

Dated _____ **2010**

The Tyne and Wear Integrated Transport Authority

and

Tyne and Wear Passenger Transport Executive

and

Darlington Borough Council

and

Arriva Durham County Limited

North East Smart Ticketing Initiative (NESTI)

Bus Operator Agreement

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This Agreement is dated day of 2010

Between

- (1) **The Tyne and Wear Integrated Transport Authority** of Civic Centre, Newcastle upon Tyne, NE99 1RD ("**the ITA**"); and
- (2) **The Tyne and Wear Passenger Transport Executive**, Nexus House, 33 St James Boulevard, Newcastle upon Tyne, Tyne and Wear, NE1 4AX ("**Nexus**"); and
- (3) **Darlington Borough Council**, Town Hall, Feethams, Darlington, County Durham, DL1 5QT ("**Darlington BC**"); and
- (4) **Arriva Durham County Limited**, incorporated and registered in England and Wales with company number 02404350 whose registered address is 1 Admiral Way, Doxford International Business Park, Sunderland, Tyne and Wear, SR3 3XP ("**the Operator**").

(Together "**the Parties**")

Background

- (A) The ITA is authorised by the NESTI Board to lead the implementation of the NESTI Project.
- (B) As part of the NESTI Project, the ITA and Darlington BC wishes to grant funding to the Operator on the terms and conditions of this Agreement.
- (C) Under section 99 of Local Transport Act 2008, the ITA may delegate its well being functions to Nexus which under section 10 Transport Act 1968 also has the power to do all things which are in its opinion necessary to facilitate the proper carrying out of its business.

In consideration of the Grant Funding to be provided by the ITA to the Operator, the Darlington Funding to be provided by Darlington BC to the Operator and the mutual benefit to the Parties of the NESTI Project, **it is now agreed as follows:-**

1. **Interpretation**

1.1. The definitions and rules of interpretation in this clause apply in this Agreement.

" AMS-HOPS" an Asset Management System - Host Operator or Processing System for smart card ticketing which manages the assets, namely the security keys and the ISAM devices as defined in the ITSO Specification;

"Actionlist" a list of actions relating to ITSO applications or products to be downloaded to ETMs and actioned by ETMs when an application or product instance in the list is encountered by the ETM, more particularly defined in the ITSO Specification and "to Actionlist" shall be construed accordingly;

"AMS-HOPS Service"	the AMS-HOPS service to be taken by the Operator being either its own ITSO-approved AMS-HOPS or an ITSO-approved AMS-HOPS managed service (which may or may not be the NESTI AMS-HOPS);
"Back Office System"	the back office system for the AMS-HOPS Service and Eligible Equipment which allows the Operator to set fares, set up accounts, produce reports and configure the system to accept different ITSO products;
"Business Day"	any day that is not a Saturday, a Sunday or a public holiday in England and Wales;
"Collaboration Agreement"	the agreement of [date] between the NESTI Board Members;
"Commencement Date"	the date of the Collaboration Agreement;
"Condition 1"	has the meaning given to it in clause 13.6.1;
"Condition 2"	has the meaning given to it in clause 13.6.2;
"CT Data"	all data generated by the Operator in relation to CT to, from or within the NESTI Area;
"CT"	all forms of concessionary travel including staff tickets which the Parties are obliged or choose to provide or accept from time to time;
"Customer Media"	a smart card or other electronic device, in each case with a contactless interface, that is compliant with Part 10 of the ITSO Specification;
"Darlington Bus"	an Eligible Bus operating out of the Darlington Depot;
"Darlington Depot"	Darlington BC's bus depot at Faverdale Depot, Unit 12, Faverdale Industrial Estate, Darlington, DL3 0PZ;
"Darlington Funding"	the grant funding of £1,000 (one thousand pounds sterling) per Darlington Bus towards Eligible Equipment for installation and use on that Darlington Bus;
"EIR"	the Environmental Information Regulations 2004;
"Eligible Bus"	a bus owned by the Operator which is in operation on scheduled local services within the NESTI Area on the basis of peak vehicle requirement (PVR)-equivalents (computed on the basis of the proportion of vehicle mileage operated to, from or

within the NESTI Area where there are also cross-boundary or out-of-area operations from the relevant eligible depots).

