ADDLESHAW GODDARD

Dated **2016**

SECRETARY OF STATE FOR TRANSPORT

WEST MIDLANDS RAIL LIMITED

COLLABORATION AGREEMENT relating to devolution of rail responsibilities in the West Midlands

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Contents

Clause		Page
1	Definitions	1
2	Commencement and Term	5
3	Collaboration Objectives	6
4	Purpose of the Agreement	6
5	Secretary of State Duties and Reserved Matters	6
6	Phase 1	6
7	Strategic Board	7
8	Franchise Management	8
9	Funding	9
10	Changes Proposed by WMR	9
11	Further Devolution of the WMSBU	11
12	Assignment, Transfer and Novation	12
13	Termination	12
14	Consequences of Termination	12
15	Confidentiality	13
16	Freedom of Information	14
17	Dispute Resolution Procedure	15
18	Notices	16
19	Waiver	17
20	Partial Invalidity	17
21	Further Assurance	17
22	Rights of Third Parties	17
23	Variation	17
24	Cumulative rights	17
25	No Partnership	18
26	Entire Agreement	18
27	Counterparts	18
28	Good Faith	18
29	Governing Law	18

Schedule

1	The Objectives	20
2	Strategic Board Responsibilities	21
3	Management Team Responsibilities	22
4	Part 1 - Separable Business Units Map	25
	Part 2 - WMR Area MPa	26
5	Funding Outputs	27

Agreement is made on 2016

Between

(1) **The Secretary Of State For Transport** whose principal place of business is at Great Minster House, 33 Horseferry Road, London, SW1P 4DR (**Secretary of State**); and

(2) **West Midlands Rail Limited** (No. 08991160) whose registered office is at 16 Summer Lane, Birmingham B19 3SD (**WMR**).

Whereas

(A) In a letter dated 25th March 2015 the Secretary of State confirmed his support for working together with WMR to develop proposals for how, by adopting a collaborative approach, local decision making could play a central role in defining future rail services in the West Midlands (**Agreed Position**).

(B) The Parties intend West Midlands devolution to be a process which can progress (proposed by WMR and accepted by the Secretary of State) to allow WMR to develop its capability and capacity and to de-risk the possible transition to full devolution of local rail services after the expiry of the 2017 WM Franchise.

(C) The Parties have been working together in furtherance of the Agreed Position and are now working together to determine further arrangements which will govern their relationship going forward. The Parties entered into heads of terms on [*insert date*] (**Heads of Terms**) in order to set out the key terms which the Parties envisaged would be further developed and documented within a formal collaboration agreement between them.

(D) This Agreement formalises and further develops the principles agreed under the Heads of Terms and sets out the terms under which the Parties agree to collaborate in order to achieve the Purpose and the Objectives set out in this Agreement.

It is agreed

1 Definitions

1.1 In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

2017 WM Franchise means the franchise which is currently being re-let by the Secretary of State in relation to the West Midlands franchise services, being the services designated by the Secretary of State pursuant to Section 23 of the Act as franchise services and currently operated by the Franchisee under the Franchise Agreement

Act means Railways Act 1993 (as amended from time to time)

Commencement Date means the date of this Agreement

Control Period means a railway investment period (currently a five year period from 2014 to 2019 for Control Period 5)

CEDR means the Centre for Effective Dispute Resolution

Confidential Information has the meaning given in clause 15.1

Coventry Corridor and Stafford Corridor means the route coloured green and titled West Coast Separable Business Unit (WMR area) on the plan set out in part 1 of Schedule 4

DfT or **Department for Transport** means the Department for Transport which is the organisation that discharges the duties of the Secretary of State

DfT Annual Funding Amount means:

(a) in respect of each Franchisee Year containing 13 Reporting Periods, an aggregate amount of not less than [£500,000] (five hundred thousand pounds sterling) and

(b) in respect of any Franchisee Year containing less than 13 Reporting Periods (which for the avoidance of doubt, shall apply to the first Franchisee Year being the period from the Start Date until the end of the last Reporting Period in the first Franchisee Year) an aggregate amount of not less than:

A x (B/13) where:

A means [£500,000] (five hundred thousand pounds sterling) and

B means the number of Reporting Periods in the relevant Franchisee Year

Dispute has the meaning given in clause 17.1

Dispute Resolution Procedure means the procedure set out in clause 17

Environmental Information Regulations means the Environmental Information Regulations 2004 and any subordinate legislation made under them together with any guidance and/or codes of practice issued by relevant Government Department in relation to such legislation

Franchise Agreement means the West Midlands franchise agreement dated 2 December 2015 between (1) the Secretary of State and (2) London and Birmingham Railway Limited or any subsequent franchise agreement entered into by the Secretary of State in relation to the 2017 WM Franchise

Franchisee means London and Birmingham Railway Limited or any successor operator of the 2017 WM Franchise

Franchisee Year means any period of twelve (12) months, beginning on 1 April and ending on 31 March, except that the first and last Franchisee Years under a Franchise Agreement may be for a period of less than twelve (12) months

Freedom of Information Act means the Freedom of Information Act 2000 and any subordinate legislation made under this Act together with any guidance and/or codes of practice issued by the Information Commissioner or relevant Government Department in relation to such legislation

Funding Outputs means the outputs set out in schedule 5 of this Agreement

Initial Dispute Board has the meaning given in clause 17.3

Insolvency Event means one of the following events:

(a) a court makes an order that WMR be wound up or a resolution for a voluntary winding-up of WMR is passed

(b) a receiver or manager in respect of WMR is appointed

(c) any voluntary arrangement is made for a composition of debts or a scheme of arrangement is approved under the Insolvency Act 1986 or the Companies Act 2006 in respect of WMR or

(d) an administration order is made or an administrator is appointed in respect of WMR

Law includes any enactment, subordinate legislation, rule, regulation, order, directive or other provision, including those of the European Community, and any judicial or administrative interpretation or application thereof, which has, in each case, the force of law in the United Kingdom or any part of it (including the Act, the Transport Act 2000, the Transport Safety Act 2003 and the Railways Act 2005)

Management Team means the management team to be established as described in clause 8.1

Notice of Mediation has the meaning given in clause 17.6

Objectives means the joint objectives of the Parties as defined in clause 3

ORR means the Office of Rail and Road established by Section 15 of the Railways and Transport Safety Act 2003 and having duties and obligations as set out in the Act

Network Rail means Network Rail Infrastructure Limited, a company registered in England with registered number 02904587 whose registered office is at 1 Eversholt Street, London, NW1 2DN and any successor in title to the network or any relevant railway facility

Parties means WMR and the Secretary of State

Phase 1 means the period from commencement of this Agreement and expiring on the first anniversary of the Start Date, or earlier if agreed between the Parties

Phase 2 means the period commencing from the first anniversary of the start date of the 2017 WM Franchise, (or earlier if agreed between the Parties) and expiring at the end of the 2017 WM Franchise or on earlier termination of this Agreement

Purpose means the purpose defined in clause 4.1

Rail Investment Strategy or **HLOS** means the railway investment strategy or high level output specification produced by the Department for Transport which defines the strategy for railway investment for each Control Period

Reporting Period has the meaning given in the Franchise Agreement;

Reserved Matters means the following matters reserved to the Secretary of State:

(a) decisions increasing net costs or net future costs to the Secretary of State

(b) determination of events of default under the 2017 WM Franchise

(c) the content of the Rail Investment Strategy and Statement of Funds Available

(d) any action required to comply with the Secretary of State's duty under Section 30 of the Act and

(e) enforcement against the franchisee under the 2017 WM Franchise pursuant to Section 55 of the Act.

