



The PPP Arbiter

Procedural Approach to Periodic Review

2 March 2009

Role and approach of the Arbiter

The role of PPP Arbiter was created by the Greater London Authority Act 1999 (the GLA Act) to give guidance or directions on matters relating to the London Underground PPP Agreements. Although appointed by the Secretary of State for Transport, the Arbiter is independent of Government and of the Parties to the PPP Agreements.

In giving guidance or directions, the Arbiter is under a statutory duty to act in the way he considers best calculated to achieve four objectives:

- to ensure that London Underground has the opportunity to revise its requirements under the PPP Agreements if the proper price exceeds the resources available;
- to promote efficiency and economy in the provision, construction, renewal, or improvement and maintenance of the railway infrastructure;
- to ensure that if a rate of return is incorporated in a PPP Agreement, and taking into account matters specified in the Agreement, a company which is efficient and economic in its performance of the requirements in that PPP Agreement would earn that return; and
- to enable the Infracos to plan the future performance of the PPP Agreements with reasonable certainty.

The Arbiter is also under a duty to take account of any factors which are notified to him by both Parties to an Agreement, or are specified in the relevant PPP Agreement, as ones to which he must have regard.

Following consultation, the Arbiter has adopted the following aim for his work, and that of his Office:

The aim of the PPP Arbiter and his Office is to give sound and timely guidance and directions on relevant aspects of the PPP Agreements when this is requested, and to work constructively with the Parties to the PPP Agreements in support of their key objective of providing to the public a modern and reliable metro service in a safe, efficient and economic manner.

We seek to achieve this by:

- *working within a clear, transparent and consistent framework;*
- *giving reasoned guidance and directions which are based on well developed analysis shared with the Parties and procedures which achieve predictability in process and outcome;*
- *establishing effective dialogue with the PPP Parties and other stakeholders to facilitate timely response to requests for guidance or direction, while maintaining our independence; and*
- *operating to high standards of accountability in all our actions.*

Further information on the functions, duties and approach of the Arbiter can be found on the Arbiter's website <http://www.ppparbiter.org.uk>.

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1 Introduction

- 1.1 The Arbiter has produced a Framework¹ for use in the giving of directions and guidance to the PPP Parties. This Procedural Approach document should be read in conjunction with that Framework to which it cross refers.
- 1.2 This document sets out the procedures which the Arbiter is minded to follow in the circumstances of a request or requests for guidance or direction in respect of Periodic Review. It also details the preparatory analysis the Arbiter intends to undertake in anticipation of a Periodic Review related reference.
- 1.3 The definitions and expressions used in this Procedural Approach document are taken from the Framework and/or the Master Definitions Agreement dated 31 December 2002 and made between (1) London Underground Limited (2) Infraco BCV Limited (3) Infraco Sub-Surface Limited and (4) Infraco JNP Limited.
- 1.4 This document should be read alongside the Arbiter's Analytical Approach to Periodic Review which is published separately². That document describes how information provided to the Arbiter as part of a reference would be analysed and how existing data held by the Arbiter would be used.
- 1.5 This document has been prepared following consultation with the PPP Parties over the period since February 2007. In particular it has been revised following issue of the Arbiter's 'Initial Ranges' guidance³.

¹ Arbiter's Procedural Framework for Use in the Giving of Directions and Guidance under the Greater London Authority Act 1999 and PPP Agreements, 4 June 2007, at http://www.ppparbiter.org.uk/files/uploads/g_proceduralFrameWork/2007651842_Procedural%20Framework.%20June%202007.PDF.

² Arbiter's Analytical Approach to Periodic Review, 2 March 2009 at <http://www.ppparbiter.org.uk/output/page25.asp?DocTypeID=10>.

³ Reference for guidance from London Underground Ltd: (i) Initial range of costs for the second Review Period; (ii) The Arbiter's assumptions as to the level of performance of a Notional Infraco during the second Review Period; (iii) The treatment of performance revenues of a Notional Infraco given the contract drafting in paragraph 7.3 of Schedule 1.9 of the PPP Contract, 9 September 2008, at http://www.ppparbiter.org.uk/files/uploads/n_guidance/200898151549_Initial_RangesGuidance.PDF.

