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Dear David

Abellio Greater Anglia (AGA) Respondent's Notice to the Appeals of TTP985 issued by MTR Crossrail (MTR) and Network Rail Infrastructure Limited (Network Rail)

- 1.1 This letter is AGA's Respondent's Notice under Part M to the appeals by MTR Crossrail (MTR) and Network Rail in relation to TTP985.
- 1.2 The appeals by Network Rail and MTR are distinct. MTR seeks to revisit arguments which were rejected by the TTP on the substantive issue i.e. who should be awarded the capacity. In contrast Network Rail does not challenge the TTP's finding on the substantive issue but raises a legal objection to the TTP's direction to Network Rail to grant the capacity to AGA. AGA believes that because each appeal is independent of the other, the ORR's finding on either appeal should not affect its findings in respect of the other.
- 1.3 AGA believes both appeals are flawed and should be rejected:
 - (a) contrary to the ORR's review function in M7.1.1, MTR has asked ORR to reconsider the points already rejected by the TTP. We believe that there is no basis for a rehearing and MTR's appeal should be rejected.
 - (b) Network Rail's appeal does not appear to be applicable to the facts in this case. Network Rail specifically asked the TTP to rule on which party should be granted the capacity in its Defendant's Response but is now apparently appealing the TTP's decision to do so. In any case, we believe Network Rail is bound by the TTP's substantive finding which is in effect the same as the formal order given. ORR should not be requested to rule on matters which have no practical effect.
- 1.4 In any event AGA believes that, even if not rejected in principle, both appeals should fail because:
 - (a) a correct application of the Decision Criteria (as conducted by the TTP) would result in the capacity being granted to AGA anyway; and

- (b) Network Rail's request for a ruling from TTP in the first place prevents it from now objecting to such a ruling having been given.

1.5 Consequently we ask ORR to uphold the TTP's findings and confirm the TTP's Determination.

2 REQUIREMENTS FOR A RESPONDENT'S NOTICE (M5.1)

2.1 AGA notes ORR has decided to align both appeals lodged in respect of TTP985. This Respondent's Notice is provided under Condition M5.1.1 of the Network Code in respect of both appeals.

2.2 AGA does not raise any grounds under Condition M4.1.1 that the appeals should not proceed.

2.3 AGA opposes both appeals as set out below. We note the appeals are entirely distinct.

- (a) MTR challenges the substantive findings (Determination 6.1-6.6) regarding which operator should be awarded the capacity for which both have applied but does not challenge the legal point of TTP's decision to impose its conclusion on Network Rail (Determination 6.7 and 7.1) whereas

- (b) Network Rail does not challenge the substantive findings but does challenge TTP's decision to substitute its finding for that of Network Rail.

2.4 The evidence is known to all parties and was presented at the TTP985 hearing. AGA considers the parties' arguments are sufficiently clear that, in the interests of proportionality, ORR should be able to reach a conclusion on these appeals on the basis of the parties' written submissions already received (or any written answers to ORR's further questions) and we are, of course, prepared to participate in any other directions ORR may wish to give and to attend any hearing ORR considers necessary.

2.5 For completeness we attach the following evidence to this Respondent's Notice all of which was before the TTP and is known to the other parties (although we note Network Rail appended the evidence it is relying upon to its Notice of Appeal):

- (a) AGA Statement of Claim and appendices
- (b) Defendant's response and appendices (Network Rail)
- (c) Defendant's response (MTR Crossrail)
- (d) Platform 18 usage document
- (e) TTP985 Determination
- (f) Notice of Appeal (Network Rail)
- (g) Notice of Appeal (MTR Crossrail)

3 MTR'S APPEAL SHOULD BE REJECTED

- 3.1 AGA believes MTR's appeal should be rejected as a matter of principle. MTR seeks a rehearing of arguments which have already been determined despite ORR's consideration of its appeal being properly limited to a review of whether the TTP was wrong in its approach.
- 3.2 In accordance with Condition M7.1.1, this appeal should be conducted on the basis that it is limited to a review of the TTP's decision. This Respondent's Notice is provided on the basis that ORR is conducting a review of the TTP's decision on the issues of substance and will only impose its own findings if it identifies that the TTP was wrong in the views it took on those issues of substance. We believe MTR's appeal contains no reasons why the TTP could not have reached the conclusion it did.
- 3.3 AGA believes the substantive issue contained in MTR's appeal is a straightforward issue concerning the application of the Decision Criteria to specific facts. It seeks a rehearing of the points which the TTP has already considered. It is expressly brought on the basis that

"MTR Crossrail does not agree with the application of the Decision Criteria or the justification provided by the Access Disputes Committee (sic) to support their decision."