Secretary of State Duties has the meaning given in clause 5.1(a)

Separable Business Units or **SBU** means:

(a) the West Midlands Separable Business Unit (WMSBU) and

(b) the West Coast Separable Business Unit (WCSBU)

and **Separable** in this context means that the SBUs are to be designed and set up with distinct passenger facing offers and separately identifiable revenues, costs (to the extent possible and appropriately allocated where costs cannot be separately identified), customer and performance metrics and on the basis that they can be re-let separately after the expiry of the 2017 WM Franchise. The WMSBU will have its own brand identity (which shall include a name, logo and colour palette) that reflects the market that its serves as specified by WMR and will have longevity beyond the term of the 2017 WM Franchise

Statement of Funds Available means the statement issued by the Department for Transport in relation to the public funds that are or are likely to be available for delivery of the Rail Investment Strategy

Start Date means the start date to be specified in the Franchise Agreement to be entered into following the current Franchise Agreement

Strategic Board means the joint board to be established as provided for in clause 7

WCSBU means the passenger services and station services in the remainder of the 2017 WM Franchise excluding the WMSBU, as identified in part 1 of schedule 4

WMR Annual Funding Amount means:

(a) in respect of each Franchisee Year containing 13 Reporting Periods, an aggregate amount of not less than [£140,000] (one hundred and forty thousand pounds sterling) and

(b) in respect of any Franchisee Year containing less than 13 Reporting Periods (which for the avoidance of doubt, applies to the first Franchisee Year being the period from the Start Date until the end of the last Reporting Period in the first Franchisee Year) an aggregate amount of not less than:

A x (B/13) where:

A means [£140,000] (one hundred and forty thousand pounds sterling)

B means the number of Reporting Periods in the relevant Franchisee Year

WMR Area means the West Midlands Rail area shown on the map set out in part 2 of schedule 4

WMR Change has the meaning given in clause 10.1

WMR Fare Change has the meaning given in clause 10.2

WMSBU means the passenger services and station services in the West Midlands Separable Business Unit (including station services at 2017 WM Franchise stations to the west of the West Coast Main Line), as identified in part 1 of schedule 4

Working Day means a day (other than a Saturday or Sunday) on which banks are open for domestic business in the City of London

1.2 **Interpretation**

Unless the context otherwise requires:

(a) references to clauses and schedules are to clauses of, and schedules to, this Agreement;

(b) use of any gender includes the other genders;

(c) references to a "**company**" shall be construed so as to include any corporation or other body corporate, wherever and however incorporated or established;

(d) references to a "**person**" shall be construed so as to include any individual, firm, company, government, state or agency of a state, local or municipal authority or government body or any joint venture, association or partnership (whether or not having separate legal personality);

(e) "**body corporate**" shall have the meaning given in section 1173 Companies Act 2006 and "**wholly-owned subsidiary**" shall have the meaning given in section 1159 Companies Act 2006;

(f) a person is deemed associated with another person or an associated person if the person is an associate of the other person within the meaning of section 435 Insolvency Act 1986

(g) a reference to any statute or statutory provision shall be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or re-enacted;

(h) a reference to any other document referred to in this Agreement is a reference to that other document as amended, varied, novated at any time;

(i) headings and titles are for convenience only and do not affect the interpretation of this Agreement;

(j) the rule known as the ejusdem generis rule shall not apply and accordingly general words introduced by the word "**other**" shall not be given a restrictive meaning by reason of the fact that they are preceded by words indicating a particular class of acts, matters or things; and

(k) general words shall not be given a restrictive meaning by reason of the fact that they are followed by particular examples intended to be embraced by the general words.

2 Commencement and Term

2.1 This Agreement shall come into full force and effect on the Commencement Date, save that the terms set out in clauses 10.2 and 11 of this Agreement shall only become effective on and from commencement of Phase 2.

2.2 This Agreement shall remain in full force and effect unless terminated by either Party in accordance with clause 13 of this Agreement.

3 Collaboration Objectives

The Parties shall collaborate with a view to increasing rail devolution within the WMR Area and to seek to achieve the joint objectives for the 2017 WM Franchise as set out in the public consultation document for the "West Midlands Rail Franchise" published by the Parties in December 2015 (**Objectives**) and which are set out in schedule 1.

4 Purpose of the Agreement

4.1 The Parties intend to facilitate rail devolution in the West Midlands (**Purpose**) and the Parties shall each use their respective reasonable endeavours to give effect to the Purpose through the operation of this Agreement.

4.2 The Parties shall carry out their obligations, and exercise their rights, under this Agreement with a view to achieving the Objectives and the Purpose.

5 Secretary of State Duties and Reserved Matters

5.1 The Parties acknowledge and agree that:

(a) the Secretary of State has responsibilities and duties deriving by reason of statutory or regulatory requirements under Law including without limitation pursuant to the Act and in relation to the proper expenditure of public monies (**Secretary of State Duties**);

(b) such Secretary of State Duties must be discharged by the Secretary of State and cannot be delegated to any other persons.

(c) the role of WMR in respect of such Secretary of State Duties can only be advisory.

5.2 Nothing in this Agreement shall fetter the discretion of the Secretary of State when carrying out the Secretary of State Duties and / or the Reserved Matters.

5.3 The Reserved Matters are a definitive list of matters in respect of which decisions are reserved to the Secretary of State. The Secretary of State shall be entitled to update the Reserved Matters by notifying WMR in writing of the amendments required.

6 Phase 1

During Phase 1, WMR shall:

(a) collaborate with the Secretary of State to develop the franchise specification and Invitation to Tender for the 2017 WM Franchise;

(b) arrange for the secondment of appropriate staff to the West Midlands Franchise Competition Team within the Department for Transport to assist with public consultation, specification and evaluation of the 2017 WM Franchise;

(c) work with the Franchisee and the Department for Transport on mobilisation for the 2017 WM Franchise;

(d) establish the Strategic Board with the Department for Transport;

(e) develop the structure of the Management Team;

(f) arrange for the provision of all reasonably required support to the Management Team in respect of its management of the WMSBU;

(g) work with the Department for Transport and the Franchisee during the first year of the 2017 WM Franchise to establish the Separable Business Units; and

(h) do anything else which the Parties jointly decide they require.

7 Strategic Board

7.1 The Parties shall endeavour to establish a joint board (**Strategic Board**) by no later than 31 October 2016.

7.2 The Strategic Board shall be the primary formal mechanism for the collaboration between the Parties in relation to rail matters in the WMR Area and in so doing shall:

(a) aim to further the Objectives and the Purpose;

(b) oversee the creation and operation of the WMSBU and the WCSBU; and

(c) be responsible for the matters set out in schedule 2.

