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Dear Gerry,

APPLICATION BY ABELLIO GREATER ANGLIA LIMITED UNDER SECTION 17 OF THE RAILWAYS ACT 1993

1 Introduction

1.1 Thank you for your letter of 13 May 2015, together with a copy of Stobart Rail Limited ("**SRL**")'s comments (the "**SRL Response**") on Abellio Greater Anglia Limited ("**AGA**")'s application under section 17 of the Railways Act 1993 (the "**Act**") to access Southend Airport Station (the "**Station**"), in which you invite AGA to comment on the SRL Response.

1.2 AGA notes that the position set out in this response is without prejudice to any further points, comments or arguments which it may make in due course; in particular if there is need to take the subject matter of this response to a formal dispute resolution process and/or review proceedings.

1.3 In summary, SRL's position (as set out in the SRL Response) is that:

1.3.1 access should continue to be granted on the existing terms set out in the Station Access Agreement dated 15 July 2011 (the "**Original SAA**");

1.3.2 there is no case to depart from those existing terms; and

1.3.3 if AGA's request were to be implemented, it would be irrational and unlawful under the Act and "EU charging principles".

1.4 AGA's position remains that the Office of Rail Regulation ("**ORR**") should direct SRL to enter into a new station access agreement in respect of the Station in accordance with its application dated 31 March 2015 (the "**Section 17 Application**") for the reasons set out below. It believes that:

1.4.1 the "existing terms" were only ever envisaged to apply for the initial duration of the Original SAA (i.e. until December 2014);

1.4.2 there are good reasons to depart from the terms set out in the Original SAA and to grant access in the model form prescribed by the ORR;

1.4.3 if AGA's request were to be implemented, it would be in accordance with law and lawful in accordance with the Act and the "EU charging principles"; and

1.4.4 indeed, AGA is of the view that if access were to be granted on the terms sought by SRL (including in particular the revenue sharing arrangements (the "**Revenue Share**")), it would be against the "EU charging principles".

2 Summary

2.1 AGA would make the following overarching comments in connection with the SRL Response:

2.1.1 the terms of the Original SAA (including the Revenue Share) were only intended to apply during the term of the Original SAA. When agreeing to construct the Station, SRL was aware that the "experimental services" calling at the Station would only be designated as such for a period of 5 years. The operational arrangements were intended to be completely separate to the term of the "experimental services", which was tied in with December 2014 – it being envisaged that a substantial proportion of SRL's investment would be recovered during this "start up" period. SRL therefore took the risk that the experimental services would not continue beyond the 5 –year period and indeed the risk that the operational arrangements would not continue beyond December 2014. This position is supported by the terms of the Operating Agreement in relation to the Station (the "**Operating Agreement**"). Secondly, if it had been intended for the terms of the Original SAA to continue until the end of the period of the "experimental services" calling at the Station (i.e. 7 July 2016) (the "**Experimental Period**") (which AGA does not believe is the case), the Original SAA would have been co-terminus with the end of the Experimental Period (see paragraph 3 below);

2.1.2 the ORR is required to consider the access application (including the reasonableness of the charges sought to be imposed) at the time an operator makes its access application (i.e. the reasonableness of the charges which SRL is seeking to impose now). In contrast to the SRL Response, AGA submits that these charges are extravagant and unreasonable (see paragraph 4 below);

2.1.3 in considering the charges which an infrastructure manager seeks to levy, the ORR must assess these against the principles set out in The Railways Infrastructure (Access and Management) Regulations 2005 (as amended) (the "**2005 Regulations**") (see paragraph 5 below);

2.1.4 the 2005 Regulations place restrictions on what may be charged by an infrastructure manager for access to infrastructure. AGA is of the view that SRL's proposed charging approach (in particular, the Revenue Share) does

not meet the requirements of the 2005 Regulations. AGA is also of the view that SRL is making a profit in excess of what it could need to make a reasonable return on investment in the Station (see paragraphs 5 and 7 below);

2.1.5 AGA believes that the charging arrangement proposed by SRL is neither fair, transparent or non-discriminatory and accordingly does not follow the requirements of the 2005 Regulations or principles of EU law more generally (see paragraphs 5 and 9 below);

2.1.6 AGA notes that the SRL Response refers to the "first railway package recast" (i.e. directive 2012/34/EU) which has not yet been implemented into English law, although the Department for Transport ("**DfT**") has published a consultation draft in The Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2015 (the "**Draft 2015 Regulations**"). Whilst the ORR should not give effect to legislation which is not yet in force, having reviewed the proposed implementing legislation, AGA is of the view that the same conclusion would be reached under the 2005 Regulations and the Draft 2015 Regulations (see paragraph 6 below);

2.1.7 it is consistent with the ORR's duties under section 4 of the Act for access to be granted on the terms set out in the Section 17 Application (see paragraph 8 below);