"Eligible Equipment"	ITSO-compliant smart electronic ticket machines (ETMs or POSTs) and ISAMs for buses ;
"E-Purse"	E-money as defined by the Financial Services Authority being a monetary value, as represented by a claim on the issuer, which is: (a) stored on an electronic device; (b) issued on receipt of funds and (c) accepted as a means of payment by persons other than the issuer:
"Existing Equipment"	has the meaning given to it in clause 4.6;
"FOIA"	the Freedom of Information Act 2000;
"Force Majeure"	any cause materially affecting the performance by a party of its obligations under this Agreement arising from any act beyond its reasonable control and affecting either party, including: acts of God, war, industrial action, protests, fire, flood, storm, tempest, epidemic, explosion, acts of terrorism, national emergencies or the failure of a third party supplier to the NESTI Project;
"Grant Funding"	the grant funding of £1,000 (one thousand pounds sterling) per Eligible Bus towards Eligible Equipment for installation and use on that Eligible Bus excluding the Darlington Funding;
"Hotlist"	a hotlist relating to fraudulent, unlawful or improper issue of ITSO products and/or CT products more particularly defined in the ITSO Specification and "to Hotlist" shall be construed accordingly;
"Insolvency Event"	If (i) any Party ceases or threatens to cease to carry on its business or a significant part of it (unless as part of a solvent reconstruction) or suspends or threatens to suspend payment of its debts or is unable or is deemed to be unable to pay its debts within the meaning of Section 123 (1) of the Insolvency Act 1986; (ii) a proposal is made, or a nominee or supervisor is appointed, of a Party for a composition in satisfaction of its debts or for a scheme of arrangement of its affairs or other arrangement or any proceedings for the benefit of its creditors are commenced under any law, regulation or procedure relating to the reconstruction or re-adjustment of debt;

(iii) a petition is made for an administration order under the Insolvency Act 1986 with respect to any Party;

(iv) any steps are taken by a Party or any other person to wind up or dissolve that Party or to appoint a liquidator, trustee, receiver, administrator, administrative receiver or similar officer to any such Party or any part of such Party's undertaking;

(v) any legal process is levied, enforced or sued against a Party or its assets or any person validly takes possession of any of the property or assets of a Party or steps are taken by any person to enforce any security right against any of the property or assets of such a Party;

"ISAM"	an ITSO Security Application Module as defined in the ITSO Specification;
"ITSO Shell"	the notional space that holds the collection of all ITSO related data. The ITSO Shell may occupy a given Customer Media platform exclusively or sit alongside other non-ITSO data collections;
"ITSO Specification"	the specification created by ITSO to provide interoperability for smart ticketing schemes available via the ITSO website from time to time;
"ITSO"	ITSO Ltd a company limited by guarantee (CRN 04115311) whose registered office is 4th Floor, Quayside Tower, 252-260 Broad Street, Birmingham, B1 2HF;
"Local Authorities"	Durham County Council, the ITA, Northumberland County Council, the Tees Valley Authorities and the Tyne and Wear Authorities;
"NAT1"	the NESTI site acceptance tests as set out in Schedule 1 Part 1 to verify that the operation of the Operator's System (excluding the NESTI AMS-HOPS and Nexus E-Purse) meets the NESTI Requirements;
"NAT2"	the NESTI site acceptance tests as set out in Schedule 1 Part 2 to verify that the operation of the Operator's System (including the NESTI AMS-HOPS and Nexus E-Purse) meets the NESTI Requirements;
"NESTI Acceptance Tests"	the NAT1 and NAT2 tests;
"NESTI Actionlist"	an Actionlist relating to activity in the NESTI Area;

"NESTI AMS-HOPS"	the AMS-HOPS managed service to be procured by Nexus;
"NESTI Area"	the geographical area in North East England comprising the administrative areas of the members of the NESTI Board;
"NESTI Board"	the board established under clause 3 of the Collaboration Agreement comprising representatives from each of the Local Authorities, the ITA and Nexus as set out in Schedule 2 of the Collaboration Agreement;
"NESTI Branding"	the NESTI brand and NESTI logo set out in Schedule 2;
"NESTI Hotlist"	a Hotlist relating to activity in the NESTI Area;
"NESTI Products"	a Nexus E-Purse including stored value for travel or stored travel rights (STR) and such other products as are agreed between the parties from time to time by way of variation to this Agreement;
"NESTI Project"	a single integrated ITSO-compliant smart card ticketing environment for regional bus, Metro, ferry and local rail operations in the administrative area of the Parties a project currently known as the North East Smart Ticketing Initiative (NESTI) as more fully described in the Outline Business Plan;
"NESTI Requirements"	the required functional operations of the NESTI Project in relation to (1) CT (2) NESTI Products and (3) Tendered Services set out Schedule 1 Part 3;
"Nexus E-Purse"	an E-Purse either (a) procured and provided by Nexus or (b) a third party E-Purse endorsed by Nexus;
"Operating Hours"	the Operator's hours of operation;
"Outline Business Plan"	the NESTI outline business plan provided by Nexus to the Operator from time to time;
"Public Authorities"	ITA, Nexus and Darlington BC, being public authorities subject to the FOIA and EIR;
"Replacement Equipment"	has the meaning given to it in clause 4.6;
"RFID"	Radio-frequency identification;
"Service Levels"	(1) that Eligible Equipment is available for 99.95% (ninety-nine point nine five percent) of Operating