7.3 The Strategic Board shall comprise two (2) senior representatives from each of the Parties and may include an independent chairperson appointed by the Strategic Board in accordance with clause 7.4. Upon establishment of the Strategic Board, both the Secretary of State and WMR shall appoint such representatives as board members of the Strategic Board. Either Party shall be entitled to replace its own board members on giving the other Party notice of the replacement board member, provided that any replacement shall be at least a deputy director or equivalent within the relevant organisation.

Meetings of the Strategic Board

7.4 The Parties shall arrange a meeting of the Strategic Board as soon as practicable after the Commencement Date. At the first meeting of the Strategic Board, the Strategic Board shall appoint a chairperson for the Strategic Board. The appointment of the chairperson shall be by mutual agreement by the board members of the Secretary of State and WMR and shall either be (i) a board member of the Secretary of State or WMR or (ii) an independent chairperson to be considered at the discretion of the Strategic Board as deemed to be necessary or desirable. In circumstances where an independent chairperson is appointed, the board member shall also decide by majority decision whether or not the independent chairperson shall have a vote in matters of the Strategic Board. The Strategic Board shall be entitled to replace the chairperson on the basis of a majority decision (and for the avoidance of doubt, on such decisions the chairperson shall not have a casting vote).

7.5 The Strategic Board shall meet at least [quarterly] commencing after the first meeting convened in compliance with clause 7.4 or more frequently:

(a) as may be determined by the chairperson of the Strategic Board; or

(b) at the request of either Party.

7.6 Subject to clauses 7.7 and 7.9, the Parties agree that the Strategic Board is required to reach decisions by majority having regard to the Purpose and Objectives which shall be subject to:

(a) the Secretary of State Duties; and

(b) the Reserved Matters.

7.7 The Strategic Board shall be quorate for the purposes of making any decision by majority only when at least one Secretary of State board member and at least one WMR board member is present at the Strategic Board meeting. For the avoidance of doubt, a Strategic Board meeting shall be quorate whether attendance is in person or via telephone or video conferencing. Where a quorum is not present, the meeting shall be adjourned until such other time as a quorum can be present.

7.8 Either Party shall be entitled to appoint an alternate board member to attend meetings of the Strategic Board where a board member is unable to attend provided that the alternate is at least a deputy director or equivalent within the relevant organisation and the other Party is given notice in writing of the alternate.

7.9 Where the Strategic Board reaches a decision in accordance with clauses 7.6 and 7.7, such decision shall not be valid unless it was reached with the agreement of both a Secretary of State board member and a WMR board member. In the event that not all Secretary of State board members or WMR board members are present at a meeting where a decision is taken, the Secretary of State board members who are present shall be entitled to act on behalf of absent Secretary of State board members and the WMR board members who are present shall be entitled to act on behalf of absent WMR board members (including, in each case, by casting votes on behalf of such absent board members).

7.10 Any decision of the Strategic Board pursuant to this Agreement in respect of the exercise of the Secretary of State Duties or decisions to be taken by the Secretary of State on Reserved Matters shall be treated by the Secretary of State only as an informed recommendation to the Secretary of State in relation to the exercise of the Secretary of State Duties and those decisions and the Secretary of State shall have due regard to such recommendation but without fettering the Secretary of State's discretion in exercising such Secretary of State Duties and making those decisions.

7.11 The Strategic Board shall develop a policy regarding the use of Confidential Information by the Parties as soon as possible following the date of this Agreement (**Confidentiality Policy**). Until the agreement of the Confidentiality Policy, the Parties shall comply with clause 15 and the business and decisions of the Strategic Board shall be kept confidential and not disclosed to third parties except to the extent the Strategic Board by agreement discloses such information by release of a press announcement or other such means.

8 Franchise Management

8.1 The Parties shall endeavour to establish a management team (**Management Team**) [by no later than [ ]] for the 2017 WM Franchise which shall perform on behalf of the Secretary of State (in respect of the WCSBU) and the Strategic Board and the Secretary of State (in respect of the WMSBU) the Management Team Responsibilities set out in schedule 3.

8.2 The initial composition and reporting structure of the Management Team shall be as set out in the diagram in the Appendix to schedule 3

8.3 Each Party shall contribute available and relevant expertise (legal, finance, media/press/communications etc) to support the Management Team.[1]

9 Funding

9.1 The Secretary of State shall pay the DfT Annual Funding Amount and WMR shall pay the WMR Annual Funding Amount [into the Joint Account[2]][***drafting note: until when?]***:

(a) in respect of the first Franchise Year, on the [Start Date][3]; and

(b) in respect of each subsequent Franchisee Year, on or before the first day of the relevant Franchise Year.

9.2 The DfT Annual Funding Amount and the WMR Funding Amount shall be used solely in relation to the Funding Outputs and WMR shall use all reasonable endeavours to achieve such Funding Outputs. As soon as becoming aware that the DfT Annual Funding Amount has not been paid, or is not reasonably likely to be paid, in accordance with clause 9.1 of this Agreement, the Secretary of State shall notify WMR.

9.3 As soon as becoming aware that the WMR Annual Funding Amount has not been paid, or is not reasonably likely to be paid, in accordance with clause 9.1 of this Agreement, WMR shall notify the Secretary of State.

9.4 Where notification is served under either clause 9.2 or 9.3, the Secretary of State and WMR shall meet as soon as reasonably practicable to discuss how the deficit in funding can be best resolved between the Parties.

9.5 The Secretary of State and WMR shall monitor and review the funding requirements under this Agreement and may reasonably amend the funding requirements under this Agreement by mutual agreement in writing. Neither Party shall be liable to the other Party to provide any funding under this Agreement beyond its respective funding commitments under clause 9.1. except where amended pursuant to this clause 9.5.

10 Changes Proposed by WMR

10.1 WMR may propose and require the implementation of cost reducing, WMR-funded or third party funded changes to the passenger services and station services provided by the WMSBU (**WMR Change**) provided always that:

(a) where the agreement of the Franchisee is required under the relevant Franchise Agreement, the WMR Change shall be subject to such agreement of the Franchisee;

(b) subject to clause 10.1(c), the Secretary of State has a right to object to any WMR Change that he reasonably considers is likely to have an adverse financial consequence to the Secretary of State;

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1 Roles and responsibilities within the Management Team are currently not defined in any detail. Parties to consider whether more detail is required in the CA in relation to how the structure will operate.

2 TBC

3 Start Date meaning Start Date of the competed Franchise Agreement or the commencement of the Collaboration Agreement?

(c) the Strategic Board shall decide if WMR Change is likely to have an adverse financial consequence to the Secretary of State provided that it shall take into account any information or evidence provided by the Secretary of State in relation to such financial consequences of the WMR Change; and

(d) either Party may refer such decision of the Strategic Board to the Dispute Resolution Procedure if it does not agree with the decision.

