3.5 a breakdown of the Fixed Costs claimed by the Operator together with a breakdown of the actual costs of any Fixed Costs incurred.
- 15.4 **tie** shall procure that the **tie** Project Manager shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary and subject to Clauses 10.11, 15.1.8, 15.1.9, 15.1.10, 15.1.11 and 15.13, certify by notice in writing to the Operator that part of the Project Development Costs and the Fixed Costs claimed in the application for payment approved by **tie** which approval shall include the sums stated in the budget for the relevant month or Quarter agreed in accordance with Clause 15.1.5 and give reasons why any part of the Project Development Costs and the Fixed Costs claimed in the application for payment has not been so approved and certified no later than 30 days after the date on which such application for payment is received by **tie** (the "Due Date for Payment"). **tie** shall not be liable to pay to the Operator any Project Development Costs contained in any budget agreed in accordance with Clause 15.1.5 to the extent that the Operator has not provided any of the Project Development Services. **tie** shall pay to the Operator the Project Development Costs contained in any budget agreed in accordance with Clause 15.1.5 where and to the extent **tie** instruct the Operator not to provide such Project Development Services.
- 15.5 Within 5 Business Days of receiving a notice from **tie** pursuant to Clause 15.4 certifying part or all of the Project Development Costs and the Fixed Costs claimed in the relevant application for payment, the Operator shall issue an invoice (substantially in the form of Schedule 13 (*Form of Operator's Invoice*)) to **tie** for ninety percent (90%) of such certified Project Development Costs and Fixed Costs . **tie** shall retain ten percent (10%) of such certified Project Development Costs (the "Retention").
- 15.6 **tie** shall pay any invoice submitted in accordance with Clause 15.5 within 30 days of the Due Date for Payment calculated in accordance with Clause 15.4 (the "Final Date for Payment").

- 15.7 Within 5 Business Days of the issue of a PPCN by **tie** (in respect of the relevant Project Phase for the relevant Line), the Operator shall submit to the **tie** Project Manager the final application for payment in respect of the Project Development Costs and the Fixed Costs claimed for the relevant Project Phase for the relevant Line. Such application for payment shall set out details listed in Clauses 15.3.1 to 15.3.4.
- 15.8 **tie** shall procure that the **tie** Project Manager shall, subject to any clarifications as are in **tie's** opinion (acting properly and reasonably) necessary and subject to Clauses 10.11, 15.1.8, 15.1.9, 15.1.10, 15.1.11 and 15.13, certify by notice in writing to the Operator that part of the Project Development Costs and the Fixed Costs claimed in the final application for payment approved by **tie** which certification shall include the budget for the relevant month or Quarter agreed in accordance with Clause 15.1.5 in respect of the Project Development Services required from the Operator which were to be provided by the Operator's Core Team and give reasons why any part of the Project Development Costs and the Fixed Costs claimed in the final application for payment has not been so approved and certified no later than 30 days after the date on which such application for payment is received by **tie** (the "Due Date for Payment").
- 15.9 Within 5 Business Days of receiving a notice from **tie** pursuant to Clause 15.8 certifying part or all of the Project Developments Costs and the Fixed Costs claimed in the final application for payment, the Operator shall issue an invoice to **tie** for one hundred percent (100%) of such certified Project Development Costs and Fixed Costs and, subject to Clause 15.11, for one hundred percent (100%) of each Retention retained in accordance with Clause 15.5.
- 15.10 **tie** shall pay the invoice submitted in accordance with Clause 15.9 within 30 days of the Due Date for Payment calculated in accordance with Clause 15.8 (the "Final Date for Payment").
- 15.11 In respect of Project Phase A, if **tie** issues a PPCN at a time when the Royal Assent to the Scottish Private Bill for the relevant Line has not yet been obtained, the Retention in respect of any specific Project Development Services provided pursuant to Clause 15.1.12 shall not be invoiced by the Operator until following the date of the giving of Royal Assent to the Scottish Private Bill for the relevant Line. **tie** shall pay the invoice submitted in accordance with this Clause 15.11 within 30 days of its receipt by **tie**.

- 15.12 The Operator may refer any Dispute about Project Development Costs and/or Fixed Costs which have not been certified by **tie** to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or part of any disputed amount should be paid by **tie** to the Operator, the Operator shall raise an invoice in respect of such determined amount and payment shall be made by **tie** to the Operator not less than 7 days from the date of receipt of such invoice by **tie** or the date which, apart from the Dispute would have been the Final Date for Payment calculated in accordance with Clause 15.6 or Clause 15.8 (as appropriate), whichever date is later.
- 15.13 Fees payable in respect of the Project Development Services provided by the Operator's Core Team during Project Phases A, B and C1 are Capped Fees subject to the following provisions of this Clause 15.13. Under no circumstances (absent **tie's** express agreement) shall **tie** be liable to pay the Operator any amount with respect to any Project Phase for the Project Development Services provided by the Operator's Core Team, in excess of the amount of the relevant Capped Fee notwithstanding that tasks may remain outstanding in order for completion of Project Development Services in any Project Phase to be achieved to **tie's** satisfaction provided always that if Project Phases A, B or C1 are extended beyond the dates set out in the Project Programme and/or the Partnering Methodology and Programme, and this extension is not due to the Operator's breach of this Agreement, the **tie** Project Manager shall meet with the Operator Project Manager to agree a budget for any further Project Development Services which are required from the Operator and which will be provided by the members of the Operator's Core Team and/or the Operator's Non-Core Staff, as if all members of the Operator's Core Team and the Operator's Non-Core Staff were Operator's Non-Core Staff.. The provisions of this Clause 15 shall apply to these Project Development Services as if the Project Development Services had been specified in accordance with Clause 15.1.3.
- 15.14 The Operator shall notify **tie** immediately if the Operator believes that the Operator's Core Team cannot carry out the Project Development Services in accordance with the timescales set out in the Partnering Methodology and Programme or otherwise in accordance with any requirements of **tie** or the **tie** Project Manager.
- 15.15 The Parties may agree to suspend provision of the Project Development Services at any time for any period up to a maximum of 12 months or such longer period as the Parties may agree. In the event of any such suspension, the Parties shall agree the

reasonable costs of such suspension, the terms for payment of such costs and the procedure for recommencement of the provision of the Project Development Services at the end of any agreed period of any suspension.

16. PAYMENTS FOR THE PROJECT DEVELOPMENT SERVICES

16.1 In consideration of the performance by the Operator of the Project Development Services in accordance with the terms of this Agreement, **tie**:

16.1.1 shall make the payments to the Operator specified in Clause 15 (*Project Development Costs*) and Clause 17 (*Payment during Project Phase C2*); and

16.1.2 subject to the terms of this Agreement, grants to the Operator, with effect from the Service Commencement Date in respect of each Line, the exclusive right to operate such Line in accordance with the terms and for the period set out in the Operating Appendix.

16.2 The Operator's only entitlement to payment from **tie** in respect of the performance of the Project Development Services shall be as expressly provided in this Agreement.

17. PAYMENT DURING PROJECT PHASE C2

17.1 The Operator shall submit to the **tie** Project Manager an application for payment no later than 7 days after the end of each month in respect of the Fixed Costs for the month just ended, the actual costs for any Target Costs for Project Phase C2 for the month just ended, any other actual costs agreed with **tie** and the Profit Element claimed for that month in respect of the Project Development Services carried out in Project Phase C2 for the relevant Line. Each application for payment shall set out the full detail of expenditure incurred and the monthly budget forecast agreed pursuant to Clause 15.1.5. The application for payment shall also include a breakdown of the Fixed Costs claimed by the Operator together with a breakdown of the actual costs of any Fixed Costs incurred.

17.2 **tie** shall procure that the **tie** Project Manager shall, subject to any clarifications as are in **tie**'s opinion (acting properly and reasonably) necessary and subject to Clauses 10.11, 17.10 and 17.11, certify by notice in writing to the Operator that part of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element claimed in the application for payment which is approved by **tie** by reference to the agreed budget and give reasons

why any part of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element has not been so approved and certified no later than 30 days after the date on which such application for payment is received by **tie** (the "Due Date for Payment").

- 17.3 Within 5 Business Days of receiving a notice from **tie** pursuant to Clause 17.2 certifying part or all of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and the Profit Element claimed in the relevant application for payment, the Operator shall issue an invoice to **tie** for ninety percent (90%) of such certified Fixed Costs, the actual costs for any Target Costs for Project Phase C2, and any other actual costs agreed with **tie** and ninety percent (90%) of the certified Profit Element. **tie** shall retain ten percent (10%) of the certified Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and ten percent (10%) of the certified Profit Element (the "Retention").
- 17.4 **tie** shall pay any invoice submitted in accordance with Clause 17.3 within 30 days of the Due Date for Payment calculated in accordance with Clause 17.2 (the "Final Date for Payment"); and
- 17.5 Within 5 Business Days of the issue by **tie** of a PPCN in respect of the Project Phase C2 for the relevant Line, the Operator shall submit to the **tie** Project Manager the final application for payment in respect of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element claimed for Project Phase C2. Such application for payment shall set out the information required in Clause 17.1.
- 17.6 **tie** shall procure that the **tie** Project Manager shall, subject to any clarifications as are in **tie**'s opinion (acting properly and reasonably) necessary and subject to Clauses 10.11, 17.10 and 17.11, certify by notice in writing to the Operator that part of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element claimed in the final application for payment which is approved by **tie** and give reasons why any part of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element claimed in the final application for payment has not been so approved and certified no later than 30 days after the date on which such application for payment is received by **tie** (the "Due Date for Payment"). The final

amount certified by **tie** shall take into account a reconciliation of cost overrun or savings, as the case may be, calculated in accordance with Clause 17.11.

- 17.7 Within 5 Business Days of receiving a notice from **tie** pursuant to Clause 17.6 certifying part or all of the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element claimed in the final application for payment, the Operator shall issue an invoice to **tie** for one hundred percent (100%) of such certified Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and Profit Element and for one hundred percent (100%) of each Retention retained in accordance with Clause 17.3.
- 17.8 **tie** shall pay the invoice submitted in accordance with Clause 17.7 within 30 days of the Due Date for Payment calculated in accordance with Clause 17.6 (the "Final Date for Payment").
- 17.9 The Operator may refer any Dispute about the Fixed Costs, the actual costs for any Target Costs for Project Phase C2, any other actual costs agreed with **tie** and/or Profit Element which have not been certified to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or part of any disputed amount should be paid by **tie** to the Operator, the Operator shall raise an invoice in respect of the determined amount and payment shall be made by **tie** to the Operator not less than 7 days from the date of receipt of such invoice by **tie** or the date which, apart from the Dispute would have been the Final Date for Payment calculated in accordance with Clause 17.4 or Clause 17.8 (as appropriate), whichever date is later.
- 17.10 **tie** shall not be required to reimburse the Operator for any amount not agreed in the relevant monthly budget for Project Phase C2.
- 17.11 To the extent that the Operator's actual costs, in respect of which Target Costs for Project Phase C2 have been allocated, for Project Development Services carried out during Project Phase C2 (i) exceed the Target Costs for Project Phase C2, **tie** shall certify (subject to a 10% retention to be released upon issue of the PPCN for Project Phase C2) a contribution of twenty percent (20%) of the undisputed amount of any such excess, up to a ceiling for such excess of ten percent (10%) of the Target Costs for Project Phase C2; or (ii) represents a saving against the Target Costs for Project

Phase C2, the Operator shall be entitled to a share of fifty percent (50%) of any such saving.

17.12 In the event that the Operator becomes aware of circumstances that may involve the completion of Project Phase C2 either being delayed or requiring expenditure in excess of Target Costs for Project Phase C2 and the Fixed Costs (excluding the Category Five Fixed Costs) claimed for Project Phase C2, the Operator shall notify **tie** forthwith.