2.1.8 the costs of operating a privately run airport should be borne by the users of the airport infrastructure – users of railway services and, indirectly, the taxpayer should not subsidise the operation of the airport (see paragraph 10 below). In particular, when assessing the rate of return of an investment, the ORR should consider only the costs of construction of the Station (£16 million, rather than £20 million set out in paragraph 30 of the SRL Response – see paragraph 12.1.2 below) and not the wider investment in the airport and associated infrastructure (£150 million, referred to in paragraphs 19 and 24 of the SRL Response) which SRL has made in the airport (as appears to be suggested by SRL) (paragraph 7);

2.1.9 AGA suggests that the ORR may wish to liaise with the Civil Aviation Authority ("**CAA**") in relation to the interface between the profits from railway charging and how the airport infrastructure is funded through the CAA processes. AGA notes that it may consider making a submission or appeal to the CAA about the level of charges proposed by SRL (see paragraph 10 below) and so AGA would encourage the ORR and the CAA to adopt an equivalent approach;

2.1.10 AGA has been trying to resolve the position regarding station access for some time with SRL. The original agreement terminated in December 2014 and AGA has not been able to reach agreement on the terms of access with SRL following on from that date. AGA therefore does not believe that granting access on the terms set out in its Section 17 Application would be unlawful or irrational. It is rational for new terms to apply from the expiry of the existing terms (see paragraph 11 below) and indeed AGA believes it

would be irrational to allow wholly unreasonable payment terms which penalise the fare payer and taxpayer to apply, which would prevent enhancements to services; and

2.1.11 AGA has a small number of more detailed comments on the substance of SRL's response (set out in paragraph 12 below).

2.2 AGA expands on each of these points in the remainder of this response.

3 Term and Termination of Original SAA

3.1 The terms of the Original SAA were agreed as part of the Operating Agreement and the form of Original SAA is appended to the Operating Agreement. AGA is of the view that the terms of the Original SAA were only intended to be for the term of the Operating Agreement (i.e. until December 2014), although AGA notes the "review" provisions pointed out by SRL. AGA understands that the "start up" arrangements were only intended to be for an initial period to December 2014, to allow a substantial proportion of SRL's investment to be recovered during that period. This was separate from the proposal to designate station calls at the Station as "experimental services" for a 5 year period (which is the normal period which the DfT specifies for experimental services). AGA is therefore of the view that SRL assumed the risk of its investment being recovered during the initial "start up" period. This is separate to the further risk it assumed of the "experimental services" continuing beyond the initial 5-year term.

3.2 As noted in the Section 17 Application, AGA terminated the existing arrangements with effect from December 2014; something which SRL does not appear to contest.

3.3 AGA would draw the ORR's attention to clauses 3.6 and 3.8 of the Operating Agreement (which are set out in full in the Appendix to this note). In particular, clause 3.8 states that "*...the charges for access to the Station are expected throughout the duration of this Agreement to be based on a share of revenue of the relevant operator in accordance with the principles set out in Schedule 4 of the form of Station Access Agreement set out in Schedule 2...*". Clause 10.1 provides that the "duration of this Agreement" is until the Passenger Change Date in December 2014.

3.4 Clause 3.8 continues on to say "*If the Station Access Agreement including those arrangements expires at any time during the term of this Agreement, the Operator undertakes that, subject to the cooperation of the SFO, it shall use all reasonable endeavours to secure an extension or replacement of that Station Access Agreement on equivalent terms...*". This indicates that the terms of the Station Access Agreement including the revenue sharing arrangements were only ever envisaged to apply during the term of the Operating Agreement (i.e. until the Passenger Change Date in December 2014) so that if the Original SAA were to fall away, it would be replaced on equivalent terms during the period until the Passenger Change Date in 2014. By implication, therefore, after the Passenger Change Date in 2014, different terms of access were envisaged to apply.

3.5 Similarly, clause 3.6 begins "*During the term of this Agreement and subject in particular to the Operator making payments by way of station access charges with reference to Revenue as contemplated by Clause 7, the Airport undertakes to the Operator that it shall bear the costs of funding of the construction, operation, repair,*

maintenance and renewal of the Station". This indicates that in exchange for the payment of access charges by reference to revenue "during the term of this Agreement" (i.e. until the Passenger Change Date in 2014) SRL agreed to construct the Station. This means that the case for construction of the Station was on the basis of higher-than-normal charges only during the period until the Passenger Change Date in December 2014. AGA therefore believes that any station access agreement for the period after the Passenger Change Date in December 2014 would be on the basis of different terms, including the access charges payable (which AGA envisaged would be on standard terms, with a qualifying expenditure and long term charge arrangement). A different, more standard form of station access agreement (including such payment arrangements) is the subject of the Section 17 Application.

3.6 If it had been intended that the Original Station Access Agreement continue on its terms for the whole of the Experimental Period, this could have been achieved through entering into a longer-term station access agreement which was co-terminus with the expiry of the Experimental Period. AGA also notes the DfT's letter of 21 May 2015 which indicates that this was a "start up" arrangement.

3.7 On the basis of the above, AGA reiterates the comments set out in section 3 of the Section 17 Application on the level of return on investment which SRL would enjoy if its position were to be implemented. AGA comments that this was never the intention and it believes the Operating Agreement supports the fact that the enhanced level of revenue recovery would only continue for a limited period, which has now expired.

