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**TO BE EXECUTED AS A DEED**

**SUBCONTRACTING OF OPERATOR OF LAST RESORT SERVICES  
AGREEMENT**

**SECRETARY OF STATE FOR TRANSPORT** (1)

and

**WELSH MINISTERS** (2)

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**THIS SUBCONTRACTING OF OPERATOR OF LAST RESORT SERVICES AGREEMENT** is dated 2018

**BETWEEN**

- (1) **THE SECRETARY OF STATE FOR TRANSPORT** whose principal address is Great Minster House, 33 Horseferry Road, London SW1P 4DR (the “**Secretary of State**”); and
- (2) **WELSH MINISTERS** whose principal place of business is Crown Building, Cathays Park, Cardiff, CF10 3NQ (“**Welsh Ministers**”) (including, as appropriate, Affiliates or subsidiaries of Welsh Ministers acting on its behalf),

each a “Party” and together the “Parties”.

**WHEREAS:**

- (A) A Transfer of Functions Order under section 58(1) of the Government of Wales Act 2006 (“**TFO**”) was made on 23 May 2018 to transfer certain Secretary of State franchising functions under the Act and the Railways Act 2005 (the “**Railways Acts**”) in order for Welsh Ministers to be the franchising authority in respect of the Welsh component of Welsh services and Wales-only services. The Secretary of State remains the franchising authority over English services insofar as they are specified in the Welsh franchise agreement.
- (B) One of the functions of a franchising authority is the duty to secure the continued operation of passenger rail services pursuant to Section 30 of the Act (**Section 30 duties**). The TFO provides that Welsh Ministers will have powers to exercise their Section 30 duties in respect of the Welsh component of the Welsh services and Wales only services as of 02:00 on 14 October 2018 (the **Transfer of OLR Functions Date**). The Secretary of State will remain the franchising authority under the Act for the English services.
- (C) Welsh Ministers will have Section 30 duties in respect of the Welsh component of Welsh services, Wales only services and any future Wales-only franchise agreements, as of the Transfer of OLR Functions Date, regardless of whether the Current Franchise Agreement has been extended, or the Welsh franchise agreement has commenced operation. For the purposes of this Agreement only, the Current Franchise Agreement and the Welsh franchise agreement shall be referred to as the “**W&B Franchise**”.

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- (D) The Section 30 duties of the Secretary of State in respect of English services will not transfer to Welsh Ministers under the TFO. However, the Secretary of State will appoint Welsh Ministers as his agent to exercise the Secretary of State's duties under Section 30 of the Act in respect of the English services pursuant to Agency Agreement no. 3. Until such time as Welsh Ministers acquire the capability to exercise duties under Section 30 of the Act, it has been agreed that Welsh Ministers will procure the performance of duties under Section 30 of the Act (the "**OLR Services**") from the Secretary of State pursuant to the terms of this Agreement.
- (E) This Agreement has been prepared to help clarify the scope and approach to proposals that Welsh Ministers will procure OLR Services from the Secretary of State. Further, in time should Welsh Ministers acquire their own capability to exercise duties under Section 30 of the Act in respect of the Welsh component of Welsh services and Wales-only services, this Agreement shall be terminated and the Parties will enter into new contractual arrangements in relation to Welsh Ministers' performance (acting as agent of the Secretary of State under Agency Agreement no.3) of the Secretary of State's duties under Section 30 of the Act in respect of the English services.

**NOW IT IS AGREED** as follows:

## **1 DEFINITIONS AND INTERPRETATION**

- 1.1 In this Agreement, unless the context requires otherwise,
- (a) the definitions set out in the Definitions Agreement shall apply; and
  - (b) words and expressions defined in the Welsh franchise agreement have the same meanings when used in this Agreement.
- 1.2 Words expressed in the singular shall include the plural and vice versa. Words referring to a particular gender include every gender.
- 1.3 References to any statute or statutory provision shall include: (i) any subordinate legislation made under it; (ii) any provision which it has modified or re-enacted (whether with or without modification); and (iii) any provision which subsequently supersedes it or re-enacts it (whether with or without modification), whether made before or after the date of this Agreement.
- 1.4 References to any relevant franchising authority, franchisee, franchise agreement or invitation to tender in this agreement are used as they are the terms used in the Railways Acts.

