

SCHEDULE 12 CHANGE

Part 1 General Change Procedure

1. APPLICATION

Wherever in this Agreement reference is made to the application of the General Change Procedure, the provisions of this Part 1 of Schedule 12 shall apply.

2. NOTIFICATION OF ELIGIBLE CHANGE

2.1 If a Party believes that an Eligible Change the subject of Parts 2 to 5 (inclusive) of this Schedule 12 has occurred or will occur then such Party (the "**Proponent**") may give a notice to the other Party (or, where such notice is to be given by the DBFO Co and it is so specified in this Schedule 12, to the Department's Agent or the Department's Representative) (the "**Other Party**") in accordance with the provisions of paragraph 2.2. Any such notice shall be given not later than 60 days after the occurrence of the Eligible Change or (as the case may be) the giving of a notice under paragraph 1 of Part 2 of this Schedule 12, paragraph 1.1 of Part 3 of this Schedule 12 or paragraph 1.1 of Part 4 of this Schedule 12 (or within such other period as is provided under any other Part of this Schedule).

2.2 Any notice given pursuant to paragraph 2.1 shall:

2.2.1 identify the relevant Eligible Change (the "**Relevant Change**");

2.2.2 (other than in the case of a Compensation Event referred to in paragraph 5 of Part 4 of this Schedule 12) set out:

2.2.2.1 the Proponent's estimate of the Change in Costs in respect of each Affected Contract Year which has resulted or will result from the Relevant Change (having regard to the obligation to mitigate set out in paragraph 9 below); and

2.2.2.2 how much (if any) of such Change in Costs in respect of each Affected Contract Year constitutes a Change in Capital Costs;

2.2.3 (other than in the case of a Compensation Event referred to in paragraph 5 of Part 4 of this Schedule 12 or a Relevant Change which falls within paragraph (d) of the definition of Eligible Change) set out the Proponent's estimate of the Change in Traffic in respect of each Affected Contract Year (determined in accordance with Annex 1 to this Part 1 and having regard to the obligation to mitigate set out in paragraph 9 below) which has resulted or will result from the Relevant Change (giving details, inter alia, of the Proponent's estimate of the resulting Change in Revenues in respect of each Affected Contract Year); and

2.2.4 be accompanied by such evidence as is necessary to support the estimates given pursuant to paragraphs 2.2.2 and 2.2.3 above.

- 2.3 On the issue or receipt by the DBFO Co of any notice pursuant to paragraph 2.1 above, the DBFO Co shall allocate a unique reference number to the actual or potential Eligible Change and shall as soon as practicable notify such number to the Department's Nominee. The DBFO Co shall maintain a sequentially numbered register of all actual and potential Eligible Changes. All subsequent correspondence between the Parties in relation to any actual or potential Eligible Change shall bear the allocated number, provided that neither the Department's Nominee nor any Party shall have any liability for any failure to comply with this paragraph 2.3 nor shall any such failure invalidate any notice or correspondence between the Parties or between any Party and the Department's Nominee.
- 2.4 Within 28 days of receipt of a notice pursuant to paragraph 2.1 above, the Other Party may by notice to the Proponent either:
- 2.4.1 accept that the Relevant Change has occurred or will occur; or
- 2.4.2 require that the issue of whether the Relevant Change has occurred or will occur be referred to the Disputes Resolution Procedure. In any such reference to the Disputes Resolution Procedure, the Proponent shall bear the burden of proving by a preponderance of the evidence that the Relevant Change has occurred or will occur.
- 2.5 If the Proponent accepts or it is determined that the Relevant Change has not occurred and will not occur, then the Proponent shall withdraw its notice or the notice shall be deemed withdrawn.
- 2.6 If the Other Party accepts or it is determined that the Relevant Change has occurred or will occur, then the Proponent and the Other Party shall proceed to the determination of the Change in Costs and Change in Traffic in accordance with paragraph 3 below.
- 2.7 The Parties will at all times before and after agreement or determination of any of the matters to be agreed or determined in accordance with this Schedule 12 continue to carry out their obligations under this Agreement. Pending any revision of Annex 1 to Part 2 of Schedule 9 in accordance with paragraph 6 below and/or any payment under paragraph 7 below (but without prejudice to the right of either Party to seek such a revision or payment in accordance with this Schedule), any Change in Costs or Change in Traffic (and consequential Change in Revenues) resulting from any Eligible Change shall lie where it falls.

3. DETERMINATION OF CHANGE IN COSTS, CHANGE IN CAPITAL COSTS AND CHANGE IN TRAFFIC

- 3.1 Upon receipt of a notice pursuant to paragraph 2.1, the Other Party may, within 60 days of receipt of such notice or within such other period as may be specified elsewhere in this Schedule 12, without prejudice to the Other Party's position as to whether or not any Relevant Change has occurred, require that the Proponent provide such additional evidence as to any Change in Costs (including without limitation any Change in Capital Costs) or Change in Traffic (and consequential Change in Revenues) as the Other Party may reasonably require, including without limitation by:
- 3.1.1 where the DBFO Co is the Proponent, preparing a preliminary design of any changes to the Works or the Project Facilities which may be required by the Relevant Change; or

- 3.1.2 preparing more detailed costings and estimates of the matters referred to in paragraphs 2.2.2 and 2.2.3 above.

The Proponent shall submit such additional evidence to the Other Party as soon as reasonably practicable, having regard to the importance of achieving an early determination of the effect on the Project.

- 3.2 The Proponent and the Other Party shall use their reasonable endeavours to agree in respect of the Relevant Change the subject of a notice under paragraph 2.1 above:
- 3.2.1 where a notice has been given by the Other Party under paragraph 9.3.2 below, what steps are the most appropriate to take to mitigate the effect of the Relevant Change;
- 3.2.2 the Change in Costs in respect of each Affected Contract Year which has resulted or will result from such Relevant Change (having regard to the obligation to mitigate set out in paragraph 9 below) and, where applicable, how much of such Change in Costs in relation to each Threshold Period constitutes a Change in Capital Costs;
- 3.2.3 (other than in the case of a Compensation Event referred to in paragraph 6 of Part 4 of this Schedule 12 or a Relevant Change which falls within paragraph (d) of the definition of Eligible Change) the Change in Traffic (determined in accordance with Annex 1 to this Part 1 and having regard to the obligation to mitigate set out in paragraph 9 below) and any consequential Change in Revenue in respect of each Affected Contract Year which has resulted or will result from such Relevant Change.
- 3.3 Any agreement reached between the Proponent and the Other Party as to the matters referred to in paragraph 3.2 shall be binding on the DBFO Co and the Secretary of State.
- 3.4 If the Proponent and the Other Party are unable to reach agreement on any of the matters referred to in paragraph 3.2 within a period of 60 days after receipt of the notice pursuant to paragraph 2.1 or (if additional evidence has been required pursuant to paragraph 3.1) the date on which all such evidence has been provided, then either may refer the Dispute to the Disputes Resolution Procedure. In any such reference to the Disputes Resolution Procedure, the Proponent shall bear the burden of proving the matter in dispute by a preponderance of the evidence.

4. DETERMINATION OF ELIGIBLE CAPITAL COSTS

- 4.1 Within 10 days of the agreement or determination in accordance with paragraph 3 above of how much, if any, of any Change in Costs so agreed or determined in relation to each Threshold Period constitutes a Change in Capital Costs, the Proponent shall determine and notify to the Other Party the amount, if any, of any Eligible Capital Costs in respect of the Relevant Change in relation to each Threshold Period. The amount of any such Eligible Capital Costs shall, in respect of any Change in Capital Costs in relation to any Threshold Period, be such amount as is determined as follows:
- 4.1.1 if the Determined Figure would not (when aggregated with all other Changes in Capital Costs already agreed or finally determined in accordance with paragraph 3 above in relation to such Threshold Period) cause the Lump Sum Threshold for such Threshold Period to be exceeded, nil;

- 4.1.2 if the Determined Figure would (when aggregated with all other Changes in Capital Costs already agreed or finally determined in respect of such Threshold Period) cause the Lump Sum Threshold for such Threshold Period to be exceeded, the amount by which such Lump Sum Threshold is thereby exceeded; or
- 4.1.3 if, when the Determined Figure is agreed or finally determined, the Lump Sum Threshold for such Threshold Period has already been exceeded, an amount equal to the Determined Figure.
- 4.2 If the Proponent and the Other Party are unable to reach agreement on the amount, if any, of the Eligible Capital Costs in relation to any Threshold Period within 14 days of the notice by the Proponent in accordance with paragraph 4.1 above, then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 4.3 Upon agreement or determination of the amount, if any, of such Eligible Capital Costs, the provisions of paragraph 7.2 below shall apply. If it is agreed or determined that there are no Eligible Capital Costs in respect of the Relevant Change, the Proponent shall withdraw its notification given under paragraph 4.1 above.
- 4.4 For the purposes of paragraph 7.2 below, the Eligible Capital Costs for all or any part of any Affected Contract Year falling within a Threshold Period shall be deemed to be such amount as is determined in accordance with the following formula:

$$A = C \times \frac{B}{ECC}$$

where:

- A = the amount to be determined;
- B = the amount of the Change in Capital Costs in respect of the Relevant Change for the Relevant Affected Contract Year;
- C = the Determined Figure; and
- ECC = the amount of the Eligible Change in Capital Costs in relation to the relevant Threshold Period in respect of the Relevant Change.

