



**Determination by the  
Office of Rail and Road:**

**Appeals made by MTR  
Corporation (Crossrail)  
Limited and Network  
Rail Infrastructure  
Limited pursuant to  
Part M of the Network  
Code against a  
Determination of the  
Timetabling Panel of  
the Access Disputes  
Committee dated  
17 August 2016**

24 October 2016

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## Summary

1. This determination by the Office of Rail and Road (“ORR”) concerns appeals made by MTR Corporation (Crossrail) Limited (“MTR”) and Network Rail Infrastructure Limited (“Network Rail”) (“the Appellants”) pursuant to Part M of the Network Code (“Part M”) against a determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 17 August 2016 (“the TTP Determination”).
2. The matters subject to appeal concern the Appellants’ dissatisfaction with the TTP Determination, which dealt with conflicting timetable bids from Abellio Greater Anglia (“AGA”) (“the Respondent”) and MTR to stable a stand-by train in platform 18 during the off-peak on weekdays at Liverpool Street Station. Following the application of the Decision Criteria set out in the Network Code, Network Rail allocated this capacity to MTR; AGA disputed this and notified the TTP. Subsequently the TTP determined Network Rail should withdraw its offer to MTR and instead offer the capacity to AGA.
3. MTR appealed this matter to ORR, challenging the TTP’s application of the Decision Criteria and the justification provided by the TTP to support its determination.
4. Network Rail also appealed paragraphs 6.7 and 7.1 of the determination, on the basis that the TTP was wrong and /or unjust in determining that capacity should be offered to AGA, because of serious procedural or other irregularities.

## Background

5. The Network Code<sup>1</sup> is a set of rules which is incorporated into, and forms part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
6. Part D sets out the process for revision of the timetable for the Network. Part M provides the process by which a party, dissatisfied with a decision of a Timetabling Panel in relation to a dispute arising under Part D of the Network Code, can appeal the matter to ORR.
7. AGA and MTR both submitted a bid to stable a stand-by train in Liverpool Street platform 18 during the off-peak period on weekdays, from December 2016, obliging Network Rail to make a decision using the Decision Criteria (Condition D4.6 of the Network Code).
8. Network Rail found in favour of MTR in the capacity allocation decision for the December 2016 timetable due to a high weighting it placed on Condition D4.6.2 (c) of the Network Code, “*maintaining and improving train service performance*”. Network Rail considered that the MTR crewed stand-by unit would deliver a significant performance benefit to MTR.
9. On 4 July 2016 AGA notified a dispute with Network Rail, in relation to Network Rail’s decision regarding the timetable for December 2016, brought under Condition D5.1 of the Network Code. It believed it had identified some significant errors and omissions in Network Rail’s “Decision Criteria Liverpool St Platform 18 Dec 16 AGA” document. On 13 July 2016 Network Rail informed the Secretary of the TTP that there was little likelihood of agreement being reached and that a TTP hearing would be necessary in order to resolve the matter.
10. In its statement of claim, AGA asked the TTP:

*“...to determine that Network Rail has not applied the Decision Criteria correctly, its assessment of the two bids received from MTR and AGA is inadequate and does not take into account AGA’s business-critical concerns (particularly in respect of detrimental customer impacts, performance and operational impacts and the imposition of unnecessary significant costs to AGA). Therefore AGA also asks the panel to direct Network Rail to withdraw its offer to MTR in respect of capacity at*

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<sup>1</sup> <http://www.networkrail.co.uk/browseDirectory.aspx?root=&dir=%5Cnetwork%20code>

*platform 18 Liverpool Street for a standby train and reinstate the offer of capacity at platform 18 Liverpool Street to AGA for its standby train.”<sup>2</sup>*

11. In its response to AGA’s statement of claim, Network Rail asked the TTP:

*“...to uphold our decision to offer Platform 18 to MTR to stable at London Liverpool Street between the peaks. 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. Network Rail is asking the panel that unless AGA have adequately demonstrated that they should have been awarded the capacity to stable in Platform 18 then Network Rail’s decision should remain.”<sup>3</sup>*

12. In MTR’s response to AGA’s statement of claim, it asked the TTP:

*“...to support the Network Rail decision that related to the provision of a MTR Crossrail stand-by train at London Liverpool Street, taking into account the additional information provided by MTR Crossrail is this document including the safety implications and taking into account Decision criteria (e), (i) and (j).”<sup>4</sup>*