18. PAYMENT DURING THE SERVICE PERIOD

18.1 The payment provisions at Clause 19 (*Payments to the Operator*) in the Operating Appendix will apply to payments during the Service Period.

19. METHOD AND CURRENCY OF PAYMENT

19.1 Subject to Clauses 19.3 and 19.4, all payments under this Agreement shall be made in pounds sterling by electronic transfer of funds to the bank account of the recipient (located in the United Kingdom) specified in the relevant invoice, quoting the invoice number against which payment is made, provided that in respect of payments pursuant to Clause 18.2 of the Operating Appendix (as regards Operating Revenues collected or received by the Operator):

19.1.1 all such Operating Revenues shall be paid directly into the bank account nominated by **tie**; and

19.1.2 the Operator shall supply statements summarising such payments in accordance with Clause 18 (*Payment of Operating Revenue to tie*) of the Operating Appendix

19.2 If either Party (acting in good faith) disputes the amount of all or any part of a payment due under this Agreement, the undisputed amount of such payment shall be paid in accordance with Clause 19.1 and the provisions of this Clause 19.2 shall apply in respect of the disputed part only. The Parties shall resolve the Dispute in accordance with Clause 42 (*Dispute Resolution Procedure*). Following resolution of the Dispute, any amount agreed or determined to have been payable shall be paid forthwith together with interest on such amount calculated in accordance with Clause 20 (*Interest*).

- 19.3 If the United Kingdom becomes a Participating Member State and to the extent that EMU Legislation provides that an amount denominated in the National Currency Unit of a Participating Member State and payable within that Participating Member State may be paid either in the Euro unit or in that National Currency Unit, each Party shall be entitled to pay any such amount either in the equivalent Euro unit (at the prevailing rate of exchange given by the Bank of England on the last Business Day prior to the due date pursuant to this Agreement for such payment) or in pounds sterling during such period as the relevant EMU Legislation permits.
- 19.4 On expiry of such period as referred to in Clause 19.3 above, the Parties shall discharge their payment obligations to one another by payment in Euros and all liabilities, amounts (whether outstanding or payable in the future) and calculations expressed in pounds sterling in this Agreement shall be converted or amended (as the case may be) automatically to the equivalent amount in Euros at the exchange rate provided pursuant to the relevant EMU Legislation.

20. INTEREST

- 20.1 Each Party shall be entitled, without prejudice to any other right or remedy (excluding any right under the Late Payment of Commercial Debts (Interest) Act 1998), to receive interest on any payment not duly made pursuant to the terms of this Agreement on the due date calculated from day to day at a rate per annum equal to the Default Interest Rate from the day after the date on which payment was due up to and including the date of payment. The Parties agree that the entitlement to interest pursuant to this Clause 20 (*Interest*) constitutes a "substantial remedy" for the purposes of section 9 of the Late Payment of Commercial Debts (Interest) Act 1998.

21. SET-OFF

- 21.1 The Operator shall not be entitled to retain or set off any amount owed to it by **tie** against any amount due to **tie** by it.
- 21.2 **tie** may retain or set off any amount owed to it by the Operator which has fallen due and payable against any amount due from **tie** to the Operator by specifying the amount(s) to be set off or retained and the ground(s) for set off or retention in the notice in writing to be issued by **tie** to the Operator on or before any Due Date for Payment or by **tie** issuing to the Operator a Notice of Intention to Withhold Payment not less than five Business Days before any Final Date for Payment.

21.3 If the retention or set-off of any amount referred to in Clause 21.1 is disputed, then any undisputed part of that amount shall be retained or set off and the following provisions of this Clause 21.3 shall apply in respect of the disputed part only. The Parties shall use all reasonable endeavours to resolve the dispute in question but, if they fail so to resolve it, either Party may refer the matter to the Disputes Resolution Procedure. Following resolution of the dispute, any amount agreed or determined to have been payable shall be paid not later than 7 days from the date of resolution of the Dispute or the date which, apart from the Dispute would have been the final date for payment (whichever is earlier), together with interest on such amount calculated in accordance with Clause 20 (*Interest*).

22. VAT

- 22.1 All amounts specified in this Agreement are exclusive of VAT.
- 22.2 If any supply made under this Agreement is or becomes chargeable to VAT then the person receiving the supply ("**Recipient**") shall in addition pay the person making the supply ("**Supplier**") the amount of that VAT against receipt by the Recipient from the Supplier of a valid and correct VAT invoice in respect of that supply.
- 22.3 Where, under this Agreement, any amount is calculated by reference to any sum which has been or will be incurred by any person, the amount shall include any VAT in respect of that sum only to the extent that such VAT is not and will not be recoverable as input tax by that person, save where such VAT is irrecoverable by reason of that person's negligence, error or omission.
- 22.4 The Operator shall provide to **tie** any information reasonably requested (including pursuant to Clause 48 (*Information and audit access*)) in connection with the amount of VAT chargeable in relation to any supply made, payment made or reimbursed in accordance with this Agreement and payable by the Operator. To the extent **tie** suffers any Losses through irrecoverable VAT as a consequence of inaccurate or inadequate VAT related documentation provided by the Operator or a delay in the provision of such documentation, the Operator shall reimburse **tie** in respect of any such Losses.
- 22.5 **tie** shall not be liable to pay the Operator any irrecoverable VAT incurred by the Operator through his own oversight or omission, in particular with regard to VAT assessment of payments made pursuant to the Pain Gain Share Mechanism (set out at

paragraphs 18 to 21 of Schedule 3 to the Operating Appendix), the KPI Regime or VAI calculation.

- 22.6 For the avoidance of doubt, a change in the rates of VAT during the Term shall not be treated as a Qualifying Change in Law but VAT shall be applied to any invoice submitted in accordance with this Agreement and shall be payable at the rate which is current as at the date of any such invoice.

23. TAXATION

- 23.1 Subject to Clause 22 (*VAT*) and Clauses 23.2 to 23.4 below, the Operator shall pay all Tax whatsoever whether parliamentary, local or otherwise which are payable in respect of (i) any rights or interests enjoyed by the Operator under this Agreement during any Project Phase and (ii) the income (other than the Patronage Revenue collected by the Operator as agent for **tie** and remitted to **tie** pursuant to Clause 18 (*Payment of Operating Revenue to tie*) of the Operating Appendix) or profits generated by the Project Operations or the Tram Business. With the exception of rates in respect of the business use or occupation of premises to perform its obligations under this Agreement (which the Operator shall be entitled to include in the Operating Costs), all other payments made as described under this provision shall be for the Operator's account.
- 23.2 In the event the Operator is notified or otherwise becomes aware of the first Rateable Value to be assigned to the System (or of any subsequent re-evaluation) it shall promptly notify **tie**. If **tie** wishes to appeal, **tie** shall notify the Operator of its intention and the Operator shall co-operate with and provide all reasonable assistance in the prosecution of the appeal, including the provision of relevant documentation, accounts and financial and technical information, the availability of relevant managers and other material evidence reasonably required by **tie**.
- 23.3 **tie** shall indemnify the Operator against any demand made in respect of the Rateable Value of the System and the Operator shall be entitled to 30% of the financial benefit of any reduction in the Rateable Value of the System resulting from any appeal made under Clause 23.2 above. The Operator shall indemnify **tie** in relation to any failure to retain, keep or produce proper and complete records which adversely affects **tie's** ability to pursue such appeal.

- 23.4 For the avoidance of doubt, no amount shall be included in the Target Operating Costs or the Fixed Costs in respect of the Rateable Value of the System, and any payment by **tie** pursuant to the indemnity in Clause 23.3 shall be made separately from the Payment Mechanism.
- 23.5 To the extent that an Infrastructure Provider is assessed as liable in respect of the Rateable Value of the System and **tie** wishes to appeal, **tie** shall notify the Operator of its intention and the Operator shall co-operate with such appeal in accordance with Clause 23.2.

24. MITIGATION AND COST MANAGEMENT

- 24.1 The Operator shall (and shall procure that each Operator Party shall) take all reasonable steps to manage, minimise and mitigate:
- 24.1.1 all Project Development Costs during Project Phases A, B and C1, and actual costs for the Project Development Services carried out during Project Phase C2 ; and
- 24.1.2 the adverse effects of any Base Case Assumption proving to be an Inappropriate Base Case Assumption.
- 24.2 At all times during the Term, each Party shall take all reasonable steps to minimise and mitigate any loss for which that Party is entitled to bring a claim against the other Party pursuant to this Agreement.
- 24.3 Without prejudice to Clause 24.2, the Operator shall (and shall procure that its Operator Parties shall) take all reasonable steps to minimise the adverse effects of any Relief Event (including by seeking damages from third parties or other remedies where proceedings would have a reasonable chance of success and would not be economically imprudent having regard to the likely level of damages or the nature of the remedies and the estimated cost or duration of the proceedings).

PART V - WARRANTIES, INDEMNITIES AND LIABILITY

25. WARRANTIES

25.1 The Operator hereby represents, warrants and undertakes to **tie** that:

25.1.1 none of the Operator, the Operator Parties or any of their respective representatives or Affiliates or professional advisers or employees or anyone acting on behalf of any of them have committed any Prohibited Act;

25.1.2 all information which has been given by any of the Operator, the Operator Parties or any of their respective representatives or Affiliates or advisers or employees or anyone acting on behalf of any of them to any member, officer, employee or adviser of **tie** was, when given true, complete and accurate in all material respects and there is no fact or matter not disclosed in writing to **tie** which:

25.1.2.1 renders any such information untrue, inaccurate or misleading; or

25.1.2.2 might, if disclosed, adversely affect the decision of anyone considering whether or not to contract with the Operator;

25.1.3 the Operator:

25.1.3.1 is duly incorporated under the law of Scotland and has the power to own its own assets and carry on its own business; and

25.1.3.2 has full power and authority to enter into and perform this Agreement which constitutes a valid and binding obligation on the Operator in accordance with its terms; and

25.1.3.3 will not, by performing its obligations under this Agreement, be in breach of any undertaking to any third party or of any applicable law so as to have a material adverse effect on its ability to discharge its obligations under this Agreement;

25.1.4 the Operator, the Operator's immediate parent company and TRANSDEV plc is not involved in any dispute with HM Inland Revenue, HM Customs & Excise, the European Commission, the OFT, or any other fiscal or regulatory

- authority in any jurisdiction concerning any matter which could materially and adversely affect the business of the Operator or the Project in any way;
- 25.1.5 the Operator does not use any processes and is not engaged in any activities which involve the misuse of any confidential or proprietary information belonging to any third party;
- 25.1.6 no claim is presently being assessed and no litigation, arbitration or proceeding is in progress or, to the best of the knowledge and belief of the Operator pending or threatened, against the Operator or any of its management or assets which might have an adverse effect on the ability of the Operator to perform the obligations in this Agreement or the Operating Appendix;
- 25.1.7 the Operator's use and the use by **tie** of the Project Development Services and any materials provided to it as part of the Project Development Services has not infringed and shall not infringe any third party's Intellectual Property Rights;
- 25.1.8 there has been no material adverse change to the financial condition the Operator's immediate parent company and TRANSDEV plc since the audited accounts for the financial year 2003 including any matter resulting in a downgrade of the Operator's immediate parent company's and TRANSDEV plc's credit rating with any commercially acknowledged independent rating agency reporting the transport sector; and
- 25.1.9 the performance of the Project Development Services does not create any situation in which a conflict of interest arises for the Operator.
- 25.2 Each of the warranties, representations and undertakings given under Clauses 25.1.1 to 25.1.9 shall be construed as a separate and independent warranty, representation and undertaking and shall not be limited or restricted by reference to or inference from any other terms of this Agreement.
- 25.3 The Operator shall immediately disclose in writing to **tie** any event or circumstance which may arise or become known to it after the Effective Date which is materially inconsistent with any of the warranties, representations or undertakings given under

Clauses 25.1.1 to 25.1.9 or which has or is likely to have a material adverse effect on the Project.