10.2 WMR may propose and require the implementation of changes to fares applicable to WMSBU passenger services (including without limitation by requesting the use of the "flex" or changing the value of "k" in the 2017 WM Franchise in relation to the fare controls applicable to those passenger services) (**WMR Fare Change**) where such WMR Fare Change does not:

(a) have adverse consequences for the Secretary of State (including without limitation by increasing costs under the 2017 WM Franchise or any other franchise, causing significant adverse changes to the Secretary of State's risk profile and by exposing the Secretary of State to the risk of successful legal challenges relating to breach of applicable public procurement legislation); or

(b) conflict with any Secretary of State Duties.

provided always that:

(i) where the agreement of the Franchisee is required under the relevant Franchise Agreement, the WMR Change shall be subject to such agreement of the Franchisee;

(ii) subject to clause 10.2(b)(iii) the Secretary of State has a right to object to any WMR Fare Change that he reasonably considers is likely to have an adverse financial consequence to the Secretary of State; and

(iii) the Strategic Board shall decide if WMR Fare Change is likely to have an adverse financial consequence to the Secretary of State or conflict with any Secretary of State Duties provided that it shall take into account any information or evidence provided by the Secretary of State in relation to such financial consequences of the WMR Change or conflict with his Statutory Duty (as the case may be); and

(iv) either Party may refer such decision of the Strategic Board to the Dispute Resolution Procedure if it does not agree with the decision.

10.3 WMR shall set up and at all times maintain an account in the joint names of the WMR and the Secretary of State (the **Joint Account**). All net savings generated by either WMR Changes or WMR Fares Changes proposed by WMR as referred to in clause 10.1 and 10.2 (after any required payments have been made to the Franchisee by the Secretary of State pursuant to the relevant Franchise Agreement) shall be paid by the Secretary of State into the Joint Account.

10.4 WMR may use the monies held in the Joint Account to fund WMR Changes or WMR Fare Changes as referred to in clauses 10.1 and 10.2 respectively and may also, with the prior written consent of the Secretary of State, transfer approved amounts out of the Joint Account to the West Midlands Combined Authority (**WMCA**) or another local authority member of WMR designated by WMR on the basis that those monies shall be used to improve rail passenger services and/or associated rail facilities in the WMR Area.

10.5 Where the Strategic Board have not decided that the WMR Change or WMR Fare Change is likely to have an adverse financial consequence to the Secretary of State, the Secretary of State shall consent to the transfer of approved amounts out of the Joint Account to the WMCA or another local authority member of WMR designated by WMR as set out in clause 10.4.

10.6 WMR shall be solely responsible for, and keep a full and accurate record of, any monies paid into and out of the Joint Account and shall be liable for any deficiencies identified in the Joint Account (save where such deficiencies are as a consequence of the Secretary of State failing to pay net savings generated pursuant to clause 10.3 into the Joint Account.

11 Further Devolution of the WMSBU

11.1 The Parties shall work together during Phase 2 and WMR may at its discretion present a business case for further devolution of responsibility for the WMSBU passenger services and station services to the Secretary of State by no later than 1 January 2022, such further devolution potentially to involve taking those services out of the franchising regime by:

(a) exempting the WMSBU passenger services from designation under section 23 of the Act or other such viable legal means of devolving rail services; and

(b) providing for such services to be contracted for directly by WMR following the expiry of the 2017 WM Franchise.

11.2 Any business case presented to the Secretary of State by WMR in accordance with clause 11.1 shall so far as reasonably practicable contain sufficient information to enable the Secretary of State to make an informed decision as to such further devolution and shall, as a minimum:

(a) be supported by a robust strategic case for change that fits with the wider public policy objectives of the Department for Transport;

(b) demonstrate value for money;

(c) be commercially viable;

(d) be financially affordable; and

(e) be achievable from a practical perspective.

11.3 The Parties intend that during Phase 2:

(a) WMR shall gain experience, build its team and demonstrate that it will be able to competitively procure, contract and manage a devolved agreement for the provision of the rail services provided by the WMSBU in the future and to inform the business case for further devolution;

(b) WMR shall monitor the reporting information relating to the WMSBU and shall demonstrate the added value that local devolved management has brought to the running of the WMSBU;

(c) the Parties shall undertake an annual review of the progress made under this Agreement with a view to determining if there are further intermediate steps that could and should be taken prior to the expiry of the 2017 WM Franchise to facilitate the Purpose;

(d) the Secretary of State (or Minister) shall meet with the WMR Board Chair and Vice Chair on an annual basis to discuss the progress in achieving the Objectives and the Purpose;

(e) the Secretary of State shall review any proposed intermediate steps to facilitate the Purpose and the envisaged business case for further devolution of responsibility for the WMSBU passenger services and station services and decide whether to implement those steps and/or to approve that business case; and

(f) if the Secretary of State so decides, the Parties shall work together as necessary to secure the statutory processes, approvals and agreements required to give full effect to the relevant decision and this shall include consideration of the best approach to the future provision of passenger rail services in the WMR Area.

12 Assignment, Transfer and Novation

12.1 Neither party shall be entitled to assign or transfer its rights and/or obligations under this Agreement without the written consent of the other Party except that the Secretary of State shall be entitled to transfer his rights and/or obligations under this Agreement to any person having the same legal capacity, power and authority of the Secretary of State.

12.2 WMR may with the Secretary of State's consent assign, transfer or novate all of its rights and obligations under this Agreement to another suitable body assuming the responsibility of WMR in respect of the delivery of rail services in the WMR Area.

13 Termination

13.1 Either Party shall be entitled to terminate this Agreement with immediate effect in the event of material breach of the Agreement or fraud or gross negligence by the other Party.

13.2 The Secretary of State shall be entitled to terminate this Agreement with immediate effect:

(a) where WMR suffers an Insolvency Event;

(b) in the event that WMR ceases to be substantially representative of the local transport authorities within the WM Area; or

(c) before the award of the 2017 WM Franchise if he decides, acting reasonably, that the arrangements set out therein are no longer consistent with current Government policy.

13.3 The Parties shall be entitled to agree to terminate this Agreement where the Parties intend to enter into a new collaboration agreement which shall supersede this Agreement.

13.4 Notwithstanding termination of this Agreement, the provisions of this clause and clauses 14 (Confidentiality), 16 (Freedom of Information), 29 (Governing Law), 17 (Dispute Resolution Procedure), 22 (Rights of Third Parties) and 25 (No Partnership) shall expressly survive such termination and continue in full force and effect along with any other clauses of and any schedules to this Agreement necessary to give full and proper effect to those clauses.

14 Consequences of Termination

14.1 If this Agreement is terminated pursuant to clause 13, the Joint Account shall be closed and all monies standing to the credit of the Joint Account shall be transferred to an account of the Secretary of State or such other account as the Secretary of State shall direct, provided that

such monies shall only be used to improve rail passenger services and/or associated rail facilities in the WMR Area.

15 Confidentiality

15.1 The provisions of this clause 15 shall apply until the Parties agree the Confidentiality Policy pursuant to clause 7.10. Thereafter, the Parties shall comply with the provisions of the Confidentiality Policy.

15.2 Subject to the provisions of the Act, the Transport Act 2000, the Railways Act 2005, the Environmental Information Regulations, the Freedom of Information Act (and any code of practice or other guidance related to the same) and clauses 15.3 to 15.9 inclusive, each Party shall hold in confidence all documents, materials and other information, whether technical or commercial, supplied by or on behalf of the other Party (all together the **Confidential Information**) and shall not, except with the other party's prior written authority, publish or otherwise disclose any Confidential Information otherwise than as expressly provided for in this Agreement unless or until the recipient Party can demonstrate that any such document, material or information is in the public domain through no fault of its own and through no contravention of the Agreement, whereupon to the extent that it is in the public domain this obligation shall cease.