Hours to service the NESTI Requirements; and

(2) that ISAMs in the Eligible Equipment are switched on and operational at all times during the Operating Hours and sufficient time after that for upload of data;

"Tees Valley Authorities"	Darlington Borough Council, Hartlepool Borough Council, Middlesbrough Council, Redcar & Cleveland Borough Council and Stockton-on-Tees Borough Council;
"Tendered Services"	bus services provided by the Operator to Nexus pursuant to a successful competitive tender;
"Term"	the term of this Agreement determined in accordance with clause 2;
"Tyne and Wear Authorities"	Newcastle City Council, the Council of the City of Sunderland, Gateshead Council, North Tyneside Metropolitan Borough Council and South Tyneside Council .

- 1.2. Clause, Schedule and paragraph headings shall not affect the interpretation of this Agreement.
- 1.3. A person includes a natural person, corporate or unincorporated body (whether or not having a separate legal personality) and that person's legal and personal representatives, successors and permitted assigns.
- 1.4. The Schedules form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Schedules.
- 1.5. A reference to a company shall include any company, corporation or other body corporate, wherever and however incorporated or established.
- 1.6. Words in the singular include the plural and vice versa.
- 1.7. A reference to one gender shall include a reference to the other genders.
- 1.8. A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension or re-enactment and includes any subordinate legislation for the time being in force made under it.
- 1.9. A reference to writing or written includes faxes but not email.
- 1.10. Documents in agreed form are documents in the form agreed by the parties and initialled by them for identification.
- 1.11. References to clauses and Schedules are to the clauses and Schedules of this Agreement; references to paragraphs are to a paragraph of the relevant Schedule.
- 1.12. Where the words include(s), including or in particular are used in this Agreement, they are deemed to have the words "without limitation" following them and, where

the context permits, the words other and otherwise are illustrative and shall not limit the sense of the words preceding them.

- 1.13. Any obligation in this Agreement on a person not to do something includes an obligation not to agree or allow that thing to be done.

2. **Commencement and Duration**

This Agreement shall be deemed to begin on the Commencement Date and shall continue on the terms of this Agreement until the expiry of the period of 5 (five) years from the Commencement Date or such longer period as the Parties shall agree in writing and subject to earlier termination under clause 14.

3. **ITSO**

- 3.1. Each of Nexus and the Operator acknowledges and agrees that:

- 3.1.1. it is responsible for obtaining its own advice and guidance on ITSO compliance and implementation of the ITSO Specification;

- 3.1.2. it shall, if not already a member of ITSO, join ITSO and enter into an operating licence with ITSO and such other agreements as ITSO shall specify is required for its participation in the NESTI Project; and

- 3.1.3. it shall remain an ITSO member during the Term.

- 3.2. If Nexus and the Operator are unable to agree between them on issues relating to compliance with and implementation of the ITSO Specification, either or both of them may ask ITSO for clarification.

4. **Eligible Equipment**

- 4.1. The Operator shall use the Grant Funding and Darlington Funding to procure Eligible Equipment from an ITSO-approved supplier and test, install, operate and maintain the Eligible Equipment.

- 4.2. The Operator shall ensure the Eligible Equipment procured is compliant with the current or previous version of the ITSO Specification available from ITSO (at the date of this Agreement, the current version is 2.1.4 and the previous version is 2.1.3) and shall ensure that when a new version of the ITSO Specification is issued by ITSO, the Eligible Equipment is upgraded by the ITSO-approved supplier to the new version of the ITSO Specification unless the Operator and Nexus agree in writing to maintain the previous version.

- 4.3. The Operator shall ensure it has legal title to the Eligible Equipment procured using the Grant Funding and Darlington Funding.

- 4.4. The Operator shall co-operate fully with Nexus in relation to the NESTI Acceptance Tests and shall permit Nexus to observe and participate in them and provide Nexus with the written results of the NESTI Acceptance Tests.