- 3.4 Such analysis is properly conducted by a TTP with reference to the parties' evidence and in this case the issues have been considered in detail by a legally qualified hearing chair and a panel of four industry specialists. We believe the decision is properly justified by the TTP and described by reference to the evidence in section 6 of the Determination and that there are no grounds for a 'review' of the decision of the TTP or to overturn the Determination. In our view it is not necessary for ORR's resources to be deployed in repeating that consideration unless the TTP is necessarily wrong.
- 3.5 In relation to these substantive issues, MTR's challenges simply repeat points already put to the TTP, raise no circumstances which might justify a rehearing of those points and there is no reason to dispute the analysis undertaken by the TTP (which AGA considers to be correct). AGA therefore argues that there is no basis for the TTP's decision on the substantive issue to be revised and MTR's appeal should, as a matter of principle, be rejected.
- 3.6 The findings which Network Rail appeals (Determination 6.7 and 7.1) are separate from and additional to the findings challenged by MTR. MTR's appeal on the substance can be rejected without affecting Network Rail's appeal on the principles.

4 NETWORK RAIL'S APPEAL SHOULD BE REJECTED

- 4.1 Network Rail's appeal should also be considered by a review of the TTP's decision (M7.1.1). It is, however, in any event, a misconceived point and should be dismissed as a matter of principle.
- 4.2 Despite some inconsistency in the way this is expressed in Network Rail's appeal (see 2.21 and 4.15)¹, it cannot be disputed that the TTP has the ability to substitute its decision for that of Network Rail in certain circumstances. This is set out in Condition D5.3.1(c).

¹ The point is understood that the TTP does have the power to substitute its conclusion but only where the circumstances in Clause D5.3.1(c) are made out.

4.3 It also cannot realistically be disputed that:

- (a) TTP understood Network Rail had requested that it was seeking a ruling from the TTP, rather than having the question remitted back to it (Determination 6.7.1).
- (b) This understanding was presumably based on Network Rail's own written submission that *"In this instance Network Rail do not feel it is appropriate for the panel to find error with Network Rail's processes, but not rule on who should be allocated the capacity."* (Determination 4.2.1)

There is no suggestion that this request was changed or otherwise qualified orally during the hearing, or that it was not known to all participants in the hearing, who did not object;

- (c) any decision from the TTP would be binding on Network Rail in any event. See for example:

- (i) Condition D5.5:

"Binding effect of appeal rulings

5.5.1 Where an appeal is brought pursuant to this Part D, the parties to the appeal shall be bound by:

- (a) *the ruling of the Timetabling Panel, unless or until ordered or determined otherwise by the [Office of Rail and Road];"*

- (ii) Condition D5.6:

"Implementing an appeal ruling

5.6.1 Network Rail shall be bound and empowered to take such steps as may be necessary to implement all rulings made by a Timetabling Panel or the [Office of Rail and Road] pursuant to this Condition D5. All such steps shall be taken promptly."

- (d) The TTP's findings in Determination sections 6.1-6.6 would therefore be binding upon Network Rail. This is true regardless of the TTP's decision to substitute its finding for that of Network Rail.
- (e) This appeal raises a fairly binary point regarding which of two operators should be given a specific allocation of infrastructure capacity and the TTP's findings in Determination sections 6.1-6.6 clearly result in a single conclusion about which operator should be given that capacity.

4.4 Although this Respondent's Notice provides some consideration of the legal issues behind Network Rail's appeal, AGA believes it is clear that the appeal is factually misconceived. Based on the facts available we believe the legal points Network Rail raises in its appeal make no difference and so Network Rail's appeal should be dismissed in principle for the following reasons:

- (a) Network Rail's written request is clear. The TTP understood it to mean that Network Rail wished the TTP to substitute its conclusion for that of Network Rail. There is no basis to conclude that the TTP was wrong to reach that understanding (and consequently ORR should not overturn it). Network Rail cannot go back on its own request in this appeal;
- (b) the appeal makes no practical difference. The substantive issue has been determined in favour of AGA. Network Rail is bound by that determination. The substitution of the TTP's finding for that of Network Rail merely reflects the step Network Rail would be obliged to undertake under Condition D5.6.1 anyway;
- (c) there is no concern here about binding precedent undermining Network Rail's ability in future decision making. The TTP expressly notes that Network Rail requested the substitution of its decision. That will not always be the case in future challenges and so consequently will not encourage inappropriate challengers.