5. DETERMINATION OF CHANGE FIGURE

- 5.1 Within 28 days after the end of each Contract Year, the Proponent shall determine and notify to the Other Party the Change Figure in respect of all Qualifying Changes in respect of such Contract Year. Such Change Figure shall be determined as at the Revision Date and shall be the figure determined as follows:
- 5.1.1 The Net Present Value of the Change in Costs in respect of all Qualifying Changes (other than any Eligible Capital Costs in respect of which the Secretary of State has given (or is deemed to have given) a notice pursuant to paragraph 7.2.3.1 below) for all Affected Contract Years shall be determined.
- 5.1.2 Other than in the case of a Compensation Event referred to in paragraph 5 of Part 4 of this Schedule 12 or a Relevant Change which falls within paragraph

(d) of the definition of Eligible Change, the Net Present Value of the Change in Revenues in respect of all Qualifying Changes for all Affected Contract Years shall be determined.

- 5.1.3 The aggregate of the figures determined pursuant to paragraphs 5.1.1 and 5.1.2 above for all Affected Contract Years shall be determined, taking into account the positive and negative values for those figures.
- 5.2 If the Proponent and the Other Party are unable to reach agreement on the amount of such Change Figure within 14 days of the notice by the Proponent in accordance with paragraph 5.1 above, then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 5.3 Upon agreement or determination of such Change Figure in accordance with this paragraph 5, the Proponent and the Other Party shall proceed to the determination of revised tolls in accordance with paragraph 6 below.

6. DETERMINATION OF REVISED TOLLS

- 6.1 Subject to paragraphs 7.3 and 7.4 below, and provided that no notice has been given in accordance with paragraph 7.1 below, within 14 days after the agreement or determination of the Change Figure in accordance with paragraph 5 above, the DBFO Co shall give a notice to the Secretary of State proposing such revisions (the "**First Amendments**") to the Relevant Toll Indicators as would ensure that the DBFO Co is left in the same financial position under this Agreement as it would have been in had such Qualifying Changes not occurred. Such revisions to the Relevant Toll Indicators shall be determined in accordance with the following procedures and requirements:
 - 6.1.1 The revisions to the values for each of such Relevant Toll Indicators (together the "**Revised Values**") shall come into effect on the relevant Revision Date.
 - 6.1.2 The Relevant Toll Indicators shall be revised proportionately (i.e. each shall be revised by the same percentage) except that in order to meet the objectives of Clause 6.1.3, revisions to the Relevant Toll Indicators shall be restricted to those applicable to the term of the Funding Agreements excluding for this purpose the Project Company Loan Notes and the Company Loan Notes or in the case of Appropriate Finance (as defined under paragraph 7.2.2 of this Part 1 of Schedule 12) over the life of such finance.
 - 6.1.3 The Changes in Costs (other than any Eligible Capital Costs in respect of which the Secretary of State has given (or is deemed to have given) a notice pursuant to paragraph 7.2.3.1 below) and (as relevant) Changes in Traffic in respect of all such Qualifying Changes agreed or determined in accordance with paragraph 3 above shall be entered into the Financial Model together with third party costs, fees and expenses reasonably and properly incurred in raising any Appropriate Finance in accordance with paragraph 7.2.2 of this Part 1 of Schedule 12, which, for the avoidance of doubt, shall not include any costs incurred by DBFO Co in relation to its management time and other internal costs. The Revised Values shall then be calculated so as to ensure that the internal rates of return of the shareholders' investment in the DBFO Co and the projected cover ratios applicable under the Funding Agreements excluding for this purpose the Project Company Loan Notes and the Company Loan Notes

throughout their remaining terms shall be maintained (in each case by reference to the then anticipated results in the DBFO Co's latest financial forecasts approved by the Funders, having regard to the current financial performance of the DBFO Co as if the Qualifying Change had not occurred).

- 6.2 If the Secretary of State does not object to the First Amendments by notice to the DBFO Co within 14 days of receiving them, then Annex 1 to Part 2 of Schedule 9 shall be amended by the First Amendments in accordance with paragraph 6.6 below.
- 6.3 If the Secretary of State does object to the First Amendments by notice to the DBFO Co within 14 days of receiving them, he may by a further notice to the DBFO Co propose alternative values for the Relevant Toll Indicators (the "**Second Amendments**") within 28 days of receiving the First Amendments. If the Secretary of State does not so propose any Second Amendments, then Annex 1 to Part 2 of Schedule 9 shall be amended by the First Amendments in accordance with paragraph 6.6 below.
- 6.4 If the Parties are unable to resolve any matter in dispute by agreement within 28 days of the service of the Second Amendments, then either Party may refer the Dispute for resolution by the Expert in accordance with paragraph 6.5 below.
- 6.5 The function of the Expert in respect of any Dispute referred to him pursuant to paragraph 6.4 shall be to determine which of the First Amendments and the Second Amendments most closely achieves the requirements of paragraphs 6.1.1, 6.1.2 and 6.1.3, and the Expert shall have no discretion to make or select any proposal other than the First Amendments or the Second Amendments.
- 6.6 Subject to the relevant Eligible Change having come into effect and subject to paragraph 7 below, Annex 1 to Part 2 of Schedule 9 shall be deemed to have been amended to reflect the relevant Revised Values agreed or determined pursuant to paragraph 6.2, 6.3 or 6.5 above with effect from the relevant Revision Date. As soon as practicable after agreement or determination of such Revised Values the DBFO Co shall re-calculate the Traffic Payment (if any) in respect of the period from such Revision Date to the date of agreement or determination of such Revised Values using the Revised Values for Annex 1 to Part 2 of Schedule 9 applicable during such period. The Secretary of State shall pay to the DBFO Co the amount by which the Traffic Payment (if any) as so re-calculated exceeds the Traffic Payment (if any) previously paid by the Secretary of State in respect of such period, together with interest thereon at a rate per annum equal to the Interest Rate plus 1 per cent per annum for the period from the date on which payment of any part of such Traffic Payment should have been paid to the date of actual payment. The DBFO Co shall repay to the Secretary of State the amount by which the Traffic Payment (if any) previously paid by the Secretary of State in respect of such period exceeds the Traffic Payment as so re-calculated, together with interest thereon at a rate per annum equal to the Interest Rate plus 1 per cent per annum for the period from the date on which payment of any part of such Traffic Payment was made to the date of repayment.
- 6.7 Any revision of Annex 1 to Part 2 of Schedule 9 pursuant to this paragraph 6 in respect of an Eligible Change (together with, where applicable, any payment made under paragraph 7 below) shall be in full satisfaction of the Proponent's claim in respect of that Eligible Change and the Proponent shall not have any other rights or remedies in respect thereof.