- 4.5. The Operator shall repay any Grant Funding which the Operator does not spend on Eligible Equipment for Eligible Buses to the ITA. The Operator shall repay any Darlington Funding which the Operator does not spend on Eligible Equipment for Darlington Buses to Darlington BC.

- 4.6. If the Operator takes or permits existing Eligible Equipment (**Existing Equipment**) to be operated outside the NESTI Area during the Term, the Operator shall replace the Existing Equipment with ITSO-compliant Eligible Equipment of equivalent functionality (**Replacement Equipment**) in the NESTI Area.

5. **Other Equipment and Services**

- 5.1. The Operator shall procure an AMS-HOPS Service and a Back Office System to operate with the Eligible Equipment.
- 5.2. The Operator will integrate the Eligible Equipment with the AMS-HOPS Service, Back Office System and (if different from the AMS-HOPS Service), the NESTI AMS-HOPS.

6. **Operation**

- 6.1. The Operator shall co-operate with the ITA's and Nexus's implementation of the NESTI Project and comply with the aims of the Outline Business Plan during the Term.
- 6.2. The Operator shall deploy and operate the Eligible Equipment to ensure the Service Levels are met.
- 6.3. The Operator shall download data from the Eligible Equipment to the NESTI AMS-HOPS at least once every 24 (twenty four) hours, including data relating to transactions for clearing and settlement.
- 6.4. The Operator shall co-operate fully with Nexus, including resending copies of transactions which are unacknowledged or lost in transmission or otherwise not downloaded to the NESTI AMS-HOPS, in the event that a disaster or system failure or other failure occurs which prevents 'business as usual' operation, including the ITSO recovery protocols for re-sending unacknowledged or missing data.
- 6.5. The Operator shall ensure that any software which is installed on Back Office equipment (i.e. the depot PC) which does not relate directly to the NESTI Project does not compromise the ability of the Back Office equipment to function and affect the Operator's ability to meet the Service Levels.
- 6.6. The Operator shall repair or replace Eligible Equipment at its own cost, including where software installed by the Operator is responsible for any loss or damage to the Eligible Equipment.

7. **Project Information**

- 7.1. The Operator shall notify Nexus in writing of:
 - 7.1.1. the total number of Eligible Buses requiring Eligible Equipment, not including the number of Darlington Buses within that total; the Operator shall inform Darlington BC of the number of Darlington Buses and Darlington BC shall pass that information on to Nexus;
 - 7.1.2. the dates for the Operator's procurement of Eligible Equipment, Back Office and AMS-HOPS Service and its own acceptance testing of the

Eligible Equipment and NESTI Acceptance Testing and go live for deployment of Eligible Equipment on Eligible Buses;

- 7.1.3. the Operator's certification that its own acceptance testing has been satisfactorily completed; and
- 7.1.4. for each Eligible Bus where the Eligible Equipment has gone live:
 - 7.1.4.1. the fleet number of each Eligible Bus;
 - 7.1.4.2. the number of the Eligible Equipment on that Eligible Bus; and
 - 7.1.4.3. the ISAM IRN/ID number associated with the Eligible Equipment.
- 7.2. The Operator shall provide Nexus with such information as Nexus reasonably requests in relation to the NESTI Requirements to permit Nexus to comply with its obligations in relation to the NESTI Products including the validation of CT returns and publication of information relating to Tendered Services.
- 7.3. The Operator will share CT Data with the relevant local authority.
- 7.4. The Operator shall not share information relating to the NESTI Products with third parties without Nexus's written consent.

8. **Change of Circumstances**

- 8.1. The Operator shall notify Nexus within 10 (ten) Business Days if the Operator:
 - 8.1.1. closes down any of its depots;
 - 8.1.2. whether in a single event or over a period of time, takes out of operation 5% (five percent) or more of the number of Eligible Buses notified to the ITA under clause 7.1.1;
 - 8.1.3. merges with another operator;
 - 8.1.4. buys another company, or the assets of another company, in which case the Operator is responsible for providing at its own cost Eligible Equipment on buses in that company or acquired from that company which operate within the NESTI Area;
 - 8.1.5. is taken over by another company or sells its assets to another company, in which case the provisions of clause 18.1 shall also apply; and/or
 - 8.1.6. suffers an Insolvency Event.
- 8.2. If the Operator increases the number of Eligible Buses, the Operator shall be responsible for the cost of further Eligible Equipment for the additional buses to those notified to the ITA under clause 7.1.1.

9. **Customer Media Products and Lists**

9.1. If the Operator procures Customer Media, it shall procure ITSO-approved Customer Media from an ITSO-approved supplier for retail or acceptance of ITSO products.