2 Background

- 2.1 This document is based on the contractual provisions in respect of Periodic Review in Tube Lines' PPP Agreement. It is the Arbiter's understanding that, following the transfer of both Metronet Infracos into TfL ownership, these companies will agree other arrangements with London Underground for their Periodic Reviews which will not involve the Arbiter. However the principles set out could equally apply to any Infraco.
- 2.2 Para 1.1 of Schedule 1.9 of the PPP Agreement sets out the full list of topics agreed by the PPP Parties for possible direction or guidance from the Arbiter at Periodic Review or otherwise under s229 or s230 respectively of the GLA Act.
- 2.3 Notwithstanding the agreed jurisdiction set out in para 1.1, s230 of the GLA Act does not seek to restrict the list of items on which guidance may be sought.
- 2.4 The topics on which directions may be sought is restricted by contract and statute to the following:
- Para 1.2 – Form and Structure
 - Para 1.3 – Base finance, risk and eligible finance
 - Para 1.3A – Eligible and Base Equity Options
 - Para 1.4 – Financing Impossibility
 - Para 1.4A – Required Finance
 - Para 1.5 – ISC Requirements
 - Para 1.6 – Equity Rate of Return
 - Para 1.7 – Prior Net Adverse Effect
 - Para 1.8 – Interim ISC.
- 2.5 The Arbiter's expectation of those topics that are most likely to be the cause of a reference for directions fall into the following categories:
- Form and Structure (para 1.2);
 - Change in Risk (para 1.3);
 - Costs (para 1.5);
 - Financing (para 1.4A); and
 - Interim Infrastructure Service Charge (ISC) (para 1.8).
- Relevant extracts from the PPP Agreement for Tube Lines are at Annex 1 to this document.
- 2.6 Under s231 of GLA Act the Arbiter is under a statutory duty to 'act in the way he considers best calculated to achieve' four objectives:
- to ensure that London Underground has the opportunity to revise its requirements under the PPP Agreements if the proper price exceeds the resources available;

- to promote efficiency and economy in the provision, construction, renewal, or improvement and maintenance of the railway infrastructure;
 - to ensure that if a rate of return is incorporated in a PPP Agreement, a company which is efficient and economic in its performance of the requirements in that PPP Agreement would earn that return; and
 - to enable the Infracos to plan the future performance of the PPP Agreements with reasonable certainty.
- 2.7 All of these duties may be relevant at Periodic Review. Hence the Arbiter considers it very important that a clear Procedural and Analytical Approach is understood by the PPP Parties in respect of each of these types of reference.
- 2.8 The Arbiter considers that it is in all Parties' and Stakeholders' interests for the Periodic Review to be satisfactorily concluded by the Review Date, as the implications for a Periodic Review extending beyond the Review Date are likely to disrupt the efficient and economic operation and maintenance of the Underground Network, as well as delaying the implementation of changes to the required outputs.

3 Timetabling issues

3.1 The contractual timetable for Tube Lines is set out in its PPP Agreement and is summarised below:

Reference point	Contractual/ actual date	Activity
At least 18 months before the Review Date	By 31 Dec 2008 (actual date 8 Dec 2008)	London Underground to set out Restated Terms and its Affordability Constraints (including the profile for payments for the ISC)
At least 12 months before the Review Date	By 30 Jun 2009	Tube Lines to respond on: <ul style="list-style-type: none"> • whether a Notional Infraco would be incapable of financing the Restated Terms; • whether the Restated Terms are outside of the limitations set out in para 2.2 of Schedule 1.9; • whether a Notional Infraco would require Base Finance (new money for old obligations); • whether the new or varied obligations in the Restated Terms involve an increase in risk for Infraco and/or the need for Eligible Debt and/or Eligible Equity for a Notional Infraco (new money for new obligations); and • the ISC required
First Review Date	30 Jun 2010 ⁴	Periodic Review to be completed

3.2 In the event that the Review is not complete by 30 June 2010, the PPP Agreement states⁵ that the contract shall (apart from any direction about interim ISC pursuant to para 1.8) continue in accordance with its existing terms until the latest of:

- the Review Date;
- the start of the first Payment Period in respect of which the level of ISC as agreed between the parties or directed by the Statutory Arbiter is payable; or
- the procurement of the Required Finance.

⁴ Being the date which is "7½ years following the Transfer Date" which was 31 December 2002.

⁵ See para 5.6 of Schedule 1.9.

Further provisions establish a longstop date some six and potentially twelve months after the Review Date for the procurement of finance to be finalised.

