

GNER'S RESPONSE TO ORR'S PROPOSED DECISION ON APPLICATIONS FOR THE TRACK ACCESS RIGHTS NECESSARY TO OPERATE ADDITIONAL PASSENGER SERVICES ON THE EAST COAST MAIN LINE

INTRODUCTION

- 1 This document sets out GNER's response to ORR's proposed decision (the '**proposed decision**') issued on 27th January 2006.
- 2 Terms and expressions defined in the proposed decision have the same meaning in this document.

EXECUTIVE SUMMARY

- 3 The proposed decision is manifestly absurd in a number of respects, not least because its impact will be wholly inconsistent with its stated objectives. For example, the ORR bases its decision on its desire to not prejudice the result of the RUS (see paragraphs 19, 61 and 66 of the proposed decision). However, the proposed decision ignores the fact that the RUS will be severely constrained by the approval of firm rights to Grand Central for a period of up to ten years whereas GNER's proposal would have no effect on the RUS.
- 4 In addition, the proposed decision is fundamentally unsound as the key assumptions which ORR uses with regard to capacity and economic benefits are both incorrect and based on highly questionable speculation on the part of ORR. In particular, ORR bases its decision not to grant additional rights to GNER on what it describes as the difficulty of introducing new services between Doncaster and Leeds "*without a complete revision of services*". GNER refers later in this document to the fact that GNER and Network Rail can demonstrate that capacity exists on this route for the additional GNER services without a major revision of the timetable. ORR states in paragraph 61 of the proposed decision that "*we would have been prepared to approve the rights sought [by GNER] had we been able to satisfy ourselves that they could be accommodated without a major revision of the timetable, and without prejudging the result of the RUS process*". GNER's proposals require neither a major revision of the timetable nor a prejudging of the RUS and, accordingly, ORR should approve the rights sought by GNER in preference to those sought by the other operators.
- 5 With regard to economic benefits ORR's conclusions are similarly unsound. Having gone to the expense of commissioning Arup to undertake an analysis of the relative economic benefits of the GNER, Hull Trains and Grand Central proposals ORR arrives at a decision which is wholly at odds with the findings of the appraisal. The version of the Arup appraisal available before the date of the proposed decision concludes that "*the highest level of overall economic benefits over the 10-year appraisal period was delivered by GNER's proposed services*" and that in terms of a combination of applicants' services the lowest level of economic benefits was delivered by a combination of Grand Central and Hull Trains. It is also remarkable that ORR considers that any conclusions it reaches on the so-called "not primarily abstractive" test should have

any credibility given that those conclusions are reached without any information as to journey times or departure times for the Grand Central services.

6 GNER also questions whether the proposed decision has any sensible meaning. The expectation of ORR is that Network Rail and Grand Central should identify “*commercially useful paths*” (see paragraph 6 of the proposed decision). GNER has asked ORR to explain what it intends by this phrase. ORR was unable to provide an explanation. Once again, GNER requests ORR to explain what it means by “*commercially useful paths*”. In particular, this phrase and the process envisaged by the proposed decision is not consistent with the Network Code’s timetable development procedure and Decision Criteria and GNER requests ORR to explain why, in the case of Grand Central, the usual decision making process and criteria should be overridden.

7 There are important legal issues to consider in relation to the proposed decision. Some of these are referred to in greater detail in this document but in particular GNER considers that the proposed decision:

- is inconsistent with the private sector delivery of the public sector’s specification as envisaged by the Rail Review;
- has an estimated cost to the DfT of £1.65 billion (see Appendix C to this document for GNER’s calculation of this amount);
- is inconsistent with the discharge of ORR’s statutory duties under section 4(1) of the Act;
- is inconsistent with ORR’s statutory duties under sections 4(5)(a) and (c) of the Act;
- is inconsistent with ORR’s own published criteria and procedures as it does not result in a “*fair and efficient*” allocation of capacity;
- as a result of ORR’s different charging framework for open access operators, will result in a track access contract which is contrary to domestic and EU legislation and which constitutes the grant of unlawful state aid;
- given the discrimination in the charging regime as between franchised operators and open access operators, is contrary to competition law principles set out in the EU Treaty (and in particular Articles 10 and 82), which principles have also been espoused as UK Government policy;
- given the discrimination in the charging regime as between franchised operators and open access operators is contrary to the policy set out in the “Future of Rail” White Paper that “*Open access operators should bear a fair share of the costs of the railway through the access charges they pay. The ORR will apply those principles in considering future open access applications*”;

- constitutes an abuse of ORR's powers as it seeks to circumvent the provisions of section 17(1)(b) of the Act and seeks to impose modification provisions which ORR has no power to impose and is in breach of GNER's right to protection of property under European human rights law;
- is based on considerations which are not relevant to ORR's statutory or published decision-making duties and fails to take account of material considerations and facts; and
- is entirely inconsistent with GNER's legitimate expectations of a rational, evidence-based decision consistent with ORR's own published criteria, procedures, policy and corporate strategy, statutory obligations and duties and the contractual commitments in GNER's franchise agreement.