25.4 The warranties, representations or undertakings given under Clauses 25.1.1 to 25.1.9 shall be repeated by the Operator (save that Clause 25.1.8 shall apply to the Operator and to the Operator's immediate parent company and TRANSDEV plc the reference in Clause 25.1.8 to audited accounts shall refer to the latest set of the audited accounts issued by the Operator, the Operator's immediate parent company and TRANSDEV plc) at the commencement of Project Phase C2 for each Line or Network Expansion.

25.5 **tie** does not give any warranty or undertaking as to the completeness, currency, accuracy or fitness for any purpose of any of the Background Information and, subject to the express provisions of this Agreement, neither **tie**, the **tie** Advisers nor any of its or their employees shall be liable to the Operator in contract, delict (including breach of statutory duty), or otherwise as a result of:

25.5.1 any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information; nor

25.5.2 any failure to make available to the Operator any materials, documents, drawings, plans or other information relating to the Project;

provided that nothing in this Clause 25.5 shall exclude any liability in respect of any statements made or information provided fraudulently.

26. REQUIRED INSURANCES

26.1 The Operator shall, at its own cost, procure that each of the Required Insurances is taken out and comes into effect on the earlier of:

26.1.1 the relevant date specified in each "Period of Insurance" set out in Schedule 10 (*Required Insurances*); and

26.1.2 the date on which the Operator is first required by Law to have in place such insurance in connection with the Project Development Services and the Project Operations,

and shall maintain the Required Insurances in full force and effect until the later of:

- 26.1.3 the relevant date specified in each "Period of Insurance" set out in Schedule 10 (*Required Insurances*); and
 - 26.1.4 the last date on which the Operator is required by Law to have in place such insurance in connection with the Project Development Services and the Project Operations.
- 26.2 The Operator shall procure that all Required Insurances shall:
- 26.2.1 be maintained in accordance with Schedule 10 (*Required Insurances*); and
 - 26.2.2 be placed at all times with insurers confirmed in writing as acceptable by **tie** (such written acceptance not to be unreasonably withheld or delayed).
- 26.3 **tie** may ask the Operator to take out and maintain any insurance from time to time in the joint names of **tie**, the Operator and, if required, any other party agreed between the Parties or become a joint named insured (the "Joint Names Insurance"). If Joint Names Insurance is required, the terms of this Clause 26 including the provisions which are stated to apply to the "Required Insurances" shall apply with any appropriate adjustment to be agreed between the Parties as a **tie** Change. The Operator shall procure that any Joint Names Insurance shall:
- 26.3.1 contain a provision that **tie** is named as a co-insured party;
 - 26.3.2 provide that any Joint Names Insurance shall continue in effect and unaltered for the benefit of the insured parties for at least 90 days after written notice by registered mail of any cancellation (including non-renewal), change, modification or lapse for any reason;
 - 26.3.3 contain a provision that requires the insurer to send copies of all notices of cancellation or alteration or suspension or any other notices given under or in relation to the policy to **tie** promptly upon receiving any notices of cancellation or alteration or suspension or any other notices;
 - 26.3.4 contain a provision that a notice of a claim given to the insurer by **tie** or the Operator under the policy shall, in the absence of manifest error, be accepted by the insurer as valid notification of a claim in respect of the interests of all insured parties;

- 26.3.5 contain a provision to the effect (on the basis of non-vitiating/severability) that all the provisions of any the Joint Names Insurance shall operate as if there were a separate policy in effect (save in respect of the sums insured, limits of liability and excesses/deductibles which shall be at the levels stated) for each named insured and that non-compliance with any policy term, condition or warranty and/or misrepresentation of material information by the Operator or any other co-insured will not affect the rights and/or interests of **tie** under any policies effected as Joint Names Insurance;
- 26.4 The Operator shall ensure that each of its insurance brokers (who shall be approved by **tie**, such approval not to be unreasonably withheld or delayed) gives **tie** as soon as reasonably practicable after any policy of Required Insurance is taken out, replaced or renewed, a letter of undertaking in the form set out in Part 2 of Schedule 10 (*Required Insurances*).
- 26.5 The Operator shall:
- 26.5.1 procure that the professional indemnity insurance and the third party liability insurance which is to be maintained by the Operator in accordance with Schedule 10 (*Required Insurances*) contains a waiver of subrogation against **tie** as required in Schedule 10 (*Required Insurances*) save in respect of fraud or deliberate non-disclosure; and
- 26.5.2 where the Operator is obliged to effect any Required Insurances, not bring any claim or action against **tie** (or any **tie** Party) in respect of any loss or damage in circumstances where and to the extent that the Operator could recover such loss or damage under such insurance (whether or not such insurance has in fact been effected or, if effected, has been vitiated as a result of any act or omission of the Operator (or any Operator Party), including but not limited to non-disclosure or under-insurance), provided that, to avoid doubt, this Clause 26.5.2 shall not by itself prevent the Operator from claiming against **tie** (or any **tie** Party) in respect of a breach of this Agreement by **tie** or any **tie** Party for any loss or damage not covered because of the level of deductibles under such insurance permitted by this Agreement or to the extent such loss or damage exceeds the greater of the insurance placed or the maximum of such insurance required under Schedule 10 (*Required Insurances*).

- 26.6 The Operator shall not take any action or fail to take any reasonable action or (insofar as it is reasonably within its power) permit or allow others to take or fail to take any action (including failure to disclose any fact) as a result of which any of the Required Insurances may be rendered void, voidable, unenforceable or suspended or impaired in whole or in part or which may otherwise render any sum paid out under any relevant policy repayable in whole or in part.
- 26.7 Not less than 30 days prior to the expiry or amendment of any of the Required Insurances, the Operator shall submit to **tie** a request for approval from **tie** of the insurer and the principal terms and conditions of such insurance policy in respect of any material change or revision to such terms and conditions or change in identity of such insurer, such approval not to be unreasonably withheld or delayed.
- 26.8 The Operator shall supply **tie** with copies of every policy document, insurance certificate and renewal certificate relating to any Joint Names Insurance (or such other evidence of insurances as may be reasonably required by **tie**) and documentary evidence to the effect that the Required Insurances (other than any Joint Third Names Insurance) have been taken out and are being maintained as soon as it is available but in any event no later than 7 days (in respect of certificates) and 60 days (in respect of policies) after the inception of the relevant policies, together with evidence of payment of the premiums and any periodic renewal certificates. If the Operator defaults in insuring or continuing to maintain the Required Insurances subject to Clause 27 (*Uninsurable Risks*), **tie** may insure against any risk in respect of which such default has occurred and recover any premiums from the Operator as a debt immediately due and payable.
- 26.9 The supply to **tie** of any insurance policy or insurance certificate or renewal certificate or other evidence of compliance with this Clause 26 (*Required Insurances*) shall not imply, or be taken as, acceptance by **tie** that:
- 26.9.1 the extent of insurance cover is sufficient and its terms are satisfactory; or
- 26.9.2 in respect of any risks not insured against, insurable interests or parties not insured, an acceptance by **tie** that the same were Uninsurable.
- 26.10 Neither failure to comply nor full compliance with the provisions of this Clause 26 (*Required Insurances*) and Clause 27 (*Uninsurable Risks*) shall relieve the Operator of its liabilities and obligations under this Agreement.

- 26.11 The Operator shall apply any proceeds of any policies of insurance maintained in accordance with Schedule 10 (*Required Insurances*) in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable (unless already paid direct to the third party or employee by the insurer).
- 26.12 The Operator shall inform **tie** in writing as soon as reasonably practicable after it receives a claim or becomes aware of the occurrence of any event that may give rise to a claim under any Joint Names Insurance and will ensure that **tie** is kept fully informed of subsequent action and developments concerning the claim; such written information shall not be required in relation to any claim of less than £50,000 (Indexed). The Operator shall take such steps as are necessary or appropriate to ensure that each Operator Party, in respect of any event or claim of a like nature arising out of or relating to the operation or responsibility of the Operator Party, takes in relation to the Operator like action to that which the Operator is required to take under this Clause 26.12 in relation to **tie**, and shall inform **tie** promptly of information thus received from any Operator Party.
- 26.13 Notwithstanding, and without prejudice to, any other provision hereof (but subject always to Clause 28 (*Indemnity*)), the Operator undertakes to the extent it has the right to do so under the relevant policy that it will not (and that each of the Operator Parties to the extent each respectively has the right to do so under the relevant policy will not) settle any Joint Names Insurance claim above £50,000 (Indexed) without the prior written agreement of **tie** (such agreement not to be unreasonably withheld or delayed).
- 26.14 The Operator undertakes with **tie** in relation to the Required Insurances:
- 26.14.1 to comply with all requirements of the insurers; and
- 26.14.2 to give notice to **tie** immediately upon the happening of any event which will adversely affect any policy of insurance effected in accordance with this Clause 26 (*Required Insurances*), including the downgrading of the credit rating to A- by Standard & Poors of any party providing any of the Required Insurances.
- 26.15 In the event that the Operator considers that the requirements of Clause 26.14.1, or 26.15.2 may conflict with any other Clause herein, the Operator shall immediately notify **tie** in writing.

- 26.16 The Required Insurances shall be reviewed before the commencement of a new Project Phase, and/or on an annual basis and/or as otherwise agreed between **tie** and the Operator by **tie** , with the support and assistance of the Operator, to ensure that the Required Insurances continue to offer value for money to **tie**. **tie** retains the right to require the Operator to amend the Required Insurances throughout the Term as it may reasonably require to reflect changes in the circumstances surrounding this Agreement or to effect changes which will offer better value for money to **tie**. Any such amendment shall be considered in accordance with Clause 24 (*tie changes*) and Clause 23 (*Performance and Financial Adjustments*).
- 26.17 Following expiry or termination of this Agreement, **tie** shall continue to pay the Operator the agreed amount for any Required Insurances which the Operator is required in terms of this Agreement to maintain beyond the date of expiry or termination of this Agreement. **tie** shall notify the Operator if **tie** does not want the Operator to continue maintaining any such Required Insurances following expiry or termination of this Agreement.
- 26.18 The Operator shall having regard to the knowledge skill and care of a competent operator, if required by **tie**, advise **tie** with regard to the selection of appropriate insurances for Project Phase C and Project Phase D.
- 26.19 **tie** shall take out or procure that such insurances as **tie** considers to be appropriate in relation to the construction, maintenance and operation of the System are taken out and maintained during Project Phase C and Project Phase D. The Operator agrees that the Operator shall take out any such insurances if required to do so by **tie**, and any such requirement on the Operator shall be considered in accordance with Clause 24 (*tie Changes*) and Clause 23 (*Performance and Financial Adjustments*) .
- 26.20 The Parties agree that appropriate amendments shall be made to this Agreement to reflect the insurances which are taken out or not taken out in terms of Clause 26.19.
- 26.21 The Operator shall be liable for claims made under the third party insurance to be taken out as a Joint Names Insurance or otherwise in respect of the Project Operations during Project Phase D, which are less than the level of stated deductibles in Schedule 10 (*Required Insurances*) as at the Effective Date relative to such insurance.

27. UNINSURABLE RISKS

27.1 Nothing in this Agreement shall oblige the Operator to take out insurance in respect of a risk or matter which is Uninsurable.

27.2 Immediately after the Operator becomes aware that a Compliance Critical Risk is Uninsurable, then:

27.2.1 the Operator shall notify **tie**; and

27.2.2 if both Parties agree or it is determined in accordance with the Dispute Resolution Procedure (on the referral of either Party) that the risk or matter is Uninsurable and that its being Uninsurable is not caused by the actions or omissions of the Operator or an Operator Party;

then the Parties shall meet to discuss the means by which the risk or matter should be managed, mitigated or controlled (including considering the use of self-insurance by either Party and/or insurance through a captive insurer in any jurisdiction).