7. LUMP SUM PAYMENT

- 7.1 If the Change Figure is positive, then notwithstanding the provisions of paragraph 6 the Secretary of State shall have the right (but shall not be obliged, otherwise than to the extent provided by paragraph 7.2 below) to make a single payment to the DBFO Co in an amount equal to the Change Figure. The Secretary of State shall give notice to the DBFO Co of his intention to make such payment not later than 10 days after the agreement or determination of the Change Figure, and shall make such payment not later than 15 days after the agreement or determination of the Change Figure. The payment shall bear interest at a rate per annum equal to the Interest Rate plus 1 per cent per annum in respect of the period (if any) from the Revision Date to the date of payment.
- 7.2 If the DBFO Co believes that all or any part of any Eligible Capital Costs in respect of any Affected Contract Year cannot be financed by the DBFO Co from either the funding which is for the time being available to or which will (when such Eligible Capital Costs require to be financed) be available to the DBFO Co under the Funding Agreements (the amount of such Eligible Capital Costs in respect of such Affected Contract Year which cannot be so financed being an "**Unfinanced Amount**"), then the following provisions of this paragraph 7.2 shall apply:
- 7.2.1 The DBFO Co shall, within 10 days of the agreement or determination of the amount of such Eligible Capital Costs in respect of each Threshold Period in accordance with paragraph 4 above, notify to the Secretary of State the amount which the DBFO Co believes to be the Unfinanced Amount for each Affected Contract Year. If the DBFO Co and the Secretary of State are unable to reach agreement on the amount of any such Unfinanced Amount within 14 days of such notification, then either Party may refer the matter for resolution under the Disputes Resolution Procedure.
- 7.2.2 The DBFO Co shall use its reasonable endeavours to procure finance in respect of the aggregate of the Unfinanced Amounts agreed or determined in accordance with paragraph 7.2.1 above in respect of the Relevant Change (together the "**Aggregate Unfinanced Amount**") on the most favourable terms reasonably available to it in the market for finance for projects of a type reasonably similar to the Project ("**Appropriate Finance**"). For the purposes of this paragraph 7.2.2, "**reasonable endeavours**" shall include, but not be limited to:
- 7.2.2.1 the DBFO Co taking all reasonable steps to obtain Appropriate Finance in respect of the Aggregate Unfinanced Amount from the Funders;
- 7.2.2.2 if requested by the Secretary of State, the DBFO Co arranging (within 10 Working Days of such request) a meeting or meetings between the Secretary of State and the Funders or other appropriate providers of finance for the purposes of a discussion as to the provision of Appropriate Finance in respect of the Aggregate Unfinanced Amount; and
- 7.2.2.3 where the Funders do not agree to provide Appropriate Finance in respect of the Aggregate Unfinanced Amount, the DBFO Co seeking the agreement of such Funders to the release or partial release of the DBFO Co from any undertaking restricting the ability of the DBFO

Co to grant an Encumbrance in favour of, or borrow from, a party other than the Funders or any similar undertaking given to or for the benefit of the Funders which, if not released (whether wholly or in part), would preclude the DBFO Co from obtaining Appropriate Finance in respect of the Aggregate Unfinanced Amount from a provider of funds other than the Funders.

7.2.3 If, having used such reasonable endeavours for a period of not less than 90 days after agreement or final determination of the amount of the last of the Unfinanced Amounts to be agreed or determined, the DBFO Co is unable to procure Appropriate Finance for the Aggregate Unfinanced Amount and informs the Secretary of State accordingly by notice given not later than 5 Working Days after the expiry of such 90 day period (such notice to provide reasonable particulars of the steps taken by the DBFO Co in seeking such Appropriate Finance), then the Secretary of State shall elect (by notice to the DBFO Co within 30 days after receipt of such notice from the DBFO CO) either (at his option):

7.2.3.1 to make payment to the DBFO Co in accordance with paragraph 7.2.4 below; or

7.2.3.2 to procure Appropriate Finance in respect of the Aggregate Unfinanced Amount on such terms as he may determine but which will leave the Funders (excluding for this purpose the holders of the Project Company Loan Notes or the Company Loan Notes) in no better and no worse position than they would have been in had such Appropriate Finance not been procured.

If the Secretary of State fails to give a notice pursuant to this paragraph 7.2.3 within the required time he shall be deemed to have given a notice pursuant to paragraph 7.2.3.1 above.

7.2.4 Where the Secretary of State gives notice (or is deemed to have given such notice) pursuant to paragraph 7.2.3.1 above, then he shall pay to the DBFO Co either (at his option):

7.2.4.1 a single lump sum equal to the aggregate of the Net Present Values of all of the Unfinanced Amounts, such payment to be made within 30 days after the date of the Secretary of State's notice (or deemed notice) under paragraph 7.2.3.1 above; or

7.2.4.2 instalments of each Unfinanced Amount as provided in paragraph 7.2.5 below,

provided that, for the avoidance of doubt, the Secretary of State may in his absolute discretion (but shall not be obliged to) make any payment under this paragraph prior to its due date.

7.2.5 Where the Secretary of State elects to make payment pursuant to paragraph 7.2.4.2 above, the Secretary of State shall pay each Unfinanced Amount to the DBFO Co in instalments as follows. The Secretary of State shall pay the Relevant Monthly Amount in respect of each month in each Affected Contract Year, commencing with the Commencement Month, such payments to be made monthly in arrears and otherwise in accordance with Clause 32.

- 7.2.6 Where the Secretary of State gives a notice pursuant to paragraph 7.2.3.2 above, then he shall procure that such Appropriate Finance is made available within 60 days of such notice. If such Appropriate Finance is not so made available then he shall be deemed to have given a notice pursuant to paragraph 7.2.3.1 above.
- 7.3 If the Secretary of State elects to make payment in accordance with paragraph 7.1 above, then there shall be no revision of Annex 1 to Part 2 of Schedule 9 to reflect the Revised Values nor shall the Financial Model be revised to reflect the Revised Values or the Changes in Costs or Changes in Traffic agreed or determined in accordance with paragraph 3 above.
- 7.4 If the Secretary of State elects under paragraph 7.2.3.1 above to make payment in accordance with paragraph 7.2.4 above (or is to have given a notice pursuant to paragraph 7.2.3.1 above), then, to the extent of the Unfinanced Amount in respect of each Affected Contract Year, the Financial Model shall not be revised to reflect the Change in Capital Costs resulting from the Relevant Change or Relevant Changes agreed or determined in accordance with paragraph 3 above.
- 7.5 Any payment made pursuant to paragraph 7.1 above in respect of an Eligible Change shall be in full satisfaction of the Proponent's claim in respect of that Eligible Change and the Proponent shall not have any other rights or remedies in respect thereof.
- 7.6 Any payment made pursuant to paragraph 7.2 above in respect of the Eligible Capital Costs attributable to a Relevant Change shall be in full satisfaction of the Proponent's claim in respect of such Eligible Capital Costs and the Proponent shall not have any other rights or remedies in respect thereof, save where in respect of any Affected Contract Year the Unfinanced Amount is less than the Eligible Capital Costs for such Affected Contract Year, in which case the payment made pursuant to paragraph 7.2 above together with any revision of Annex 1 to Part 2 of Schedule 9 pursuant to paragraph 6 above shall be in full satisfaction of the Proponent's claim in respect of that Relevant Change and the Proponent shall not have any other rights or remedies in respect thereof.
- 7.7 Where any amount is paid or payable to the DBFO Co pursuant to paragraphs 7.1 or 7.2.4 of this Part 1 of Schedule 12 and the DBFO Co becomes liable to taxation or has any increased taxation liability by reason of such amount being so paid or payable, the sum due to the DBFO Co in respect of such amount shall be increased to the extent necessary to ensure that after payment of such taxation liability, the DBFO Co receives a net sum equal to the amount otherwise due to it pursuant to paragraphs 7.1 or 7.2.4 regarding any such liability to taxation. Where such sum is paid and the DBFO Co receives or is granted a credit or relief from or repayment of such taxation or increased taxation liability, the DBFO Co will promptly pay to the Secretary of State the amount attributable to such sum paid so as to leave the DBFO Co (after the payment back to the Secretary of State) in no better position than it would have been in if such sum had not been paid. The DBFO Co shall provide to the Secretary of State such evidence as the Secretary of State may reasonably require regarding the existence or extent of such liability to taxation.
- 8. UPDATING THE FINANCIAL MODEL**
- 8.1 Subject to paragraph 7 above, within 15 days after the agreement or determination of the Revised Values in accordance with paragraph 6 above, the DBFO Co shall procure that the Financial Model is updated to take into account the Revised Values and the Changes in Costs and Changes in Traffic (and consequential Changes in Revenues) agreed or

determined in accordance with paragraph 3 above. The Financial Model as so revised shall be the Financial Model for all purposes of this Agreement, subject to further revision in accordance with this paragraph 8.