15.3 Each Party may disclose any data or information acquired by it under or pursuant to the Agreement without the prior written consent of the other Party if such disclosure is made in good faith:

(a) to any outside consultants or advisers engaged by or on behalf of such Party and acting in that capacity, upon obtaining from such consultants or advisers an undertaking of confidentiality equivalent to that contained in clause 15.1;

(b) to the extent required by Law or pursuant to an order of any court of competent jurisdiction or the rules of any dispute resolution procedures to which a Dispute is referred in accordance with the Agreement; or

(c) to any director, employee or officer of such Party, to the extent necessary to enable such Party to perform its obligations under the Agreement or to protect or enforce its rights under the Agreement;

15.4 The Secretary of State may disclose the Confidential Information of WMR:

(a) on a confidential basis to any Central Government Body for any proper purpose of the Secretary of State or of the relevant Central Government Body;

(b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;

(c) to the extent that the Secretary of State (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;

(d) on a confidential basis for the purpose of the exercise of its rights under this Franchise Agreement;

(e) on a confidential basis to a proposed successor, transferee or assignee of the Secretary of State in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Secretary of State under this clause 15.4.

15.5 For the purposes of clause 15.4, the following defined term shall have the following meaning:

Central Government Body means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics:

(a) Government Department

(b) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive, or tribunal)

(c) Non-Ministerial Department or

(d) Executive Agency.

15.6 Nothing in this clause 14 shall be deemed to prohibit, prevent or hinder, or render the Secretary of State liable for, the disclosure of any information by the Secretary of State to the ORR, Network Rail, the Parliamentary Commissioner for Administration, a Minister of the Crown, any department of the government of the United Kingdom, the Scottish Parliament, the National Assembly of Wales, the Mayor of London, the Greater London Authority or any department or officer of any of them or of information which is otherwise disclosed for the purpose of facilitating the carrying out of his functions.

15.7 WMR hereby authorises the Secretary of State to provide to the ORR, to the extent so requested by the ORR, such information as may be provided to the Secretary of State in relation to this Agreement.

15.8 The Parties recognise that the Comptroller and Auditor General may, in pursuance of his functions under the Exchequer and Audit Department Act 1921, the National Audit Act 1983 and the Government Resources and Accounts Act 2000, disclose information which he has obtained pursuant to those Acts and which a party to this Agreement would not be able to disclose otherwise than under this clause 15.

15.9 This clause 15 (and any other provisions necessary to give effect hereto) shall survive the termination of the Agreement, irrespective of the reason for termination.

16 Freedom of Information

16.1 The Parties acknowledge and shall procure that their agents and subcontractors acknowledge that the Parties are each subject to the requirements of the Freedom of Information Act and the Environmental Information Regulations and accordingly the parties shall and shall procure that their agents and subcontractors shall assist and co-operate with the other Party to enable that Party to comply with his information disclosure obligations under the Freedom of Information Act and/or the Environmental Information Regulations.

16.2 Where a Party receives a Request for Information (**Requested Party**) and the Requested Party is unable to respond to such Request for Information without the assistance of the other party (**Assisting Party**), the Requested Party shall notify the Assisting Party that assistance is required and the Assisting Party shall and shall procure that its agents and subcontractors shall:

(a) provide the Requested Party with a copy of all information in its (or their) possession or power in the form that the Requested Party requires within five Working Days of the Requested Party's request (or within such other period as he may specify); and

(b) provide all necessary assistance as reasonably requested by the Requested Party to enable him to respond to any Request for Information within the time for compliance set out in section 10 of the Freedom of Information Act or regulation 5 of the Environmental Information Regulations as applicable.

16.3 The Requested Party shall be responsible for determining in his absolute discretion, and notwithstanding any other provision in this Agreement or any other agreement, whether Confidential Information and/or any other information is exempt from disclosure in accordance with the provisions of the Freedom of Information Act and/or the Environmental Information Regulations.

16.4 Each Party acknowledges and shall procure that its agents and subcontractors acknowledge that notwithstanding any provision to the contrary in this Agreement each Party may be obliged under the Freedom of Information Act and/or the Environmental Information Regulations and any related Code of Practice or other guidance to disclose information concerning each Party and/or their respective agents and subcontractors:

(a) in certain circumstances without consulting the other Party (or its agents and/or subcontractors where applicable); or

(b) following consultation with the other and having taken its views into account (and the views of its agents and/or subcontractors where applicable),

provided always that where applicable the Requested Party shall in accordance with the provisions of the Freedom of Information Act and/or the Environmental Information Regulations take reasonable steps where appropriate to give the other Party advance notice or failing that to draw the disclosure to the other Party's attention after any such disclosure.

17 Dispute Resolution Procedure

17.1 The Parties shall use all reasonable endeavours to negotiate in good faith and settle amicably any dispute or difference of whatever nature between them arising under, out of, or in connection with this Agreement (each such dispute or difference a **Dispute**).

17.2 Following any referral of a Dispute to the Dispute Resolution Procedure in accordance with the terms of this Agreement, the provisions set out in this clause 17 shall apply.

17.3 The Dispute shall initially be referred for resolution to [the Director General, DfT Rail Executive] and the Chief Executive (or equivalent until appointed) of, WMR (**Initial Dispute Board**) who shall seek to resolve the matter as soon as reasonably possible and in any event within twenty (20) Working Days of escalation, or such other period as may be reasonable given the nature of the Dispute, and the urgency of resolution. The Initial Dispute Board shall be entitled to request such additional information as may be reasonably requested from either WMR or the Secretary of State in respect of the Dispute, including, but not limited to, any information to be provided pursuant to the relevant provisions of this Agreement.

17.4 Both Parties shall be entitled to make oral and/or written representations to the Initial Dispute Board prior to the Initial Dispute Board making its final determination.

17.5 Where the Initial Dispute Board are not able to resolve the Dispute within twenty (20) Working Days of escalation pursuant to clause 17.3, the Initial Dispute Board shall refer the Dispute for determination by [a Minister and the chairperson of WMR] who shall seek to determine the Dispute within twenty (20) Working Days of escalation, or such other period as may be reasonable given the nature of the Dispute

17.6 If the Parties cannot resolve a Dispute in accordance with the above escalation procedure, either Party may at any time refer the Dispute for mediation by serving a written notice on the other Party to that effect (**Notice of Mediation**).

17.7 If a Notice of Mediation is given, then the Dispute shall be referred to the CEDR for mediation in accordance with the CEDR's model mediation procedure. If the Parties are unable to agree on the appointment of a mediator, or any other matter relating to the referral or conduct of the mediation, it shall be referred to the then president of CEDR who shall decide such matters.

17.8 Except where this Agreement has terminated, the parties shall continue to perform their obligations under the Agreement, regardless of the nature of the Dispute and notwithstanding the referral of the Dispute for resolution pursuant to this clause 17.

17.9 WMR acknowledges and accepts that the decision of the Secretary of State in relation to this exercise of any of the Secretary of State Duties is final and binding.