13. The TTP heard dispute TTP985 on 5 August 2016 and issued the TTP Determination on 17 August 2016<sup>5</sup>.

14. The determination was as follows:

*“7.1 Having considered carefully the submissions and evidence, and based on my analysis of the legal and contractual issues, my determination is that Network Rail shall withdraw its offer to MTR in respect of capacity for a standby train at Liverpool Street Platform 18 and instead offer the capacity to AGA for its Class 321 standby train.”*

15. In the TTP Determination, the TTP Hearing Chair set out the analysis and consideration of the issues by the TTP as follows<sup>6</sup>:

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<sup>2</sup> Sole Reference Abellio Greater Anglia – Statement of Claim December 2016 – Timetabling Dispute TTP985, paragraph 6.1

<sup>3</sup> Defendant’s Response to a Sole Reference to a Timetabling Panel in accordance with the provision of Chapter H of the ADR Rules effective from 1 August 2010, December 2016 – Timetabling Dispute TTP985, paragraph 5.1.

<sup>4</sup> Dispute Party – MTR Crossrail, December 2016 Timetable Dispute: TTP985, paragraph 6.

<sup>5</sup> Determination of the Timetabling Panel of the Access Disputes Committee, 17 August 2016.

<sup>6</sup> Determination of the Timetabling Panel of the Access Disputes Committee, 17 August 2016, paragraphs 6.2 to 6.6.

- the TTP explored the relevance of AGA’s Class 317 unit stabled at Platform 1 at Liverpool Street to this Dispute but reached the view it did not need further consideration;
- the TTP considered Network Rail’s application of the Decision Criteria to assess how much confidence it could place in the way in which Network Rail had reached its decision. Network Rail clarified at the outset of the hearing that it regarded PPM as the only relevant criterion (Criterion 4.6.2 (c) of Part D);
- the TTP explored how Network Rail had applied Criterion 4.6.2 (c) and took into account evidence in its own weighing of the factor, including evidence relating to the alternative option offered to AGA (to stable at Southend Victoria) and the alternative options that emerged during the hearing;
- the TTP considered Criterion 4.6.2 (f) was also a relevant factor, which although taken into account by Network Rail, was given such a low weighting by Network Rail as to result in a flawed application of the Decision Criteria;
- the TTP considered Criterion 4.6.2 (j), noting that this was not considered applicable by Network Rail in reaching its decision.

16. In reaching its decision, the TTP concluded that Network Rail’s application of the Decision Criteria was flawed in that:

- Network Rail had failed to consider all the relevant criteria; and
- even within the criteria Network Rail applied, it had failed to consider all the relevant factors and to weight them correctly.

17. In deciding to exercise its power under Condition 6.3.1 (c) under Part D, whereby the TTP may substitute its decision for that of Network Rail, the TTP noted that:

*“6.7.1 Network Rail’s statement of case made it clear that it was seeking a ruling from the Panel, rather than having the question remitted back to Network Rail for reconsideration. The Panel therefore had to substitute its own application of the Decision Criteria for Network Rail’s flawed application.”<sup>7</sup>*

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<sup>7</sup> Determination of the Timetabling Panel of the Access Disputes Committee, 17 August 2016, paragraph 6.7.1

# The appeals

## ORR's handling of the appeals

18. On 23 August 2016, MTR gave notice that, in accordance with Condition 3.1.1 of Part M, it wished to challenge the TTP Determination, on the grounds that it did not agree with the TTP's application of the Decision Criteria or the justification provided to support its decision. This notice was served by e-mail on Network Rail and AGA on 25 August 2016.
19. On 23 August 2016, Network Rail gave notice, in accordance with Condition 3.1.1 of Part M, that it wished to challenge the TTP Determination but requested an extension to the timescales to serve its full notice of appeal. ORR considered that it would be appropriate to allow an extension in accordance with Condition 2.1.2(b) (i) of Part M and agreed that the notice of appeal should be served on ORR and the Respondent by 30 August 2016.
20. On 30 August 2016, Network Rail served a valid notice of appeal stating that it wished to appeal paragraphs 6.7 and 7.1 of the TTP Determination. This was on the grounds that these paragraphs were wrong and/or unjust due to a serious irregularity because the TTP substituted its own decision for that of Network Rail; Network Rail said the TTP did not have the power to do so, because there were no express and/or insufficient implied "exceptional circumstances" to do so. This notice was served by e-mail on MTR and AGA.
21. On 2 September 2016, ORR wrote to the Appellants and the Respondent to advise them that ORR was minded to hear the appeals. ORR notified the Dispute Parties that, in light of the fact that both MTR and Network Rail's appeals related to timetabling determination TTP985, we would consider both appeals together and intended to align the timescales of both processes.
22. ORR reminded AGA that, in accordance with Condition 5 of Part M, it had until 13 September 2016 to serve on the Appellants, ORR and the other Dispute Parties a notice stating that they opposed the appeal and, insofar as reasonably practicable, attach any evidence on which they wished to rely.
23. On 12 September 2016, AGA served notice on ORR and the Appellants that it opposed the appeal and set out its reasons.<sup>8</sup>