9.2. The Operator shall ensure that its Eligible Equipment accepts all ITSO Shells.

9.3. The Operator may sell NESTI Products on Customer Media and shall accept NESTI Products as payment.

9.4. The Operator shall accept CT on Customer Media and shall transfer the full CT Data to the NESTI AMS-HOPS and relevant Local Authority at the periods in clause 6.3.

9.5. The Operator shall manage:

9.5.1. the Customer Media issued by the Operator including the transfer of its requests for reimbursement for NESTI Products to the NESTI AMS-HOPS, the reissue of defective or lost Customer Media, the blocking of Customer Media and Actionlist processing and notifying Nexus if the Customer Media or products on the Customer Media are Hotlisted in accordance with the ITSO Specification and ITSO operating licence; and

9.5.2. the customers to whom the Operator issues Customer Media including dealing with queries and complaints and provision of a telephone helpline.

9.6. The Operator shall co-operate with Nexus in relation to Actionlists of Customer Media or products on Customer Media by:

9.6.1. Accepting any NESTI Actionlist from time to time; and

9.6.2. Ensuring that NESTI Actionlist is downloaded to all Eligible Equipment within 24 (twenty-four) hours of receipt from Nexus.

9.7. The Operator shall co-operate with Nexus in relation to Hotlisting of Customer Media or products on Customer Media by:

9.7.1. Accepting any NESTI Hotlist from time to time or as mandated by ITSO from time to time; and

9.7.2. Ensuring that NESTI Hotlist is downloaded to all Eligible Equipment within 24 (twenty-four) hours of receipt from Nexus

provided that if the Operator fails to comply with clause 9.7.2 the Operator shall be liable for any shortfall in fares due to the Hotlisting.

9.8. The ITA shall provide or procure the provision of a financial settlement and reimbursement service for the NESTI Products.

10. **Data Protection**

10.1. The Operator shall be responsible for data protection compliance of its own ticketing scheme and in particular shall:

- 10.1.1. notify customers of the presence of RFID tags on its Customer Media and explain the implications;
- 10.1.2. notify customers what personal data the Operator is collecting and the purpose of the collection;
- 10.1.3. notify a customer if the Operator can personally identify that customer using data from RFID systems coupled with information available elsewhere, for instance, combining data from Customer Media and images captured on CCTV;
- 10.1.4. only process a limited amount of personal data and only collect personal data for specified legitimate purposes; the Operator should be conscious of "function creep" and ensure it has safeguards in place to prevent it from occurring;
- 10.1.5. ensure the quality of personal data the Operator processes by ensuring that any personal data processed is accurate and kept up to date;
- 10.1.6. not collect or store more personal data than is necessary for the purpose of administering the Operator's ticketing scheme;
- 10.1.7. notify customers of the Hotlisting of Customer Media and sharing of Hotlists with Nexus and other ITSO members for the purpose of prevention and detection of fraud, unlawful use and other improper use;
- 10.1.8. ensure the data are retained for no longer than necessary and that secure methods of destroying data are employed;
- 10.1.9. ensure the personal data are secure against unauthorised access. The Operator should have safeguards in place to prevent:
 - 10.1.9.1. the "skimming" of the Customer Media's RFID tag by an unauthorised compatible reader, for example by cryptography;
 - 10.1.9.2. "eavesdropping" on communication between Eligible Equipment and Customer Media, for example by an adequate level of encryption; and
 - 10.1.9.3. the "cloning" of insufficiently secure RFID tags in Customer Media;
- 10.1.10. ensure any monitoring of customers' movements by recording and storing their journey details is only carried out where there is a legitimate reason for doing so and the collection of personal data is relevant and proportionate to the needs of journey planning and customer service; the Operator shall notify customers subject to tracking and obtain their consent for any tracking that goes beyond what customers would expect for a given legitimate purpose;
- 10.1.11. ensure any profiling customers' buying habits is carried out without using personal data where possible; if profiling does involve personal data and is to be used for direct marketing purposes, the Operator shall inform customers that profiling is taking place and provide them with a

means of opting into or out of any direct marketing in compliance with applicable legislation.

11. **Branding**

The Operator shall use the NESTI Branding in accordance with applicable branding guidelines notified to it by Nexus and the ITSO logo in accordance with the ITSO operating licence or with ITSO's branding guidelines from time to time.

12. **Expenditure and Records**

12.1. The Operator acknowledges and agrees that any Darlington Funding originates from Darlington BC and shall (if applicable) spend the Darlington Funding solely on Darlington Buses.