4 Charges to be considered at point of application for access

4.1 Each access application (whether in respect of track or a station) is submitted to – and considered individually by – the ORR. Therefore, each access application is considered by the ORR on its merits at the time it is proposed to enter into that access agreement (with the ORR issuing directions in relation to each application).

4.2 AGA believes that, as the ORR is required to consider each application at the time it is proposed to enter into an access agreement, it needs to consider the merits of the application on each occasion. Therefore, AGA does not believe that simply because the ORR has previously agreed to an arrangement, it should approve that arrangement again in a subsequent access application. AGA notes that SRL's submission focuses heavily on the fact that the ORR reviewed the proposals in 2011. AGA disagrees with the suggestion (whether explicit or implied) that because the ORR approved the arrangements in 2011, it should direct AGA and SRL to enter into an agreement on equivalent terms. Each application needs to be considered on its merits.

4.3 AGA notes the ORR's "Criteria and procedures for the approval of track access contracts" which, although intended to capture track access applications, sets out the ORR's approach to its duties under sections 17 and 18 of the Act (which also apply to station access applications)[1]. AGA notes the comment "*One of our key roles is to protect access beneficiaries from being charged unduly high prices...*", a comment which AGA believes applies equally in the context of station access charging.

[1] http://orr.gov.uk/__data/assets/pdf_file/0003/4818/ta_criteria_and_procedures.pdf

4.4 AGA believes that the ORR is entitled to take a different view of the charges in 2015 than it did in 2011. AGA thinks that there are good reasons for the terms upon which access is granted to change, particularly given:

4.4.1 the Revenue Share arrangement was only intended to be for a shorter initial "start up" period (see paragraph 3 above);

4.4.2 the return on investment estimate set out in section 3 of the Section 17 Application is extravagantly high and unreasonable for a rail operator to bear. AGA is of the view that the sums which SRL proposes to charge in connection with accessing the Station are "unduly high" in the context of the investment made;

4.4.3 AGA notes that if it was required to pay such sums, it would prevent AGA and the DfT investing in service enhancements to the Station, to the detriment of passengers; and

4.4.4 the terms set out in the Original SAA are inconsistent with the requirements of the 2005 Regulations (see paragraph 5 below).

4.5 AGA would therefore request that the ORR directs SRL to grant access on different terms to those set out in the Original SAA.

5 Charging principles – the 2005 Regulations

5.1 Regulation 12(5) of the 2005 Regulations requires the infrastructure manager to: (a) charge fees for use of the railway infrastructure for which he is responsible; and (b) utilise such fees as are received to fund his business. The definition of "railway infrastructure" includes stations. Regulation 12(5) of the 2005 Regulations is subject to regulation 12(1) which requires the ORR to establish the charging framework and the specific charging rules governing the determination of fees to be charged in accordance with regulation (5).

5.2 SRL is required to determine the fees to be charged for use of the infrastructure in accordance with the ORR's charging framework, the specific charging rules and the principles and exceptions set out in Schedule 3 of the 2005 Regulations (see regulation 12(2)). AGA recognises that SRL may possibly be entitled to a reasonable rate of return on its investment in the Station (but not its wider investment in the airport) and this would form part of the qualifying expenditure or long term charge for accessing the Station.

5.3 In particular, AGA would note the following requirements set out in Schedule 3 of the 2005 Regulations:

5.3.1 the charging scheme must comply with the rules set out in the network statement produced under regulation 11(4) (which relates to "railway infrastructure" as defined in paragraph 5.1 above) (paragraph 1(1)(a));

5.3.2 charges must be equivalent and non-discriminatory for different railway undertakings that perform services of an equivalent nature (paragraph 1(1)(b));

5.3.3 in setting the charges for the supply of services referred to in sub-paragraph 5 (which includes passenger stations), account must be taken of the competitive situation of rail transport (paragraph 1(6)); and

5.3.4 an investment recovery charge may be levied by an infrastructure manager in certain circumstances which would result in higher charges being set on the basis of the long-term costs of the project, which may incorporate agreements on the sharing of risk associated with new investments (see paragraph 7 below).

5.4 In relation to:

5.4.1 paragraph 5.3.1, AGA does not believe that SRL has published a network statement for the Station against which charges can be assessed; therefore it has not set the charges in compliance with the 2005 Regulations;

5.4.2 paragraph 5.3.2, AGA does not believe that it would be possible for charges to be levied on an equivalent and non-discriminatory basis for different railway undertakings:

(a) the extremely high level of charging is not in itself fair and removes revenue which could be used elsewhere to strengthen services to the Station to the benefit of passengers as a whole (see also paragraph 9 below);

(b) if another operator were to call at the Station, it would be impossible to separately identify what revenue it generates to allow charging to be undertaken fairly and on equivalent terms;

(c) a more reasonable charging arrangement would be to include any reasonable return on investment within qualifying expenditure or the long term charge so that any operator calling at the Station would pay a proportion of such charges;

(d) in any event, the unreasonably high level of charges (i.e. SRL receiving 91% of all gross revenue less season tickets) places a potentially insurmountable barrier to any other operator being granted access, thus charges are discriminatory in favour of the incumbent operator (although AGA denies that the charges themselves are on favourable terms); and

(e) the method by which charges are determined does not relate to the costs incurred to operate the Station and are therefore not transparent in the way they have been formulated;

5.4.3 paragraph 5.3.3, AGA believes that no consideration has been given to the competitive situation of rail transport as the abstraction of revenue through these unreasonably high charges means that funds will not be available to reduce overcrowding on services to and from the Station by strengthening services (see also paragraph 9 below); and

5.4.4 paragraph 5.3.4, please see paragraph 7 below.