- 8.2 The DBFO Co shall ensure that 2 copies of the revised version of the Financial Model are lodged with The National Computing Centre Limited or the substitute custodian promptly pursuant to the provisions of Clause 5.1.2.
- 8.3 Notwithstanding actual inflation between the date of execution of this Agreement and the revision of the Financial Model, the reference date for indexing amounts in the Financial Model shall remain as January 1998.

9. MITIGATION

- 9.1 The DBFO Co shall take all steps reasonably necessary to mitigate the effects of any Eligible Change so as to minimise any increase in costs and any reduction in traffic and revenues resulting from such Eligible Change.
- 9.2 At the same time as it gives any notice to the Other Party under paragraph 2.1 above, the DBFO Co shall give notice to the Other Party:
- 9.2.1 setting out a range of options showing the various steps which could be taken in order to mitigate the effect of the relevant Eligible Change, together with the associated costs for each proposal and where appropriate any savings which may thereby be obtained to the increase in costs or reduction in traffic and revenues resulting from such Eligible Change; and
 - 9.2.2 identifying which of those steps it proposes to take in order to mitigate the effect of the relevant Eligible Change.

The notice shall also specify the latest date by which such steps may be or are permitted to be taken (if any) and the benefits and costs of taking such steps at an earlier date.

- 9.3 The Other Party shall notify the DBFO Co within a period of 28 days of receipt of a notice pursuant to paragraph 9.2 above either:
- 9.3.1 that he agrees that the steps proposed to be taken are the most appropriate in order to enable the DBFO Co to discharge its duty under paragraph 9.1 above, in which case the DBFO Co shall take such steps; or
 - 9.3.2 that he does not so agree, and setting out his own proposal of steps to be taken by the DBFO Co in order to mitigate the effect of the relevant Eligible Change. This proposal may also provide for a delay in implementation of any proposal by the DBFO Co.
- 9.4 The DBFO Co may object to a proposal by the Other Party only on the grounds:
- 9.4.1 that the proposal may increase either the increase in costs or any reduction in traffic and revenues resulting from the Eligible Change (save to the extent taken into account in the agreement or determination of the Change in Costs and/or the Change in Traffic (and any consequential Change in Revenues) in relation to such Eligible Change under the preceding paragraphs of this Part 1);

- 9.4.2 of safety (of personnel, plant or equipment); or
- 9.4.3 of material departure from Good Industry Practice.
- 9.5 In the event of a Dispute between the DBFO Co and the Other Party as to whether the objection by the DBFO Co under paragraph 9.4 above is valid, the Dispute shall be dealt with in accordance with the provisions of paragraph 3.4 above, and the DBFO Co shall take such steps as are agreed or determined to be appropriate to mitigate the effect of the relevant Eligible Change.
- 9.6 If the DBFO Co is required to take any steps under this paragraph 9 in order to mitigate the effect of the relevant Eligible Change, then the costs of taking such steps shall be taken into account in determining the Change in Costs in respect of such Eligible Change in accordance with paragraph 3 above.

10. INTERPRETATION

In this Part 1 of Schedule 12, unless the context otherwise requires, the following expressions have the following meanings:

"Aggregate Unfinanced Amount" has the meaning given in paragraph 7.2.2 above.

"Appropriate Finance" has the meaning given in paragraph 7.2.2 above.

"Change in Capital Costs" means any net increase in the DBFO Co's costs of performing the Operations in respect of a Contract Year as a consequence of an Eligible Change, other than (i) operation and maintenance costs and other costs of a similar or recurring nature and (ii) Lane Closure Charges. For the avoidance of doubt, this does not include any change in revenue.

"Commencement Month" means, in respect of any payment made or to be made pursuant to paragraph 7.2.4.2 above, the later of:

- (a) the calendar month in which the Secretary of State gives notice (or is deemed to have given notice) under paragraph 7.2.3.1 above; and
- (b) the first month of the first Affected Contract Year.

"Determined Figure" means the amount of the Change in Capital Costs agreed or determined in accordance with paragraph 3 above.

"Eligible Capital Costs" has the meaning given in paragraph 4.1 above.

"Lump Sum Threshold" means:

- (a) in respect of the period from the date of this Agreement until (but excluding) the issuance of the Permit to Use shall be the sum of £2 million; and
- (b) in respect of the period from (and including) the issuance of the Permit to Use to the end of the Contract Period, the sum of £2 million (in January 1998 prices, provided that, for the purposes of Clause 1.2.15, n shall be the earlier of (i) the calendar month in respect of which the January 1998 price comparison is to be

made and (ii) the calendar month in which it is first determined, in accordance with paragraph 4 above, that the Determined Figure would (when aggregated with all other Changes in Capital Costs already agreed or finally determined in respect of such Threshold Period) cause the Lump Sum Threshold for such Threshold Period to be exceeded).

"Qualifying Change" means, in respect of any Contract Year, a Relevant Change:

- (a) in respect of which all of the matters (to the extent applicable) referred to in paragraph 3 above were agreed or finally determined during such Contract Year and which came into effect during or prior to such Contract Year; or
- (b) in respect of which all of the matters (to the extent applicable) referred to in paragraph 3 above were agreed or finally determined during or prior to such Contract Year and which came into effect during such Contract Year.

"Relevant Change" has the meaning given in paragraph 2.2.1 above.

"Relevant Monthly Amount" means, in respect of each Affected Contract Year in respect of a Relevant Change, an amount equal to:

- (a) the Unfinanced Amount in respect of such Affected Contract Year;

divided by
- (b) the number of calendar months (or partial calendar months) in such Affected Contract Year or, in the case of the first such Affected Contract Year, the number of calendar months (or partial calendar months) during the period beginning with the Commencement Month and ending at the end of such Affected Contract Year.

"Relevant Toll Indicators" means, in relation to Annex 1 to Part 2 of Schedule 9, the values for A_p , B_p , C_p , D_p , E_p and F_p set out in that Annex.

"Revised Values" has the meaning given in paragraph 6.1.1 above.

"Revision Date" means, in respect of any Relevant Change, the first day of the Contract Year immediately following the Contract Year in which such Relevant Change became a Qualifying Change.

"Threshold Period" means either of the periods referred to in the definition of Lump Sum Threshold.

"Unfinanced Amount" has the meaning given in paragraph 7.2 above.

**Annex 1 to
Part 1 of Schedule 12**

Determination of Change in Traffic

The Change in Traffic in respect of each Affected Contract Year shall be determined by the following procedure:

1. The effect of the Eligible Change the subject of a notice in accordance with paragraph 2.1 of Part 1 of this Schedule 12 on actual traffic levels prevailing at the time of the Eligible Change shall be assessed.
2. The percentage change in traffic levels resulting from the Eligible Change shall be agreed (or, in the absence of agreement, determined by the Disputes Resolution Procedure in accordance with paragraph 3.4 of Part 1 of this Schedule 12) in respect of each Affected Contract Year. Such percentage change shall be agreed or determined by comparing, in respect of each Affected Contract Year:
 - 2.1 Forecast traffic levels for such Affected Contract Year (such forecast to be made by reference to actual traffic levels immediately prior to the earlier of (i) the date on which such forecast is made (the "**Forecast Date**") and (ii) the date on which such Eligible Change came into effect) on the assumption that such Eligible Change has not occurred; with the following:
 - 2.1.1 (to the extent that all or any part of such Affected Contract Year occurs after the Forecast Date) forecast traffic levels for such Affected Contract Year or such part as the case may be, such forecast to be made by reference to actual traffic levels on the Forecast Date and to take into account the occurrence of such Eligible Change; and
 - 2.1.2 (to the extent that all or any part of such Affected Contract Year occurs prior to the Forecast Date) the actual traffic levels for such Affected Contract Year or such part, as the case may be.
3. The percentage change in traffic levels agreed or determined for each Affected Contract Year shall be applied to the traffic levels in respect of HGVs and Other Vehicles for that Contract Year in the Financial Model.

SCHEDULE 12 CHANGE

Part 2 Department's Change

1. NOTIFICATION

- 1.1 The Department's Nominee may at any time by notice issue a request to the DBFO Co for a Department's Change. In the case of a Department's Change other than one which is a variation in the design, quality or quantity of the Works, such notice shall specify the date from which such Department's Change is to be effective.
- 1.2 If the Secretary of State believes that such Department's Change would result in a Change in Costs and/or a Change in Traffic the Secretary of State may give notice to that effect to the DBFO Co at the same time as his notice under paragraph 1.1 above.