12.2. The Operator shall keep and maintain to the satisfaction of the ITA and Darlington BC until 2 (two) years after the expiry of the Agreement accurate books and records in respect of the expenditure of Grant Funding and Darlington Funding. The Operator shall on request afford the ITA or Darlington BC or their representatives such access to those records as may be required by the ITA or Darlington BC in connection with the Agreement and provide oral or written explanations and all other reasonable assistance to representatives of, the ITA, Darlington BC, the Secretary of State and the National Audit Office for the purposes only of the examination and certification of the ITA's or Darlington BC's accounts and for the purpose of any examination of the economy, efficiency and effectiveness with which the ITA or Darlington BC has used its resources.

13. **Payment**

13.1. In consideration of the Operator's participation in the NESTI Project and procurement of Eligible Equipment, Darlington BC and the ITA will make the payments set out in this clause within 30 (thirty) working days of receipt of invoices from the Operator raised in accordance with this clause.

13.2. Payments shall be made on the basis of invoices presented by the Operator which shall be accurate in all respects.

13.3. Payment by the ITA and Darlington BC shall be without prejudice to any claims or rights which the ITA or Darlington BC may have against the Operator and shall not constitute any admission by the ITA or Darlington BC as to the performance by the Operator of its obligations under this Agreement. Prior to any such payment, the ITA and Darlington BC shall be entitled to make deductions or deferrals in respect of any disputes or claims whatsoever with or against the Operator, arising from this Agreement.

13.4. The ITA shall pay Grant Funding and Darlington BC shall pay Darlington Funding in each case to the Operator as a contribution to the cost of each item of Eligible Equipment on the following conditions:

13.4.1. The Operator confirms in writing the number of Eligible Buses in accordance with clause 7.1.1; and

13.4.2. The Operator certifies to Nexus and Darlington BC in writing that its own factory and site acceptance tests for each item of Eligible Equipment have been successfully completed; and

- 13.4.3. Condition 1 has been satisfied in which case the Operator shall be entitled to raise an invoice to Darlington BC for £800 (eight hundred pounds sterling) for each Darlington Bus and to the ITA for £800 (eight hundred pounds sterling) for each Eligible Bus which is not a Darlington Bus; and
- 13.4.4. Condition 2 has been satisfied in which case the Operator shall be entitled to raise an invoice to Darlington BC for £200 (two hundred pounds sterling) for each Darlington Bus and to the ITA for £200 (two hundred pounds sterling) for each Eligible Bus which is not a Darlington Bus.
- 13.5. Grant Funding is provided subject to sufficient funds being made available to Darlington BC and to the ITA by the NESTI Board Members and the Department for Transport.
- 13.6. In this clause:
- 13.6.1. **Condition 1** means that 21 (twenty-one) days of error free operation have elapsed since the NAT1 have been passed to Nexus's satisfaction for at least 99% (ninety-nine percent) of the Eligible Buses; and
- 13.6.2. **Condition 2** means that 21 (twenty-one) days of error free operation have elapsed since the NAT2 have been passed to Nexus's satisfaction for at least 99% (ninety-nine percent) of the Eligible Buses and that the Operator has signed up to a commercial agreement for the Nexus E-Purse in accordance with Schedule 1 Part 3 paragraph 3.1.2.2.

14. **Termination**

- 14.1. If the Operator suffers an Insolvency Event or if the Operator shall have committed a material breach of this Agreement and (if such breach is capable of remedy) shall have failed to remedy such breach within 30 (thirty) days of being required by the ITA or Nexus in writing to do so, the ITA or Nexus shall be entitled to terminate this contract by notice to the Operator with immediate effect.
- 14.2. For the purpose of this clause, "material breach" shall include a breach of clause 4 (Eligible Equipment).

15. **Liability**

- 15.1. The ITA and Nexus shall not be liable to the Operator for:
- 15.1.1. any indirect or consequent loss, damage, injury or costs whatsoever which arise out of or are connected with the ITA or Nexus's adherence or non-adherence to the terms and conditions of this Agreement;
- 15.1.2. any claims, expenses, fines, damages and losses of any kind incurred by the Operator in connection with this Agreement; or
- 15.1.3. any third party for any breach of the Operator's conditions of carriage.
- 15.2. The Operator acknowledges that it bears the operational risk of its participation in the NESTI Project and any risk in connection with the Eligible Equipment, Back Office and AMS-HOPS Service.