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## **2 COMMENCEMENT VARIATION AND DURATION**

- 2.1 The provisions of this Agreement shall commence, take effect and be binding on each of the Secretary of State and Welsh Ministers on and from the Transfer of OLR Functions Date and shall continue in force until the expiry of the Welsh franchise agreement, unless otherwise terminated earlier by mutual written consent of the Parties, for instance because Welsh Ministers have acquired the capability to exercise duties under Section 30 of the Act themselves in respect of the Welsh component of Welsh services and Wales-only services. In such circumstances it is proposed that the Parties will enter into new contractual arrangements in relation to Welsh Ministers' performance (acting as agent of the Secretary of State under Agency Agreement no.3) of the Secretary of State's duties under Section 30 of the Act in respect of the English services.
- 2.2 This Agreement shall be reviewed by the Parties in the event that the Current Franchise Agreement is extended and Welsh Ministers become the franchising authority for the Welsh component of Welsh services and Wales-only services under the TFO. In such circumstances, the Parties will consider if there are any provisions in the Joint Parties' Agreement which would assist the Parties to manage their respective duties under Section 30 of the Act for the duration of any extension.
- 2.3 Otherwise, the Parties shall be entitled to review and amend this Agreement, provided that any amendment shall be in writing and agreed by both Parties.

## **3 OTHER RELATED AGREEMENTS**

- 3.1 The Parties acknowledge their respective rights and obligations under:
- (a) this Agreement;
  - (b) Agency Agreement no. 3;
  - (c) the Funding and Outputs Agreement; and
  - (d) subject to such agreement being entered into, the Co-operation & Collaboration Agreement,

which (together with the Definitions Agreement) comprise the **"Wales & Borders Agreements"**.

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## **4 CONFIDENTIALITY AND FREEDOM OF INFORMATION**

- 4.1 Each Party undertakes that it shall not at any time during this Agreement disclose to any person any confidential information concerning the activities, business, affairs or suppliers of the other Party, except as permitted by this Clause 4.
- 4.2 Each Party may disclose the other Party's confidential information:
- (a) to its employees, officers, representatives or advisers who need to know such information for the purposes of exercising the Party's rights or carrying out its obligations under or in connection with this Agreement and under the Act provided that it ensures that the employees, officers, representatives or advisers to whom it discloses the other Party's confidential information comply with this Clause 4;
  - (b) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority; or
  - (c) where at the time of its disclosure, the confidential information is already in the public domain other than by a breach of this Agreement.
- 4.3 No Party shall use any other Party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with this Agreement.
- 4.4 Nothing in this Agreement shall prevent the Secretary of State or Welsh Ministers from disclosing and/or publishing under the provisions of the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 any term or condition or information contained in or relating to this Agreement.
- 4.5 Each Party shall co-operate with the other Party and supply all necessary information and documentation required in connection with any request received under the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004 and/or the Secretary of State's publication scheme requirements under the Freedom of Information Act 2000.

## **5 CURRENT SECRETARY OF STATE OLR ARRANGEMENTS**

- 5.1 The Secretary of State has contracts in place with OLR Advisers, for the provision of OLR Services. The OLR Services are more fully described in Clause 10. OLR Advisers' contracts were let under the Secretary of State's STAR framework in November 2015 for a period of 2 years. The OLR Advisers' contracts have been extended to May 2018 after which replacement OLR Advisers contracts will be let. Any

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OLR Advisers appointed by the Secretary of State will be competent and experienced to perform the OLR Services.

## **6 PROVISION OF OLR SERVICES TO WELSH MINISTERS - SUMMARY**

6.1 From the Transfer of OLR Functions Date, the Secretary of State agrees to provide the following OLR Services to Welsh Ministers in respect of the W&B Franchise:

- (a) review of periodic reports provided by Welsh Ministers on the financial status, operational performance and franchising status of the W&B Franchise by the OLR Advisers;
- (b) 'deep dives' of the W&B Franchise, if so requested by Welsh Ministers;
- (c) provision of rail industry experts. OLR Advisers and senior interim managers in the event that Welsh Ministers and the Secretary of State, in respect of the W&B Franchise, are obliged to exercise their Section 30 duties; and
- (d) use of Secretary of State shelf companies to establish the appropriate corporate framework.

6.2 Appended to this Agreement at Annex A is the Secretary of State's Section 30 Handbook (the "**Handbook**"). The Handbook is a working document for those involved in the termination of passenger rail franchises and the mobilisation of a new franchise by the Secretary of State. The Handbook describes the activities that a franchising authority needs to undertake to ensure the seamless continuity of railway passenger services in the event that a franchising authority is obliged to exercise Section 30 duties.

## **7 PROVISION OF OLR SERVICES TO WELSH MINISTERS – OLR REPORTS**

7.1 Financial management information and performance reports (the "**franchise information**") will be provided a periodic basis by Welsh Ministers to the Secretary of State for use by its OLR Advisers as required.

7.2 If Welsh Ministers are unable to provide the franchise information in the form required to the Secretary of State, Welsh Ministers will:

- (a) provide the raw financial and performance data to the Secretary of State; and
- (b) nominate officials to receive training on how to provide the franchise information in the form required by the Secretary of State or his OLR Advisers and the Secretary of State will procure that this training is delivered to Welsh Ministers' nominated officials.

