



The PPP Arbiter

**Reference for Guidance from
London Underground Ltd**

**Procedures and Timetable for
Initial Ranges Request for Guidance**

30 April 2008

Role and approach of the Arbiter

The role of PPP Arbiter was created by the Greater London Authority Act 1999 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 PPP 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 Background to Request for Guidance

- 1.1 At London Underground's request a Pre-Reference meeting was held on 7 April 2008 between London Underground and the Arbiter. At that meeting London Underground tabled a draft question it proposed to ask the Arbiter in a formal Request for Guidance ("RfG").
- 1.2 London Underground notified Tube Lines of the likely RfG on 8 April. A period of correspondence followed amongst London Underground, Tube Lines and the Arbiter refining the draft RfG and culminating in London Underground formally issuing the Reference on 14 April. A copy of the Reference Application Notice was published on the Arbiter's website¹ on 15 April and is attached as an Annex to this document.

2 Decision to give Guidance

- 2.1 Where, as in this case, a reference is made under s230 of the GLA Act by one party to a PPP Agreement, the Arbiter may give to the parties to that PPP Agreement such guidance as he considers appropriate².
- 2.2 Following receipt of the RfG there was a period of correspondence amongst London Underground, Tube Lines and the Arbiter followed by formal representation to the Arbiter by Tube Lines on whether, in this case, the Arbiter should give guidance.
- 2.3 Having duly considered the representations made to him, the Arbiter decided on 23 April that he does intend to give such guidance as he considers appropriate³.
- 2.4 Whilst the Arbiter notes the provisions in s230(4) of the GLA Act⁴ and the facts that:
 - (i) some of the obligations being priced in this Guidance are liable to change once London Underground issues its Restated Terms; and
 - (ii) some of the data currently available to the Arbiter and/or the Reference Parties is expected to improve prior to the Periodic Review,

he expects that, in the absence of new information, any directions he gives in the context of a Periodic Review would take account of the

¹ See http://www.ppparbiter.org.uk/files/uploads/i_pressNotices/20084151331_Press_Note_01_08%20and%20reference%20application%20notice.pdf

² In the alternative circumstance where both parties to a PPP Agreement jointly seek guidance under s230, the Arbiter shall give such guidance as he considers appropriate

³ See http://www.ppparbiter.org.uk/files/uploads/n_guidance/2008423165535_Decision_on_giving_guidance.pdf

⁴ S230(4) states that "where the PPP arbiter has give any guidance under this section in relation to a matter which is subsequently referred to him for direction under subsection (3) of section 229 above, the direction which may be given by the PPP arbiter under that subsection is not restricted by that guidance."

Guidance given in respect of this reference.

3 Procedural Framework

- 3.1 As with all references received to date, Arbiter intends to follow his Procedural Framework, the current version of which was issued on 4 June 2007⁵.
- 3.2 Within his Procedural Framework the Arbiter has set out the approach he would expect to adopt in the circumstances of an unanticipated request for guidance as in this case⁶.
- 3.3 Section 4 of the Arbiter's Procedural Approach to the receipt of an unanticipated request for Guidance sets out a procedural approach comprising eight steps of which five have already taken place as described in Table 1 below.
- 3.4 Section 4 to this document sets out the Arbiter's indicative timetable for delivery of the remaining steps in this Procedural Approach and, in Section 5, the process to be followed. In Section 6 the Arbiter describes his current expectation of the form of guidance he considers appropriate.

Table 1: Arbiter's Procedural Approach

Step within Approach	Comment
(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.	London Underground complied with this by seeking a Pre-Reference meeting on 7 April as described in paragraph 1.1 above.
(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).	As noted in paragraph 1.2 above, a valid Reference was received on 14 April in the format required under Article 4 of the Arbiter's Procedural Framework.

⁵ See http://www.ppparbiter.org.uk/files/uploads/g_proceduralFrameWork/2007651842_Procedural%20Framework,%20June%202007.PDF

⁶ See http://www.ppparbiter.org.uk/files/uploads/g_proceduralFrameWork/200848165614_Procedure%203%20Procedural%20Approach%20to%20unanticipated%20guidance%2006_07.pdf