5.5 AGA therefore disagrees with SRL's submission that its charging proposals would be consistent with the "EU charging principles" (as implemented into English law under the 2005 Regulations).

5.6 Finally, AGA does not believe that paragraphs 38 and 39 of the SRL Response are relevant to the Section 17 Application. AGA understands that, in relation to Heathrow airport, the railway infrastructure is currently in the process of becoming regulated (and therefore complying with the 2005 Regulations) and it has not yet been agreed whether a financial return on the investment can be levied (or, if so, the rate of return). In relation to Gatwick Airport, SRL acknowledges that the vast majority of funding has been by way of public funds. This should have no bearing on the position at the Station where (by its own acknowledgment) the DfT has chosen not to put public funds into the construction of the station. These are therefore not comparable situations. The ORR may also wish to take into account its determination in relation to Prestwick airport station as part of its determination of the Section 17 Application.

6 Charging Principles – the Draft 2015 Regulations

6.1 AGA notes that SRL refers to the "EU charging principles" set out in the "recast first railway package" (i.e. directive 2012/34/EU) in the SRL Response. The ORR will no doubt be aware that these "EU charging principles" have not yet been implemented into English law and so, at the date of submission of this response, should not yet be taken into account by the ORR. However, AGA notes that an equivalent set of "EU charging principles" are set out in the 2005 Regulations.

6.2 AGA further notes that the DfT has published a consultation (but not yet its conclusions) on an implementing set of regulations for the "recast first railway package" (i.e. directive 2012/34/EU) by way of the Draft 2015 Regulations. AGA has reviewed the DfT's proposals for these regulations and in relation to those parts of the 2005 Regulations cited in this note, does not believe that any material amendments are being proposed under the Draft 2015 Regulations. AGA therefore believes that the same arguments as set out elsewhere in this note would apply regardless of whether the 2005 Regulations apply or if the Draft 2015 Regulations were to be implemented in their consultation form.

7 Investment Recovery Charge

7.1 AGA notes paragraph 21 of the SRL Response, which mentions that recovery of investment in enhancement projects completed after 1988 is generally to be permitted. What the SRL Response does not mention, however, is that in order for such investment to be recoverable, certain criteria must be satisfied. These are set out in paragraph 3 of Schedule 3 to the 2005 Regulations.

7.2 The conditions which are imposed on setting an investment recovery charge are as follows:

7.2.1 the project must increase efficiency or cost-effectiveness; and

7.2.2 the project could not otherwise have been undertaken without the prospect of such higher charges,

and, if these are conditions are satisfied (which AGA does not believe is the case) the infrastructure manager may only set higher charges on the basis of the long term costs of the project.

7.3 Whilst higher access charges were set out in the Original SAA, AGA is of the view that the project could and would have been undertaken without the prospect of such higher charges. Southend Airport has in recent years increasingly been promoting itself as a further alternative to the other "London" airports. Rail is currently the most effective method of travelling to the airport by public transport. AGA believes that, regardless of the higher access charges, if SRL wanted to continue promoting and expanding the airport, it would have been compelled in any event to construct the Station to allow it to achieve its expansion plans. In particular, AGA understands that the airport expansion's planning consent was based in large part on increasing the modal share of passengers travelling to the airport by public transport – without a rail station, it would not be able to comply with this.

7.4 AGA also notes that SRL was developing proposals for the Station in any event regardless of the Revenue Share arrangements and that SRL was content to accept the small Revenue Share payments at the outset – meaning passengers could access the airport by rail. As is now the case, the excessively high charges are overcompensating SRL for its investment in the infrastructure and AGA cannot see how this "windfall" would have been expected by SRL or needed to justify the initial investment in the Station. Therefore, AGA does not believe the second limb of the test has been satisfied.

7.5 AGA therefore is of the view that the project could – and indeed would – have been undertaken by funding it from airport revenues and landing charges. In addition, AGA does not believe that SRL would be able to demonstrate that that the construction of the Station would increase efficiency or cost-effectiveness. The construction of the Station seems only to have made the airport as a whole more sustainable in the long term. As discussed in paragraph 9 below, AGA is of the view that the Revenue Share makes the provision of railway services to the Station less efficient because services are now overcrowded, not cost-effective and AGA cannot invest in service enhancements.