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<sup>8</sup> The Appeal Notices and AGA's Respondent's Notice are on [the Network Code section](#) of [www.orr.gov.uk](http://www.orr.gov.uk)

24. On 16 September 2016 ORR wrote to the Dispute Parties, asking two clarification questions of Network Rail and asking it to provide any further information it wanted us to consider by 20 September 2016. ORR advised the Dispute Parties that, on the basis of the information received at that point, both appeals would be limited to a review of the decision of the TTP, in accordance with Condition 7.1.1 of Part M.
25. On 20 September 2016 Network Rail wrote to ORR providing its response to ORR's clarification questions.
26. On 20 September 2016, MTR wrote to ORR with further representations in relation to its appeal of the TTP Determination<sup>9</sup>.

## MTR's grounds for appeal

27. MTR's notice of appeal dated 23 August 2016 stated that it did not agree with the application of the Decision Criteria or the justification provided by the TTP to support its decision<sup>10</sup>. In particular, it set out the following grounds of appeal:
  - The TTP failed to consider a number of issues sufficiently in determining that its decision "*provides a better opportunity for services to be maintained to provide the greatest benefit to passengers*"<sup>11</sup>;
  - The TTP failed to consider the impact of additional costs to be incurred by both operators. In particular, that AGA did not adequately demonstrate that it would incur additional costs if it could no longer stable a stand-by train at Liverpool Street, and that the TTP had not taken into account the additional costs MTR would incur if stabling at Gidea Park; and
  - The TTP did not adequately consider alternative options for stabling when applying the Decision Criteria. In particular, it did not consider the operational constraints of MTR stabling a stand-by train at Gidea Park, nor the possibility of AGA stabling its stand-by train at an alternative location.
28. MTR wrote to ORR on 20 September with supplementary evidence, in relation to its view of additional costs incurred by AGA and usage of the existing stand-by train, which it asked ORR to consider when reviewing the decision made by the TTP on 5 August 2016.

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<sup>9</sup> The notices of appeal, AGA's response and the Appellants further comments are found [here](#).

<sup>10</sup> Appeal made by MTR (Crossrail) Limited pursuant to Part M of the Network Code, dated 23 August 2016.

<sup>11</sup> Determination of the Timetabling Panel of the Access Disputes Committee, 17 August 2016, paragraph 6.7.2

## Network Rail's grounds for appeal

29. Network Rail's notice of appeal dated 30 August 2016 set out the following grounds<sup>12</sup>:

- The TTP Determination is wrong and/or unjust due to a serious irregularity because the TTP substituted its own decision for that of Network Rail, when the TTP did not have power to do so, because there were no express, and/or no or insufficient implied "exceptional circumstances" so as to give power and/or jurisdiction to the TTP under Condition 5.3.1 to do so;
- Condition 5.3.1 (c) of Part D should only be triggered in the required "exceptional circumstances" so as to ensure that Part D operates in the way in which it was intended, with a TTP only substituting its own decision for that of Network Rail in truly exceptional circumstances which are expressly laid out by a TTP in its Determination;
- the TTP Determination creates a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Network Code, in that Network Rail's decisions are more likely routinely to be challenged simply so that a TTP can be asked to substitute its own decision, rather than remitting the decision back to Network Rail;
- the TTP Determination is unjust due to a serious procedural irregularity because the TTP misinterpreted paragraph 5.1 of the Network Rail's statement of case to mean that Network Rail was asking the TTP to substitute its own decision for that of Network Rail, when Network Rail was not in fact asking the TTP to do so. The TTP therefore proceeded on a false premise. The TTP failed to check with Network Rail or with any of the other Dispute Parties what was being asked of it; and
- the TTP Determination is unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regard to Condition 5.3.1 (c) of Part D, in failing to set out the "exceptional circumstances" which it was said gave the TTP power to substitute its own decision for that of Network Rail.