Step within Approach	Comment
<p>(iii) Responding Party: where there is a Responding Party (see Article 2) a Response to Reference should be in the form prescribed in the Framework (see Article 5 and the Response to Reference Template set out in Appendix Two to the Framework).</p>	<p>The indicative timetable set out in Section 4 below details when Tube Lines (as Responding Party) is to provide its Response to Reference.</p>
<p>(iv) Minimum Submission Requirements: the Initial Submission should make clear:</p> <ul style="list-style-type: none"> • how the matter being referred relates to the PPP Agreement; and • the nature of the guidance sought and the reasons for seeking it. <p>The Arbiter would welcome being consulted on any draft Initial Submission prior to its formal issue.</p>	<p>Alongside the Reference Application Notice received on 14 April, London Underground submitted its Statement of Case/Initial Submission which met the requirements of the Arbiter's Procedural Framework. As established by the confidentiality provisions within paragraph 2.10 of the Arbiter's Procedural Framework, this document has not been made public.</p>
<p>(v) Post-reference meeting, Timetable and initial indication of form of guidance: having received the Reference and Initial 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 Detailed Submissions and give an initial indication of the form of guidance that he considers appropriate and whether, in cases where he is not obliged to give guidance, he proposes to give it. He will invite</p>	<p>On 24 April the Arbiter convened a Post-Reference meeting attended by London Underground (as Referring Party) and Tube Lines (as Responding Party). As envisaged in Article 3.2 of the Arbiter's Procedural Framework, the Post-Reference meeting covered the following points:</p> <ol style="list-style-type: none"> 1. Arbiter's decision on whether to give Guidance 2. Procedures most appropriate to the Reference 3. Nature of issues for Guidance 4. Detailed Submission Requirements and Response to Reference 5. Possible provision of Initial Guidance during the Reference process

Step within Approach	Comment
<i>representations on this initial indication of his proposed approach to the Reference.</i>	6. Outline indicative timetable 7. Advisers to the Arbitrator 8. Advisers to the Reference Parties 9. Other matters

4 Indicative Timetable

- 4.1 London Underground has requested that the Arbitrator issues his Guidance no later than 1 September. Whilst the Arbitrator recognises the drivers behind this end date, he considers that a publication date of 3 September for final Guidance makes better provision for the Reference Parties to make representations on draft Guidance issued by 15 August.
- 4.2 Table 2 below sets out the Arbitrator's indicative timetable as described in Article 6 of the Arbitrator's Procedural Framework. As noted in Article 6.6, the Arbitrator may revise this timetable at any point during the Reference Proceedings.

Table 2: Arbitrator's Indicative Timetable

Date	Timetable	Notes
w/c 28 April	Bilateral meetings between the Arbitrator and the Reference Parties to discuss common assumptions such that Detailed Submission Requirements can be set	See para 5.1 below
7 May	Trilateral meeting to confirm common assumptions and to discuss the Detailed Submission Requirements	See para 5.2 below
9 May	Arbitrator to issue his Detailed Submission Requirements to the Reference Parties	See para 5.3 below
2 June	London Underground to make Detailed Submission and Tube Lines to make detailed Response to Reference	See para 5.4 below
4 June	Each Reference Party to present key elements of its submission to the Arbitrator if required	See para 5.5 below
23 June	Latest date for any supplementary submission from London Underground and supplementary Response to Reference from Tube Lines	See paras 5.6, 5.7 and 5.9 below
June – August	Arbitrator to convene trilateral meetings approximately fortnightly (or other such time periods as the Arbitrator considers appropriate)	See para 5.8 below

Date	Timetable	Notes
By 15 August	Arbiter to consult on draft Guidance	See para 5.10 below
By 26 August	Latest date for Reference Parties to provide written representations on draft Guidance	See para 5.10 below
27 August	Each Reference Party to present its representations on the draft Guidance to the Arbiter if required	See para 5.11
3 September	Final Guidance and Technical Reports issued to Reference Parties. Final Guidance to be published	See para 5.11

5 Procedures most appropriate to the Reference

- 5.1 As discussed with the Reference Parties at the Post-Reference meeting, the Arbiter considers that a bilateral meeting with each Reference Party during the week commencing 28 April would be helpful in establishing common ground and assumptions between the parties so that appropriate Detailed Submission Requirements can be set and abortive work is avoided. As part of this, the Arbiter expects London Underground to explain its Cost Modelling methodology to Tube Lines.
- 5.2 The Arbiter will convene a meeting with both Reference Parties on 7 May to ensure that his understanding of the common ground and assumptions is shared. At that meeting the Arbiter intends to discuss his proposed Detailed Submission Requirements and his proposed timetable for the production of submissions including the advance exchange of certain data by the Reference Parties.
- 5.3 The Arbiter expects to issue his Detailed Submission Requirements to the Reference Parties on 9 May.
- 5.4 The Arbiter expects that the simultaneous submissions to be made on 2 June are each to be in the form required by the Detailed Submission Requirements. In Tube Lines' case, the Arbiter expects that the numbers supporting its submission should draw heavily on the Annual Asset Management Plan ("AAMP") as already prepared and/or revised by the ongoing approval process being run by London Underground. To the extent that figures in Tube Lines' submission are different to those in that AAMP process, the Arbiter will expect a detailed explanation and reconciliation to be provided.
- 5.5 To enable the Arbiter and his advisers to gain an early understanding of the submissions received, each Reference Party will be provided with the opportunity to present the key issues within its submission on 4 June. The Arbiter will confirm his requirements for these presentations within his Detailed Submission Requirements.