7.6 AGA notes that even if both conditions for imposing an investment recovery charge are satisfied (which AGA does not believe is the case), the higher charges may only be set on the basis of the long term costs of the project. SRL is not proposing to do that – it is proposing to set it on the basis of the revenues earned by the operator calling at the Station. Whilst at the time of entering into the Original SAA, it may have been envisaged that the level of revenue could be commensurate with the long term costs of the project (although AGA has not been able to confirm this), with the increase in revenues, it cannot be demonstrated that the long term costs are in any way comparable to revenues (particularly given the level of return received to date and projected into the future). AGA therefore believes that any new access agreement should not use Revenue Share as the basis for charging.

7.7 Finally, AGA notes that if higher charges were to be set on the basis of the long term costs of the project, these (and the reasonable return thereon) should be based on the £16 million investment in the Station rather than: (1) the £20 million described

in the SRL Response – see paragraph 12.1.2 below; or (2) the £150 million investment in the airport and associated facilities.

8 ORR duties under the Act

8.1 AGA notes SRL's position set out in paragraph 20 of the SRL Response, which indicates that SRL believes that the ORR's general duties under section 4 of the Act would favour a conclusion in line with its views. AGA believes that its position is more consistent with the ORR's general duties under section 4 of the Act. In particular, AGA would draw the ORR's attention to the following duties:

8.1.1 to promote improvements in railway service performance (section 4(1)(zb));

8.1.2 otherwise to protect the users of railway services (section 4(1)(a));

8.1.3 to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable (section 4(1)(b));

8.1.4 to promote efficiency and economy on the part of persons providing railway services; (section 4(1)(c));

8.1.5 to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance (section 4(1)(g));

8.1.6 to exercise its functions in a manner which is best calculated to protect the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the quality and price charges for such services (section 4(2)(b)); and

8.1.7 in performing its duties, to have regard, in particular, to the interests, in securing value for money, of users and potential users of railway services and providers of railway services, of the persons who make available the resources and other funds mentioned in that subsection and of the general public (section 4(5C)).

8.2 AGA notes that the ORR is required to exercise its functions in determining the Section 17 Application in a manner which it considers is best calculated to achieve the general duties described in paragraph 8.1 above, together with the other duties set out in the Act (i.e. the ORR will need to take into account circumstances as they now exist). In relation to those duties described in paragraph 8.1, AGA would comment as follows:

8.2.1 "*railway service performance*" is defined in section 4(9) of the Act as including "the avoidance or mitigation of passenger overcrowding". As noted in the Section 17 Application, there is currently a considerable level of overcrowding on services operating to the Station. If the level of charges under the Original SAA were to continue, AGA notes that it will not be in a position to invest in measures to reduce overcrowding on services, such as strengthening services or increasing capacity. Indeed, to avoid the current levels of overcrowding, AGA may need to consider reducing the number of services calling at the Station to disincentivise passenger usage. In

considering its duty to promote improvements in railway service performance, the ORR should take into account the fact that if charging levels under the Original SAA continue, levels of overcrowding will continue and could get worse, something which AGA wishes to avoid;

8.2.2 in considering the users of railway services, the ORR should note that the continued existence of charges equivalent to those set out in the Original SAA would not allow AGA to provide adequate capacity for users of its services;

8.2.3 "*promoting the use of the railway network... to the greatest extent it considers economically practicable*" requires the ORR to reach a view on economics. AGA notes again that it may be forced to reduce the number of services calling at the Station if the charges set out in the Original SAA were to continue to manage levels of overcrowding – which would not be promoting the use of the railway network. However, if a more reasonable charging arrangement were put in place, it could become economically viable to enhance services which would encourage use of the railway network. AGA is of the view that SRL had intended to recover the majority of its costs during the term of the Original SAA (which is supported by the DfT's letter of 21 May 2015) and so economic practicability would tend to favour a reasonable access charge – which would also allow AGA to enhance its service provision;

8.2.4 AGA is of the view that promoting "*efficiency and economy*" would not be incentivised where SRL is able to recover an amount significantly in excess of its costs of operating the Station; indeed as described in the Section 17 Application, the amounts set out in the Original SAA would mean SRL would be set to recover a wholly unreasonable rate of return on its investment over the course of 30 years (and AGA would invite SRL to substantiate its claims over the anticipated level of return on investment). The ORR should also take into account AGA's position as a provider of passenger services – it cannot either be efficient or economic for AGA to be required to pay considerably in excess of a reasonable amount (even taking into account operating costs) to access the Station;

8.2.5 AGA notes that SRL has also referred to this duty in the SRL Response and acknowledges that the ORR would need to take into account SRL's position as a provider of station services (falling within the definition of "railway services" set out in section 82 of the Act). However, to continue the charging arrangements on the basis of the Original SAA would not allow AGA to plan its business with a reasonable degree of assurance. AGA had assumed that the charging arrangements in the Original SAA would continue only for the duration of the Operating Agreement (see paragraph 3 above) and would impose a significant cost, which would have a detrimental impact on its business (and AGA reasserts that the costs are beyond what an operator would reasonably expect to pay for accessing a station);

8.2.6 as a provider of services for the carriage of passengers by railway, AGA requests the ORR to exercise its duties in a way which protects it from the exceptionally high charges (by any estimate) for accessing the Station/the

services provided at the Station. In connection with this point are the principles of charging described in the 2005 Regulations (please see paragraph 5 above) which the ORR should take into account in exercising this duty; and

8.2.7 the charging arrangements set out in the Original SAA may have been value for money at the time the Original SAA was entered into and for the duration of the Operating Agreement. However, given this period has now passed with the significantly higher charges, there has already been ample opportunity to recover a significant proportion of the costs of constructing the Station. It is now not value for money to continue with the access arrangements on the same charging terms. In exercising this duty, the ORR should take into account the representations of the DfT as a funder of the services, with the DfT commenting that SRL's position was intended to be for the "start up" period. The interest of users of services should also be taken into account in the context of the overcrowding experienced on the services and the points made in the above paragraphs.