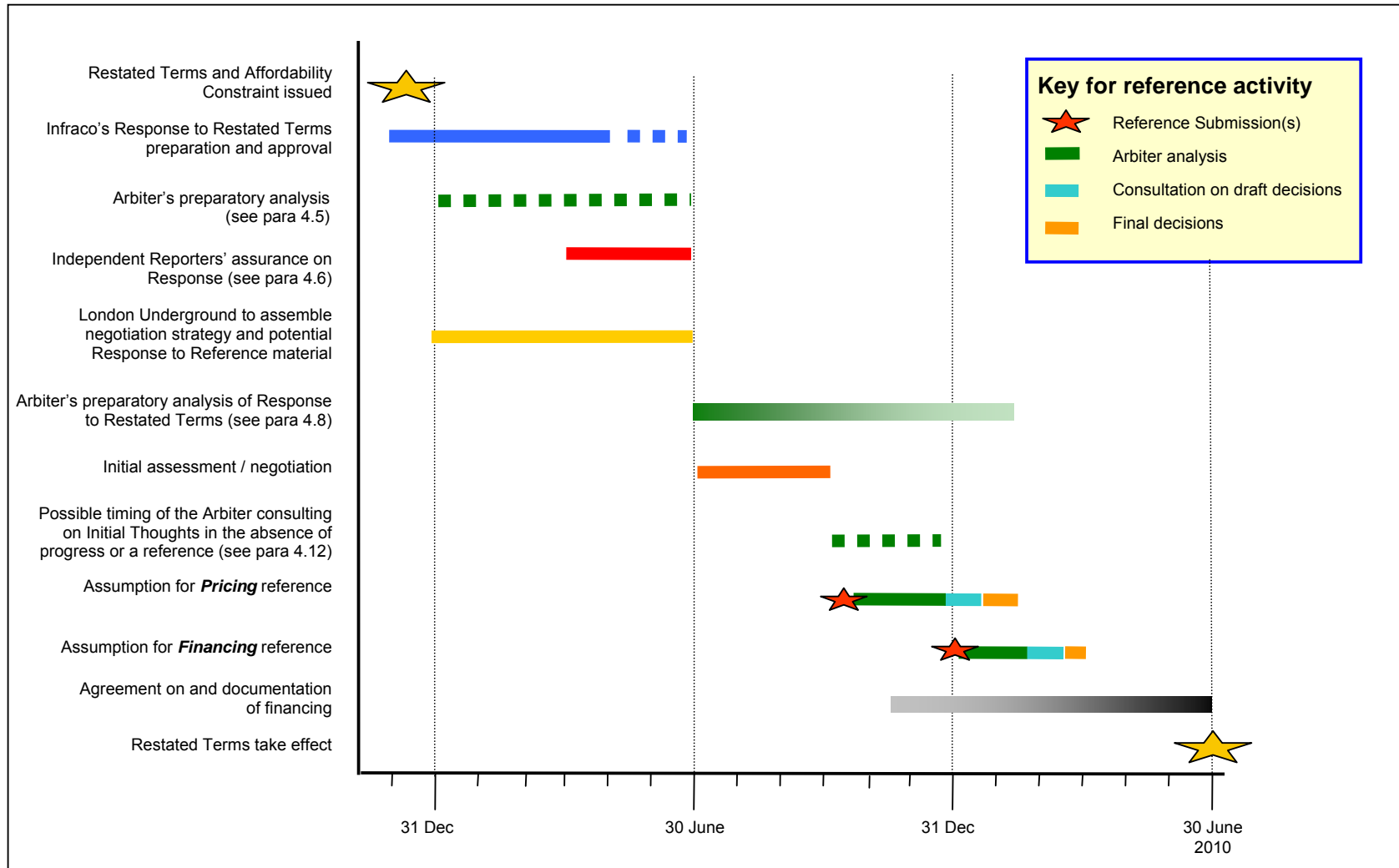
- 3.3 In such circumstances the Arbiter may be asked to give directions on an Interim ISC sufficient to enable a Notional Infraco to perform its existing obligations. He would expect to receive representations at the time on the factors he should take in to account (including a Notional Infraco’s financing requirements) in making such a direction.
- 3.4 When considering any timetable that might apply in a Periodic Review related reference, the Arbiter has considered the likely duration for the types of reference described in paragraph 2.5 above, split between three phases of work:
- analysis: the time period for the Arbiter, his Office and Advisers to consider the submissions from each Reference Party and to develop draft guidance or directions;
 - consultation: the time period between the issue of draft guidance or direction to the Reference Parties (and other relevant Stakeholders as appropriate) and the date for representations on those drafts; and
 - final decision: the time period for the Arbiter, his Office and Advisers to consider representations received and to prepare final guidance or directions as appropriate.

Nature of reference	Anticipated Reference duration (months)			
	Analysis	Consultation	Final decision	Total
Form and Structure	≤ 1	≤ 1	½	2
Change in Risk	2	1	½	3½
Costs	4 - 6	1	1	6 - 8
Financing	2	1	½	3½
Interim ISC	≤ 1	¼	¼	1½

- 3.5 The indicative times set out in the table in paragraph 3.4 above start from the receipt of submissions, and assume no prior involvement of the Arbiter in reviewing submissions. Section 4 of this document indicates how the timescales might be reduced if the Arbiter undertakes preparatory work in advance of a reference being made.
- 3.6 When considering the overall timetable for Periodic Review described further below, the Arbiter has made the following assumptions about the most plausible elapsed times for preparation of those submissions:

	Preparation time for submissions (months)	
	London Underground	Tube Lines
Form and Structure	½	½
Change in Risk	2	2
Costs (from the point that Restated Terms are made available)	As appropriate in the circumstances	6
Financing	2	2
Interim ISC	½	½

- 3.7 Tube Lines could require some element of new financing for the second Review Period. In that event, a period of time would be needed following agreement between the Parties or following a direction on the relevant costs and resultant ISC for the next Review Period to allow for documentation and closure of any required finance (including standby and other working capital facilities); in the Arbitrator's view, this could be at least six months. This implies that agreement on costs and ISC (reflecting shared assumptions for the servicing of any Required Finance) for the second Review Period is required by December 2009 at the latest.
- 3.8 In order to increase the likelihood of achieving this timetable, and to reduce the timescales for a reference set out in paragraph 3.4, the Arbitrator intends to 'shadow' the contractual negotiations between London Underground and Tube Lines in order to prepare for a reference. The nature of this preparation is described further in section 4.
- 3.9 Figure 1 illustrates both the contractual process for Periodic Review and the periods in which the Arbitrator proposes to undertake his own analysis to prepare for a reference.