4.5 AGA notes that it is not ORR's role to hear appeals simply to give guidance for future conduct in other circumstances. Nonetheless, we do note that the apparent substance of Network Rail's appeal could be resolved by a statement from ORR that, while not applicable in these circumstances, TTPs should not normally substitute their decisions for Network Rail's decisions unless Network Rail requests they do so (this would appear to be the basis of Network Rail's request for guidance at appeal paragraph 4.8). This would in our opinion, however, add nothing to condition D5.3.1(c).

4.6 For these reasons (and without reference to the arguments raised by Network Rail) AGA submits that, on these facts, this appeal has no prospect of success and should, in principle, be rejected.

4.7 Our further submissions in this Respondent's Notice are relevant only if the appeals are not dismissed in principle as above. They deal with the arguments raised by MTR and Network Rail to demonstrate that the TTP was correct in its findings and the appeals have no merit.

5 FACTS AND BACKGROUND

5.1 The appeal concerns conflicting Access Proposals for capacity to stable a spare unit in platform 18 at Liverpool Street station during the weekday off peak. Although other options were explored during the TTP hearing, AGA believes it is common ground that:

- (a) only one 8-car unit can be stabled in this platform – for the purposes of this timetable that will be either a 321 unit belonging to AGA or a 315 unit belonging to MTR.
- (b) Neither party has a contractual right to this capacity. AGA has stabled a spare unit using this capacity for a considerable period and has relied upon that option in not objecting to changes to stabling capacity elsewhere on the network e.g. at Ilford station. That does not however give rise to any legally enforceable grandfather rights in favour of AGA. MTR wishes to use this capacity until May 2019.
- (c) The AGA unit stabled in platform 1 at Liverpool Street station is not a viable alternative for the recovery of services on the GE mainline, for which the capacity is sought.

- (d) AGA has been offered slots to allow it to stable units at Southend Victoria carriage sidings instead. This would involve additional daily running of approximately 166.12 unit miles and the acquisition of additional drivers. AGA has demonstrated that costs in relation to this these are potentially in the order of £53k additional running costs per annum, £118k additional staffing costs per annum and over £20k in negative revenue effect per annum.
- (e) Stabling at Southend would delay introducing a replacement unit by a considerable time – transit to Liverpool Street from Southend for this standby would be between 45 and 60 minutes, (depending on whether it was allowed into traffic in front of or following another service on the day) plus approximately 10 minutes turnaround time at Liverpool Street.
- (f) MTR may alternatively stable units at Gidea Park (until it adopts alternative arrangements in 2019). The attractiveness of this option to MTR is debatable, however the finding of the TTP does not directly require this option so it is not in itself a matter of appeal.
- (g) MTR operates a 'metro' style service with departures every 10 minutes. AGA operates a wider range of services including longer distance services departing every 30 or 60 minutes. Loss of one of our services consequently results in far greater delays for passengers. We acknowledge some MTR services do have higher loadings, although that may be absorbed by a following service when a previous service is cancelled.
- (h) Providing the capacity for stabling to MTR may produce a reduction in Schedule 8 payments from Network Rail to MTR, however this potential saving is offset by the corresponding increase in Schedule 8 payments from Network Rail to AGA for the increase in cancellations due to loss of our standby at Liverpool Street, as well as the additional costs incurred by AGA in implementing the proposed alternative stabling arrangements.
- (i) The offer of the capacity is subject to the application of the Decision Criteria in Condition D of the Network Code (see D4.1.1, for example).

5.2 The relevant Decision Criteria are set out in Condition D as follows:

4.6 The Decision Criteria

- 4.6.1 *Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).*
- 4.6.2 *In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (“the Considerations”) in accordance with Condition D4.6.3 below:*
 - (a) *maintaining, developing and improving the capability of the Network;*
 - (b) *that the spread of services reflects demand;*

(c) maintaining and improving train service performance;

- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers and goods;

(f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;

- (g) seeking consistency with any relevant Route Utilisation Strategy;
- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
- (i) mitigating the effect on the environment;

(j) enabling operators of trains to utilise their assets efficiently;

- (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates; and
- (l) no International Freight Train Slot included in section A of an International Freight Capacity Notice shall be changed.