15.3. Nothing in this Agreement shall limit or exclude the liability of either Party for fraud, death or personal injury caused by its negligence or any other liability which cannot be excluded by law.

16. **Freedom of Information**

16.1. The Operator acknowledges that the Public Authorities are subject to the requirements of the FOIA and the EIR and shall assist and cooperate with the Public Authorities (at the Operator's expense) to enable the Public Authorities to comply with these information disclosure requirements.

16.2. The Operator shall:

16.2.1. transfer any request for information held by the Operator on behalf of any Public Authority to that Public Authority as soon as practicable after receipt and in any event within 2 (two) Business Days of receiving that request for information;

16.2.2. provide the Public Authority with a copy of all information in its possession or power in the form that the Public Authority requires soon as practicable and in any event within 5 (five) Business Days (or such other period as the Public Authority may specify) of the Public Authority requesting that information; and

16.2.3. provide all necessary assistance as reasonably requested by the Public Authority to enable the Public Authority respond to a request for information within the time for compliance set out in the FOIA, and regulation 5 of the EIR as applicable.

16.3. The Public Authority shall be responsible for determining at its absolute discretion whether:

16.3.1. the information is exempt from disclosure under the FOIA or the EIR as applicable;

16.3.2. the information is to be disclosed in response to a request for information, and

in no event shall the Operator respond directly to a request for information unless expressly authorised to do so by the Public Authority in writing.

16.4. The Operator acknowledges that the Public Authority may, acting in accordance with the Code of Practice on the Discharge of Functions of Public Authorities under Part I of the FOIA, be obliged to disclose information:-

16.4.1. without consulting with the Operator, or

16.4.2. following consultation with the Operator and having taken its views into account.

16.5. The Operator acknowledges that any lists or schedules provided by it outlining confidential information are of indicative value only and that the Public Authority may nevertheless be obliged to disclose confidential information in accordance with clause 16.4.

17. **Notices**

- 17.1. Any notice required by this Agreement to be given by any Party to the others shall be in writing and shall be served personally, by fax or by sending it by recorded delivery to the appropriate address or fax number notified to each of the others for such purposes and the address for postal or personal service shall be as set out in clause 17.3 as set out below.
- 17.2. Any notice served personally will be deemed to have been served on the day of delivery; any notice sent by post will be deemed to have been served 48 (forty eight) hours after it was posted; any notice sent by fax will be deemed to have been served 24 (twenty four) hours after it was despatched save where the deemed date of service falls on a day other than a Business Day in which case the date of service will be the following Business Day.
- 17.3. The address to be used for the purposes of a notice served under the provisions of clause 17.1 above shall be the address set out in this Agreement or such other address as shall be notified by that Party to the other Parties in accordance with clause 17.1.

18. **General**

18.1. Assignment

The Operator shall not transfer this Agreement to another party without the ITA's written consent. Where it is agreed that a transfer of the rights and obligations under this Agreement is to take place, such a transfer shall be by way of a novation of this Agreement.

18.2. Relationship of Parties

Except for the ITA's delegation to Nexus under section 99 of Local Transport Act 2008, nothing in this Agreement, and no action taken by the Parties pursuant to this Agreement, shall constitute, or be deemed to constitute, a partnership between the Parties, or shall constitute any party as the agent, employee or representative of the other.

18.3. Competition

No term of this Agreement shall be construed as having the object or effect of limiting, restricting, distorting or preventing competition whether expressly or impliedly. The Operator agrees that it will not, in the course of carrying out its obligations under this Agreement enter into any agreement or concerted practice with any other operator of transport services:

18.3.1. to fix, agree or otherwise influence the fares chargeable for use of such transport services;

18.3.2. to agree or otherwise influence the routes or timetables operated by such transport services;

18.3.3. to agree to act in such a way as to restrict the ability of other operators and potential operators of transport services to operate transport services whether by raising the costs of so doing or otherwise;

- 18.3.4. to eliminate the Operator's or any other individual operator's own single or return tickets; or
- 18.3.5. to share or exchange commercially sensitive information with any other individual operator or operators so as to facilitate any of the actions under clauses 18.3.1 to 18.3.4 above.

18.4. Entire Agreement

This Agreement constitutes the entire agreement between the Parties relating to the Grant Funding and Darlington Funding for Eligible Buses. This Agreement supersedes all prior negotiations, representations and undertakings, whether written or oral, except that this clause 18.4 shall not exclude liability in respect of any fraudulent misrepresentation.