27.3 At the meeting referred in Clause 27.2, either Party may propose:

27.3.1 any necessary change in the Project Development Services or Project Operations;

27.3.2 whether any amendments are required to the terms of the Agreement including any required adjustment to the Capped Fees, Fixed Costs (excluding the Category Five Fixed Costs) , Target Costs for Project Phase C2, Target Operating Costs or the Target Revenue; and

27.3.3 whether relief from compliance with obligations is required, as a result of the risk or matter becoming Uninsurable.

27.4 If the requirements of Clause 27.2 are satisfied but the Parties cannot agree as to how to manage, mitigate or control the risk or matter then, for the period during which the relevant Compliance Critical Risk is Uninsurable:

27.4.1 to the extent that the Operator is prevented or otherwise hindered from performing the Project Development Services or the Project Operations in the manner required by this Agreement:

27.4.1.1 the Operator shall be relieved from such performance and shall not be liable to **tie** for failure so to perform provided it continues to perform the remainder of the Project Development Services or the Project Operations as best as it is reasonably able to; and

27.4.1.2 during Project Phase C2 and Project Phase D, the Target Costs for Project Phase C2 or Target Operating Costs or the Fixed Costs (excluding the Category Five Fixed Costs) as the case may be shall be reduced by an amount which reflects the net cost savings made as a result of restricted Project Development Services or restricted Project Operations and Target Revenues shall be adjusted to reflect the impact of restricted Project Operations on Patronage Revenue. If the Operator determines not to reduce its operating establishment or cost base to reflect restricted Project Operations but to maintain this at the level necessary for normal Project Operations, **tie** shall not be obliged to pay the marginal Fixed Costs or Operating Costs relating to such establishment or cost base.

27.4.2 **tie** shall have the option to be exercised by notice in writing at any time in the period during which such Compliance Critical Risk is Uninsurable (provided that **tie** shall, if such period continues for more than 180 days, be deemed to have exercised such option on the 181st day) to terminate this Agreement forthwith.

28. INDEMNITY

28.1 The Operator shall, subject to Clause 28.2, indemnify **tie** and keep **tie** indemnified on demand at all times from and against all Indemnified Liabilities which arise out of, or in consequence of, or in connection with any breach of this Agreement by the Operator, any non-performance or delay in performance of the Operator's obligations under this Agreement or any breach of statutory duty by the Operator (or any Operator Party).

28.2 The Operator's liability to indemnify **tie** under Clause 28.1 does not extend to any Indemnified Liabilities to the extent that:

28.2.1 they are caused by the negligent acts or negligent omissions of **tie** or any **tie** Party; or

28.2.2 they are caused by the breach by **tie** of its obligations under this Agreement (save where and to the extent such breach occurs by reason of the Operator's or any Operator Party's breach or negligence); or

28.2.3 they arise as a direct result of the Operator acting on specific written instructions issued by **tie** or the **tie** Project Manager (excluding any instruction to comply with the terms of this Agreement (or any part of it)) provided that, prior to acting on such instruction, the Operator:

28.2.3.1 notifies the **tie** Project Manager of the risk of the relevant Indemnified Liability occurring as a result of acting on the instruction; and

28.2.3.2 does not then act on the instruction until it receives written confirmation from the **tie** Project Manager that it should do so.

For the avoidance of doubt neither instructions issued pursuant to Clause 24 (*tie Changes*) of the Operating Appendix and Clause 25 (*Operator Changes*) of the Operating Appendix shall constitute specific written instructions for the purposes of this provision.

28.3 Any amount paid by the Operator to **tie** pursuant to this Clause 28 (*Indemnity*) shall be excluded from the calculation of the Operating Costs.

29. CONDUCT OF CLAIMS

Subject always to the requirements of the Required Insurances:

29.1 If **tie** receives any notice, demand, letter or other document concerning any claim from which it appears that **tie** is or may become entitled to indemnification under this Agreement ("Claim"), **tie** shall notify the Operator as soon as reasonably practicable and shall supply a copy of the relevant Claim to the Operator.

- 29.2 Where it appears that **tie** is, or may become, entitled to indemnification from the Operator in respect of the liability arising out of the act or omission which is the subject of the Claim, the Operator shall take conduct of any defence, dispute, compromise or appeal of the Claim and of any incidental negotiations and shall be entitled to resist the Claim in the name of **tie** and **tie** will give the Operator all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim.
- 29.3 In relation to any Claim subject to Clause 29.2:
- 29.3.1 the Operator shall keep **tie** fully informed and consult with it about material elements of the conduct of the Claim;
- 29.3.2 the Operator shall not bring the name of **tie** into disrepute; and
- 29.3.3 the Operator shall not pay or settle such Claims without the prior written consent of **tie**, such consent not to be unreasonably withheld or delayed.
- 29.4 **tie** shall be free to take steps in the proceedings, pay or settle any Claim on such terms as it thinks fit (and without prejudice to its rights and remedies under this Agreement) if the Operator fails to notify **tie** of its intention to conduct the relevant Claim within 20 Business Days of the notice from **tie** under Clause 29.1 above or the Operator notifies **tie** that it does not intend to take conduct of the Claim.
- 29.5 **tie** shall be free at any time to give notice to the Operator that it is retaining or taking over (as the case may be) the conduct of any defence, dispute, compromise or appeal of any Claim (or of any incidental negotiations) to which Clause 29.2 applies. On receipt of such notice the Operator shall promptly take all steps necessary to transfer the conduct of such claim to **tie** and shall provide to **tie** all reasonable co-operation, access and assistance for the purposes of considering and resisting such Claim. If **tie** gives any notice pursuant to this Clause 29.5, then the Operator shall be released from any liability under the relevant indemnity in respect of such Claim. **tie** shall keep the Operator reasonably informed as to the progress and status of any such Claim until such Claim is settled, withdrawn, discontinued or otherwise disposed of.
- 29.6 If, in controlling and contesting any Claim, **tie** takes or fails to take any action in relation to such Claim which it might reasonably be expected to take or not take (as the case may be) which terminates or reduces any entitlement of the Operator to

recover any part of the Claim from any insurer under any of the Required Insurances, the liability of the Operator to indemnify **tie** in respect of such Claim shall be reduced by an amount equal to such part or as the case may be the amount of the reduction thereof (except in the case where **tie** could not reasonably have been expected to have known that the Operator's entitlement could be so terminated or reduced).

29.7 If the Operator pays to **tie** an amount in respect of an indemnity and **tie** subsequently recovers (whether by payment, discount, credit, saving, relief, other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the Claim, **tie** shall forthwith repay to the Operator whichever is the lesser of:

29.7.1 an amount equal to the sum recovered (or the value of the saving or benefit obtained) less any out-of-pocket costs and expenses properly incurred by **tie** in recovering the same; and

29.7.2 the amount paid to **tie** by the Operator in respect of the Claim under the relevant indemnity;

provided that there shall be no obligation on **tie** to pursue such recovery and that the Operator is repaid only to the extent that the amount of such recovery aggregated with any sum recovered from the Operator exceeds any loss sustained by **tie** in respect of the Claim.

30. LIABILITY AND SOLE REMEDY

30.1 Subject to Clause 30.3, the Parties acknowledge and agree that the only rights available to them to terminate this Agreement are those expressly set out in this Agreement and that neither Party shall be entitled to exercise a right to terminate or rescind or accept the repudiation of this Agreement under any other right whether arising in common law or statute or otherwise howsoever (other than for fraud or a fraudulent misrepresentation).

30.2 The Parties further acknowledge and agree that the express rights provided in this Agreement in relation to termination and the calculation and payment of amounts due following such termination are exclusive and are in place of (and not cumulative with) any other rights or remedies which might arise as a consequence of such termination. The Parties hereby waive all other rights and remedies arising from such

termination, whether express or implied, arising by common law (including in delict), by statute or otherwise howsoever provided that nothing in this Clause 30.2 shall exclude the right of the Parties to claim remedies expressly conferred on them by this Agreement.

30.3 Nothing in this Agreement shall exclude or limit the liability:

30.3.1 of either Party for:

30.3.1.1 death or personal injury caused by that Party's negligence or the negligence of anyone for whom that Party is vicariously liable;

30.3.1.2 fraud or fraudulent misrepresentation; or

30.3.1.3 any breach of warranty given as to valid and marketable title, freedom from unduly onerous burdens and conditions or entitlement to possession by action of prescription; or

30.3.2 of the Operator, for any breach of this Agreement or any delict (including negligence) or other liability arising prior to termination of this Agreement;

provided that nothing in this Clause 30.3 shall confer on either Party rights or remedies that they would not otherwise have.

30.4 Subject to Clause 30.3, neither party shall be entitled to claim damages for breach of this Agreement, in delict (including negligence), breach of statutory duty or on any other basis whatsoever to the extent that such damages claimed by that Party are for Indirect Losses suffered by that Party provided that for the avoidance of doubt, nothing in this Clause 30.4 shall affect either Party's liability to the other Party, whether under any indemnity, under Clause 29.6 or otherwise, in respect of any claim, action, proceedings or demand against such other Party by a third party in connection with Indirect Loss suffered.

30.5 The Operator shall not be relieved or excused of any responsibility, liability or obligation under this Agreement by the appointment of any Operator Party. The Operator shall, as between itself and **tie**, be responsible for the selection, pricing, performance, acts, defaults, omissions, breaches, delict and offences of all the Operator Parties. All references in this Agreement to any act, default, omission,

breach, delict or offence of the Operator shall be construed to include any such act, default, omission, breach or delict of any Operator Party.

PART VI - TERMINATION

31. TERMINATION DURING DEVELOPMENT PHASE

31.1 During Project Phase A, Project Phase B and Project Phase C1 in respect of any Line, **tie** may terminate this Agreement, either:

31.1.1 in whole, if no Line has reached Project Phase C2 or Project Phase D at the time of such termination;

31.1.2 in part, for such Lines where project development is still in Project Phase A, Project Phase B or Project Phase C1; or

31.1.3 in part, if the Scottish Private Bill in respect of a Line is not enacted;

such termination to be by way of **tie** providing at least 30 days notice in writing to the Operator at any time.

31.2 During Project Phase A and Project Phase B in respect of Line 1 or Line 2, **tie** may terminate this Agreement in whole or in part, if there is a material increase or alteration to the costs of the Project or the liabilities and risks to **tie** beyond those which **tie** considers (i) can be managed within Affordability Limits or (ii) are reasonable and prudent to retain, such termination to be by way of **tie** providing at least 30 days notice in writing to the Operator at any time.

31.3 If **tie** serves notice to terminate this Agreement in respect of one or more Lines ("**Terminated Lines**") pursuant to Clause 31.1.2, and **tie** chooses to continue development of any of such Terminated Lines, either by itself or in conjunction with any third party, **tie** shall discuss with the Operator in good faith, at the stage of development of such Terminated Line equivalent to Project Phase B:

31.3.1 the Target Costs for Project Phase C2 for such Terminated Line;

31.3.2 the Interim Target Operating Costs, Interim Fixed Costs and the Interim Target Revenues for the System including such Terminated Line (if it is proposed that there be a time interval between the Service Commencement Date and the Full Service Commencement Date for such Terminated Line);

- 31.3.3 the Target Operating Costs, any adjustments to the Fixed Costs (excluding the Category Five Fixed Costs) and the Target Revenues for the System including such Terminated Line;
- 31.3.4 amendments to the Operating Output Specification, the Operating Method Statements (and the Operating Appendix to the extent necessary) to take effect from the Service Commencement Date of such Terminated Line; and
- 31.3.5 any other aspect of the terms of this Agreement to be amended to reflect the Operator's rights and obligations in respect of such Terminated Line (or the System including such Terminated Line);

on the basis that the Operator should be in a No Better and No Worse position following the implementation and Service Commencement of the Terminated Line provided that **tie** shall not be liable to pay the Operator any sum which the Operator has included in its Profit Element with respect to such Terminated Line.