4.6.3 When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those it has identified as relevant so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail. Where, in light of the particular circumstances, Network Rail considers that application of two or more of the relevant Considerations will lead to a conflicting result then it must decide which of them is or are the most important in the circumstances and when applying it or them, do so with appropriate weight.

4.6.4 The Objective and the Considerations together form the Decision Criteria.

Highlights are added in respect of criteria considered by the parties and the TTP as relevant. AGA is content to accept that this appeal be limited to consideration of the TTP's approach to those criteria. However, in the event that any other party seeks to argue the application of other criteria, we reserve the right to revert with our submissions on the criteria more generally.

5.3 The procedural background is set out in the Determination of the TTP (section 2).

6 MTR CROSSRAIL'S APPEAL

6.1 As stated above MTR's appeal should be rejected in principle as it seeks to re-visit matters which have been resolved at the TTP. Nonetheless, even if it is not rejected in principle, the arguments for the award of the capacity to AGA are stronger and MTR's appeal should therefore fail.

6.2 MTR's appeal is based on its disagreement with the analysis of the TTP in three respects.

6.3 Maintaining Services

AGA's solution provides a better opportunity for services to be maintained to provide the greatest benefit to passengers;

6.4 MTR states that it does not agree with this finding. It relies on arguments raised with the TTP that:

- (a) its service would be crewed;
- (b) it has offered to make the stand by available to other operators;
- (c) MTR is a high frequency metro operator;
- (d) that on one occasion service recovery has been hindered by AGA being unable to move the stand-by unit due to lack of drivers;

6.5 All of these arguments were raised and addressed by the TTP on the basis of a careful review of the evidence and a detailed hearing. There are no grounds to conclude that the TTP's conclusions on them were improperly reached.

6.6 The fact that MTR's service would be crewed does not assist its argument. The absence of a crew on AGA's unit means that it will be significantly harder to bring it into service if stabled elsewhere than Liverpool Street (where a crew is likely to be available). This was noted in relation to the need to transport a driver to Gidea Park in the event that AGA was obliged to stable there. This would still entail recruitment of two drivers by AGA and incur additional costs of creating a new PNB point for AGA drivers at Gidea Park. It would be even more difficult if the unit was stabled in Southend and, as the TTP found (Determination 6.4.10), stabling in the Southend area would only realistically provide cover for an Up service from Southend.

6.7 By contrast MTR's crew can bring its unit into service immediately wherever it is stabled. If stabled at Gidea Park an MTR unit could enter service in either the Up or Down direction for the purposes of stepping up the service or covering missed stops at any point on the journey. MTR has a train crew depot at Gidea Park which would appear to facilitate this further.

6.8 The offer to make the unit available to other operators was considered rightly by the TTP to be unconvincing. Sending AGA passengers on MTR services to Shenfield is impractical due to the extended journey time (42 minutes) compared with our own services. This means that passengers would miss any onward connections by an extra hour at Shenfield. This is a complex solution requiring additional changes, is an unreliable offer, depends on MTR's other priorities for the unit at a particular moment in time and is not a comparable alternative to a through service provided by an operational spare.

- 6.9 The TTP properly considered the impact on passengers' waiting times of a lost AGA service and a lost MTR service. Due to the frequency of MTR's services and the capacity to absorb passengers onto the following service, impact on MTR's passengers was considered lower (maximum 10 minutes on a comparatively short overall journey time) than on AGA's passengers (maximum 60 minutes potentially extending a significantly longer journey time).
- 6.10 Network Rail and MTR raised one incident of difficulty moving the unit when a recovery plan was proposed. AGA believes this is a one-off in recent times and is irrelevant when compared with the hundreds of times we have deployed this standby over the 15+ years we have used platform 18 for this purpose. Following the questioning of the figures in our Statement of Claim by Network Rail and MTR we provided information to all parties at the TTP hearing which contains details of use of the standby over the past 18 months. We have more than adequately demonstrated that being uncrewed has in no way been a hindrance to use of this unit in passenger service whenever required. Spare units are a scarce resource and if it was not serviceable to us in this way we would have withdrawn its use many years ago.