9 Fair, transparent and non-discriminatory charging

9.1 AGA has already set out in paragraph 5.4.2 of this note its reasons for believing that the charges set out in the Original SAA (and proposed by SRL for the replacement station access agreement) are discriminatory and would prevent other operators from accessing the Station on equivalent terms. The Revenue Share means that AGA is funding all of the costs of the Station. For the charging arrangements to be fair and non-discriminatory, they should form part of qualifying expenditure or the long term charge and be allocated across all operators calling at the Station on a proportionate basis. AGA has also described in paragraph 5.4.2 why it believes the proposed charging arrangements are not transparent.

9.2 AGA would like to take this opportunity to set out the implications of a decision to continue the station access arrangements on the existing terms. AGA believes that this highlights the inherent unfairness in the arrangements proposed by SRL: unfairness for AGA, unfairness for the DfT as funder of the services and unfairness for the passenger and fare payer.

9.3 As noted in the Section 17 Application, the increasing prominence of the airport as an alternative in the "London" area has led to increasing passenger numbers – but also a significant level of revenue abstraction from the franchise. There is currently overcrowding on a number of services operated by AGA which, in large part, relates to passengers travelling to and from the Station. Whilst AGA is pleased to see passengers using its services and wishes to encourage the use of railway services and promote the industry as a whole, the current overcrowding levels remain unsustainable in the long term and unfair to its customers.

9.4 Ordinarily, where passenger demand for services is high, AGA would look to take some of the revenue received from the services and use it to invest in service improvements, such as enhancing the passenger carrying capacity of the services through adding additional coaches. In the case of services operating to the Station, because 73% of all ticket revenue (taking into account season tickets) under the Original SAA is paid to SRL, this means there is very little remaining to invest in

additional capacity on these services. In addition, AGA notes that SRL takes no responsibility for making repayments to passengers in the event of delays or other refunds (in particular, under the "delay repay" mechanism) so it takes its share of the ticket revenue without sharing in any of the potential detriment.

9.5 Indeed, it is extremely difficult to form a business case for further investment in the services where the vast majority of revenue from such services would be paid to SRL but the cost of providing such additional services (including, for example, cleaning costs) would be entirely for AGA to bear. AGA (working with the DfT) may be required to consider timetable amendments to reduce overcrowding, which may result in a fewer number of services calling at the Station. This cannot be in the interests of the rail industry or passengers but would be a necessary consequence of the existing arrangements continuing.

9.6 As the DfT notes in its letter of 21 May 2015, the terms of the revenue share were considered appropriate at the time as a "start up" measure, recognising the available spare capacity on services but commenting there is now no business case for well-needed additional capacity on the services due to the significant abstraction of revenue from the franchise as a result of this arrangement. AGA believes that to continue these arrangements would not be fair to AGA, the DfT or the railway user.

10 Airport charging and the role of the CAA

10.1 As noted in section 3.1 of the Section 17 Application, the cost of constructing the Station was not intended to be funded by the tax payer. AGA accepts that SRL made a significant amount of investment in constructing the Station – however, the main reason for this was in its own commercial interests by enhancing the airport facilities (and access to those facilities) to promote increased passenger usage to enhance the competitive advantage of the airport and to encourage other airlines to use it.

10.2 In section 3.1 of the Section 17 Application, AGA also noted that the costs of constructing the Station will have been fully funded within the next 3 years, which SRL does not agree with. AGA commented in section 3.4 of the Section 17 Application that the arrangements under the Original SAA gives SRL a level of income that subsidises their airport expansion – a statement which AGA stands by. AGA understands that the levels of funding being generated by the Revenue Share allows SRL (through the "single till" approach) to cross-subsidise the provision of other airport facilities.

10.3 AGA is particularly concerned about the consequential impacts of this potential cross-subsidisation on AGA's business and the railway more generally. The Station is generating airport revenues and is generating excess revenue (beyond the costs of operating, maintaining and renewing the Station) due to the Revenue Share arrangement. AGA notes that airlines are being attracted to the airport and are moving services from other London airports – for example, in the last 18 months, easyJet moved a number of services from Stansted airport to Southend airport (which has led to further revenue abstraction from AGA's Stansted airport services).

10.4 AGA believes this approach is fundamentally inequitable. Airports should be funded by the airline industry rather than by the rail industry. Airport facilities should be funded by users of the airport through the fees charged to the airlines using the airport. They should not be funded by the publicly-subsidised rail industry,

particularly where the DfT has made a conscious decision not to fund the construction of the Station.