4 Preparatory analysis

4.1 Section 232 of the GLA Act⁶ gives the Arbiter powers to prepare for giving guidance or directions, even where a reference has not been made. For the reasons set out in the previous section, the Arbiter considers that he should undertake work during 2009 to prepare for a Periodic Review reference. This will build on the work undertaken as part of the Initial Ranges guidance.

Nature of preparation

4.2 The Arbiter envisages that his preparation for a Periodic Review reference may involve:

- requesting and gathering background information which would assist in the event that a reference was made to him;
- putting questions to the PPP Parties in relation to the background information to the extent that it is necessary for the Arbiter to understand the background information;
- collating all information in any manner he sees fit;
- consulting third party experts;
- consulting the PPP Parties on the questions to be posed to such experts;
- asking the PPP Parties to submit views in writing on particular issues;
- forming (but not expressing) preliminary views; and
- consulting more widely, as envisaged by the GLA Act, as the Arbiter considers appropriate.

4.3 When gathering any such preparatory information from the PPP Parties Arbiter will be mindful of the resources required in providing that information given the need to prepare the Response to Restated Terms and other material for the Periodic Review process.

4.4 The Arbiter may also wish to consult on aspects of his preliminary analysis in advance of a request for guidance or directions. Such consultation may be with the Parties only, but may also involve wider consultation as envisaged in the GLA Act. Such consultation might, for example to seek comments on:

- the process that the Arbiter has applied in his preliminary analysis;
- the information and benchmarking data that he has applied;
- the robustness of the resulting output; and
- further work required before guidance or directions could be given.

4.5 In the period to June 2009, in advance of Tube Lines' Response to Restated Terms, the Arbiter anticipates that his work will focus on three areas:

⁶ See Annex 2 for the relevant sections of the GLA Act

- further development of existing benchmarking work including more detailed efficiency analysis;
 - exploration of areas of known contention between the Parties such that the Arbiter can develop his own knowledge and is better able to review any submissions made to him; and
 - the Arbiter's Reporters' analysis of the basis of preparation of the Response.
- 4.6 The Arbiter will discuss with the Parties the scope and timing of the Reporters' work but expects the Infracore to facilitate the Reporters being able to produce a report that provides assurance on the Response broadly coincident with that Response being provided to London Underground and copied to the Arbiter.
- 4.7 Following submission of the Response to Restated Terms, the Arbiter anticipates that the Parties will seek to agree costs and ISC for the second Review Period. His current understanding is that a reference is unlikely to be made before September 2009 at the earliest.
- 4.8 Given the constraints on the timetable discussed in section 3, the Arbiter will undertake his own analysis of the Response to Restated Terms as if a reference had been made, but without seeking further clarification from the Parties in advance of a reference.
- 4.9 In addition to undertaking his own analysis of the Response to Restated Terms the Arbiter considers that it would be beneficial if there was also a submission from London Underground provided at the same time. Such a submission could draw on material that London Underground will have used in setting the Affordability Constraints and developing Restated Terms which, the Arbiter assumes, will form the basis of London Underground's negotiating position. Any numerical data in such a submission should be in DBS format. Subject to any persuasive representation by London Underground on grounds for confidentiality, the Arbiter would expect to treat any such submission in accordance with the principles set out in paragraph 2.10 of the Procedural Framework dated 4 June 2007.
- 4.10 The Arbiter does not currently envisage making analysis undertaken in the period to June 2009 available to the Parties. However, the Arbiter reserves the right to consult on the outcome of his further analysis, taking account of Tube Lines' Response to Restated Terms and any submission to him from London Underground, if substantive progress is not being made in agreeing revised terms by October 2009, as described in paragraph 4.12 below.
- 4.11 Given this preparatory analysis, the Arbiter anticipates that he may be in a position to give draft directions on costs within two to three months of a reference (rather than the four to six months indicated in paragraph 3.4), provided that any Submissions made with such a reference are sufficiently consistent with the information provided at the Response to Restated Terms stage such that the preparatory analysis remains valid.

- 4.12 If by October 2009 it becomes apparent to the Arbiter that the Parties have not agreed terms and there is a risk that terms will not be agreed in a timely fashion, the Arbiter will consider and consult with the Parties as to whether, in the interests of finalising the review by the Review Date, he should consult on his analysis to date in the form of an Initial Thoughts consultation paper and in particular whether such a consultation would assist the Parties in settling outstanding points in their negotiations.
- 4.13 In addition to the Arbiter-led preparation described above, the Arbiter also sees some merit in the PPP Parties seeking to shadow run those elements of the Restated Terms that are appropriate (for example shadow running, in the later part of the current Review Period, those elements of the performance regime that are to be amended alongside the current contractual measures).