6.11 AGA Additional Costs

AGA's solution reflects the 'additional costs that AGA would undoubtedly face if it could no longer stable its Class 321 at Platform 18':

- 6.12 MTR argues that
- (a) AGA has not adequately demonstrated the additional costs it will incur.
 - (b) The TTP did not adequately consider the impact on both operators as MTR's costs of stabling at Gidea Park and AGA's potential savings (vs Southend) from stabling at Gidea Park were not recognised.
- 6.13 MTR accepts that AGA would incur additional costs but challenges the TTP's finding on the basis that it is not convinced that we adequately demonstrated these costs. AGA believes it has already provided satisfactory evidence pertaining to the relevant cost details in our Statement of Claim and that what was provided is above what might be expected, given that the dispute documentation is in the public domain and this commercially sensitive information thereby freely accessible to parties other than the dispute parties. Notwithstanding this, we are more than willing to provide further evidence to ORR in support of the figures in our Statement of Claim if ORR believes this is pertinent to the appeal. Indeed we would point out that TTP noted at the hearing it thought the costs AGA submitted looked modest in some respects. In any event it is clear that AGA will obviously incur additional costs if not stabling at Liverpool Street due to the substantial extra distance to travel to Southend Victoria carriage sidings. Network Rail has accepted that these costs must necessarily outweigh any Schedule 8 advantages.
- 6.14 Gidea Park is not a station served by AGA and we have no train crew based there. Positioning our standby unit at Gidea Park would still cost AGA two additional drivers to take the unit to and from this location and remain with the unit until required in service. We have no PNB facilities for drivers at Gidea Park so this would mean additional costs in agreeing a new PNB location with drivers' union representatives plus the cost of either creating a new AGA PNB facility or paying MTR for access to and use of its existing PNB facility there for our drivers. It would also mean additional unit mileage costs (albeit less than Southend Victoria) and it would still take the standby unit 28-33 minutes to reach Liverpool Street, plus an

additional circa 10 minutes turnround time in the platform at Liverpool Street. Therefore it is not an operational or financially viable option for AGA services.

6.15 By contrast, evidence was before the TTP that the MTR standby could be mobilised from Gidea Park quickly and that this station lay part-way along MTR's route allowing it to enter in service in either direction. No evidence of additional costs to MTR of this alternative was before the TTP and was not raised at the hearing and it is not obvious why the costs should be substantially different for MTR to stabling at Liverpool Street. We also note that despite arguing that AGA has not adequately demonstrated its costs in respect of the proposed new standby arrangement, MTR provided no examples at all either in its Defendant's Response, at the TTP hearing or in its Notice of Appeal of its alleged additional costs. Indeed we are at pains to understand exactly what additional costs MTR might bear in relation to this, given that it already serves Gidea Park station and has an existing drivers' depot there.

6.16 Gidea Park

That the 'option of stabling MTR's Class 315 at Gidea Park might on occasions be even more beneficial than stabling at Liverpool Street'.

6.17 MTR disputes this analysis due to

- (a) the time taken to move the unit to Liverpool Street in comparison to its 10 minute metro service vs the time taken for AGA to move a unit compared to its longer service timings;
- (b) its preference to operate a spare at Liverpool Street because there is a fitter;
- (c) MTR's offer to make its spare available to alleviate disruption by operating to Shenfield.

6.18 Although the TTP considered this point in relation to the impact on the parties, stabling at Gidea Park was not a necessary part of the TTP's findings (see Determination 6.7.3). The TTP conducted an analysis of the application of the Decision Criteria and concluded that Network Rail had inappropriately put substantial weight on this criterion (D4.6.2(c)) in favour of MTR when on analysis it does not necessarily favour MTR at all. This appears correct in light of the evidence. Certainly on a review we believe there is no reason to conclude that the TTP was wrong in this respect.