2. NOTICE OF OBJECTION

Within 28 days of the service of notice to the DBFO Co of a request for a Department's Change, the DBFO Co may give notice to the Department's Nominee:

- 2.1 that it objects to the Department's Change, but the DBFO Co may only object on the grounds:
- 2.1.1 of safety (of personnel, plant or equipment) or of material departure from Good Industry Practice; and/or
 - 2.1.2 in the case of a Department's Change other than one which is a variation in the design, quality or quantity of the Works, that such Department's Change cannot reasonably be effected by the date specified in the notice given by the Department's Nominee (and specifying the date on which the Department's Change could reasonably be effected); and/or
- 2.2 specifying the period of any delay to completion of the Works by the date set out in the Programme for such completion which the DBFO Co believes has arisen or will arise as a consequence of such Department's Change, and such notice shall be deemed to be a notice pursuant to Clause 11.6.1; and/or
- 2.3 (save where the Secretary of State has already given a notice under paragraph 1.2 above in respect of the relevant Department's Change) that such Department's Change would result in a Change in Costs and/or a Change in Traffic.

3. NO OBJECTION

If the DBFO Co does not give a notice pursuant to paragraph 2.1, paragraph 2.2 or paragraph 2.3 above and the Secretary of State does not give a notice pursuant to paragraph 1.2 above, then the DBFO Co shall promptly submit to the Department's Nominee a Department's Change Certificate in respect of such Department's Change. Subject to paragraph 8 below, the Department's Nominee shall countersign the Department's Change Certificate and return it to the DBFO Co within 14 days. Upon

receipt of the countersigned Department's Change Certificate, the DBFO Co shall cause the Department's Change to be implemented at no cost to the Secretary of State. In the case of a Department's Change other than one which is a variation in the design, quality or quantity of the Works such implementation shall be effective from and after the date specified in the Department's Nominee's notice pursuant to paragraph 1.1 above.

4. **OBJECTION TO CHANGE**

- 4.1 If the DBFO Co objects to the Department's Change in accordance with paragraph 2.1 above, then in its notice the DBFO Co shall give details of the grounds for such objection (including where relevant preliminary design assessments and preliminary calculations and studies). The DBFO Co shall, at the request of the Department's Nominee and at no cost to the Secretary of State except as provided in paragraph 8 below, provide such further assessments or calculations as the Department's Nominee may reasonably require to determine whether, in the case of an objection in accordance with paragraph 2.1.1 above, the DBFO Co may object on that ground or whether in the case of an objection in accordance with paragraph 2.1.2 above, the date specified in such objection is reasonable.
- 4.2 If the Department's Nominee is unable to accept a ground notified by the DBFO Co under paragraph 2.1 above and no agreement is reached with the DBFO Co as to the implementation of the Department's Change within 28 days, then either the DBFO Co or the Department's Nominee may refer the matter to the Disputes Resolution Procedure to determine, in the case of an objection in accordance with paragraph 2.1.1 above, whether or not the objection is justified and, in the case of an objection in accordance with paragraph 2.1.2 above, what date would be reasonable for the implementation of the Department's Change.
- 4.3 If under the Disputes Resolution Procedure the DBFO Co's objection is upheld, then the request for the Department's Change shall be deemed to be withdrawn.
- 4.4 If under the Disputes Resolution Procedure the DBFO Co's objection is not upheld, then:
- 4.4.1 in the case of a Department's Change which is a variation in the design, quality or quantity of the Works, the DBFO Co shall:
- 4.4.1.1 promptly submit to the Department's Nominee a Department's Change Certificate; and
- 4.4.1.2 upon receipt of the countersigned Department's Change Certificate cause the Department's Change to be implemented (at no cost to the Secretary of State save as provided in paragraph 6 below);
- 4.4.2 in the case of any other Department's Change, the DBFO Co shall (subject to paragraph 4.7 below) cause the Department's Change to be implemented (at no cost to the Secretary of State save as provided in paragraph 6 below) from the date specified in paragraph 4.6 below.
- 4.5 Subject to paragraph 8 below, in the case of a Department's Change which is a variation in the design, quality or quantity of the Works, the Department's Nominee shall countersign the Department's Change Certificate and return it to the DBFO Co within 14 days unless there is then outstanding any issue under paragraph 5 or paragraph 6 below, in which case he shall countersign and return it not later than 14 days after the agreement or determination of the last such issue.

- 4.6 Subject to paragraph 8 below, in the case of a Department's Change other than one which is a variation in the design, quality or quantity of the Works, if the DBFO Co has not made an objection in accordance with paragraph 2.1.2 above, then the Implementation Date shall be the date specified in the Department's Nominee's notice in accordance with paragraph 1 above. Subject to paragraph 8 below, if the DBFO Co has made an objection in accordance with paragraph 2.1.2 above, then the Implementation Date shall be the date agreed or determined in accordance with paragraph 4.2 above.
- 4.7 If at the Implementation Date there is outstanding any issue under paragraph 6 below, the Department's Nominee may by notice to the DBFO Co require the Implementation Date to be delayed to the date which is 14 days after the agreement or determination of the last such issue.
- 4.8 For the avoidance of doubt, the DBFO Co shall proceed with the implementation of the Department's Change:
- 4.8.1 in the case of a Department's Change which is a variation in the design, quality or quantity of the Works, upon the receipt of the countersigned Department's Change Certificate; or
 - 4.8.2 in the case of any other Department's Change on the Implementation Date (in the absence of any notice under paragraph 4.7 above),

notwithstanding that no determination has been made under either paragraph 5 or paragraph 6 below.

5. **DELAY**

If the DBFO Co gives a notice pursuant to paragraph 2.2 above, then the provisions of Clause 11.6 (Extension of Time) shall apply for the purpose of determining the length of the Delay Period (if any) to which the DBFO Co shall be entitled as a consequence of the Department's Change.

6. **GENERAL CHANGE PROCEDURE**

- 6.1 If the Secretary of State gives a notice in accordance with paragraph 1.2 above or the DBFO Co gives a notice in accordance with paragraph 2.3 above, then the General Change Procedure shall apply, subject to the provisions of this paragraph 6. Any such notice shall be deemed to be a notice pursuant to paragraph 2.1 of Part 1 of this Schedule 12 and the Party giving such notice shall be the "**Proponent**" and the recipient of such notice shall be the "**Other Party**" for the purposes of the General Change Procedure.
- 6.2 If the DBFO Co has also given a notice in accordance with either paragraph 2.1 or paragraph 2.2 above (or both), then the notice given by the DBFO Co in accordance with paragraph 2.3 above shall contain such of the information specified in paragraph 2.2 of Part 1 of this Schedule 12 as is available to the DBFO Co at the date of the notice. Without prejudice to paragraph 3.1 of Part 1 of Schedule 12, the DBFO Co shall promptly submit to the Department's Nominee any further particulars of such matters of which the DBFO Co becomes aware in the course of any proceedings pursuant to paragraph 4 or paragraph 5 above (as the case may be).

- 6.3 If the DBFO Co has given a notice in accordance with either paragraph 2.1 or paragraph 2.2 above, then any request for additional evidence pursuant to paragraph 3.1 of Part 1 of this Schedule 12 shall be made within 60 days after the date on which all such objections under paragraphs 2.1 and 2.2 above have been agreed or determined.
- 6.4 For purposes of determining the Change in Costs and Change in Traffic pursuant to paragraph 3 of Part 1 of this Schedule 12, the following shall be taken into account in respect of a Department's Change, other than one which is a variation in the design, quality or quantity of the Works, only in the period from and after the Implementation Date:
- 6.4.1 additional management or overhead costs;
 - 6.4.2 additional financing costs payable under the Funding Agreements; and
 - 6.4.3 any reduction in traffic.

7. NO LIABILITY

Except as otherwise expressly agreed, the Secretary of State shall bear no risk or liabilities whatsoever arising from a Department's Change and accordingly, except as aforesaid, the Secretary of State shall have no liability to make any payment in connection with or arising from a Department's Change other than as agreed or determined pursuant to Part 1 of this Schedule 12 or in accordance with paragraph 8 below.