- 31.4 If **tie** and the Operator are unable to agree on the matters referred to in Clause 31.3, then the termination rights in Clause 31.5 will apply.
- 31.5 Notwithstanding that one or more Lines may be in Project Phase C2 or Project Phase D, if **tie** and the Operator are unable to agree:
 - 31.5.1 the Fixed Costs and/or the Target Costs for Project Phase C2 for any proposed new Line or Network Expansion;
 - 31.5.2 Interim Target Operating Costs, Interim Fixed Costs and Interim Target Revenues for the System including any proposed new Line or Network Expansion;
 - 31.5.3 the Target Revenues and Target Operating Costs and/or Fixed Costs for Project Phase D for the System including any proposed new Line or Network Expansion;
 - 31.5.4 amendments to the Operating Output Specification, the Operating Method Statements (and the Operating Appendix to the extent necessary) to take effect from the Service Commencement Date of any proposed new Line or Network Expansion; or

31.5.5 any other aspect of the contractual terms to apply in respect of Project Phase C2 or Project Phase D in respect of such Line or Network Expansion (or the System including such proposed new Line)

then **tie** shall be entitled to serve notice on the Operator to terminate this Agreement as a whole, such notice to take effect:

- (a) at the commencement of Project Phase C2 for such proposed new Line; or
- (b) at such other time as **tie** may specify prior to the expiry of the Term, being not less than 30 days after the date of the notice.

31.6 In the event that in **tie's** opinion delay in completion of Project Phase C2 for any Line (irrespective of the reason) indicates that there is no reasonable prospect of Project Phase D commencing within six months of the Planned Service Commencement Date, **tie** shall be entitled to terminate this Agreement in respect of such Line by serving notice which shall take effect after 30 days.

32. TERMINATION ON TIE DEFAULT OR AT OPERATOR OPTION

32.1 If a **tie** Default has occurred and the Operator wishes to terminate this Agreement, the Operator must serve a Termination Notice on **tie** within 30 days of becoming aware of the **tie** Default. Failure to do so shall be a waiver of the right to terminate.

32.2 The Operator shall specify in the Termination Notice the type of **tie** Default which has occurred entitling the Operator to terminate.

32.3 Provided the Operator has complied with Clauses 32.1 and 32.2, this Agreement will terminate on the day falling 60 days after the date on which **tie** receives the Termination Notice, unless **tie** rectifies the **tie** Default within 45 days of receipt of the Termination Notice.

32.4 The Operator shall not be entitled to, and shall not purport to, terminate this Agreement or accept any repudiation of this Agreement, except as expressly provided in this Clause 32 (*Termination on tie Default or at Operator Option*).

33. PERSISTENT BREACH

33.1 If a breach by the Operator of any of its obligations under this Agreement has occurred more than once then **tie** may serve a notice ("**Persistent Breach Notice**") on the Operator:

33.1.1 specifying that it is a Persistent Breach Notice;

33.1.2 giving reasonable details of the breach; and

33.1.3 stating that such breach is a breach which, if it recurs frequently or continues, may result in a termination of this Agreement.

33.2 If, following service of such a Persistent Breach Notice, the breach specified has continued or occurred more than once after the date falling 30 days after the date of service of the Persistent Breach Notice and before the date falling 365 days after the date of service of such notice, then **tie** may serve another notice ("**Final Persistent Breach Notice**") on the Operator:

33.2.1 specifying that it is a Final Persistent Breach Notice;

33.2.2 stating that the breach specified has been the subject of a prior Persistent Breach Notice within the period of 365 days prior to the date of service of the Final Persistent Breach Notice; and

33.2.3 stating that if such failure is not remedied within 7 days or is remedied and occurs once or more within the 180 day period after the date of service of the Final Persistent Breach Notice, this Agreement may be terminated.

34. TERMINATION ON OPERATOR DEFAULT

34.1 If an Operator Default has occurred and **tie** wishes to terminate this Agreement, it must serve a Termination Notice on the Operator.

34.2 Such Termination Notice must specify:

34.2.1 the type and nature of Operator Default that has occurred, giving reasonable details; and

- 34.2.2 that this Agreement will terminate on the day falling 60 days after the date on which the Operator receives the Termination Notice, unless, if (in the opinion of **tie**) the Operator Default is remediable, and the Operator puts forward a rectification programme acceptable to **tie** within 30 days or rectifies the Operator Default no later than 15 days before the 60 days above elapses.
- 34.3 If the Operator either rectifies the Operator Default (if remediable) within the time period specified in such Termination Notice or implements in accordance with its terms, the rectification programme approved in writing by **tie**, the Termination Notice will be deemed to be revoked and this Agreement will continue.
- 34.4 If the Operator fails to rectify the Operator Default within the time period specified in such Termination Notice, this Agreement will terminate on the date falling 60 days after the date of service of the Termination Notice pursuant to Clause 34.1.
- 34.5 If the Operator fails to implement, in accordance with its terms, any rectification programme approved in writing by **tie**, this Agreement will terminate on the date of such failure.
- 34.6 The Operator shall reimburse **tie** for all reasonable costs incurred by **tie** in exercising any of its rights under this Clause 34 (*Termination on Operator Default*) (including any relevant increased administrative expenses), and, for the avoidance of doubt, any such costs reimbursed shall be excluded from the calculation of Operating Costs for the purposes of any calculation pursuant to Schedule 3 (*Project Phase D Payment Mechanism and KPI Regime*) to the Operating Appendix.
- 34.7 **tie** shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of **tie** (to terminate or otherwise) under this Clause 34 (*Termination on Operator Default*) are in addition (and without prejudice) to any other right which **tie** may have to claim the amount of loss or damage suffered by **tie** on account of the acts or omissions of the Operator (or to take any action, including seeking an order for specific implement, other than termination of this Agreement).
- 34.8 The Operator shall immediately notify **tie** of

- 34.8.1 any resolution or decision by the board of directors of the Operator or a decision by any director of the Operator to seek legal or financial advice pertaining to the solvency of the Operator; and
- 34.8.2 any presentation of any petition for the purpose of winding up the Operator or any petition for an administration order.

35. TERMINATION BY REASON OF FORCE MAJEURE

- 35.1 Neither Party shall be entitled to bring a claim for a breach of obligations under this Agreement by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party or create grounds for termination of the whole or a part of this Agreement (save in so far as expressly provided by Clause 35.5) to the extent that a Force Majeure Event occurs and such party is directly prevented from carrying out such obligations by that Force Majeure Event or the direct consequences thereof.
- 35.2 If a Force Majeure Event occurs as described in Clause 35.1 the Operator shall be relieved from deductions under the KPI Regime to the extent that the Force Majeure Event or the direct consequences thereof adversely affect the performance by the Operator of its obligations under this Agreement and the parties shall in good faith seek to agree equitable adjustments of a permanent or temporary nature to the Payment Mechanism and provisions regarding Target Costs for Project Phase C2 or Target Operating Costs or Fixed Costs (excluding the Category Five Fixed Costs) or Target Revenues to the extent that the Force Majeure Event or the direct consequences thereof adversely affect the performance by the Operator of its obligations under this Agreement .
- 35.3 On the occurrence of a Force Majeure Event, the Affected Party shall notify the other Party as soon as reasonably practicable, specifying details of the Force Majeure Event and providing evidence of its effect on the obligations of the Affected Party and any action proposed to remove or mitigate its effect.
- 35.4 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 to the Project or interruption of Transport Services and the Operator 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. **tie** shall continue to meet the Project Development Costs and/or the Operating Costs (adjusted to take account of any disrupted, extended or restricted Project Operations) for the System for a period of 30 days following notification of a Force Majeure Event or such longer period as **tie** may agree.

35.5 If the terms or measures to remove the effect of the Force Majeure Event cannot be agreed on or before the date falling 30 days after the date of the commencement of the Force Majeure Event or by the end of such longer period as **tie** may have agreed in accordance with Clause 35.4 or otherwise, or such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with all or a material part of its obligations under this Agreement for a period of more than 30 days after the date of the commencement of the Force Majeure Event or by the end of such longer period as **tie** may have agreed in accordance with Clause 35.4 or otherwise, either Party shall have the option to terminate this Agreement by written notice to the other.

35.6 The Affected Party shall notify the other Party as soon as reasonably practicable after the Force Majeure Event ceases and/or no longer causes the Affected Party to be unable to comply with its obligations under this Agreement. Following such notification, unless otherwise agreed by **tie**, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

36. TERMINATION FOR CORRUPT GIFTS AND FRAUD

36.1 If the Operator, or any Operator Party or any of their respective representatives, or Affiliates or professional advisers or employees or anyone acting on behalf of any of them, commits any Prohibited Act, then **tie** shall be entitled to act in accordance with Clauses 36.2 to 36.7.

36.2 If a Prohibited Act is committed by the Operator or by an employee of the Operator or any Affiliate not acting independently of the Operator, then **tie** may terminate this Agreement by giving notice to the Operator.

36.3 If a Prohibited Act is committed by an employee of the Operator acting independently of the Operator, then **tie** may give notice to the Operator of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the Operator terminates the employee's employment and (if necessary)

procures the performance of the relevant part of the Project Operations or the Project Development Services by another person.

36.4 If a Prohibited Act is committed by an Operator Party not acting independently of the Operator, then **tie** may give notice to the Operator of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the Operator terminates the relevant Operator Party and procures the performance of the relevant part of the Project Operations or the Project Development Services by another person.

36.5 If a Prohibited Act is committed by an Operator Party acting independently of the Operator, then **tie** may give notice to the Operator of termination and this Agreement will terminate, unless within 30 days of receipt of such notice the Operator terminates the Operator Party's employment and (if necessary) procures the performance of the relevant part of the Project Operations or the Project Development Services by another person.

36.6 If a Prohibited Act is committed by any other person specified in Clause 36.1 but not specified in Clauses 36.2 to 36.4, then **tie** may give notice to the Operator of termination and this Agreement will terminate unless within 30 days of receipt of such notice, the Operator procures the termination of such person's employment and of the appointment of their employer in relation to the Project (where not employed by the Operator or an Operator Party) and (if necessary) procures the performance of the relevant part of the Project Operations or Project Development Services by another person.

36.7 Any notice of termination under this Clause 36 (*Termination for Corrupt Gifts and Fraud*) shall specify:

36.7.1 the nature of the Prohibited Act;

36.7.2 the identity of the person whom **tie** believe has committed the Prohibited Act; and

36.7.3 the date on which this Agreement will terminate, in accordance with the applicable provision of this Clause 36 (*Termination for Corrupt Gifts and Fraud*).

37. VOLUNTARY TERMINATION BY TIE

37.1 tie may terminate this Agreement upon 60 days written notice to the Operator and without liability for any termination payment (but without prejudice to the provisions of Clause 39 (*Compensation on Termination*)) at the following stages of the Project:

37.1.1 at any time if the circumstances in Clause 13.4 have arisen;

37.1.2 except in the first three years of operation following the issue of the first Certificate of Service Commencement, at any other time during the Service Period if there is an Operating Deficit in 6 Reporting Periods out of any rolling period of 12 months;

37.1.3 during Project Phase D, notwithstanding any referral to or decision in terms of the Dispute Resolution Procedure, in the event that the Parties are unable to agree adjustments to the Fixed Costs, Target Operating Costs and Target Revenues or other elements of Schedule 3 (*Project Phase D Payment Mechanism and KPI Regime*) of the Operating Appendix sought by tie following reset carried out pursuant to Clause 21 (*Reset of the Fixed Costs, the Target Operating Costs and the Target Revenue*) of the Operating Appendix.

37.2 This Agreement will terminate on the date falling 60 days after the date of service of the notice referred to in Clause 37.1.

38. EXPIRY

38.1 Subject to Clause 2 (*Term of Agreement*), this Agreement shall terminate automatically on the expiry of the Term unless it shall have been terminated earlier in accordance with the provisions of this Agreement. The Operator shall not be entitled to any compensation for termination of this Agreement on expiry of the Term and shall make arrangements for the orderly transfer and release to tie or its designated agent of all assets, rights and benefits used for the Project Operations by the Operator so as to safeguard efficient and continuous provision of the Transport Services during transition.