18.5. Publicity

- 18.5.1. Without prejudice to the Parties' obligations under the FOIA or EIR, none of the Parties shall make any press announcements or publicise the NESTI Project or any part thereof in any way, except with the written consent of all of the ITA (such consent not to be unreasonably withheld or delayed).
- 18.5.2. The Parties shall take all reasonable steps to ensure the observance of the provisions of this clause by all of their servants, employees, sub-contractors, agents, professional advisers and consultants.
- 18.5.3. The Operator shall comply with any NESTI communication protocol for the NESTI Project notified to it by the ITA and/or Nexus.

18.6. Variation

No variation or modification to the Agreement is valid unless it is in writing and signed by each Party.

18.7. Waiver

- 18.7.1. Failure by any Party at any time to enforce any one or more of the provisions of this Agreement or to require performance by the other Parties of any of the provisions shall not constitute or be construed as a waiver of the provision or of the right at any time subsequently to enforce all terms and conditions of this Agreement nor affect the validity of the agreement or any part of it or the right of the Parties to enforce any provision in accordance with its terms.
- 18.7.2. No waiver of any of the provisions of this Agreement shall be effective unless it is expressed to be a waiver in writing and communicated in accordance with clause 17.

18.8. Force Majeure

No Party shall be liable for failure to perform its obligations under this Agreement if such failure results from Force Majeure.

18.9. Severance

If any provision of the Agreement shall become or shall be declared by any court of competent jurisdiction to be invalid or unenforceable in any way, such invalidity shall not impair or affect any other provision all of which shall remain in full force and effect.

18.10. Costs and Expenses

Each of the parties will pay their own costs and expenses incurred in connection with the negotiation, preparation, execution, completion and implementation of this Agreement.

19. **Third Party Rights**

19.1. A person who is not a party to this Agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement, but this does not affect any right or remedy of a third party which exists, or is available, apart from that Act.

19.2. The rights of the Parties to terminate rescind or agree any variation, waiver or settlement under this Agreement is not subject to the consent of any person that is not a Party to this agreement.

20. **Law and Jurisdiction**

20.1. This Agreement and any dispute or claim arising out of or in connection with it or its subject matter of formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the laws of England and Wales.

20.2. The Parties to this Agreement irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

This Agreement has been signed by the Parties and takes effect on the Commencement Date.

Schedule 1

NESTI Acceptance Tests

1. Part 1 – NAT1
 - 1.1. The NESTI site acceptance tests to verify that the operation of the Operator's System (**excluding** the NESTI AMS-HOPS and the NESTI EPurse) meets the NESTI Requirements:
 - 1.1.1. [MVA to set out here.]
2. Part 2 – NAT2
 - 2.1. The NESTI site acceptance tests to verify that the operation of the Operator's System (**including** the NESTI AMS-HOPS and the NESTI EPurse) meets the NESTI Requirements:
 - 2.1.1. [MVA to set out here.]
3. Part 3 – NESTI Requirements
 - 3.1. The required functional operations of the NESTI Project in relation to (1) CT (2) NESTI Products and (3) Tendered Services as set out below:
 - 3.1.1. [CT – Nexus/MVA to set out here.]
 - 3.1.2. [NESTI Products – Nexus/MVA to set out here.]
 - 3.1.2.1. The Operator shall accept the Nexus E-Purse as a valid form of payment for its own products and services on Eligible Buses (and any other products and services for which it operates as an agent) and shall take such action as is necessary to provide for this to occur which, for the avoidance of doubt, includes single trip fare and tickets purchased on board the Eligible Bus.
 - 3.1.2.2. The Operator shall enter into such commercial agreement as may be required for the procurement provision or endorsement of the Nexus E-Purse.
 - 3.1.3. [Tendered Services – Nexus/MVA to set out here.]

Schedule 2

NESTI Brand

1. [Set out "NESTI" brand and symbol here.]

Signed by **The Tyne And Wear Integrated Transport Authority** in the presence of:

.....
Signature of witness

Authorised Signatory Of The Tyne And Wear Integrated Transport Authority

Witness name:

.....

Witness address:

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Signed by **The Tyne and Wear Passenger Transport Executive** in the presence of:

.....
Signature of witness

Authorised Signatory Of The Tyne and Wear Passenger Transport Executive

Witness name:

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Witness address:

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Signed by **Darlington Borough Council** in the presence of:

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Signature of witness

Authorised Signatory Of Darlington Borough Council

Witness name:

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Witness address:

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Signed by **Arriva Durham County Limited** in the presence of:

Authorised Signatory Of Arriva Durham
County Limited

.....
Signature of witness

Witness name:

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Witness address:

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