8. WITHDRAWAL OF REQUEST

The Department's Nominee may withdraw the request for a Department's Change at any time prior to the issue of a Department's Change Certificate countersigned by the Department's Nominee or the Implementation Date, as the case may be. In the case of a withdrawal or a deemed withdrawal pursuant to paragraph 4.3 above, the DBFO Co shall be entitled to be paid the reasonable costs and expenses incurred by it in the preparation of the design and estimates referred to in paragraph 3.1.1 of Part 1 of this Schedule 12 and, where applicable, the costs incurred by the DBFO Co in any reference to the Disputes Resolution Procedure under the General Change Procedure or this Part 2 of Schedule 12.

9. CONSEQUENTIAL AMENDMENTS

The DBFO Co and the Department's Nominee shall use their reasonable endeavours to agree any consequential amendments to the terms of this Agreement (including without limitation the Handback Requirements) necessary to give full effect to any Department's Change agreed or determined in accordance with this Part 2 of Schedule 12. If they are unable to reach agreement within 28 days after the issue of the countersigned Department's Change Certificate or the Implementation Date (as the case may be), then either may refer the matter for resolution under the Disputes Resolution Procedure.

SCHEDULE 12 CHANGE

Part 3 Additional Works

1. NOTIFICATION

- 1.1 If either the DBFO Co or the Secretary of State believes that an Eligible Change has occurred or will occur as a consequence of any Additional Works required by the Secretary of State to be carried out in accordance with Part 1 of Schedule 13, then the DBFO Co or the Secretary of State (as the case may be) shall give a notice to that effect to the other by the time specified in paragraph 1.2 below.
- 1.2 A notice pursuant to paragraph 1.1 above shall be given:
- 1.2.1 if by the Secretary of State, at the time he gives the notice in accordance with paragraph 1.1 of Part 1 of Schedule 13 in respect of such Additional Works; and
 - 1.2.2 if by the DBFO Co, within 28 days of receipt of the notice from the Secretary of State in accordance with paragraph 1.1 of Part 1 of Schedule 13 in respect of such Additional Works.

2. GENERAL CHANGE PROCEDURE

If a notice is given in accordance with paragraph 1.1 above, then the General Change Procedure shall apply, subject to the provisions of this Part 3 of Schedule 12. For the avoidance of doubt, the notice given in accordance with paragraph 1.1 above shall be deemed to have been given pursuant to paragraph 2.1 of Part 1 of this Schedule 12, and the Party giving such notice shall be the "**Proponent**" and the recipient of such notice shall be the "**Other Party**" for the purposes of the General Change Procedure.

3. DESIGN WORKS

Any request by the Secretary of State (as the Other Party) pursuant to paragraph 3.1.1 of Part 1 of this Schedule 12 shall not be deemed to require the DBFO Co to prepare any design of the Additional Works themselves, which for the avoidance of doubt shall be dealt with in accordance with Part 1 of Schedule 13.

4. DETERMINATION OF REVISED TOLLS

For the purposes of the determination of the Revised Values in accordance with paragraph 6 of Part 1 of this Schedule 12, there shall be included:

- 4.1 any Change in Costs in respect of the costs of operation and maintenance of the Project Facilities, as modified by the Additional Works, but excluding any costs of performing the DBFO Co's obligations under Part 1 of Schedule 13; and

- 4.2 the effect of any Change in Traffic from and after the date on which the construction of the Additional Works commences.

5. CHANGE FIGURE

No amendments to this Agreement agreed or determined in accordance with paragraph 6 of Part 1 of this Schedule 12 or paragraph 8 below shall come into effect, and no payment shall be made in accordance with paragraph 6 of Part 1 of this Schedule 12, unless the construction of the Additional Works shall have been commenced.

6. NO LIABILITY

Except as otherwise expressly agreed the Secretary of State shall bear no risk or liabilities whatsoever arising from any Additional Works and accordingly, except as aforesaid, the Secretary of State shall have no liability to make any payment in connection with or arising from Additional Works other than as provided in Schedule 13 or as agreed or determined pursuant to Part 1 of this Schedule 12 or in accordance with paragraph 7 below.

7. WITHDRAWAL OF REQUEST

The Department's Representative may withdraw the request for any Additional Works at any time prior to the commencement of construction of such Additional Works. In the case of such a withdrawal, the DBFO Co shall be entitled to be paid the reasonable costs and expenses incurred by it in the preparation of the design and estimates referred to in paragraph 3.1.1 of Part 1 of this Schedule 12 and, where applicable, the costs incurred by the DBFO Co in any reference to the Disputes Resolution Procedure under the General Change Procedure or this Part 3 of Schedule 12.

8. CONSEQUENTIAL AMENDMENTS

The DBFO Co and the Department's Representative shall use their reasonable endeavours to agree any amendments to the terms of this Agreement (including without limitation the Handback Requirements) necessary as a consequence of any Additional Works. If they are unable to reach agreement within 28 days after the date of commencement of construction of such Additional Works, then either may refer the matter for resolution under the Disputes Resolution Procedure.

SCHEDULE 12 CHANGE

Part 4 Compensation Events

1. NOTIFICATION

- 1.1 If the DBFO Co believes that a Compensation Event has occurred, then the DBFO Co shall give a notice to that effect to the Secretary of State by the time specified in paragraph 1.2 below. Such notice shall also specify the period (if any) of any delay to completion of the Works by the date set out in the Programme for such completion which the DBFO Co believes has arisen or will arise as a consequence of such Compensation Event.
- 1.2 A notice pursuant to paragraph 1.1 above shall be given not later than 28 days after the later of the date on which (if applicable) it is agreed or determined that the relevant event will cause material delay to or materially impede the issue of the Permit to Use by the Programme Date; and:
- 1.2.1 in the case of a failure by the Secretary of State to issue the Commencement Certificate, the date on which the Commencement Certificate is issued;
 - 1.2.2 in the case of a failure by the Secretary of State to issue the Permit to Use, or the Completion Certificate or the Taking Over Certificate, the date on which such Permit to Use, Completion Certificate or Taking Over Certificate is issued or the date of a determination in accordance with Clause 12.4.2 that such Permit to Use, Completion Certificate or Taking Over Certificate should have been issued;
 - 1.2.3 in the case of a material breach by the Secretary of State of the provisions of Clause 8.1 (Access for DBFO Co), the date on which such material breach ceases;
 - 1.2.4 in the case of the occurrence of a Relevant Change in Law, the date on which the Relevant Change in Law comes into effect; and
 - 1.2.5 in any other case, the day on which the Compensation Event is asserted to have first occurred.

2. DELAY

If the DBFO Co gives a notice pursuant to paragraph 1.1 above which specifies a period for delay to completion of the Works by the date set out in the Programme for such completion which the DBFO Co believes has arisen or will arise as a consequence of such Compensation Event, then the provisions of Clause 11.6 (Extension of Time) shall apply for the purposes of determining the length of the Delay Period (if any) to which the DBFO Co shall be entitled as a consequence of the Compensation Event.

3. GENERAL CHANGE PROCEDURE

If a notice is given in accordance with paragraph 1.1 above, then (except in respect of a Compensation Event arising from the failure of the Secretary of State to issue the Permit to Use or the Completion Certificate, which shall be subject to the provisions of paragraph 6 below) the General Change Procedure shall apply, subject to the provisions of this Part 4 of Schedule 12. For the avoidance of doubt, the notice given in accordance with paragraph 1.1 above shall be deemed to have been given pursuant to paragraph 2.1 of Part 1 of this Schedule 12 and the DBFO Co shall be the "**Proponent**" and the Secretary of State shall be the "**Other Party**" for purposes of the General Change Procedure.

4. DESIGN WORKS

The provisions of paragraph 3.1.1 of Part 1 of this Schedule 12 shall not apply in respect of any Compensation Event

5. DETERMINATION OF REVISED TOLLS

- 5.1 For the purposes of the determination of the Revised Values in accordance with paragraph 6 of Part 1 of this Schedule 12 in respect of any Compensation Event which causes material delay to or materially impedes the issue of the Permit to Use by the Programme Date, both Changes in Costs and Changes in Traffic shall be taken into account.
- 5.2 For the purposes of the determination of the Revised Values in accordance with paragraph 6 of Part 1 of this Schedule 12 in respect of any failure of the Department's Agent to issue a Taking Over Certificate, Changes in Traffic shall not be taken into account and Changes in Costs shall be taken into account only insofar as they relate to the period from the date (determined in accordance with Clause 12.4.2.2) on which the Taking Over Certificate should have been issued to the date on which it is issued.