39. COMPENSATION ON TERMINATION

39.1 No compensation shall be payable by **tie** to the Operator for termination of this Agreement whether under contract, delict (including negligence), breach of (or compliance with) statutory duty, restitution or otherwise but without prejudice to:

39.1.1 any antecedent liability of **tie** that arose prior to the Termination Date (but not from the termination itself except if pursuant to Clause 32 (*Termination on tie Default or at Operator Option*));

39.1.2 any liability arising in respect of any breach by **tie** of its obligations under Clause 40 (*Effect of Termination*) which arises or continues after the Termination Date;

39.1.3 any entitlement of the Operator to Vision Achievement Incentive payment in the event of a termination (a) for **tie** Default; or (b) for failure to agree matters resulting in termination pursuant to Clause 31.5; or (c) a termination for Force Majeure, or (d) Clause 37 (*Voluntary Termination by tie*) (except for Clause 37.1.1); or

39.1.4 payment by **tie** to the Operator of any demobilisation costs which have been demonstrably and reasonably incurred by the Operator in the event of a termination in respect of:

- (a) failure to agree Network Expansion pursuant to Clause 11.5;
- (b) Uninsurable Risk occurring pursuant to Clause 27.4;
- (c) Clauses 31.1, 31.2, 31.4 or 31.5;
- (d) **tie** Default pursuant to Clause 32 (*Termination on tie Default or at Operator option*);or
- (e) voluntary termination pursuant to Clause 37 (*Voluntary Termination by tie*).

The Operator shall use all reasonable endeavours to minimise and mitigate any such demobilisation costs and **tie** shall not be liable to pay the Operator for such demobilisation costs to the extent that the Operator has failed to minimise or mitigate such demobilisation costs or to the extent that such

demobilisation costs have arisen out of the Operator's breach of this Agreement or any negligent act or omission by the Operator.

39.2 Subject to Clause 39.1, the Operator shall not have any other right or remedy against **tie** on termination or expiry of this Agreement.

40. EFFECT OF TERMINATION

40.1 Notwithstanding any provision of this Agreement, on service of a Termination Notice, this Agreement shall only terminate in accordance with the provisions of this Clause 40 (*Effect of Termination*).

40.2 Subject to any exercise by **tie** of its rights to perform, or to procure a third party to perform, the obligations of the Operator, the Parties shall continue to perform their obligations under this Agreement, notwithstanding the giving of any notice of default or breach or Termination Notice, until the termination of this Agreement becomes effective.

40.3 To the extent that the termination of this Agreement occurs during Project Phase C2 or Project Phase D, the provisions of Clause 28 (*Transition on termination or expiry*) of the Operating Appendix shall apply.

40.4 To the extent that the termination of this Agreement occurs during Project Phase A, Project Phase B, or Project Phase C1, the provisions of Clause 28 (*Transition on termination or expiry*) of the Operating Appendix shall apply to the extent relevant.

40.5 Within 60 days of termination of this Agreement, **tie** shall pay to the Operator:

40.5.1 any undisputed sums due from **tie** to the Operator pursuant to Clause 15 (*Project Development Costs*), Clause 17 (*Payment During Project Phase C2*) and/or Schedule 3 (*Project Phase D Payment Mechanism and KPI Regime*) subject to any appropriate pain/gain share reconciliation;

40.5.2 any entitlement of the Operator to Vision Achievement Incentive payment pursuant to Clause 39.1.3 calculated in accordance with Schedule 3 (*Project Phase D Payment Mechanism and KPI Regime*); and

40.5.3 any entitlement to demobilisation costs pursuant to Clause 39.1.4.

- 40.6 Within 60 days of termination of this Agreement, the Operator shall pay to **tie** any sums due from the Operator to **tie** pursuant to this Agreement including any sum due to **tie** following any appropriate pain/gain share reconciliation or any sums due pursuant to Clause 34.6.
- 40.7 Either Party may refer any Dispute about disputed sums pursuant to Clause 15 (*Project Development Costs*), Clause 17 (*Payment during Project Phase C2*) and/or Schedule 3 (*Project Phase D Payment Mechanism and KPI Regime*) to the Dispute Resolution Procedure. If it is determined pursuant to the Dispute Resolution Procedure that the whole or part of any disputed amount is due to either **tie** or the Operator, **tie** or the Operator (as appropriate) shall raise an invoice in respect of such determined amount and payment shall be made by the relevant Party within 60 days of the receipt of such invoice.
- 40.8 The following Clauses shall survive termination of this Agreement:
- 40.8.1 Clauses 1 (*Definitions and Interpretation*), 8 (*Operator's Performance Security*), 19 (*Method and Currency of Payment*), 20 (*Interest*), 21 (*Set-off*), 22 (*VAT*), 23 (*Taxation*), 24 (*Mitigation and Cost Management*), 26 (*Required Insurances*), 28 (*Indemnity*), 29 (*Conduct of Claims*), 30 (*Liability and Sole Remedy*), 38 (*Expiry*), 39 (*Compensation on termination or expiry*) and Clauses 40 (*Effect of termination*) to 59 (*Maladministration Complaints*) inclusive and Schedule 7 (*Dispute Resolution Procedure*), and such other provisions as are expressed to survive termination of this Agreement; and
- 40.8.2 in the Operating Appendix, Clause 28 (*Transition on Termination or Expiry*), and such other provisions as are expressed to survive termination of this Agreement.
- 40.8.3 For the avoidance of doubt, upon expiry of the Term or any termination of this Agreement (for whatever cause) any accrued rights or obligations to which **tie** may be entitled or be subject to before such date shall remain in full force and effect.

41. PERSONNEL ISSUES ON TERMINATION

- 41.1 In the event that TUPE and/or the Acquired Rights Directive or any other Legislation governing the rights and obligations of employees or their employers or any person to

whom they are to transfer their employment applies or will apply on the Expiry Date or the Termination Date such that the contracts of employment of the Project Operations Staff and or/ Project Development Staff engaged at such date ("**Transferring Project Staff**"), or any of them, shall be transferred from the Operator or a relevant Operator Party to **tie** or a Successor Operator to perform some or all of the Project Development Services or Project Operations or any activities equivalent to a relevant part of the Project Operations, the provisions of Clauses 41.2 to 41.8 shall apply.

41.2 The Parties shall comply with their respective obligations under TUPE and the Acquired Rights Directive or as otherwise may be required by Law in respect of the transfer of the Transferring Project Staff on the Expiry Date or Termination Date (as the case may be) ("**Transfer Date**").

41.3 The Operator shall (and shall procure that each relevant Operator Party shall) indemnify **tie** and keep **tie** indemnified on demand at all times from and against all Employment Liabilities which **tie** may suffer or incur which relate to or arise in respect of (whether directly or indirectly):

41.3.1 any Transferring Project Staff in respect of or in any way relating to any period up to and including the Transfer Date; and

41.3.2 any person employed or engaged, or formerly employed or engaged, by the Operator or any Operator Party (other than any Transferring Project Staff) for which it may be alleged that **tie** are liable by virtue of the operation of this Agreement and/or TUPE and/or the Acquired Rights Directive.

41.4 The Operator shall (and shall procure that each relevant Operator Party shall) indemnify the Successor Operator and keep the Successor Operator indemnified on demand at all times from and against all Employment Liabilities which the Successor Operator may suffer or incur which relate to or arise in respect of (whether directly or indirectly):

41.4.1 any Transferring Project Staff in respect of or in any way relating to any period up to and including the Transfer Date; and

41.4.2 any person employed or engaged, or formerly employed or engaged, by the Operator or any Operator Party (other than any Transferring Project Staff)

for which it may be alleged that the Successor Operator is liable by virtue of the operation of this Agreement and/or TUPE and/or the Acquired Rights Directive.

- 41.5 The Parties acknowledge that it is their intention that the benefit of Clauses 41.4, 41.7, 41.8 and 41.9 (inclusive) shall be assigned to the Successor Operator at the absolute discretion of **tie** and the Operator shall do, and agrees to procure that each relevant Operator Party shall do, all acts and things that **tie** deems reasonably necessary to give effect to such assignment including execution of all documents required.
- 41.6 **tie** shall procure that the Successor Operator shall assume the outstanding obligations of the Operator and/or each relevant Operator Party in respect of the untaken holiday entitlements and unpaid holiday remuneration of the Transferring Project Staff accrued up to the Transfer Date and, in consideration, the Operator shall pay, or shall procure that each relevant Operator Party shall pay, to the Successor Operator within 30 days of the Transfer Date (as the case may be), the full amount necessary to enable the Successor Operator to meet the costs of providing such accrued holiday entitlements and remuneration as at Transfer Date.
- 41.7 The Operator shall, and the Operator shall procure that each relevant Operator Party shall, prior to the transfer of the employment of any Transferring Project Staff pursuant to TUPE and the Acquired Rights Directive, comply with all of their respective obligations to inform and consult with appropriate representatives (as such term is defined in regulation 10 of TUPE) of affected Project Operations Staff and Project Development Staff and shall carry out such provision of information to, or consultation with, such representatives as is required of them by Law.
- 41.8 The Operator shall, and the Operator shall procure that each relevant Operator Party shall, indemnify and keep **tie** and the Successor Operator indemnified on demand at all times in respect of all Employment Liabilities arising out of any failure of the Operator and/or any Operator Party to comply fully with their respective obligations pursuant to Clause 41.7, save where, and to the extent only that, failure to do so is attributable to the default or failure on the part of **tie** or a Successor Operator to provide relevant information to the Operator or the relevant Operator Party (as the case may be) as is required of **tie** or the Successor Operator by Law.

41.9 Following the service of a Termination Notice or at any time in the 365 days before the Expiry Date, the Operator shall not, and shall procure that each Operator Party shall not, without the prior written consent of **tie** (which consent shall not be unreasonably withheld or delayed), carry out any of the following:

41.9.1 the termination of the employment or engagement of any Project Operations Staff or Project Development Staff;

41.9.2 the alteration or change (or the making of any promise to alter or change) in any way any terms and conditions of employment, or terms of engagement, of any Project Operations Staff or Project Development Staff (whether with or without the consent of any such Project Operations Staff or Project Development Staff (as appropriate)) other than in order to give effect to wage or salary awards which are in line with those offered generally for similar status individuals within the relevant employer's workforce or as is required by Law;

41.9.3 the recruitment of any employees, self-employed consultants or other personnel to perform any of the Project Operations or Project Development Services (except as a replacement for any Project Operations Staff or Project Development Staff whose employment is terminated and where the replacement is recruited on terms which are not materially better than the terms of the Project Operations Staff or Project Development Staff member being replaced); and

41.9.4 the re-assignment of any of the Project Operations Staff or Project Development Staff to or from duties connected with the Project Operations or the Project Development Services.

41.10 Following the service of a Termination Notice or at any time in the 730 days before the Expiry Date, within 30 days of a written request from **tie**, the Operator shall, or the Operator shall procure that each Operator Party shall, provide to **tie** such information concerning the Project Operations Staff and Project Development Staff as **tie** shall reasonably stipulate ("**Staffing Information**") including:

41.10.1 the number of Project Operations Staff and Project Development Staff;

- 41.10.2 their status as employees, self-employment contractors, agency workers or otherwise;
 - 41.10.3 their ages, dates of commencement of employment or engagement and gender;
 - 41.10.4 their relevant contractual notice periods and any other terms relating to termination of employment, including redundancy procedures and contractual redundancy payment schemes;
 - 41.10.5 the wages, salaries, profit sharing, incentive and bonus arrangements applicable to them;
 - 41.10.6 details of other employment related benefits, including (without limitation) medical insurance, life assurance, pension or other retirement benefit schemes, share option schemes and company car schemes applicable to them;
 - 41.10.7 any outstanding or potential contractual, statutory or other liabilities in respect of such individuals (including in respect of personal injury claims);
 - 41.10.8 details of any such individuals on long-term sickness absence, maternity or parental leave; and
 - 41.10.9 copies of all relevant documents and materials relating to such information, including copies of relevant contracts of employment.
- 41.11 The Operator expressly consents, and shall procure that each Operator Party and all Project Operations Staff and Project Development Staff shall consent, to any Staffing Information being provided to third parties, including a Successor Operator or any prospective Successor Operator, subject to such third party agreeing to respect the confidentiality of the Staffing Information, and only to use such Staffing Information for the purposes for which it was provided.