5 Information requirements

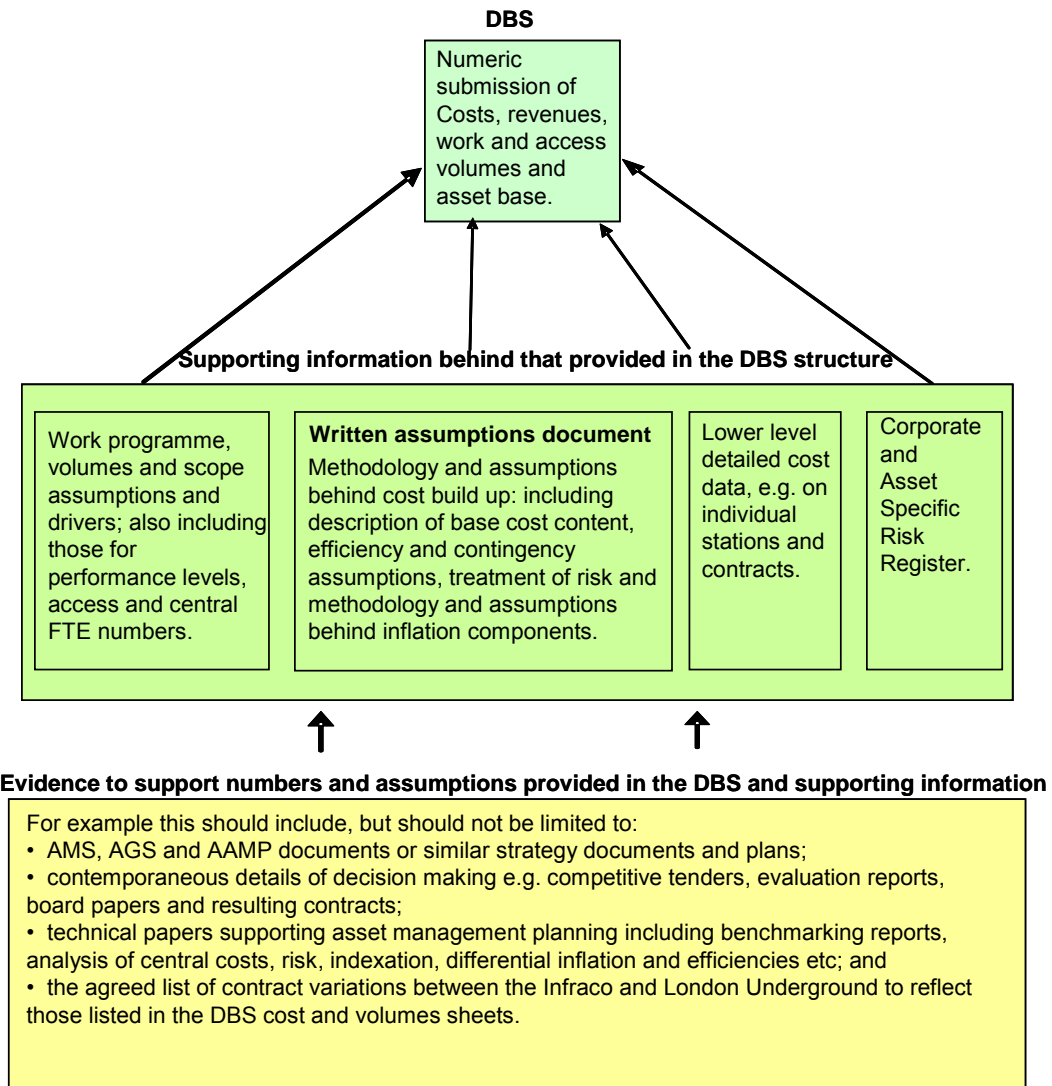
General principles

- 5.1 In order to bring a standardised format to the cost based data required and a shared understanding of the level of disaggregation required, the Arbiter has developed with the PPP Parties a Data Breakdown Structure (DBS) to capture cost and volume based data. The Arbiter requires both Parties to provide numeric data to him using the format set out in Version 7.1 of the DBS.
- 5.2 To support numeric submissions made by either Party, the Arbiter will expect supporting evidence to be provided in a form that is consistent and can be read across to the numeric data provided in the DBS.
- 5.3 In the case of Tube Lines', the Arbiter expects this supporting information to include:
- a statement of strategy and objectives for the Infraco as a whole, together with a description of how this overall strategy applies both to the various asset groups and to administration costs;
 - plans for each asset group containing data which clearly demonstrates consistency with the strategy objectives, and sets out the assumptions for asset management planning and proposed implementation plans, including justification for the approach proposed, volume of work proposed and the basis of cost estimates;
 - evidence to show that base costs, central costs and overheads are efficient and economic;
 - evidence of the basis for future assumptions, including technical papers supporting those assumptions, in a form which allows trends in performance, delivery and costs to be compared both between Infracos and over time on a consistent basis;
 - a description of the Infraco's approach to efficiencies including any comparisons with external benchmarks of cost and performance used by the Infraco to support its numeric submission;
 - where the Infraco strategy requires significant investment, contemporaneous evidence of the decision making process should be provided e.g. details of significant competitive tenders including tender evaluation documents and papers making recommendations to the Infraco Board;
 - details of sub contracting and procurement approaches including the treatment of inflation and risk sharing with sub contractors;
 - details of risk processes and resulting risk provisions that are incorporated into costs including the provision of risk registers. Supporting evidence may include reports produced by the Lenders' Technical Adviser;
 - the Infraco's indexation and differential inflation assumptions and technical papers that support these; and

- its financial model.