6.19 The TTP's conclusion

6.20 The TTP correctly applied the Decision Criteria for the following reasons:

(c) Maintaining and improving train service performance	<p>MTR's service is more regular and following services can absorb any individual lost service. Maximum waiting time for passengers is likely therefore to be 10 minutes on a short journey (hence little impact on passengers at destination). By contrast AGA's passengers may be required to wait up to 60 minutes for the next service on longer journeys which will inevitably cause very late arrival and missed connections.</p> <p>MTR has a viable (and as found by the TTP – in some cases</p>
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	<p>potentially advantageous) alternative stabling option at Gidea Park. Gidea Park is not a realistic alternative for AGA (including because of the response times of the unit, the need to send a crew there when the unit was needed, the additional cost and the fact that Gidea Park is not served by AGA).</p> <p>The alternative proposed to AGA (Southend) would incur substantial additional costs for AGA, require substantial additional unit miles, additional slots (which is not operationally robust) and is only realistically an option for failures on the Southend Up line. It would also create a worsenment in PPM due to both the poor quality additional train paths and impact of cancellations due to the loss of the standby.</p>
<p>(f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware</p>	<p>Network Rail recognised that the costs to AGA will outweigh any changes in Schedule 8 payments to Network Rail.</p> <p>Although Network Rail considered that a crewed MTR unit would be likely to see the biggest reduction in Schedule 8 costs (N.B. Network Rail has never supplied any numbers to support this assertion) this is not correct. This argument appears to overlook the additional Schedule 8 costs which Network Rail would be required to pay to AGA if we lost our current stand-by unit. Even on Schedule 8 alone there is no clear advantage to the MTR solution.</p> <p>AGA has also demonstrated the commercial impact on its business in our Statement of Claim.</p>
<p>(j) Enabling operators of trains to utilise their assets efficiently</p>	<p>Requiring AGA to stable at Southend will clearly have a substantially greater impact on AGA than MTR's option of stabling at Gidea Park. Gidea Park is not a realistic option for AGA and is not a station served by AGA.</p> <p>AGA's unit being uncrewed would exaggerate this impact. MTR's unit being crewed means it can be put into service from Gidea Park without substantial delay.</p> <p>Substantial additional costs associated with this alternative stabling proposal for AGA would significantly adversely affect the efficient use of its spare. We would estimate MTR's comparative costs are much lower however MTR has never offered evidence of its costs to the dispute parties.</p>

7 NETWORK RAIL'S APPEAL

7.1 Network Rail argues that the TTP was wrong:

- (a) to rely upon condition D5.3.1(c) where Network Rail alleges that there are no exceptional circumstances, or where those exceptional circumstances were not expressly cited by the TTP;
- (b) in interpreting Network Rail's statement of case to include a request for the TTP to substitute its decision in place of Network Rail's.

7.2 AGA has set out above why we believe this appeal should be rejected in principle as it is irrelevant on the facts, sets no precedent and does not change the practical outcome of the TTP finding. However, even if Network Rail's arguments are considered in detail, it is clear that the TTP was entitled to make the findings and determination that it did.

7.3 TTP's reliance upon D5.3.1(c)

7.4 The TTP concluded that Network Rail's analysis of the Decision Criteria was flawed (see Determination 6.4.17, 6.5.3, 6.6.1). Network Rail has not appealed that finding. Network Rail's appeal is consequently confined to the TTP's further decision to substitute a specific finding for Network Rail's analysis i.e. to order that *"Network Rail shall withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and instead off the capacity to AGA for its Class 321 standby train"*.

7.5 It is clear that the TTP made this order because it considered Network Rail had asked it to do so. In such circumstances it is unacceptable for Network Rail to criticise the TTP for failing to explain in detail what exceptional circumstances it was relying upon.

7.6 In fact there is more than one way in which the TTP would be entitled to rely upon the request from Network Rail (and in our view it does not matter which one the TTP did rely upon). The TTP could properly conclude that Network Rail's request amounted to an agreement that

- (a) this case constituted exceptional circumstances; or
- (b) that Network Rail was content to accept the TTP's determination (which it would have to apply under Condition D5.6) and consequently did not require express consideration and analysis of the circumstances.

7.7 Either conclusion was available to the TTP:

- (a) where the party which is bound to comply with the determination expressly states that it does "not feel it is appropriate for the Panel to find error with Network Rail's processes" unless it also rules "on who should be allocated the capacity," the TTP is entitled to conclude that Network Rail considers this case raises exceptional circumstances sufficient for the purposes of Condition D5.3.1(c).
- (b) Equally, where the party which is bound to comply with the determination of the TTP requests confirmation of the outcome to be achieved, the TTP is obviously entitled to express that outcome.