18 Notices

18.1

(a) Any notice, notification or other communication under or in connection with clause 13 (Termination) or clause 17 (Disputes) of this Agreement shall be in writing and shall be delivered by hand or recorded delivery or sent by pre-paid first class post to the relevant party at the address for service set out below, or to such other address in the United Kingdom as each party may specify by notice in writing to the other party:

Name: The Department for Transport
Address: 33 Horseferry Road, London SW1P 4DR
E-mail: [ ]
Attention: [ ]

Name: West Midlands Rail Limited
Address: 16 Summer Lane, Birmingham B19 3SD
E-mail: [ ]
Attention: [ ]

(b) Any other notice, notification or other communication under or in connection with this Agreement shall be in writing and shall be delivered:

(i) in accordance with clause 18.1(a); or

(ii) by electronic data transfer,

except that it shall be marked for the attention of the Contract Manager or the Franchise Manager of the West Midlands franchise (as the case may be).

18.2 Deemed Receipt

Any notice or other communication issued pursuant to clause 18.1 shall be deemed to have been received by the party to whom it is addressed as follows:

(a) if sent by hand or recorded delivery, when delivered;

(b) if sent by pre-paid first class post, from and to any place within the United Kingdom, three Working Days after posting unless otherwise proven; and

(c) if sent by electronic data transfer, upon sending, subject to receipt by the sender of a "delivered" confirmation (provided that the sender shall not be required to produce a "read" confirmation).

19 Waiver

19.1 Either Party may at any time waive any obligation of the other Party under this Agreement and the obligations of the parties hereunder shall be construed accordingly.

19.2 No waiver by either Party of any default by the other Party in the performance of such Party's obligations under this Agreement shall operate or be construed as a waiver of any other or further such default, whether of a like or different character. A failure to exercise or delay in exercising a right or remedy under this Agreement shall not constitute a waiver of any right or remedy or a waiver of any other rights or remedies and no single or partial exercise of any right or remedy under this Agreement shall prevent any further exercise of such right or remedy or the exercise of any other right or remedy.

20 Partial Invalidity

If any provision in this Agreement is held to be void, illegal, invalid or unenforceable, in whole or in part, under any enactment or rule of Law, such provision or part shall to that extent be deemed not to form part of this Agreement but the legality, validity and enforceability of the remainder of the Agreement shall not be affected.

21 Further Assurance

Each Party agrees to execute and deliver all such further instruments and do and perform all such further acts and things as shall be necessary or expedient for the carrying out of the provisions of this Agreement.

22 Rights of Third Parties

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

23 Variation

This Agreement may only be varied in writing signed by each of the Parties.

24 Cumulative rights

The rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by Law.

25 No Partnership

Nothing in this Agreement and no action taken by the Parties under this Agreement shall constitute a partnership, association or other cooperative entity between any of the Parties or constitute any Party the agent of any other Party for any purpose.

26 Entire Agreement

26.1 This Agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

26.2 Each Party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation based on any statement in this Agreement.

27 Counterparts

This Agreement may be executed in any number of counterparts, and by the Parties on separate counterparts, but shall not be effective until each Party has executed at least one counterpart. Each counterpart shall constitute an original of this Agreement, but all the counterparts shall together constitute but one and the same instrument.

28 Good Faith

The Parties hereby acknowledge a duty of good faith to each other in relation to all matters arising under this Agreement.

29 Governing Law

This Agreement (and any non-contractual obligations arising out of or in connection with it) shall be governed by and construed in accordance with the laws of England and Wales and the parties irrevocably agree that the courts of England and Wales are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with the Agreement.

Executed [as a deed][as an agreement] by the Parties or their duly authorised representatives [but not delivered until][on] the date of this Agreement.

THE CORPORATE SEAL OF)
THE SECRETARY OF STATE FOR TRANSPORT)
is hereunto affixed:)

Authenticated by authority of the Secretary of State for Transport

Executed [as a deed] by	)	
West Midlands Rail Limited	)	.....
acting by a director in the presence of	)	Director

.....
Signature of witness

Name .....

Address .....

.....

Schedule 1

The Objectives

1 Better for the economy – Support the current and predicted growth in jobs, housing, industry, leisure and tourism and retail with a distinct focus on each of the following markets:

- West Midlands' local and regional services;
- long-distance services along the West Coast Mainline from Liverpool to Birmingham and from Crewe to London; and
- Services to/from London including branch lines.

Ensure there are the right services and capacity to cater for current users and future growth throughout the day and week.

2 Better for the passenger – Deliver high quality services and stations, reduce delays and cancellations, and achieve significant improvements in customer satisfaction. Provide affordable, easy to use services at the times and to the places that people want to travel both now and in the future supported by the provision of accurate and timely information.

3 Better for communities – Increase engagement between the operator of the new franchise and the communities it serves.

4 Better for staff – Deliver a franchise which demonstrates a genuine pride in developing staff over the long term, aiming to improve staff satisfaction, motivation and retention, and deliver best in class customer service.

5 Better for taxpayers – Make the most of the significant investment being made to make improvements to the rail network (summarised in Appendix D). Making sure the right level of service is provided to reflect travel patterns and demand, ensuring resources (funding, staff and trains) are used in the areas that need it most. Make improvements efficiently, providing value for money.

6 Maximising the benefits from investment in infrastructure – Supporting the development of a safe and accessible network to modernise and meet the requirements of a modern railway.

7 Supporting devolution – Develop a plan for the future specification and management of local services to pass to West Midlands Rail in a future franchise, providing a structure for the delivery of those rail services that is focused on the needs of the West Midlands.

8 Supporting HS2 – Work with HS2 and Network Rail as a partner on relevant works to enable the delivery of the new high speed rail line between London, the Midlands and Crewe. Ensure that the foundations are in place for the West Midlands to be ready for the opening of HS2, supporting the HS2 Connectivity Programme being delivered through the recently announced West Midlands £8bn growth deal.

9 Both the DfT and WMR are also committed to ensuring that rail fully plays its part in supporting low carbon, environmental and wider sustainability objectives.

Schedule 2

Strategic Board Responsibilities

Subject to the Reserved Matters, the Strategic Board shall be responsible for:

1 overseeing franchise management activity in respect of the WMSBU and providing appropriate input into the WCSBU insofar as that input concerns rail services in the WMR Area;

2 preparing and approving the WMSBU annual business plans;

3 discussing proposals for further devolution of responsibility for rail services within the WMR Area;

4 undertaking an annual (or more frequent if agreed by both parties) review and agreeing on franchise management responsibilities to be delegated by the Secretary of State to WMR in order to facilitate the Purpose;

5 developing and keeping under review investment options in respect of the WMSBU and providing appropriate input into the investment options for the WCSBU insofar as that input concerns rail services in the WMR Area;

6 keeping WMSBU performance under review and making recommendations to the Secretary of State as to the taking of enforcement action and providing appropriate input in relation to the performance of the WCSBU insofar as that input concerns rail services in the WMR Area;

7 making recommendations and providing guidance to the Secretary of State on the carrying out of other Secretary of State Duties and decisions on other Reserved Matters, to the extent relevant to WMSBU services;

8 discussing WMR's proposals and representations relating to passenger services and station services in the WMR Area that do not fall within the WMSBU (including any such services in the WCSBU and in franchises other than the 2017 WM Franchise) and where appropriate making recommendations or providing guidance thereon to the Secretary of State (on the basis that the Secretary of State supports the aspirations of WMR to move towards a position of greater influence in relation to rail services generally within the WMR Area); and

9 consider proposals put forward by WMR pursuant to the matters referred to in clauses 10.1 and 10.2 of the Agreement.