- 5.6 Consistent with the Arbiter's principles set out in his Procedural Framework⁷, both Reference Parties will be provided with an opportunity to make a supplementary submission in the form of comments on the other Reference Party's Detailed Submission within three weeks of receipt. The Arbiter notes that this time period is shorter than similar periods referred to in his Procedural Framework⁸ but, as explained at the Post-Reference meeting, he considers a shorter time limit reasonable in the particular circumstances of this Reference.
- 5.7 The Arbiter does not intend for the supplementary submission process to provide either Reference Party with the opportunity to provide further information that it should reasonably have provided as part of its Detailed Submission.
- 5.8 The Arbiter will convene trilateral meetings approximately fortnightly (or other such time periods as the Arbiter considers appropriate) during the period from receipt of Detailed Submissions to the giving of final Guidance. These meetings will enable the Arbiter to identify principal areas of agreement or disagreement and to identify the requirements and process for the submission of any further information from the Reference Parties as required by the Arbiter. The Arbiter expects that any supplementary information or explanations received as a result of this trilateral process will be fully shared between the Arbiter and both Reference Parties.
- 5.9 Given this trilateral meeting process no unsolicited information received from either Reference Party after 23 June will be considered unless it was expressly requested by the Arbiter.
- 5.10 The Arbiter intends to issue to the Reference Parties (but not publish) Draft Guidance by 15 August. The Arbiter will expect the Reference Parties to make any representations on the draft Guidance by 26 August. The Arbiter notes that Article 10.6 of his Procedural Framework makes reference to 30 days (or such other period as determined by the Arbiter) but, as explained at the Post-Reference meeting, he considers a shorter time limit reasonable in the particular circumstances of this Reference.
- 5.11 In light of the short timescale described in paragraph 5.10 above, the Arbiter intends to provide each Reference Party with an opportunity to make oral representations on 27 August. The final Guidance (but not Technical Reports) will be published on Arbiter's website on 3 September.

⁷ See Part 2 of the Arbiter's Procedural Framework.

⁸ Whilst not directly comparable to the circumstances of this Reference, Article 5 of the Arbiter's Procedural Framework allows a Responding Party 30 days (or such other period as determined by the Arbiter) to respond to an Initial Submission.

6 Form of Guidance

- 6.1 Given his decision to give guidance⁹, and as referred to in step (v) in Table 1 above, the Arbiter has set out in this Section the form of guidance he currently considers appropriate.
- 6.2 In respect of the first limb of the guidance requested (“the Arbiter’s best estimate of certain cashflows”), the Arbiter intends that his Guidance will:
- result from the Arbiter following, to the extent appropriate, his draft Analytical Approach to Periodic Review as provided to the Reference Parties on 23 April;
 - draw upon a broad range of available data including that derived from the Joint and International Benchmarking studies and comparative data and financial projections from the Metronet Infracos;
 - other than in exceptional circumstances, be expressed as ranges;
 - include the Arbiter’s thoughts on the actions needed to narrow those ranges; and
 - be explicit about the assumptions made when coming to those best estimates of certain cashflows.
- 6.3 In respect of the second limb of the guidance requested (“the Arbiter’s assumptions as to the level of performance ... of a Notional Infraco”), the Arbiter intends that his Guidance will not actually set performance levels for the second Review Period. What the Arbiter intends to do is:
- consider the Reference Parties’ views on what the achievable level of performance is in light of Tube Lines’ AAMP and recent performance trends for all Infracos; and
 - form a view on the performance level that the notional Tube Lines infraco should achieve and base his costs on that.
- 6.4 To the extent that the performance assumptions made by the Arbiter differ from benchmark, the Arbiter will be explicit in his Guidance on the assumptions he has made on how this performance level has been reflected in the costs.
- 6.5 Rather than setting benchmarks himself, the Arbiter therefore expects that London Underground would take account of the Guidance when setting the benchmark levels of performance as part of the Restated Terms.
- 6.6 In addition to answering the three limbs of guidance being sought, the Arbiter may also comment on how he sees the remainder of the Periodic Review process working in light of the Guidance given.

⁹ See Section 2 above.

Annex: Reference Application Notice

ANNEX: REFERENCE APPLICATION NOTICE

Appendix One Reference Template

REFERENCE TO THE ARBITER FOR DIRECTIONS OR GUIDANCE

Note: Please send the completed Reference to the Arbitrator and any PPP Party who is not a Referring Party along with your statement or other evidence referred to below. This Reference and evidence is also to be submitted electronically to the Arbitrator chrisbolt@ppparbitrator.org.uk.