6. PERMIT TO USE AND COMPLETION CERTIFICATE

- 6.1 If it is determined in accordance with Clause 12.4.2 that the Secretary of State should have issued the Permit to Use or the Completion Certificate on a date prior to the date on which such Permit to Use or Completion Certificate was actually issued, then the Traffic Payment shall be calculated for such period on the basis that the Permit to Use or Completion Certificate, as the case may be, had been issued on the date determined in accordance with Clause 12.4.2.2. In the event of any dispute as to the amount of such Traffic Payment, either Party may refer the matter for resolution in accordance with the Disputes Resolution Procedure.
- 6.2 The Secretary of State shall pay to the DBFO Co the amount by which the Traffic Payment calculated in accordance with paragraph 6.1 above exceeds the Traffic Payment (if any) previously paid by the Secretary of State in respect of such period, together with interest thereon at a rate per annum equal to the Interest Rate plus 2 per cent per annum for the period from the date on which payment of any part of such Traffic Payment should have been paid to the date of actual payment.

SCHEDULE 12 CHANGE

Part 5 User Paid Tolls

1. DEFINITIONS

For the purposes of this Part 5 of Schedule 12, the following expressions have the following meanings:

"Base Year" means the Contract Year immediately preceding the First Transition Year.

"First Transition Year" means the Contract Year in which User Paid Tolls first become payable in respect of the whole or any material part of the Project Road.

"Relevant Toll Indicators" has the meaning given in paragraph 10 of Part 1 of this Schedule 12.

"Road Traffic Statistics" means the Department's annual publication "Road Traffic Statistics Great Britain" or any replacement of or substitute for such publication.

"Second Transition Year" means the Contract Year immediately following the First Transition Year.

"Third Transition Year" means the Contract Year immediately following the Second Transition Year.

"Traffic Index for Other Vehicles" means the sum of the values for "Cars and taxis", "Motorcycles, etc." and "Light vans" for all roads as shown in the table "Motor vehicle flow by vehicle type (average daily 24 hour flow at an average point)" in Road Traffic Statistics in respect of the relevant calendar year.

"Traffic Index for HGVs" means the sum of the values for "Goods vehicles" and "Buses and coaches" for all roads as shown in the table "Motor vehicle flow by vehicle type (average daily 24 hour flow at an average point)" in Road Traffic Statistics in respect of the relevant calendar year.

"Transition Period" means the period covered by the First Transition Year, the Second Transition Year and the Third Transition Year.

"User Paid Toll" means any consideration paid or payable by the Users (or any category of Users) of the Project Road for the right of passage along the Project Road, whether payable in cash or by any electronic or mechanical means and whether payable at the time of passage by the User along the Project Road or at any other time and regardless of the recipient of the consideration.

2. USER PAID TOLLS

- 2.1 Notwithstanding any other provision of this Agreement, the Secretary of State shall be entitled at any time during the Contract Period himself to charge and/or collect User Paid

Tolls in respect of the whole or any part of the Project Road or to authorise any one or more third persons so to charge and/or collect User Paid Tolls in respect of the whole or any part of the Project Road. The DBFO Co shall have no entitlement to or interest in any User Paid Toll charged and/or collected in respect of the Project Road or any part thereof, and any such User Paid Tolls which shall come into the possession of the DBFO Co shall be held by it for the benefit of the Secretary of State or such other person as may be entitled thereto and shall as soon as reasonably practicable be paid over to the Secretary of State or as he may direct.

- 2.2 Without limitation to Clause 13.4 (Access), the DBFO Co shall procure that any person so entitled to charge and/or collect User Paid Tolls shall (subject to compliance with all relevant health and safety requirements) have access to the Site and the Adjacent Areas at all reasonable times and on reasonable notice throughout the Contract Period in order:

- 2.2.1 to install or construct any equipment, plant or works required for or in connection with the charging and/or collection of User Paid Tolls or the inspection, operation or maintenance of such equipment, plant or works; and
- 2.2.2 to conduct any operations required for or in connection with the charging and/or collection of User Paid Tolls.

The Secretary of State shall use his reasonable endeavours to procure that any such person co-operates with and co-ordinates his activities with those of the DBFO Co so as to avoid any delay or disruption to the Operations. In the event that material delay or disruption to the Operations is caused by any such person the provisions of Part 4 of this Schedule 12 shall apply.

3. **TRANSITION PERIOD**

- 3.1 During the Transition Period, the Traffic Payment shall be calculated in accordance with Clause 31 (Calculation of Payments) and Part 2 of Schedule 9 (Traffic Payment), but subject to the modifications set out in this paragraph 3.

- 3.2 In respect of the First Transition Year and the Second Transition Year:

- 3.2.1 notwithstanding paragraph 2 of Part 2 of Schedule 9, the total number of vehicle kilometres for Other Vehicles and vehicle kilometres for HGVs to be used for purposes of determining the Traffic Payment pursuant to paragraph 1 of Part 2 of Schedule 9 shall be the total number of vehicle kilometres for Other Vehicles and vehicle kilometres for HGVs respectively for the Base Year rather than for the First Transition Year or the Second Transition Year (as the case may be), and accordingly

- 3.2.2 the following definitions for $OV_{n,p}$ and $HGV_{n,p}$ shall be substituted for those set out in paragraph 1 of Part 2 of Schedule 9:

$$OV_{n,p} = OV_{B,p} * \quad \times \quad \frac{TIOV_n}{TIOV_B}$$

$$HGV_{n,p} = HGV_{B,p} * \quad \times \quad \frac{TIHGV_n}{TIHGV_B}$$

Where:

$OV_{B,p}^*$ = subject to paragraph 3.6, the total number of vehicle kilometres for Other Vehicles for the calendar period during the Base Year which is equivalent to the calendar period comprising Toll Period p , as set out in the Annual Report for the Base Year pursuant to paragraph 3.2 of Part 2 of Schedule 14.

$HGV_{B,p}^*$ = subject to paragraph 3.6, the total number of vehicle kilometres for HGVs for the calendar period during the Base Year which is equivalent to the calendar period comprising Toll Period p , as set out in the Annual Report for the Base Year pursuant to paragraph 3.1 of Part 2 of Schedule 14.

$TIOV_n$ = the Traffic Index for Other Vehicles in respect of the calendar year ending in Contract Year n .

$TIOV_B$ = the Traffic Index for Other Vehicles in respect of the calendar year ending in the Base Year.

$TIHGV_n$ = the Traffic Index for HGVs in respect of the calendar year ending in Contract Year n .

$TIHGV_B$ = the Traffic Index for HGVs in respect of the calendar year ending in the Base Year.

3.3 In respect of the Third Transition Year:

3.3.1 the total number of vehicle kilometres for Other Vehicles and vehicle kilometres for HGVs to be used for purposes of determining the Traffic Payment pursuant to paragraph 1 of Part 2 of Schedule 9 in respect of any Toll Period p shall be the total number of vehicle kilometres for Other Vehicles for Toll Period p and vehicle kilometres for HGVs for Toll Period p reported in the Annual Report for the Third Transition Year pursuant to paragraph 3.1 of Part 2 of Schedule 14, and accordingly $OV_{n,p}$ and $HGV_{n,p}$ shall have the same definitions as set out in paragraph 1 of Part 2 of Schedule 9;

3.3.2 the values for the Relevant Toll Indicators shall be the revised values agreed or determined in accordance with paragraph 4 below.

3.4 Subject to the provisions of paragraph 5 below, the Traffic Payment in respect of each Contract Year after the Third Transition Year shall be calculated in accordance with Clause 31 (Calculation of Payments) and Part 2 of Schedule 9 (Traffic Payment), save that the values for the Relevant Toll Indicators shall be the revised values agreed or determined in accordance with paragraph 4 below.