Schedule 3

Management Team Responsibilities

1 Subject to the Reserved Matters, the Management Team shall be responsible for:

(a) subject to the Reserved Matters, implementation of the Strategic Board business plans for the WMSBU;

(b) implementation of cost neutral or cost reducing changes in respect of the WMSBU in accordance with the delegated authority of the Strategic Board and the terms of the Agreement;

(c) save in respect of Reserved Matters, day-to-day contact and commercial management of the WMBSU (on behalf of the Strategic Board and the Secretary of State) including:

(i) appropriate contract administration;

(ii) performance monitoring (including any service quality regime); and

(iii) risk management and reporting.

(d) developing change proposals for consideration by the Strategic Board in conjunction with the Franchisee, WMR and other stakeholders including the changes referred to in clauses 10.1 and 10.2 of the Agreement;

(e) providing general briefing and support for ministers and the WMR partner authorities relating to the WMSBU and the operation of the Strategic Board and Management Team and in preparing for the annual reviews;

(f) in relation to rail investment in the WMR Area:

(i) developing proposals for the Government's HLOS for each Control Period, identifying related or necessary change proposals;

(ii) developing WMR funded investment proposals, identifying related or necessary changes pursuant to clauses 10.1 and 10.2 of the Agreement;

(iii) overseeing the development of output statements and metrics for Network Rail setting out in more detail what is sought from HLOS requirements and proposed changes having regard to the total HLOS funding available;

(iv) where the Strategic Board has been delegated HLOS Scheme Management by the Secretary of State, to act as Network Rail's 'Client' for such HLOS schemes, as agreed between Secretary of State and WMR, including finalising the detailed scheme output specifications and agreeing these with Network Rail and Secretary of State including budget provision and affordability;

2 Notwithstanding that the Strategic Board shall have primary responsibility for the WMSBU and the Secretary of State shall have primary responsibility for the WCSBU, the Parties shall work together in respect of the two business units. In particular the Secretary of State recognises that WMR has an interest in the Coventry Corridor and Stafford Corridor and the Secretary of State shall have due regard to comments made by WMR in respect of the Coventry Corridor

and the Stafford Corridor.

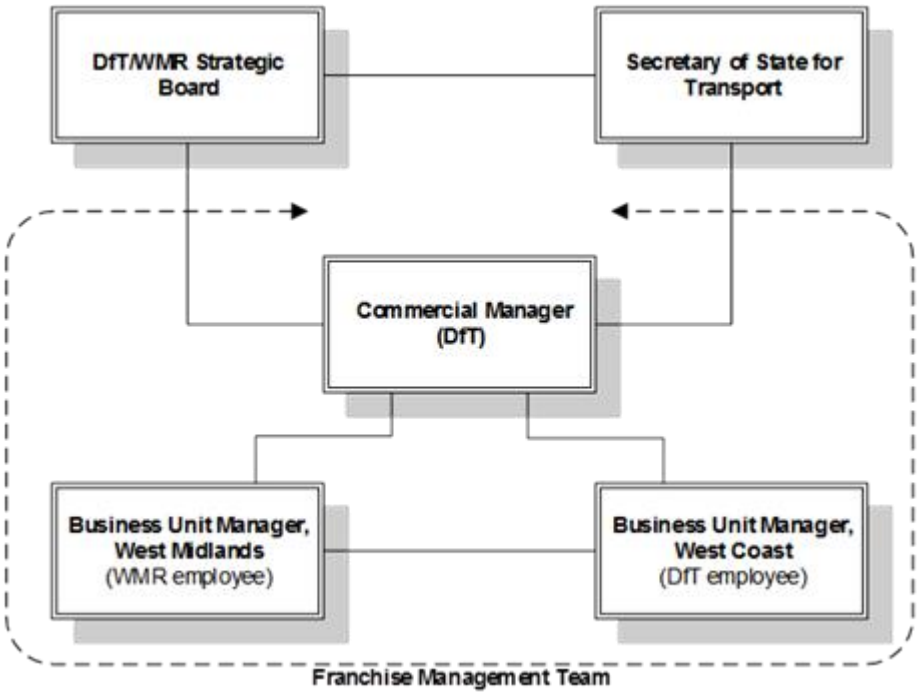
Appendix to Schedule 3

Franchise Management Structure

1 Designed to be dynamic and to facilitate the development of local leadership of the WMSBU, with responsibilities transferring to WMR incrementally over time

2 One full-time Business Unit Manager to be provided by each of DfT and WMR

3 [DfT Commercial Manager on West Midlands franchise]



4 The WMSBU Manager shall be based predominantly in the West Midlands, with co-location at Great Minster House as required and as workload dictates

5 WCSBU Manager shall be based predominantly in Great Minster House but with regular travel to and time spent in the West Midlands as required and as workload dictates