In certain areas these expectations are described further in the Arbiter's Analytical Approach to Periodic Review.

- 5.4 Any submission by London Underground provided contemporaneously to the Response to Restated Terms or any Submission in respect of a reference should reflect this requirement for supporting information to the extent relevant. This might include London Underground's financial modelling used to derive the Affordability Constraints.
- 5.5 The substantive submission from Tube Lines should therefore be structured broadly as depicted below:



Information Requirement

- 5.6 The Arbiter considers that it is important that an Information Requirement⁷, which is common to London Underground, Tube Lines and the Arbiter, is established to support the Periodic Review process. In the context of the Periodic Review, this required information includes items that the Arbiter expects the Parties to produce and share with him in the absence of a reference. This will facilitate the Arbiter's preparation for a reference.
- 5.7 The Arbiter will require Tube Lines to provide to him its Response to Restated Terms at the same time as this is submitted to London Underground. He would expect the Response to Restated Terms, and supporting documents, to include all the information identified above.
- 5.8 Although the supporting information may not necessarily include a suite of AGS and AAMP documents, the relevant material should be provided in a form consistent with them and talking on board comments from the Reporters in their most recent reviews of these documents. The Arbiter anticipates that this supporting information will include transparent assumptions in relation to work programmes, procurement arrangements, access/closures, risk and efficiency amounts and that this documentary evidence will be provided in a form that allows easy read across to the data provided in the DBS.
- 5.9 It is important that all Parties have confidence in the robustness of the content of the information provided. To provide the Arbiter with this confidence, he will commission a review of the basis of preparation of the Response to Restated Terms from the Reporters and may also commission independent reviews of other analysis provided by the Parties to support his preparation for a reference.
- 5.10 In relation to London Underground, in addition to any contemporaneous submission, the Arbiter expects ongoing access to the contractual data contained within KMS and Restate KMS, and the Periodic Review data room on the same basis that access is provided to Infracore.
- 5.11 Where the Arbiter requires additional information following a reference from the Information Requirement set out above, he will, wherever practicable, consult with the Parties on his requirements.

⁷ In the context of the Procedural Framework this Information Requirement is both the Minimum Information Requirement and Detailed Information Requirement reflecting the specific nature of a Periodic Review reference.

6 Procedures

- 6.1 The Arbiter's Procedural Framework envisages that his formal procedures commence when a reference is being actively considered by one or both of the Parties to a PPP Agreement. In the case of Periodic Review, he considers that he should prepare for a reference whether or not one is in prospect, given the timetable constraints considered in the previous sections and the need to give timely and robust directions if a reference is in the event made. Such preparatory activity is clearly anticipated in the GLA Act, and the Arbiter has powers which include consultation and doing "such other things as he considers necessary or expedient" to prepare for a reference⁸.
- 6.2 The Arbiter will therefore, in respect of Periodic Review, add another stage to his procedures. This stage follows the issue of Restated Terms, and will extend up to the point that a reference is made. It will, in particular, take account of information in Tube Lines' Response to Restated Terms, which the Arbiter will require to be submitted to him at the same time as it is provided under the terms of the contract to London Underground as well as any contemporaneous submission made by London Underground. Given this requirement, the Arbiter sees no need to distinguish between Initial and Detailed Submissions for a reference. Therefore only one submission (and corresponding Response to Reference) will be required to be submitted by each Reference Party, at the time a reference is made.
- 6.3 The format for the Response to Reference and any contemporaneous submission by London Underground, based around the Arbiter's required Data Breakdown Structure (DBS) has been established in discussion between Tube Lines, London Underground and the Arbiter, in the light of the review of the most recent Annual Asset Management Plans by the Reporters appointed by the Arbiter. Information requirements are discussed further in section 5.
- 6.4 Each Reference Party will, in accordance with Article 5 of the Procedural Framework, have the opportunity to provide to the Arbiter its views on the submission of the other Reference Party. The time allowed for this may be short, and will be set out in the timetable established by the Arbiter under Article 6 of the Procedural Framework.
- 6.5 Consistent with other procedural approaches, the approach which the Arbiter is minded to follow in any Periodic Review specific reference is therefore as follows:
- (i) **Prior warning:** the Arbiter would consider it helpful if a PPP Party or PPP Parties gave advance warning if it or they intended to seek guidance or direction in respect of Periodic Review.
 - (ii) **Reference:** any Reference should be in the form prescribed in the Framework (see Article 4 and the Reference Template set out in Appendix One to the Framework).

⁸ GLA Act, section 232.