REFERENCE APPLICATION NOTICE

Dated: 14 April 2008

We, London Underground Limited

(the Referring Party)

Wish to apply to the Arbitrator for guidance relating to:

• The Arbitrator's best estimate of certain of the cash flows of Notional Infraco set out in paragraph 7.2 of Schedule 1.9 of the PPP Contract calculated as if this Reference for Guidance were a reference for Directions on these matters at Periodic Review:

- for the second Review Period only
- for the JNP PPP Contract only
- based on existing Infraco Obligations
- assuming compliance by Infraco with its first Review Period obligations and an absence of claims
- making allowance for such costs of access as the Arbitrator judges necessary to achieve stated performance levels

and subject as further set out in LUL's Statement of Case/Initial Submission.

• The Arbitrator's assumptions as to the level of performance in respect of Capability, Availability, Ambience and Service Points of a Notional Infraco during the second Review Period, based on what might reasonably be expected to be achieved given current Tube Lines' performance levels and trends.

• The appropriate treatment of performance revenues of a Notional Infraco in light of paragraph 7.3 of Schedule 1.9 of the PPP Contract.

Note: State clearly and concisely what is being sought.

I/we are applying for guidance because:

• LUL considers that Guidance on the matters set out in this notice would provide greater confidence that LUL's Restated Terms will be affordable thus (a) reducing the risk that Restated Terms will need to be de-scoped late in the Periodic Review process, with the attendant risk that this will result in sub-optimal results and (b) increasing the likelihood that Periodic Review will be successfully completed before the Review Date.

• LUL considers that the position in respect of the performance issues described in this notice is currently uncertain, and that accordingly it would be in the interests of all parties for such uncertainties to be clarified, to avoid wasted effort and the risk that Periodic Review may be delayed because the parties interpret matters differently.

• LUL believes that the issues described in this notice would be appropriate matters for Guidance in accordance, inter alia, with paragraph 3.3 of the Arbitrator's Procedural Approach to the receipt of an unanticipated request for Guidance.

Note: Briefly set out why you are seeking directions or guidance, the nature and circumstances of the matter in dispute or upon which guidance is sought, and any question on which you seek a decision by the Arbitrator. Include the material facts on which you rely identifying any relevant PPP Agreements or statutory provision(s) applicable.

Attached to this Reference is: (tick appropriate boxes)

- (i) Statement of Case
- (ii) Initial Submission
- (iii) Detailed Submission

Note: In the event that the Initial Submission is not attached to this Reference please detail the exceptional circumstances and state the date agreed by the Arbitrator for its subsequent provision.

Where there is one Referring Party:

In accordance with Article 4.3, I confirm that a copy of this Reference and any documents and information comprised or referred to in it has been provided to:

Andrew Cleaves
Tube Lines Director
telephone: 020 7088 4940
fax number: 020 7088 6344
email: andrew.cleaves@tubelines.com

Note: Insert name and contact details of the person to whom the Reference has been sent.

I/we confirm that to the best of my/our knowledge and belief that the contents of this Reference and any documents and information comprised or referred to in it are true and accurate

Signed	<i>Sarah Atkins</i>	Dated:	<i>14/4/08</i>
Authorised Signatory Director/Secretary			
*Signed		Dated:	
Authorised Signatory Director/Secretary			

³ If applicable include additional confirmation relevant to statements or projections for future years as follows: "This Reference also includes statements and/or projections for future years which are given in good faith, following appropriate enquiries and on the basis of stated assumptions set out therein which assumptions are reasonably held by me/us as at the date hereof. Where those assumptions differ from those contained in the most recent AAMP and the business plans relied upon by shareholders and lenders this is made clear within the Reference or any documents and information comprised or referred to in it."

⁴ Where another Referring Party joins in the reference it shall be at liberty to agree, disagree or express no view on all or any aspects of the Reference (see paragraph 6.5 of Schedule 1.9 to the Metronet PPP Agreements).

Address(es) to which communications about this Reference should be sent:

Sarah Atkins
Director of Reviews and Legal
London Underground
telephone: 020 7918 3433
fax number: 020 7918 4597
email: sarah.atkins@tube.tfl.gov.uk

You should provide this information for the Arbitrator:

1. Identity of any Responding Party, Third Party or PPP Stakeholders likely to be involved in the conduct of the Reference.

Tube Lines Limited

Metronet SSL Limited and Metronet BCV Limited to the extent the Arbitrator considers relevant

2. Has the subject of this Reference or any ancillary matter or matter material to the Reference been (or is currently being) considered elsewhere in another forum and if so where?

No

3. Is it intended that this Reference or any such ancillary or related matter be considered in another forum in the future?

No

4. By what date is the Arbitrator's decision requested?

1 September 2008