6 Accommodation in the West Midlands to be provided by WMR – likely to be 16 Summer Lane, Birmingham

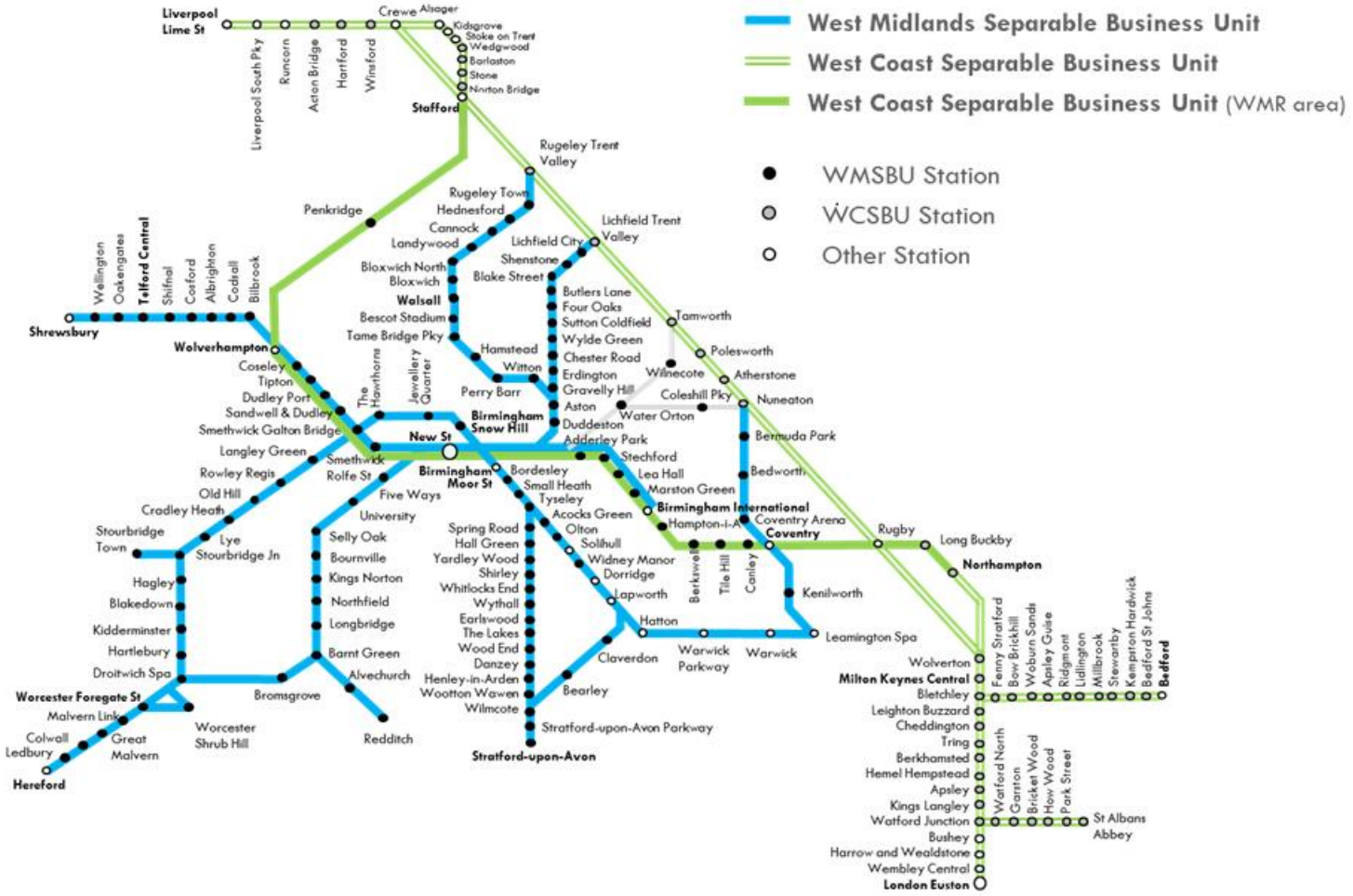
Reporting

7 Quarterly franchise-wide report/meetings shall be held between the Commercial Manager, the WMR Director and both SBU Managers

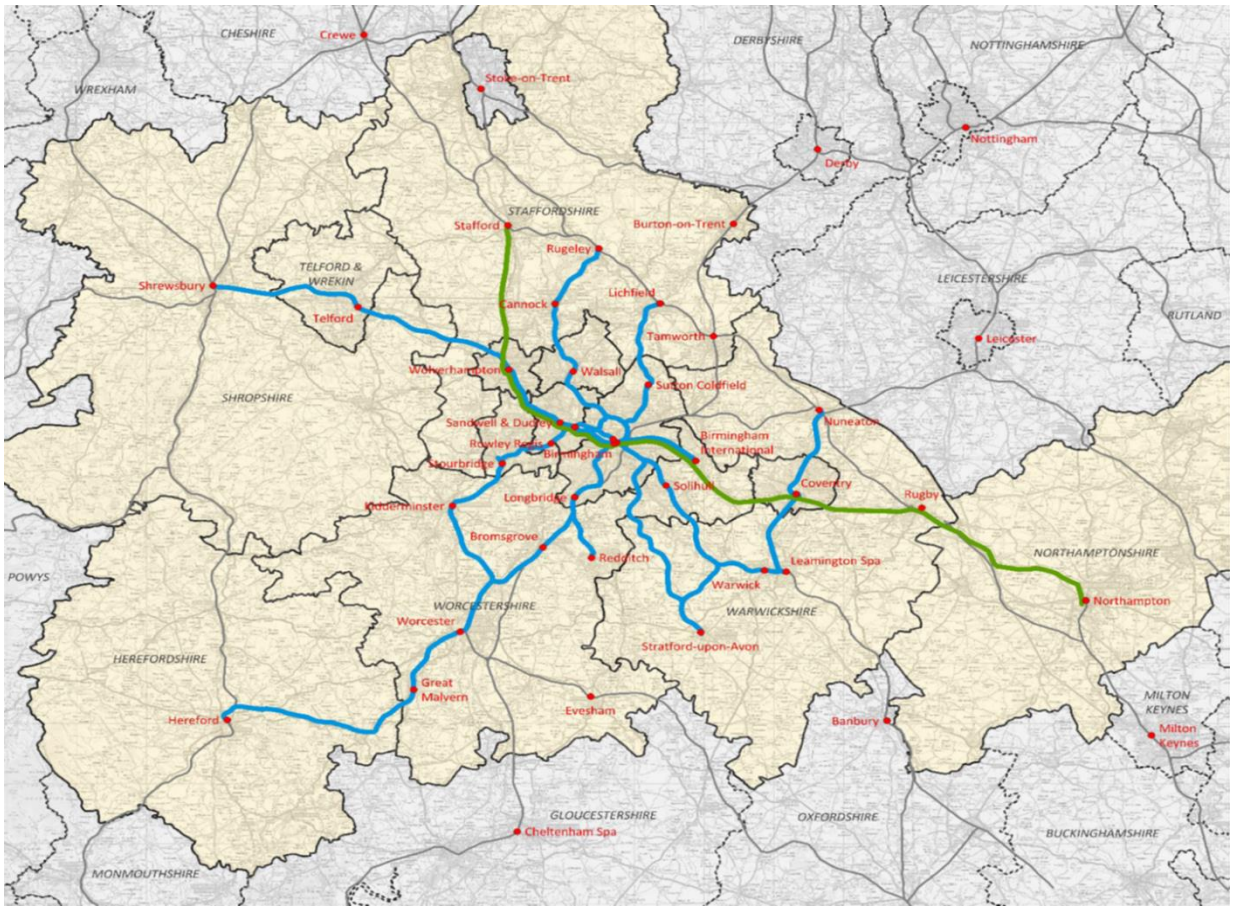
8 Business unit reporting/meetings shall be held during each reporting period between both SBU Managers (each to lead for their SBU)

Schedule 4

Part 1 - Separable Business Units Map



Part 2 - WMR Area MPa



Schedule 5

Funding Outputs

1 Year 1 Outputs

1.1 Recruit WMR Director, WMR Business Unit Manager and WMR Contract/Admin Support;

1.2 Establish WMR company structure, office space and support services;

1.3 By Q1 2018/19 prepare first version of the Business Plan and within this define the targets for marketing;

1.4 Establish relationship with the Franchisee including regular attendance in shadow form at Franchise Agreement review meetings;

1.5 Support the set-up of the Separable Business Units and establish structures for formal West Midlands Separable Business Unit reporting by the date required in the Franchise Agreement; and

1.6 Attendance at the Strategic Board.

2 Year 2 and Future Years

2.1 Confirm staff (WMR Director, WMR Business Unit Manager and WMR Contract/Admin) are in-post;

2.2 Report progress against the Business Plan;

2.3 Update the Business Plan on an annual basis; and

2.4 Attendance at the Strategic Board.

3 General

3.1 Establish clear roles and responsibilities regarding the Franchise and the Separable Business Unit monitoring and management;

3.2 Establish meeting structure to monitor the outputs of the Separable Business Units; and

3.3 Ensure that obligations are understood and processes in place to manage outputs and outcomes to be consistent with the Purpose and Objectives of this Agreement.