PART VII - MISCELLANEOUS PROVISIONS

42. DISPUTE RESOLUTION PROCEDURE

The Parties agree that Schedule 7 (*Dispute Resolution Procedure*) shall have effect for the resolution of any differences or disputes between the Parties arising under, out of or in relation to, this Agreement, save for matters expressly reserved to some other jurisdiction pursuant to any provision of the Scottish Private Bills.

43. ASSIGNATION, SUB-CONTRACTING AND CHANGES IN CONTROL

- 43.1 The Operator shall not, without the prior written consent of **tie**,
- 43.1.1 assign, transfer or otherwise dispose of any interest in, or right or obligation under, this Agreement; or
 - 43.1.2 sub-contract any of its obligations under this Agreement without the prior written consent of **tie** (such consent not to be unreasonably withheld or delayed).
- 43.2 **tie** shall not assign or otherwise dispose of any interest in, or rights or obligations under this Agreement in whole or in part to any person, save:
- 43.2.1 to the Scottish Ministers or any local authority or other body with no worse financial standing than that of **tie** who, as a result of any Change in Law, takes over all or substantially all the functions of **tie**; or
 - 43.2.2 to any other person whose obligations under this Agreement are unconditionally and irrevocably guaranteed (in a form reasonably acceptable to the Operator) by **tie** or a person falling within Clause 43.2.1; or
 - 43.2.3 with the prior written consent of the Operator (such consent not to be unreasonably withheld or delayed).
- 43.3 **tie** shall be entitled to novate the entirety of this Agreement to any nominee which is an entity established by CEC and/or established in accordance with Legislation for the purposes of managing the implementation of service integration between tram operations and publicly owned bus operations in Edinburgh. If the Agreement is to be novated pursuant to this Clause 43.3, **tie** and the Operator shall agree a

shareholder's agreement confirming **tie**'s (or its relevant nominee's) participation in the Operator together with associated rights.

43.4 Subject to Clause 43.5 prior to the expiry of thirty six (36) months following the Service Commencement Date for the first Line to become operational, the Operator shall procure that no Change of Control of the Operator (or any company of which the Operator is a subsidiary) shall take place without the prior written approval of **tie**.

43.5 If applicable, Clause 43.4 shall not apply to a Change of Control resulting from the sale of any shares in the Operator held by any Third Party Shareholder.

43.6 The Operator shall inform the **tie** Project Manager as soon as reasonably practicable and, in any event, within five Business Days of any Change of Control of the Operator.

44. SECURITY INTERESTS

44.1 The Operator shall not create or agree to create any Security Interest over the System or any part of the System or over this Agreement.

44.2 The Operator shall not dispose of any right in respect of or interest in any asset used in the Project Operations or relating to the System if to do so would have a material adverse effect upon either the Project or the position of **tie** under this Agreement, whether or not this Agreement has terminated or expired provided always that restrictions in this Clause shall not apply in the case of:

44.2.1 disposals of redundant or obsolete assets not required for the operation of the System; or

44.2.2 disposals of property or assets where such property or assets are replaced by other property or assets comparable or superior as to type and function.

45. INFORMATION AND CONFIDENTIALITY

45.1 The Parties shall keep confidential all matters relating to this Agreement and the Project and, save as provided in Clause 45.3, shall not disclose any such matters to any third parties.

45.2 Each Party shall use all reasonable endeavours to procure that their respective employees and any other person to whom they disclose information pursuant to

Clauses 45.3.1, 45.3.3, 45.3.6 and 45.3.7 shall comply with this Clause 45 (*Information and Confidentiality*) as if they were parties to this Agreement.

45.3 Clause 45.1 shall not apply to:

45.3.1 any disclosure of information that is reasonably required by the Parties in order to carry out the Project Development Objectives and perform their obligations and exercise their rights under this Agreement;

45.3.2 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 45 (*Information and Confidentiality*);

45.3.3 disclosure to enable a determination to be made under the Dispute Resolution Procedure, subject always to that disclosure being restricted to parties directly involved in the process ;

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

45.3.5 any disclosure of information which is already lawfully in the possession of the receiving party, prior to its disclosure by the disclosing party;

45.3.6 any provision of information to the professional advisers or insurance advisers of either Party;

45.3.7 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 Operator to enable it to carry out its obligations under the Agreement, any provision of information to that person but only to the extent reasonably necessary to enable a decision to be taken on the proposal;

45.3.8 any disclosure by **tie** of information relating to the design, construction, operation and maintenance of the System and such other information as may be reasonably required for the purpose of conducting a due diligence exercise to any proposed Successor Operator, its advisers, should **tie** decide to retender the Project Operations or any part of them;

45.3.9 any registration of information in respect of the Necessary Consents and any property registration required;

45.3.10 any disclosure of information by **tie** to CEC, Partnerships UK Limited, any department, office or agency of the Scottish Executive or the UK government;

45.3.11 any disclosure by **tie** of any document related to this Agreement and which the Operator has agreed with **tie** contains no Commercially Sensitive Information (such agreement not to be unreasonably withheld or delayed);

45.3.12 any disclosure for the purpose of:

45.3.12.1 the examination and certification of **tie's** or the Operator's accounts; or

45.3.12.2 any examination (pursuant to applicable Law) of the economy, efficiency and effectiveness with which **tie** has used their resources or funding made available for the Project; and

45.3.13 any disclosure by **tie** of any information (except for information which has been designated as Commercially Sensitive Information) as may be reasonably required for the purpose of appointing and working with any Infrastructure Provider;

45.4 Any public relations material, press releases, public presentations or conference engagements in relation to the Project planned by the Operator require **tie's** prior written approval during the Term.

46. INTELLECTUAL PROPERTY RIGHTS

46.1 All Operator IPR shall continue to be owned by the Operator.

46.2 The Operator hereby:

46.2.1 assigns by way of future assignment to **tie** with full title guarantee the Project IPR which is created by it and shall procure that Project IPR created by any Operator Party is also so assigned, for all the residue of the term of such

rights and all renewals or extensions thereof and together with all accrued causes of action in respect thereof;

46.2.2 grants to **tie** a non-exclusive perpetual irrevocable royalty free licence to use such Operator IPR as may be necessary for **tie** to use solely in relation to the Project and any Network Expansion and for no other purpose;

46.2.3 grants to **tie** the right to grant non-exclusive non-assignable sub-licences to third party contractors for such lengths of time as **tie** may reasonably require and otherwise on the same terms as the licence granted to **tie** pursuant to Clause 46.2.2 above, to use the Operator IPR referred to in that Clause in so far as is necessary or desirable for such third party contractor to use such Operator IPR solely in relation to work connected with the Project and any Network Expansion.

46.3 For the avoidance of doubt, the persons to whom **tie** may grant sub-licences pursuant to Clause 46.2.3 above shall include:

46.3.1 any Infrastructure Provider and its contractors for purposes connected with the performance of any Infrastructure Delivery Agreement;

46.3.2 any party other than the Operator providing support to **tie** in relation to the development of any Network Expansion;

46.3.3 any party other than the Operator engaged in the provision of Transport Services on the System; and

46.3.4 any assignee or transferee under this Agreement.

46.4 **tie** hereby:

46.4.1 grants to the Operator a non-exclusive revocable royalty free licence for the Term to use such Project IPR as is owned by it as may be necessary for the Operator to use solely and exclusively for the purpose of meeting its obligations under this Agreement (including the Operating Appendix and for no other purpose); and

46.4.2 grants to the Operator the right to grant non-exclusive non-assignable sub-licences to the Operator Parties on the same terms as the licence granted to

the Operator pursuant to Clause 46.4.1 above to use the Project IPR referred to in that Clause in so far as is necessary or desirable for such Operator Parties to use such Project IPR, solely and exclusively for the purpose of performing their obligations in relation to the Project.

- 46.5 The Operator shall at any time and from time to time hereafter at the request of **tie** execute all such documents and do all such further acts as may be required in order to vest the rights referred to in Clause 46.2.1 in **tie**.
- 46.6 The Operator waives any and all moral rights held or to be held by the Operator in the Project Data and the Project IPR and shall procure that all of the Operator Parties who are authors of the whole or any part of the Project Data or the Project IPR waive and abandon in writing all moral rights.
- 46.7 The Operator agrees that all rights in the Project IPR shall remain the property of **tie** and the Operator shall retain no rights in the Project IPR beyond the licence granted in Clause 46.4.1 above. The Operator shall be entitled to use such Project IPR only on the terms set out herein and solely for the purpose of the Project. In particular, otherwise as permitted in this Agreement herein, the Operator shall not (and shall procure that its sub-licensees pursuant to Clause 46.4.2 shall not) disclose, assign, sub-licence, lease, rent or otherwise dispose of the Project IPR.
- 46.8 To the extent that any of the Project Data are generated by or maintained on a computer or similar system, the Operator shall use all reasonable endeavours to procure for the benefit of **tie**, at no charge or at the lowest reasonable fee, the grant of a licence or sub-licence for any relevant Third Party Software on the same terms as the Operator Software is licensed to **tie**, to enable **tie** or its nominee to access and otherwise use (subject to the payment by **tie** of the relevant fee, if any) such Project Data in connection with the Project. As an alternative, the Operator may provide such Project Data in a format which may be read by software generally available at reasonable prices in the market at the relevant time or in hard copy format.
- 46.9 The Operator shall, within thirty (30) days of any upgrade or update to the Operator Software and/or Specially Written Software and/or Third Party Software, for the Term:

- 46.9.1 deposit a copy of the Operator Software and/or Specially Written Software with the Escrow Agent under the terms and conditions of the Escrow Agreement; and
- 46.9.2 use all reasonable endeavours to procure the deposit of a copy of all the Third Party Software with the Escrow Agent and under the terms and conditions of the Escrow Agreement, or with another person under terms that are materially the same as the Escrow Agreement, and in either case for the benefit of **tie**.
- 46.10 The Operator shall comply with the terms of the Escrow Agreement, or any other like agreement in respect of the Third Party Software under Clause 46.9.2 for the duration of this Agreement.
- 46.11 Any costs relating to the Escrow Agreement, including any costs relating to the registration of any Operator Software, Specially Written Software and Third Party Software, and any renewal costs charged from time to time by the Escrow Agent, shall be the sole responsibility of the Operator.
- 46.12 The Operator shall ensure the back-up and storage in safe custody of the Project Data in accordance with Good Industry Practice. Without prejudice to this obligation, the Operator shall submit to the **tie** Project Manager for approval its proposals for the back-up and storage in safe custody of the Project Data and **tie** shall be entitled to object if the same is not in accordance with Good Industry Practice. The Operator shall comply, and shall cause all the Operator Parties to comply, with all such proposals to which the **tie** Project Manager has given his or her approval. The Operator may vary its procedures for such back-up and storage subject to submitting its proposals for change to the **tie** Project Manager, who shall be entitled to object on the basis set out above.
- 46.13 Where a claim or proceeding is made or brought against **tie** or its permitted licensees which arises out of the infringement of any Intellectual Property Rights in any Project Data or other materials provided by the Operator or any Operator Party to **tie** then, unless such infringement has arisen out of the use of any Intellectual Property Rights by **tie** in breach of this Agreement, the Operator shall indemnify and keep **tie** indemnified on demand at all times from and against all Indemnified Liabilities arising in connection with such claim or proceedings.