- (iii) **Responding Party:** on the assumption that a reference is made by only one of the Parties, the Arbiter will allow the other Party to submit a Response to Reference (see Article 5 and the Response to Reference Template set out in Appendix Two to the Framework). However, in light of the timing constraints described in section 3 above, and the involvement of the Parties in negotiation on the Response to Restated Terms, the Arbiter may allow a shorter period for submission than the 30 days referred to in Article 5.3, and in circumstances where the Reference is submitted more than 30 days after the Response to Restated Terms has been received may require that any such Response to Reference be submitted at the time the reference is made. The Responding Party will have the opportunity to seek clarifications from the Arbiter during the reference analysis phase and will have the opportunity to make representations on any draft directions.
 - (iv) **Submission Requirements:** see section 5.
 - (v) **Post-reference meeting, Timetable and initial indication of form of direction or guidance:** having received the Reference and Submission, the Arbiter will usually convene a post-reference meeting (see Article 3) at which he would confirm (or as soon as possible thereafter) the manner he proposes to use the Framework. At or soon after that post-reference meeting the Arbiter will set the Timetable (see Article 6). At this stage he may also set out his requirements for any further submissions (if any).
 - (vi) **Draft guidance or directions:** the Arbiter's intention is to provide, once his analysis is complete, draft guidance or directions to the Reference Parties who are to be provided the opportunity to comment on the draft before the guidance or directions are finalised (see Article 10). In addition to publication of draft directions in accordance with Article 10.5, the Arbiter also envisages publishing draft guidance on a consistent basis. As with the publication of draft directions, the provisions within Article 10.5 enabling Reference Parties to make representations on redactions, will also apply to draft guidance.
 - (vii) **Guidance or directions:** in the context of a Periodic Review, the Arbiter's intention is that any guidance (to the extent that he considers it appropriate to provide the guidance envisaged) or directions and his reasons will be published (see Article 11). Any technical report will generally be provided only to the Reference Parties.
- 6.6 As set out in Article 12 of the Procedural Framework, the Arbiter may on completion of the reference seek the views of the Reference Parties (and, if appropriate, Third Parties) on the Reference Proceedings in order to learn from a Reference once it is completed, so that the Framework and this Approach document may be improved.

Annex 1

Relevant extracts from the Tube Lines PPP Agreement

Para 1.2: Form and structure of review

This paragraph refers to the form and structure of the way in which (or any aspect of the way in which) the parties should proceed concerning a Periodic Review or an Extraordinary Review to give effect to and facilitate the intent of Part 2 or Part 3 of Schedule 1.9 including (without limitation):

- (a) information to be exchanged between the parties including provision for LUL to revise its Affordability Constraints;
- (b) following any direction as to financing impossibility pursuant to paragraph 1.4 (a) below;
- (c) in relation to obtaining a current credit rating for Infraco as contemplated by paragraph 6.3, the procedure for a joint application by the parties for a credit rating and information to be supplied to credit rating agencies;
- (d) procedures in relation to any election that LUL may make pursuant to paragraph 4.2(b) below;
- (e) procedures for iterations that enable the LUL Options to be utilised in refining the balance between Restated Terms, Affordability Constraints and financing constraints in a manner that makes provision for LUL to propose and Infraco to respond by service of notices equivalent to those required pursuant to paragraphs 2 and 3 in respect of the Restated Terms and Affordability Constraints as originally proposed;
- (f) in relation to any aspect of the appointment or role of the financial advisor referred to in paragraphs 6, 9 and 11 below;
- (g) the dates that are to be the End Date and the Last Financing Date;
- (h) any contention that it would be advantageous for:
 - (i) the Review Process to continue beyond the Review Date; and/or
 - (ii) to revise the End Date; and/or
 - (iii) to revise the Last Financing Date (subject to the limits in the definition of that term);
- (i) following any direction confirming that there has been a material adverse change and/or temporary market disruption which has prevented Infraco procuring the Required Finance prior to the Last Financing Date;

- (j) in relation to an Extraordinary Review, the timetable to which the parties should provide one another with the notices that are equivalent (mutatis mutandis) to those that are required pursuant to paragraphs 2 and 3 below; and
- (k) procedures to take account (for the purposes of giving or amending any direction pursuant to paragraph 1.5 below) of any information received by Infraco in relation to the price and/or terms on which Infraco is able to procure the provision of Rolling Stock on the Northern Line in LUL NL Circumstances (as such term is defined in paragraph 21 of Part 3 of this Schedule 1.9).

Para 1.3: Base finance, risk and eligible finance

This paragraph refers to any contention by Infraco that:-

- (a) Base Finance is required at a Periodic Review; and/or
- (b) new or varied obligations contained in the Restated Terms proposed by LUL at a Periodic Review or at an Extraordinary Review (which for the avoidance of doubt shall include the variation of any of the limits and cover (including deductibles) of insurance in accordance with paragraph 4 of Schedule 5.19 (Insurance) of the Contract and/or clause 10.1 of the Insurance Agreement) or the Affordability Constraints:
 - (i) involve an increase in risk (including but not limited to an increase in technical risk in meeting the Restated Terms (and regardless of any costs or contingencies in respect thereof taken into account pursuant to paragraph 7) and including also an increase in risk of non-payment by LUL resulting from a change in the payment profile that LUL may specify as part of the Restated Terms) for Infraco that is material in the context of Infraco's overall activities pursuant to the Contract or in the context of the risk of failure to pay ISC; and/or
 - (ii) are such that a Notional Infraco would require Eligible Finance for performance of the Restated Terms from the Review Date.