## AGA's response to the appeals

30. In AGA's 12 September 2016 response, AGA disagreed with both Appellants' grounds. The reasons are set out further below.

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<sup>12</sup> Appeal made by Network Rail Infrastructure Limited pursuant to Part M of the Network Code, dated 30 August 2016, paragraphs 2.2.1 to 2.2.5

31. In its letter, AGA stated that:

*“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:*

- (c) a correct application of the Decision Criteria (as conducted by the TTP) would result in the capacity being granted to AGA anyway; and*
- (d) 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.”<sup>13</sup>*

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<sup>13</sup> Letter from Abellio Greater Anglia, dated 12 September 2016, paragraphs 1.3 and 1.4

## ORR's consideration of the appeals

32. ORR has carefully considered the issues involved in these appeals and in particular the submissions from the Appellants and the Respondent. ORR has first considered the procedural grounds raised by Network Rail before going on to consider the substantive grounds raised by MTR. ORR's consideration of the appeals is set out below.

### Network Rail's appeal

33. In relation to Network Rail's claim that the TTP was wrong and/or unjust to substitute its own decision for that of Network Rail, Condition 5.3.1 of Part D provides that:

*"In determining any appeal pursuant to this Part D, any Timetabling Panel...may exercise one or more of the following powers:*

- (a) it may give general directions to Network Rail specifying the result to be achieved but not the means by which it shall be achieved;*
- (b) it may direct that a challenged decision of Network Rail shall stand;*
- (c) it may substitute an alternative decision in place of a challenged decision of Network Rail;*

*provided that the power described in (c) above shall only be exercised in exceptional circumstances."*

34. The term "exceptional circumstances" is not defined in the Network Code. As such, ORR considers that what may constitute exceptional circumstances will turn on the facts of a particular case. It is for the TTP (or, as the case may be, ORR) to determine whether such exceptional circumstances exist. Turning to the particular circumstances of this case, it is clear that the TTP understood that Network Rail, in its statement of case, was seeking a ruling from the TTP, rather than having the question remitted back to Network Rail for reconsideration. As such, the TTP understood it had to substitute its own application of the Decision Criteria for Network Rail's flawed application<sup>14</sup>.

35. In reaching that understanding, the TTP took account of paragraph 5.1 in Network Rail's statement of claim, which stated:

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<sup>14</sup> Determination of the Timetabling Panel of the Access Disputes Committee, 17 August 2016, paragraph 6.7.1

*“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 capacity. Network Rail is asking the panel that unless AGA have adequately demonstrated that they should have been awarded the capacity to stable in Platform 18 then Network Rail’s decision should remain.”*

36. In its notice of appeal to ORR, Network Rail made representations that its intention in drafting this paragraph was to *“request that the Panel did not base its decision on the Appellant’s application of the Decision Criteria, flawed or not. The Appellant 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.”*<sup>15</sup>
37. In its letter of 20 September 2016, responding to ORR’s clarification questions, Network Rail went on to say that the statement at paragraph 5.1 of its statement of case was Network Rail’s attempt to ensure that, even if the TTP found fault with Network Rail’s application of the Decision Criteria it would not automatically result in the TTP finding that the outcome (i.e. awarding the capacity to MTR) was wrong. Rather, it wanted to ensure the TTP also considered the cases of both operators and in particular whether AGA had adequately demonstrated that it should have been awarded capacity.<sup>16</sup> However, it went on to say that even if the TTP had found against Network Rail, it was in fact asking the TTP to give directions *“to order Network Rail to reconsider the award of capacity at platform 18 at Liverpool Street and...reapply the Decision Criteria in a way which took into account any flaws found by the Panel in Network Rail’s original application of the Decision Criteria.”*<sup>17</sup>
38. By Network Rail’s own admission, the language of paragraph 5.1 in its statement of claim was not clear<sup>18</sup>. Network Rail has submitted that by failing to check with Network Rail what was being asked of it, the TTP proceeded on a false premise and in doing so, caused a serious procedural irregularity which means the TTP Determination is unjust.
39. Whilst ORR notes the representations made by Network Rail regarding its intentions in drafting paragraph 5.1, it is not satisfied that the TTP was wrong in interpreting the wording in Network Rail’s statement of case as it did. A plain English reading of paragraph 5.1 points to the conclusion that Network Rail was asking the TTP not only to determine whether there were errors in Network Rail’s processes but was also

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<sup>15</sup> Appeal made by Network Rail Infrastructure Limited pursuant to Part M of the Network Code, dated 30 August 2016, paragraph 4.14.