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## **8 PROVISION OF OLR SERVICES TO WELSH MINISTERS – DEEP DIVES**

- 8.1 The Secretary of State shall procure that his OLR Advisers review, on a quarterly basis, or at such other frequency as the Parties may agree, whether a Deep Dive of the W&B Franchise is required. On the advice of the OLR Advisers, and where agreed between the Parties, the Parties will instruct the OLR advisers to undertake Deep Dives into the W&B Franchise either on a risk basis or as part of a rolling programme.

## **9 PROVISION OF OLR SERVICES TO WELSH MINISTERS – OLR COMPANY ARRANGEMENTS**

- 9.1 The Secretary of State will procure that the OLR Advisers set up two OLR companies, one to act as a holding company, the other to act as the operating company. The operating company will hold all the relevant railway operating licences.
- 9.2 Alternatively, if Welsh Ministers wish at any time, they can set up two shelf companies, or purchase one of the Secretary of State's shelf companies that have been set up for OLR purposes.
- 9.3 The Secretary of State will procure that the OLR Advisers assist Welsh Ministers in determining the best company structure to assist Welsh Ministers in meeting their duties under Section 30 of the Act.

## **10 PROVISION OF OLR SERVICES TO WELSH MINISTERS – EXERCISE OF SECTION 30 DUTIES**

- 10.1 Should a potential procurement or Franchisee failure be identified, subject to Welsh Ministers and the Secretary of State agreeing, the Secretary of State shall procure that the OLR Advisers:
- (a) undertake a full due diligence exercise. The OLR Advisers will prepare a draft business plan that sets out the OLR Advisers' plans for the W&B Franchise and any subsequent exit strategy;
  - (b) support Welsh Ministers in pre-mobilisation negotiations with the Franchisee and other key suppliers;
  - (c) undertake Safety case and operational licence preparation;
  - (d) carry out a commercial contract review which may include:
    - (i) identifying onerous clauses or liabilities in any third party Key Contracts that the OLR Advisers would not recommend that Welsh Ministers step into as part of any Direct Agreement arrangements; and

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- (ii) confirming that contracts are capable of inclusion in a statutory transfer scheme;
  - (e) undertake business planning and budget setting with the Franchisee;
  - (f) undertake planning to ensure the continuity of the train services. This will include the provision of experts with the following technical expertise:
    - (i) timetabling;
    - (ii) train planning;
    - (iii) rail asset management;
    - (iv) contract management;
    - (v) rail IT;
    - (vi) rolling stock expertise;
    - (vii) marketing, branding and de-branding;
    - (viii) HR services and management of the TUPE and pensions transfer process; and
  - (g) report accordingly to Welsh Ministers.

10.2 In the event that Section 30 of the Act is triggered and Welsh Ministers and the Secretary of State are obliged to secure the continued operation of franchised passenger services under the W&B Franchise, Welsh Ministers:

- (a) will provide standby directors with suitable skills and experience who would be available at short notice to step in and manage a holding company. The directors would include individuals who could act as chief executive officer, finance officer and suitably qualified non-executive directors; and
- (b) agree that if the OLR Advisers provide any senior interim managers to an operating subsidiary of the Welsh Ministers holding company, e.g. an interim Managing Director and interim Finance Director, it is not anticipated that those senior interim managers would transfer to any successor operator as part of any TUPE process.

10.3 The OLR Advisers will undertake the following activities:

- (a) project management services;



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- (b) senior support to Welsh Ministers;
  - (c) internal termination team management;
  - (d) business review; and
  - (e) employee consultation, supplier and stakeholder management.

- 10.4 The OLR Advisers have prepared the Handbook to provide guidance in the event that the OLR Advisers are required to assist Welsh Ministers and the Secretary of State in exercising their duties under Section 30 of the Act. A copy of the Handbook is appended to this Agreement at Annex A.
- 10.5 Where the Secretary of State considers that the OLR Advisers should be instructed under this Clause 10, and Welsh Ministers disagree on the appointment or any terms of reference, the Parties will raise the matter at the Joint Strategic Board or any other appropriate forum at which there is senior representation by both Parties.

## **11 COMMISSIONING OLR ADVISERS**

- 11.1 Where Welsh Ministers identify OLR advice that needs to be commissioned under this Agreement, Welsh Ministers will outline the scope of their requirements to the Secretary of State, who will then seek an estimate from the OLR Adviser(s) for this advice. The OLR Adviser's estimate(s) will be agreed in writing by Welsh Ministers before any advice is commissioned.
- 11.2 The OLR Advisers will provide the Secretary of State with invoices for advice that has been commissioned on behalf of Welsh Ministers. The Secretary of State will confirm with Welsh Ministers that the invoices are acceptable to Welsh Ministers before paying the invoice(s). The Secretary of State will then raise an invoice for Welsh Ministers to reimburse the Secretary of State for the cost of the advice and Welsh Ministers will pay the Secretary of State by means of a DEL transfer.
- 11.3 Where the Secretary of State considers that the OLR Advisers should be instructed to provide OLR advice, and Welsh Ministers disagree, the Parties will raise the matter at the Joint Strategic Board, or any other forum at which there is senior representation by both Parties.