10.5 On the basis of the above, AGA believes the ORR (as part of its determination of the Section 17 Application) may wish to liaise with the CAA to ensure there is consistency between the two regulatory regimes and the manner in which railway income is being used in the context of the airport. AGA may consider making a submission or appeal to the CAA about the SRL charges.

10.6 Please also see paragraph 5.6 above, in which AGA sets out its comments in relation to the comparison with other London airports which SRL has made in the SRL Response.

11 Retrospective access charging – December 2014

11.1 AGA notes SRL's comments in paragraphs 18 to 27 of the SRL Response headed "Request for Retrospective Effect". AGA disagrees entirely with the SRL position. As noted in paragraph 3 above, AGA is of the view that the Revenue Share arrangement was only intended to apply until the Passenger Change Date in December 2014. AGA had been trying to discuss and agree a replacement station access agreement with SRL for some time prior to the expiry of the existing arrangements. SRL should not be able to benefit from its own wilful refusal to enter into replacement arrangements.

11.2 AGA disagrees in particular with the statement that if the ORR was to agree to the replacement station access agreement coming into effect from the Passenger Change Date in 2014, it would accelerate and extend the scope of the five-yearly review process and be illegal or irrational. AGA believes that the Revenue Share arrangement was only intended to apply for an initial short term and so the ORR agreeing to the proposed station access agreement would implement what was always intended. In any event, given the Original SAA arrangements have come to an end, the ORR is required to assess the charging arrangements in all the circumstances (including the unreasonable level of charging for access which is proposed).

11.3 AGA does not believe it would be illegal or irrational for the ORR to determine that the replacement station access agreement, with revised charging arrangements, should commence from December 2014 and therefore disagrees with SRL on this point. If the ORR agrees with AGA that the access charges are not appropriate in all the circumstances, AGA is of the view that it would be consistent with the ORR's general duties (as discussed in paragraph 8 above) to give effect to the revised charges from when they became applicable – AGA believes this should be December 2014 and therefore legal and rational.

11.4 AGA notes that it terminated the existing arrangements with effect from December 2014. Given that, at the time, the parties were unable to reach an agreement in relation to replacement arrangements, an interim extension was agreed to allow services to continue to call at the Station (as required by the DfT). However, it was never intended that the period of such extension would be on the same financial arrangements – instead, it was intended to try and reach commercial agreement on alternative terms (and in the absence of such agreement, apply for access under section 17 of the Act) which would apply from December 2014.

11.5 AGA further disagrees with the statement made in paragraph 21 of the SRL Response that "*no other private company is likely to make a similarly substantial investment in new railway facilities...*". As AGA has stated in the Section 17 Application, SRL has benefitted considerably from the construction of the Station: providing a method for airline passengers to get to the airport, encouraging other airlines to use the airport and recovering a substantial part of its investment in the first few years of operation. AGA appreciates that private companies may possibly be entitled to recover and make a reasonable return on their investment in accordance with the 2005 Regulations – and the proposed arrangements would not detract from that. The proposed approach would ensure that private companies do not make wholly unreasonable returns on their investment (but could still recover a reasonable return) – this should not be a disincentive for private companies to invest in railway facilities.

12 Other comments on SRL Response

12.1 AGA would make the following further specific comments on the SRL Response (paragraph references are to paragraphs of the SRL Response):

12.1.1 (paragraph 9) AGA disagrees with the suggestion that the Station is not causing a call on public funds. As noted in paragraph 9 of this response above, funds which would otherwise be available to the DfT/AGA to fund service enhancements are not available due to the excessive levels of charging for accessing the Station;

12.1.2 (paragraphs 9, 23, 29 and 30) AGA remains of the view that there is over-recovery of costs – in particular, it notes that in the London Southend airport surface access strategy published in 2011, there are references to the cost of construction of the Station being £16 million, rather than £20 million set out in paragraph 30 of the SRL Response – see paragraph 12.1.2 below. AGA has paid to SRL since the start of its franchise £ [2] in connection with the Revenue Share arrangements. If the arrangements set out in the Original SAA were to continue, extrapolating this figure over a 30-year period (and assuming no further increase in passenger usage or increases in fares) this would lead to payments to SRL of £ [3]. The DfT's letter of 21 May 2015 indicates that the continuation of the current arrangements would be an "*increased investment burden... on the taxpayer*";

12.1.3 (paragraph 9) AGA considers the templates currently published by the ORR are appropriate in the context of the Station and the qualifying expenditure or long term charge arrangements are more appropriate for allowing SRL to recover a reasonable return on its investment (in the context of sums it has already recovered);

12.1.4 (paragraph 9) SRL knew the risk of services being designated as "experimental" at the point it made the £16 million investment in the Station, rather than £20 million set out in paragraph 30 of the SRL Response – see paragraph 12.1.2 above (and AGA notes that this £16

[2] Text has been omitted from the document in accordance with the provisions within the Freedom of Information Act 2000.
[3] Text has been omitted from the document in accordance with the provisions within the Freedom of Information Act 2000.