<sup>16</sup> Letter from Network Rail, dated 20 September 2016, paragraph 1.4.

<sup>17</sup> Letter from Network Rail, dated 20 September 2016, paragraph 1.7.

<sup>18</sup> Letter from Network Rail, dated 20 September 2016, paragraph 1.10.

seeking a “ruling” from the TTP on who should be awarded the capacity, but only if AGA had adequately demonstrated that they should have been awarded the capacity. Therefore, ORR considers that the TTP was reasonable in concluding that Network Rail was in fact asking the TTP to substitute its own decision for that of Network Rail’s. In light of the fact that the TTP was clear about what Network Rail was asking of it, ORR does not consider the TTP was required to check that point with Network Rail.

40. Network Rail’s second ground of appeal contends that because Condition 5.3.1 (c) should only be triggered in “exceptional circumstances” and to ensure it operates in the way intended, a TTP may only substitute its own decision for that of Network Rail in truly exceptional circumstances which are expressly laid out by a TTP in its determination. It is evident from the reasoning set out in the TTP Determination, that the TTP placed great weight on Network Rail’s request that the TTP substitute its own decision for that of Network Rail. As such, ORR is satisfied that the TTP considered this amounted to the exceptional circumstances required to be able to exercise the power in Condition 5.3.1 (c).
41. Network Rail also made representations that the TTP Determination was unjust due to a serious procedural irregularity because the Hearing Chair failed to record his decisions and conclusions reached with regarding to Condition 5.3.1 (c) in failing to make express reference as to why there were exceptional circumstances in this particular case. ORR acknowledges that, as a matter of good practice, where a TTP decides to exercise the power set out in Condition 5.3.1 (c) of Part D, it would be helpful to include clear language explaining what the exceptional circumstances are in any particular case. Notwithstanding this, ORR is satisfied that the TTP Determination sets out a clear record of the exceptional circumstances relied on in this case, namely Network Rail’s request in its statement of claim for the TTP to substitute its decision for that of Network Rail. Although the TTP did not use the term “exceptional circumstances” in the TTP Determination, ORR considers that sufficient reasoning was included by the TTP to justify the exercise of the power set out in Condition 5.3.1 (c).
42. ORR has considered Network Rail’s representations that the TTP Determination will create a precedent which is likely to have a significant detrimental impact on the operation of Part D of the Network Code, in that Network Rail’s decisions are more likely to be challenged simply so that a TTP can be asked to substitute its own decision, rather than remitting the decision back to Network Rail. ORR is not persuaded that the TTP Determination will set such a precedent. It is clear from paragraph 6.7.1 of the TTP Determination, that the TTP placed great weight on Network Rail’s request for it to substitute its decision with that of the TTP.

Although the Respondent also made the same request in its statement of claim,<sup>19</sup> the TTP has not relied upon this in recording its decision. As such, ORR considers that any precedent arising from this matter, is within Network Rail's control. Where it does not intend the TTP to exercise the power in Condition 5.3.1 (c), it should say so clearly in its statement of case.

43. Furthermore, ORR has considered Network Rail's request for guidance on the triggering of exceptional circumstances in relation to Condition 5.3.1 (c) of the Network Code. ORR considers there is discretion on the part of both the TTP and ORR to determine what may constitute exceptional circumstances in a particular case, and therefore it is not appropriate for ORR to give guidance.

## MTR's appeal

44. In relation to MTR's grounds of dispute concerning the TTP's application of the Decision Criteria, Condition 4.6 of Part D sets out the Decision Criteria that Network Rail is required to consider when it decides any matter falling within Part D. In its Determination, the TTP decided that Network Rail's initial application of the Decision Criteria was flawed and therefore undertook its own application of the Decision Criteria. MTR does not agree with either the application of the Decision Criteria by the TTP or the justification provided to support its decision.
45. Taking each point in turn, MTR has made representations that, in determining that its decision 'provides a better opportunity for services to be maintained to provide the greatest benefit to passengers', the TTP did not adequately consider the issues sufficiently. MTR said that the TTP failed to recognise the different requirements of AGA as a longer-distance operator and MTR as a high-frequency metro operator. In doing so, MTR contends that the TTP "*gave greater weight to longer-distance journeys (i.e. to Braintree) than shorter distance 'metro' type journeys*"<sup>20</sup>. In addition, it says that provision of a crewed train provides a greater opportunity to recover late running train services that have not been taken into account by the TTP.
46. ORR is satisfied that in reaching its conclusion that AGA should be permitted to stable its Class 321 in platform 18, the TTP gave sufficient consideration to the issues raised by the parties in relation to the potential uses of the stand-by units and the benefits to passengers arising as a result, as set out in paragraph 6.4 of its Determination. ORR considers that the TTP has provided sufficient justification for its