## **12 COSTS**

- 12.1 OLR costs, to be agreed, which will be paid by Welsh Ministers, include the following:
- (a) OLR Adviser costs;
  - (b) provision of reporting services; and

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- (c) training Welsh Minister's officers in the production of OLR Reports. Cost to include travel and subsistence and Welsh Ministers will provide a suitable venue for training.

12.2 The provision of OLR Services is charged on a time, materials and disbursements basis. Current call off rates for the Secretary of State's OLR Advisers and worked examples of the costs the Secretary of State has previously incurred in exercising his duties under Section 30 of the Act have been provided to Welsh Ministers.

12.3 The Secretary of State will not reimburse Welsh Ministers for any costs Welsh Ministers incur in exercising duties under Section 30 of the Act over the W&B Franchise. For the avoidance of doubt, this includes any costs incurred in securing the continued provision of English services.

12.4 In the event of any dispute between Welsh Ministers and the Secretary of State concerning OLR Adviser costs the dispute mechanism as set out in Clause 9 of Agency Agreement no. 3 shall be available to the Parties.

### **13 FUTURE OLR AGENCY ARRANGEMENTS**

13.1 These arrangements will continue until such time as Welsh Ministers acquire the capability to exercise duties under Section 30 of the Act without the assistance of the Secretary of State's OLR Advisers and the Parties have agreed to enter into a new contractual arrangement in relation to Welsh Ministers' performance (acting as agent of the Secretary of State under Agency Agreement no.3) of the Secretary of State's duties under Section 30 of the Act in respect of the English services.

### **14 FURTHER ASSURANCE**

14.1 Each Party agrees to use all reasonable endeavours to do or procure to be done all such further acts and execute or procure the execution of all such documents as any other Party may from time to time reasonably require for the purpose of giving the other Party the full benefit of the provisions of this Agreement.

### **15 GOVERNING LAW AND JURISDICTION**

15.1 This Agreement, and any non-contractual obligations arising out of or in connection with it, its subject matter and formation, shall be governed by and construed in accordance with the laws of England and Wales and, subject to the use of the Dispute resolution procedure set out in Clause 9 of Agency Agreement no. 3 the Parties irrevocably agree that the courts of England and Wales are to have exclusive jurisdiction to settle any Disputes (including any non-contractual Disputes) which may arise out of or in connection with this Agreement.

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## **16 THIRD PARTY RIGHTS**

- 16.1 A person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

## **17 COUNTERPARTS**

- 17.1 This Agreement may be executed in any number of counterparts or duplicates, each of which shall be an original and such counterparts or duplicates shall together constitute one and the same Agreement.

## **18 NO AGENCY OR PARTNERSHIP**

- 18.1 Nothing in this Agreement shall be deemed to constitute a partnership between the Parties nor constitute any Party the agent of any other Party.
- 18.2 Neither Party shall act or describe itself as the agent of any other Party, nor shall it make or represent that it has authority to make any commitments on the behalf of any other Party except where expressly so permitted under Agency Agreement no. 3.

## **19 NO DELEGATION**

- 19.1 No provision of this Agreement shall be construed as a delegation by any of the Parties of any of their respective functions or authority to any Party.

## **20 LEGALLY BINDING**

- 20.1 The Parties agree that this Agreement shall be fully legally binding between the Parties.

## **21 STATUTORY POWERS**

- 21.1 Nothing contained or implied in this Agreement shall prejudice or affect the rights, powers, duties and obligations of each of the Parties in the exercise of their respective functions as may be amended, supplemented or increased from time to time and the rights, powers, duties and obligations of each of the Parties pursuant to their respective functions may be as fully and effectually exercised as if this Agreement had not been made.

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**IN WITNESS** whereof the Parties hereto have executed this Agreement as a Deed the day and year first before written.

**The Secretary of State**

The corporate seal of the  
**SECRETARY OF STATE FOR TRANSPORT**  
hereto affixed is authenticated by:

.....  
Authenticated by authority of the  
Secretary of State for Transport

**Welsh Ministers**

Executed as a deed by applying the seal of Welsh Ministers.

The application of the seal of Welsh Ministers is AUTHENTICATED by Michael Clarke who is duly authorised for that purpose by the Director of Legal Services by authority of Welsh Ministers under section 90(2) of the Government of Wales Act 2006

Authenticated by authority of the  
Director of Legal Services

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**Annex A**  
**Handbook**