Para 1.4A: Required Finance

This paragraph refers to any contention as to:

- (a) the amount or any other characteristics of Required Finance; and
- (b) the amount of any finance required for standby or liquidity facilities or for the purposes of financing Net Adverse Effects less than the Materiality Threshold as it would be prudent for a Notional Infraco to have.

Para 1.5: ISC requirements

This paragraph refers to:

- (a) the best estimate (that is, the most likely outcome) of amounts and times of payment and receipt of each of the cashflows:
 - (i) as referred to in paragraph 7 below; or
 - (ii) as subsequently adjusted pursuant to the exercise of an LUL Option referred to in paragraph 9 below,on the basis (in relation to paragraph 7.2(b)) that the aggregate of all the amounts allowed in respect of the operating and capital costs of a Notional Infraco after the Review Date shall be the best estimate of such amounts as would be agreed to by a Notional Infraco when entering into a contract after a competitive tendering process in respect of the relevant activities having regard to:
 - (x) the risks associated with individual activities (including the risk of cost overruns and ISC Adjustments);
 - (y) the risk that a Notional Infraco may have to undertake activities which it has not expected to have to carry out; and
 - (z) the probability that in the management of a portfolio of activities, the actual cost of some individual activities will exceed the costs allowed, and the actual costs of other individual activities will be less than the costs allowed;
- (b) the ISC to be paid by LUL from the next Review Date on the basis set out in paragraph 7.4 below and such that the negative cashflows (as directed pursuant to paragraph (a) above) are funded by the positive cashflows (as directed pursuant to paragraph (a) above) without the need to draw on other finance. Such ISC to be stated:
 - (i) in semi-annual periods in the form set out in Appendix 1 (Underlying ISC and Aggregated Usage Projections) of Schedule 4.1 of the PPP Contract;
 - (ii) in such amounts as to take into account that indexation will be applied to those amounts in accordance with Schedule 4.2; and
 - (iii) separately identifying in respect of each such semi-annual period the aggregate Fixed Amounts for that period used by the Arbiter in the cashflows referred to in paragraph 7 as adjusted to take into account that indexation will be applied to those amounts in accordance with Schedule 4.2;
- (c) a statement of the amounts allowed by way of fixed amounts and the timing of their payment in respect of any Base Finance, and/or Eligible Finance as the Statutory Arbiter may have directed in the current

Review is required pursuant to this paragraph and paragraph 7 below, in the form of a revised version of Annex 3 of this Schedule 1.9 (Fixed Amounts) as new terms of the Contract pursuant to section 229(4) of the GLA Act;

- (d) a statement of the value of RPIX applicable to the relevant Contract Year which has been used to state the ISC in accordance with paragraph 1.5(b).

Para 1.8: Interim ISC

This paragraph refers to an interim level of ISC that would be sufficient to enable a Notional Infraco to perform its existing obligations:

- (a) in relation to a Periodic Review, pending the Restated Terms taking effect pursuant to paragraph 5.5 below where this has not occurred prior to the Review Date; and
- (b) in relation to an Extraordinary Review, pending any direction pursuant to paragraph 1.9(b) below.

Annex 2

Relevant extracts from GLA Act

s232 [Further powers]

- (1) For the purposes of the proper discharge of the functions conferred or imposed on him by or under this Act, the PPP arbiter may—
 - (a) carry out inspections of such of the railway infrastructure or equipment belonging to, or under the control of, any party to a PPP agreement as he considers appropriate;
 - (b) consult such bodies or persons as he considers appropriate in relation to any direction or guidance given or proposed to be given by him;
 - (c) do all such things as he considers appropriate for or in connection with the giving of a direction under section 229(3) above or guidance under section 230(2) above; and
 - (d) do such other things as he considers necessary or expedient.
- (2) The powers conferred on the PPP arbiter by this section and section 233 below are exercisable for purposes preparatory or ancillary to the giving of directions or guidance under this Chapter generally and notwithstanding that there is no matter in relation to which a direction under section 229(3) above, or guidance under section 230(2) above, is required.
- (3) In this section “railway infrastructure” has the same meaning as in section 231 above.

s233 [Provision of information to the PPP arbiter]

- (1) Any person falling within subsection (2) below shall, at the request of the PPP arbiter, provide him with such information as the PPP arbiter considers relevant to the proper discharge of the functions conferred or imposed on him by or under this Act and as may be specified or described in the request.
- (2) The persons who fall within this subsection are—
 - (a) any party to a PPP agreement;
 - (b) any associate of a party to a PPP agreement; and
 - (c) any PPP related third party.
- (3) The information shall be provided in such form and manner, and within and within such time, as may be specified in the request.