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<sup>19</sup> Sole Reference Abellio Greater Anglia – Statement of Claim December 2016 – Timetabling Dispute TTP985, paragraph 6.1

<sup>20</sup> Appeal made by MTR (Crossrail) Limited pursuant to Part M of the Network Code, dated 23 August 2016, point 1.

application of the Decision Criteria and has appropriately applied its discretion in determining the weighting to be applied to these factors.

47. MTR has made representations that AGA failed to adequately demonstrate that they will incur additional costs if they can no longer stable a stand-by train at Liverpool Street. Further, MTR states that the TTP failed to take into consideration the additional costs that MTR would incur if it were to stable a stand-by train at Gidea Park instead of Liverpool Street.
48. ORR is satisfied that the TTP undertook a robust analysis of the costs put forward by AGA. ORR notes that MTR, in its statement of claim, did not submit any information regarding the additional costs that would be incurred by MTR. It is for the Appellant and Respondent to ensure they put before the TTP (or ORR as the case may be) all information that it wishes to have taken into account. As such, ORR considers it was reasonable of the TTP to reach its decision on the basis of the information before it.
49. MTR has made representations that the TTP erred in suggesting that stabling a train at Gidea Park could potentially be more beneficial to MTR than if it were stabled at Liverpool Street, in that it failed to adequately consider the alternative options when applying the Decision Criteria. ORR is satisfied that the TTP has set out adequate reasoning and justification in its determination for reaching such a conclusion. ORR also notes that the TTP was not recommending stabling at Gidea Park but was simply suggesting it might be an option.
50. In its letter of 20 September 2016, MTR supplied supplementary evidence to ORR, which it asked us to consider in reviewing the TTP's decision. As set out in the email to the parties on 16 September 2016, ORR's role is limited to a review of the TPP's determination and is not a rehearing of the matter. The information supplied by MTR on 20 September was not information that was available to the TTP when it heard the matter on 5 August. As such ORR does not consider it is relevant to its review of the determination reached by the TTP.
51. Nevertheless, we observe that such supplementary information could be useful to Network Rail when it comes to develop future timetables and to optimise use of platform capacity at Liverpool Street.

## ORR Conclusions

52. In light of the considerations above, ORR determines in relation to each ground of Network Rail's appeal that the TTP Determination:
- is not wrong and/or unjust due to a serious procedural irregularity and that the TTP was entitled, under Condition 5.3.1 (c) of the Code, to substitute its own decision for that of Network Rail as it considered there to be sufficient "exceptional circumstances" giving it the power to do so;
  - does not create a precedent which will have a significant detrimental impact on the operation of Part D of the Code;
  - is not unjust due to serious procedural irregularity and the TTP did not proceed on a false premise, but instead it followed a reasonable interpretation of what Network Rail had asked it to do; and
  - is not unjust due to a serious procedural irregularity and that the Hearing Chair did record his decisions and conclusions with regard to Condition 5.3.1 (c) of the Code, by recording the significance attached to Network Rail's request for the TTP to substitute its own decision for that of Network Rail.
53. ORR determines that it is not appropriate to strike out paragraphs 6.7 and 7.1 of the TTP Determination on these grounds and therefore the TTP Determination stands.
54. ORR determines in relation to each ground of MTR's appeal as follows:
- that the TTP, in its application of the Decision Criteria, gave sufficient consideration to each of the factors outlined in the TTP Determination;
  - the weight to be attached to each Decision Criteria was a matter within the discretion of the TTP and that it properly exercised its discretion; and
  - the TTP has provided sufficient justification to support its decision.
55. ORR determines that the TTP discharged its obligations appropriately and does not agree it is appropriate to strike out the TTP Determination on these grounds.



John Larkinson

Director, Railway Markets and Economics

24 October 2016