million Station investment should be distinguished from any wider investment it may have made in the airport) and entered into a commercial arrangement for a shorter term than the "experimental services" period as a "start up" arrangement. This gave it some certainty as to recovery of costs in that initial "start up" period (i.e. until December 2014);

12.1.5 (paragraph 13) AGA recognises that the airport's growth (and rail passenger patronage growth) has been much more successful than originally envisaged but whilst it may have originally been envisaged that only off-peak capacity would be utilised, this is very different to what is occurring in practice today. In addition, SRL's Revenue Share from the existing arrangement also includes revenue generated from peak time services;

12.1.6 (paragraph 16) AGA disagrees with the assertions by SRL in relation to the impact of the Crossrail services transfer on revenue to the Station as AGA continues to serve the Station rather than Crossrail (in any event, this is irrelevant because the Operating Agreement was always intended to terminate in December 2014, so alternative arrangements could be expected beyond that date);

12.1.7 (paragraph 24) AGA strongly disagrees that "*The franchise is no more expensive for AGA to operate than it would have been had the Station not been constructed.*" Had AGA been paying qualifying expenditure and long term charge in proportion to the actual costs of operating, maintaining and renewing the Station (on the "standard" industry basis), the sums payable to SRL would be considerably lower and had the revenues been available to strengthen services, additional revenue may have been generated;

12.1.8 (paragraphs 26 and 35) AGA disagrees with SRL's estimate that only 22% of airline passengers travel to the airport by rail and notes that overcrowding levels on its services to the Station have been increasing year-on-year (AGA has estimated that a third of passengers on additional summer services operated by AGA in 2014 were travelling to/from the Station – and the cost of these additional services were entirely funded by AGA with no support from SRL);

12.1.9 (paragraph 35) despite AGA having tried on a number of occasions, SRL was not willing to contemplate any meetings which discussed amendments to the Original SAA and Operating Agreement;

12.1.10 (paragraph 35) ticket selling equipment is being funded through the Revenue Share arrangements – AGA notes that under the "standard" industry model, this would be funded through the qualifying expenditure and long term charge payments (and therefore this would remain a cost which SRL could recover under the arrangements which AGA is proposing under the Section 17 Application). In any event, under the Retailing Agent's Licence, the Agent (i.e. SRL) is responsible for having available for use and for licensing and maintaining TVMs and other ticket issuing equipment (and where TVMs are provided, the Retailing Agent's Licence requires the Agent to be responsible for maintaining them); and

12.1.11 (paragraph 35) whilst AGA notes SRL's comments in the paragraph starting "SRL also notes that..." AGA notes that the reciprocal position could also be the case: many rail passengers who would otherwise have purchased tickets elsewhere many now purchase them at the airport.

13 Conclusions and redactions

13.1 AGA remains firmly of the view that the Section 17 Application should be granted and respectfully requests the ORR to grant it. For the reasons set out in this response, AGA believes to grant the Section 17 Application would be appropriate economically, legally and on the basis of the circumstances in which the ORR is now required to make its assessment. Furthermore, granting the Section 17 Application would be in the interest of rail users and funders generally, whilst ensuring that private companies proposing investments also have a sufficient degree of assurance in making these investments.

13.2 Please feel free to contact me if AGA can offer any further assistance to the ORR to allow it to make its determination.

13.3 We would respectfully request that SRL's representations as to redactions should also apply where such numbers are used in this letter. We confirm that references to the Operating Agreement may also be included in the published version.

Yours sincerely

Susan Cross
Head of Franchise Management and Development

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Appendix

Extracts from the Operating Agreement

3.6 During the term of this Agreement and subject in particular to the Operator making payments by way of station access charges with reference to Revenue as contemplated by Clause 7, the Airport undertakes to the Operator that it shall bear the costs of funding of the construction, operation, repair, maintenance and renewal of the Station such that the station access charges to the Operator to make use of the Station are maintained as contemplated by Clause 7.

3.8 It is acknowledged that, subject as provided in clause 9, the charges for access to the Station are expected throughout the duration of this Agreement to be based on a share of revenue of the relevant operator in accordance with the principles set out in Schedule 4 of the form of Station Access Agreement set out in Schedule 2 together with (while this Agreement remains in force) a payment by the SFO to the Operator of an amount in respect of the costs of its services calling at the Station as set out in the same Schedule 4. If the Station Access Agreement including those arrangements expires at any time during the term of this Agreement, the Operator undertakes that, subject to the cooperation of the SFO, it shall use all reasonable endeavours to secure an extension or replacement of that Station Access Agreement on equivalent terms (including with regard to the access charge based on a share of revenue and contribution towards costs in accordance with the principles set out in Schedule 4 of the form of Station Access Agreement set out in Schedule 2) and to secure any approval of the ORR required in connection with that extension or replacement.

10.1 Subject to Clause 9 and Clause 10.2, this Agreement shall continue until the Passenger Change Date in December 2014.

AGA Notes: (1) Clause 9 sets out when parties are entitled to review the operation of the "experimental services" which may lead to the agreement being terminated earlier.

(2) Clause 10.2 sets out "default" grounds for termination.