3.5 For the avoidance of doubt, the provisions of Part 5 of Schedule 9 shall apply mutatis mutandis in respect of the Traffic Index for Other Vehicles and the Traffic Index for HGVs, save that:

3.5.1 paragraphs 1, 2 and 6 of that Part 5 of Schedule 9 shall not apply;

- 3.5.2 for purposes of the remainder of Part 5 of Schedule 9, references to "Index_n" shall be deemed to be references to TIOV_n or TIHGV_n (as defined in paragraph 3.2.2 above) as the case may be; and
- 3.5.3 the provisions in paragraph 3.7 below shall be deemed to have been substituted for paragraph 3 of that Part 5 of Schedule 9.
- 3.6 If any part of the calendar period during the Base Year referred to in the definition of OVB_p* and HGVB_p* in paragraph 3.2.2 above falls prior to the date of issue of the Permit to Use, then the number of vehicle kilometres for Other Vehicles and HGVs on the Project Road for such part of such period shall be determined on the basis of the one-way expected hourly flows and the percentage of HGVs set out in Annex 2 to Part 3 of Schedule 9.
- 3.7 The provisions referred to in paragraph 3.5.3 are as follows:

"3. **TEMPORARY UNAVAILABILITY OF OR ERROR IN THE INDEX**

- 3.1 If, at the Review Date, Index_n (or a figure or figures required to calculate Index_n) has (in the opinion of both the Secretary of State and the DBFO Co) been computed or published in error, then the Parties will jointly endeavour (in good faith) to agree upon a corrected figure, to be used in the said revision. To the extent that the Secretary of State and the DBFO Co have been able to agree upon a corrected figure, it shall be used and shall not subsequently be amended in respect of the relevant Contract Year; provided that if, in the circumstances set out above, the Parties have been unable to obtain or agree upon any corrected figure within a period of 30 days, then paragraph 4 shall apply.
- 3.2 If, at the Review Date, Index_n (or a figure or figures required to calculate Index_n) is (in the opinion of both the Secretary of State and the DBFO Co) temporarily not available from the relevant publication (but is likely to be available at a later date), then:
- 3.2.1 the most recently available figures (including any preliminary figures in respect of the calendar year ending in the relevant Contract Year) shall be used for purposes of the calculation of the Traffic Payment in the Annual Reconciliation Notice in respect of the relevant Contract Year;
- 3.2.2 as soon as practical after Index_n (or the figure or figures required to calculate Index_n) becomes available, the Traffic Payment in respect of the relevant Contract Year shall be recalculated using such Index_n and any adjustment to reflect any previous over-payment or under-payment of the Traffic Payment in respect of the relevant Contract Year shall be included in the next Monthly Invoice to be issued after such recalculation;
- 3.2.3 if Index_n (or the figure or figures required to calculate Index_n) does not become available within 12 months of the Review Date in respect of the relevant Contract Year then paragraph 4 shall apply (provided that notice may be

given under that paragraph 4 not later than 30 days after the anniversary of the Review Date), and the amendment to or replacement of Index_n agreed or determined in accordance with paragraph 4 shall be used in the recalculation in accordance with paragraph 3.2.2 above."

4. REBASED TOLL

- 4.1 At the time it provides the Annual Report in respect of the Second Transition Year, the DBFO Co shall provide to the Department's Nominee a notice setting out its proposals (the "**First Proposals**") as to revised values for the Relevant Toll Indicators in accordance with paragraph 6.1 of Part 1 of Schedule 12, such that the test set out in paragraph 4.2 below is satisfied.
- 4.2 The test referred to in paragraph 4.1 above is that, if the Traffic Payment in respect of the Second Transition Year had been calculated:
- 4.2.1 using the revised values for the Relevant Toll Indicators contained in the proposal;
 - 4.2.2 using the total number of vehicle kilometres for Other Vehicles and vehicle kilometres for HGVs reported in the Annual Report for the Second Transition Year pursuant to paragraph 3.2 of Part 2 of Schedule 14 (and accordingly OV_{n,p} and HGV_{n,p} shall have the same definitions as set out in paragraph 1 of Part 2 of Schedule 9); and
 - 4.2.3 otherwise in accordance with paragraph 1 of Part 2 of Schedule 9,
- the Traffic Payment to the DBFO Co in respect of the Second Transition Year would have been equal to the Traffic Payment payable to the DBFO Co in respect of the Second Transition Year in accordance with paragraph 3.2 above.
- 4.3 If the Department's Nominee raises no objection by notice to the DBFO Co within 14 days of receiving the First Proposals, then paragraph 1 of Part 2 of Schedule 9 shall be deemed to be amended as set out in the First Proposals with effect from the first day of the Third Transition Year.
- 4.4 If the Department's Nominee objects to the First Proposals by notice to the DBFO Co within 14 days of receiving them, it may make alternative proposals (the "**Second Proposals**") in respect of the revised values for the Relevant Toll Indicators within 28 days of receiving the First Proposals. If the Department's Nominee does not so make any Second Proposals then the First Proposals shall take effect as provided in paragraph 4.3.
- 4.5 If the DBFO Co and the Department's Nominee are unable to resolve any matter in question by agreement within 28 days of the service of the Second Proposals, then either may refer the Dispute for resolution by the Expert in accordance with paragraph 4.6.
- 4.6 The function of the Expert in respect of any Dispute referred to him pursuant to paragraph 4.5 shall be to determine which of the First Proposals and the Second Proposals most closely meets the test set out in paragraph 4.2 above and the Expert shall have no discretion to make or select any proposal other than the First Proposals or the Second Proposals.

5. CHANGES IN USER PAID TOLLS

5.1 If at any time after the introduction of User Paid Tolls the level of User Paid Tolls changes or User Paid Tolls are withdrawn, then the provisions of paragraphs 3 and 4 above shall apply in respect of such change in or withdrawal of User Paid Tolls as though it were the introduction of User Paid Tolls, provided that:

5.1.1 in the case of a change in User Paid Tolls, this paragraph 5.1 shall not apply unless the aggregate change in the User Paid Tolls (weighted in accordance with the categories of vehicle subject to such User Paid Tolls) since the introduction of User Paid Tolls or (as the case may be) the last application of this paragraph 5.1 is such as to satisfy the test set out in paragraph 5.2 below; and

5.1.2 the First Transition Year, in the case of a change in User Paid Tolls, shall be the Contract Year in which such aggregate change in the User Paid Tolls first satisfies the test set out in paragraph 5.2 below and, in the case of the withdrawal of User Paid Tolls, shall be the Contract Year in which such withdrawal occurs.

5.2 The test referred to in paragraph 5.1 is as follows:

$$\frac{T_m}{T_n} \geq 1.15 \times \frac{RPI_m}{RPI_n} \quad \text{or} \quad \leq 0.85 \times \frac{RPI_m}{RPI_n}$$

where n is any Contract Year and m is any subsequent Contract Year, provided that $m \leq n + 2$.

Where:

T_n = the average of the User Paid Tolls in respect of Contract Year n weighted by the number of vehicles which fell into each category of vehicle in respect of which such User Paid Tolls are payable in Contract Year n.

T_m = the average of the User Paid Tolls in respect of Contract Year m weighted by the number of vehicles which fell into each category of vehicle in respect of which such User Paid Tolls are payable in such Contract Year m.

RPI_n = the value for RPI on 31st January in Contract Year n.

RPI_m = the value for RPI on 31st January in Contract Year m.

6. CHANGE IN COSTS

6.1 If the Secretary of State believes at any time that any Eligible Change has occurred or will occur as a consequence of the imposition or withdrawal of User Paid Tolls or any change in User Paid Tolls within the scope of paragraph 5 above, he may give a notice to that effect to the DBFO Co.

- 6.2 If a notice is given in accordance with paragraph 6.1 above, then the General Change Procedure shall apply, subject to the provisions of this paragraph 6. For the avoidance of doubt the notice given in accordance with paragraph 6.1 above shall be deemed to have been given pursuant to paragraph 2.1 of Part 1 of this Schedule 12, and the Secretary of State shall be the "**Proponent**" and the DBFO Co shall be the "**Other Party**" for the purposes of the General Change Procedure.
- 6.3 The provisions of paragraph 3.1.1 of Part 1 of this Schedule 12 shall not apply in respect of any notice given by the Secretary of State in accordance with paragraph 6.1 above.
- 6.4 For the purposes of the determination of the Revised Values in accordance with paragraph 6 of Part 1 of this Schedule 12, no Change in Traffic shall be taken into account and Changes in Costs in respect of the costs of operation and maintenance of the Project Facilities shall be taken into account from and after the later of the date of the notice in accordance with paragraph 6.1 above and the first day of the relevant First Transition Year.
- 6.5 For the avoidance of doubt, the provisions of paragraph 9 of Part 1 of Schedule 12 shall not apply to an Eligible Change the subject of a notice in accordance with paragraph 6.1 above.

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