7.8 Ultimately, the TTP was in any event entitled to conclude that this case amounted to exceptional circumstances. Where the infrastructure manager has expressly stated that in these circumstances it believes that the TTP must rule on who should be allocated the capacity, the TTP is entitled to conclude that the circumstances are exceptional. The TTP cannot leave an infrastructure manager to reach a conclusion which that infrastructure

manager has expressly stated it believes the TTP must rule on as that could result in substantial disruption to the process of timetabling.

- 7.9 It is not clear on what basis (particularly in light of Network Rail's request) Network Rail alleges that the lack of express analysis in the Determination of the exceptional circumstances renders the finding void. If the TTP was (as it was) able to make this finding then the terms of the written Determination alone cannot make the finding wrong.
- 7.10 Network Rail further argues that the TTP was unable to comply with Network Rail's own request for a ruling without raising its intention at the hearing and requesting submissions (this point is also raised in relation to the TTP's interpretation of Network Rail's submissions in paragraph 4.16 of its appeal). It is not clear what the basis for that argument is. All parties were aware of Network Rail's request at the hearing and no party objected. AGA has not objected to the finding and neither has MTR, despite their making an appeal. The TTP does not have to confirm a negative (i.e. that the parties do not object to a particular finding) and was entitled to proceed as requested.
- 7.11 For completeness we note that the TTP provided Network Rail (as requested) with the outcome to be achieved i.e. the award of the capacity to AGA. It did not seek to dictate to Network Rail all associated matters such as the consequent stabling and pathing, which it rightly left to Network Rail.

7.12 TTP's interpretation of Network Rail's Request

- 7.13 Network Rail also appears to assert that it did not mean what it said in its statement of case and that the TTP was required to confirm Network Rail's intentions (see Network Rail appeal paragraph 4.15).
- 7.14 It is unconvincing to argue that the TTP was obliged to check it could rely upon each point of the parties' submissions. There is no suggestion that Network Rail or any other party raised this point and therefore it is unsurprising that the TTP assumed it could rely upon Network Rail's submission in this respect.
- 7.15 At paragraphs 4.13 and 4.14 of its appeal, Network Rail appears to assert that its request the TTP "*rule on who should be allocated the capacity*" did not mean that it wanted the TTP to substitute Network Rail's finding on allocation for its own ruling on the point.
- 7.16 Instead Network Rail's appeal states that its intention was to:

"request that the Panel did not base its decision on [Network Rail's] application of the Decision Criteria, flawed or not. [Network Rail] wanted the Panel instead to focus on whether or not AGA had adequately demonstrated why it should have been awarded the capacity to stable at Platform 18."

AGA does not fully understand the meaning of this paragraph. The TTP was necessarily required to consider whether Network Rail's application of the Decision Criteria was flawed. If Network Rail wanted the Panel to focus on AGA's demonstration of its arguments it should have said so explicitly, rather than requesting that the TTP "*rule on who should be allocated the capacity.*"

- 7.17 Whatever Network Rail's intention may have been, the TTP was entitled to rely upon the words and submissions Network Rail actually made. AGA submits that it is clear a request to

"rule on who should be allocated the capacity," was just that, and that the TTP did proceed to rule on who should be allocated the capacity. It is therefore apparent that Network Rail's appeal on that point must fail.

8 DECISION SOUGHT

- 8.1 AGA requests that ORR rejects both appeals and confirms the findings of the TTP.
- 8.2 In the event that ORR is minded to give guidance in relation to the legal point raised by Network Rail (as apparently requested by Network Rail in its appeal at paragraph 4.8)², i.e. the use by TTPs in general on the power in Condition D5.3.1, AGA requests that ORR confirm the TTP's substantive findings in the Determination 6.1-6.6 and clarify the approach to be taken:
- (a) where Network Rail confirms to a TTP that it wishes the TTP to rule on who should be allocated the disputed capacity; and
 - (b) in general on the nature of exceptional circumstances as referred to in Condition D5.3.1.

We will be pleased to provide ORR with further information or respond to queries in relation to this matter as required.

Yours sincerely

Charlotte Bindley
Head of Train Planning

Cc Tony Skilton, ADC
Mike Clutton, LOROL
Jonathan James, MTR Crossrail
Nicole Ledwith and Sian Williams, Network Rail
Rob Plaskitt and Ian Williams, ORR

² For the avoidance of doubt, AGA is not requesting that ORR do so in this case as in our view, it is not necessary based upon these facts and Condition D5.3.1 is sufficiently clear.