- 46.14 For the purposes of this Clause 46 (*Intellectual Property Rights*), "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.
- 46.15 The provisions of this Clause 46 (*Intellectual Property Rights*) shall apply during the continuance of this Agreement and after its termination howsoever arising, and immediately following termination howsoever arising, the Operator shall provide **tie** with:
- 46.15.1 a copy of the object code for the Third Party Software and the Operator Software on media that is reasonably acceptable to **tie**;
- 46.15.2 a copy of the source code for the Specially Written Software on media that is reasonably acceptable to **tie**; and
- 46.15.3 a copy of all documentation, manuals and other technical information relating to the Third Party Software, the Specially Written Software and the Operator Software that is reasonably required by **tie** to operate, manage and support the Third Party Software, the Specially Written Software and the Operator Software.

47. DATA PROTECTION

- 47.1 For the purpose of the following Clauses, the term "personal data" shall have the meaning given to it in the Data Protection Act 1998.
- 47.2 The Operator shall, in relation to any personal data in respect of which it is either the "data controller" or the "data processor" for the purposes of the Data Protection Act 1998, comply with the obligations of a "data controller" under the provisions of the seventh data protection principle as set out in Schedule 1 of that Act. In addition, the Operator:
- 47.2.1 shall have at all material times (and shall use its best endeavours to procure that all Operator Parties have or will have at all material times) the appropriate technical and organisational measures in place against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data held or processed by it;

- 47.2.2 shall (and shall use its best endeavours to procure that the Operator Parties shall) take at all material times, all reasonable steps to ensure the integrity of any of its staff with access to personal data processed in connection with the Project;
- 47.2.3 shall act only on the instructions of **tie** in relation to the processing of any personal data in respect of which **tie** is the "data controller" for the purposes of that Act;
- 47.2.4 shall only obtain, hold, process, use, store and disclose such personal data as is necessary to perform its obligations under this Agreement; and
- 47.2.5 shall allow **tie** access to any relevant premises on reasonable notice to inspect its procedures referred to in Clause 47.2.1.

48. INFORMATION AND AUDIT ACCESS

- 48.1 The Operator shall in accordance with Good Industry Practice keep and maintain:
 - 48.1.1 detailed records regarding the Project Development Services and its activities in relation to the Project;
 - 48.1.2 all Project Data;
 - 48.1.3 detailed records regarding the Project Operations, including details of ticket sales, Patronage Revenue receipts and breakdowns of Operating Costs; and
 - 48.1.4 all invoices, timesheets and expense claims for which it has sought or is seeking reimbursement under the provisions of this Agreement;and shall keep such records for at least twelve years following expiry or termination of this Agreement.
- 48.2 The records referred to in Clause 48.1 shall be kept in good order and in such form as to be capable of audit (including by electronic means) by the **tie** Project Manager or any other third party. The Operator shall make such records available for inspection by or on behalf of **tie** and the **tie** Project Manager at all reasonable times.
- 48.3 The Operator shall provide to the **tie** Project Manager and **tie**'s auditors all information, documents, records and the like in the possession of, or available to, the

Operator (and to this end the Operator shall use all reasonable endeavours to procure that all such items in the possession of the Operator Parties shall be available to it) as may be reasonably requested by the **tie** Project Manager for any purpose in connection with the Project or this Agreement.

- 48.4 The Operator shall provide and shall procure that the Operator Parties shall provide such information, data records, and assistance as **tie** may reasonably require from time to time, including to enable **tie** and CEC to meet its obligations to provide reports and returns pursuant to Law, directions and guidance applicable to the passenger transport sector and audit.
- 48.5 The Operator shall comply, as its own cost, with any request by **tie** in respect of the recording, storage, keeping, disclosure, organisation, use, processing, dissemination, deletion or destruction of any records, data or information obtained by the Operator as a result of carrying out the Transport Services or any other obligation under this Agreement.
- 48.6 **tie** shall provide to the Operator (subject to reasonable notice and relevant undertaking as to costs) such information within its possession or control with respect to the Project as the Operator may reasonably request to enable it to perform its obligations under this Agreement, provided that **tie** shall have no obligation to provide information with respect to which it is subject to an obligation of confidentiality (whether under any Law, at contract or otherwise).
- 48.7 The provisions of this Clause 48 (*Information and Audit Access*) shall apply during the continuance of this Agreement and after its expiry or termination howsoever arising.

49. ENTIRE AGREEMENT

- 49.1 The Operator acknowledges and confirms that it has, by carrying out such due diligence and other investigations as any Operator acting in accordance with Good Industry Practice would do, satisfied itself fully as to the veracity, accuracy, reasonableness, scope, materiality, currency (where applicable) and completeness of all the Background Information.
- 49.2 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the Parties in connection with its subject

matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.

- 49.3 Each of the Parties confirms to the other that it has neither been induced to enter into this Agreement in reliance on, nor has it made, any representation or warranty except those contained or referred to in this Agreement.
- 49.4 Any representations or warranties other than those contained or referred to in this Agreement are superseded and extinguished by this Agreement.
- 49.5 Each Party irrevocably and unconditionally waives all rights and remedies which it might otherwise have had in relation to any representations or warranties other than those contained or referred to in this Agreement.
- 49.6 Each Party irrevocably and unconditionally waives any right it may have to rescind this Agreement on the grounds that any representation or warranty (whether contained or referred to in this Agreement or not) constitutes a misrepresentation.
- 49.7 Nothing in this Clause 49 (*Entire Agreement*) shall affect the liability of either Party in respect of fraud or fraudulent misrepresentation.

50. FURTHER ASSURANCE

- 50.1 Each Party shall at the reasonable request and cost of the other (save where either in satisfaction of an Operator Condition Precedent or where it is expressly provided that the cost of such act or execution shall be for that Party's account) do any act or execute any document that may be necessary to give full effect to this Agreement.

51. JURISDICTION

- 51.1 This Agreement, any document completed or to be completed in accordance with its provisions and any matter arising from it or any such document shall be governed by and construed in accordance with Scots law.
- 51.2 Subject to Clause 42 (*Dispute Resolution Procedure*), the Parties hereby irrevocably submit to the exclusive jurisdiction of the Court of Session in relation to this Agreement, any such document and any such matter.

52. VARIATIONS AND WAIVERS TO BE IN WRITING

No variation, alteration or waiver of any of the provisions of this Agreement shall be effective unless it is in writing and signed by or on behalf of the Party against which the enforcement of such variation, alteration or waiver is sought.

53. WAIVER AND CUMULATIVE REMEDIES

53.1 Save where expressly stated, no failure or delay by either Party to exercise any right or remedy in connection with this Agreement will operate as a waiver of it or of any other right or remedy nor will any single or partial exercise preclude any further exercise of the same, or of some other right or remedy. A waiver of any breach of this Agreement shall not be deemed to be a waiver of any subsequent breach.

53.2 The Parties' rights and remedies under this Agreement are, except where provided otherwise in this Agreement, independent, cumulative and do not operate to exclude one another or any rights or remedies provided by law.

54. NO PARTNERSHIP OR AGENCY

54.1 Nothing in this Agreement shall be construed as creating a partnership between **tie** and the Operator.

54.2 The Operator shall not (and shall procure that the Operator Parties shall not) act or purport to act as agent for **tie** in relation to any matter. The Operator shall not be entitled to bind **tie** in any way or to create any liability or cause of action against **tie** and shall not hold itself out (and shall procure that no Operator Party shall hold itself out) as having any such authority or power, provided always that this Clause 54.2 shall be without prejudice to:

54.2.1 Clause 17 (*Collection of Fare Revenue*) of the Operating Appendix, pursuant to which the Operator is authorised to enter into contracts of carriage with passengers, and to collect Patronage Revenue, as agent for **tie**; and

54.2.2 Clause 13 (*Edinburgh Tram Network Integration*) of this Agreement and Clause 11 (*Operation and Maintenance Procedures*) of the Operating Appendix, pursuant to which **tie** may delegate to the Operator the exercise of some of **tie**'s contractual rights under the Infrastructure Delivery Agreement(s).

55. NOTICES

55.1 Any notice or notification required or authorised to be given under this Agreement by one Party to the other shall be:

55.1.1 in writing;

55.1.2 sent by one of the following methods:

55.1.2.1 pre-paid registered or recorded delivery post or facsimile transmission addressed to the Party to which it is given at:

(a) in the case of notices given to **tie**: Transport Initiatives Edinburgh Limited, 91 Hanover Street, Edinburgh, EH2 1JD fax number 0131 718 4271, attention: A. Macaulay Esq., Projects Director, or such other address in the United Kingdom as **tie** may notify the Operator from time to time for that purpose; or

(b) in the case of notices given to the Operator, TRANSDEV Edinburgh Tram Limited, 91 Hanover Street, Edinburgh, EH2 1JD, attention D. Humphrey Esq. or such other address in the United Kingdom as the Operator may notify **tie** from time to time for that purpose; or

55.1.2.2 facsimile transmission addressed to the **tie** Project Manager or the Operator Project Manager (as appropriate) at a facsimile number notified to the giving Party by the receiving Party for the service of notices under this Agreement from time to time; or

55.1.2.3 personal delivery into the hands of:

(a) in the case of notices given to **tie**, the **tie** Project Manager; or

(b) in the case of notices given to the Operator, the Operator Project Manager

55.1.3 be deemed duly served:

55.1.3.1 if sent by pre-paid registered or recorded delivery post, 2 clear Business Days after posting; or

55.1.3.2 if sent via facsimile transmission or personal delivery, on the day of issue of the relevant fax confirmation receipt or such personal delivery (as appropriate), unless that day is not a Business Day in which case it shall be deemed duly served on the next Business Day thereafter.

56. INVALID TERMS

56.1 If any term of this Agreement shall be held to any extent to be invalid, unlawful or unenforceable:

56.1.1 that term shall to that extent be deemed not to form part of this Agreement; and

56.1.2 the validity and enforceability of the remainder of this Agreement shall not be affected.

57. THIRD PARTIES RIGHTS

57.1 Save as provided in Clause 57.2, a person who is not party to this Agreement shall have no right to enforce any term of this Agreement.

57.2 The **tie** Advisers and CEC shall have the benefit of the terms of Clause 25.5.

58. HUMAN RIGHTS ACT

58.1 Insofar as and to the extent that the Operator is deemed to be acting as a public authority for the purposes of the Human Rights Act 1998, any claim asserted or proceedings commenced against **tie** arising from a negligent act or negligent omission by the Operator or breach by the Operator of its obligations under this Agreement shall, for the purposes of Clause 28 (*Indemnity*), be treated as an Indemnified Liability.

59. MALADMINISTRATION COMPLAINTS

59.1 The Operator shall provide such reasonable assistance (including the provision of witnesses) as **tie** may reasonably request (having regard to the Transport Services, in particular as to the timing, duration and number of witnesses) in connection with any audit process or judicial review of **tie's** involvement in the Project or the Project generally.

IN WITNESS WHEREOF these presents consisting of this and the 87 preceding pages together with Schedules 1 to 19 (inclusive) and the Operating Appendix together with Schedules 1 to 6 (inclusive) which are annexed and signed as relative hereto are executed as follows:

EXECUTED for and on behalf of **TRANSPORT INITIATIVES EDINBURGH LIMITED**

at Edinburgh on 14 May 2004 by

Director/Authorised Signatory: [Redacted]

Full Name: MICHAEL WILLIAM DAIS HOWELL

Witness: [Redacted]

Full Name: SHARON FITZGERALD

Address: 403000 DLA, RUTLAND SQUARE, EDINBURGH

EXECUTED for and on behalf of **TRANSDEV EDINBURGH TRAM LIMITED**

at Edinburgh on 14 May 2004 by

Director/Authorised Signatory: [Redacted]

Full Name: JOEL LEBRETON

Witness: [Redacted]

Full Name: David Humphrey

Address: Ealing W5 [Redacted]