PROCESS TO DATE

- 8** GNER notes that ORR is not currently minded to hold a hearing. Given the divergence of views and the serious implications for ECML of the proposed decision GNER requests that ORR does hold a hearing. As a result of the proposed decision many new issues which have not previously been consulted upon are raised and it is important that these are debated in a fair and transparent manner. A hearing is both necessary and desirable.

The proposed decision will have serious long term consequences for one of the most important and congested routes in Great Britain and for the future of the Government's franchising policy. The parties which are affected should have a fair hearing.

- 9** GNER also notes that the final version of Arup's economic appraisal was not issued until 2nd February 2006, after the issue of the proposed decision. ORR has not published its views on the final report and parties have therefore not been given any opportunity to consider these. Although consistent with ORR's decision to ignore the economic benefits analysis relevant to the three applications, a proper and transparent debate on the respective economic benefits of the three proposals is an essential part of the due process.
- 10** In this context GNER believes it is instructive to refer to the process adopted by the Rail Regulator in response to the competing applications of GNER, WAGN and Hull Trains in 1999 for track access rights on ECML. During that process two hearings and a number of workshops were held which were critical to identifying relevant considerations and solutions. The process adopted in 1999 resulted in an evidence-based approach on capacity issues, an approach which is lacking in the current process.
- 11** There are a number of other serious concerns about the process leading up to the issue of the proposed decision. These include the extremely short response times allocated by ORR to respondents for the submission of their views on detailed

capacity and economic appraisal reports which took Network Rail and Arup many months to compile and the fact that the proposed decision is based on versions of those reports which were in draft and did not take account of all the relevant issues. The Network Rail capacity study remains in draft form and, for example, there has been no analysis by Network Rail of the down direction in detail (see paragraph 7.8.1 of the Network Rail study) nor has there been a proper performance assessment (see paragraph 21 of the proposed decision).

12 In paragraph 13 of the proposed decision ORR appears to place particular weight on the relative levels of support for Grand Central's and GNER's proposals. ORR might take time to reflect on the extent to which Grand Central's PR campaign has resulted in the level of support in the North East to which it refers. GNER did not undertake such an extensive PR campaign, assuming that legal, technical and economic merits of its application would be the decisive factors in any decision. However, GNER points to the high level of support for GNER's proposals that the proposed decision has prompted. In particular, in just a two week period, following the issue of the proposed decision more than 5,800 passengers contacted ORR to express their support for GNER's extra services between Leeds and Kings Cross. In addition to passenger support 32 MPs have so far signed an Early Day Motion tabled by Mary Creagh MP (Wakefield), calling for ORR to change its proposed decision in favour of GNER's proposals. GNER also understands that many stakeholder organisations, civil and business leaders right along the ECML have contacted ORR urging it to reverse its decision in favour of GNER's proposals. These include representations from Scotland, the East Midlands and London, as well as the Yorkshire region. It is important not to lose sight of the fact that the GNER proposals would provide nearly two million extra seats every year on a route that has seen passenger journeys increase by up to 40 per cent. in each direction in the last five years. GNER also makes the following points on public support issues:

- the precise nature of any services that may be provided by Grand Central were and remain unclear;
- members of the public will generally react favourably to any proposal for direct services from their community to London;
- it was not made clear to the statutory stakeholders in this process that the proposals were being put forward on an "either/or" basis; and
- West Yorkshire stakeholders assumed that as the GNER proposals constituted a franchise commitment, they would not be blocked by ORR.

13 At this point it is also worth saying something about the history of the Leeds half hourly proposal. The Leeds half hourly concept is of course not new. GNER first raised the aspiration of a half hourly interval service between Leeds and London with Railtrack in 1997. This was re-iterated during routine meetings with Railtrack and was a stated aspiration of GNER at the ORR hearings on Track Access Rights on ECML in 1999. The combination of infrastructure works to deliver Leeds First together with

power supply restrictions at the south end of the route prevented this. Following completion of the Leeds First scheme and Corries Mill Feeder station (both of which were partly justified as they enable the Leeds half hourly service to be delivered), GNER was then unable to implement the service due to the loss of a train at Heck in 2001 and continuing uncertainty on franchise ownership.

When the Secretary of State announced GNER's franchise extension in 2002, it was linked to the development of Allington Chord to facilitate the development of the Leeds half hourly service. It would be extraordinary if money has been given to Network Rail for Leeds First, Corries Mill and the Allington Chord for the provision of the Leeds half hourly service by a Government awarded franchise and for this capacity then to be given to an open access operator, be it Hull Trains or Grand Central.

Leeds half hourly was included in the SRA's stakeholder consultation prior to issuing the ITT for the ECML franchise in 2004. It was included in the ITT for the ICEC franchise as the Variant 1 timetable for which all bidders had to bid against. As part of GNER's bid process, as required by the SRA, GNER requested guidance from Network Rail as to the practicability of Leeds half hourly and their response was that "*This proposal would appear to be generally practicable*". This was as recent as November 2004.

In short, GNER has been working with Government over a number of years to secure the delivery of this proposal for the benefit of customers and a significant amount of public money has been invested with a view to delivery of the GNER proposals.

THE PROPOSED DECISION

- 14 The proposed decision involves the granting of rights to Grand Central for "*up to ten years*" (see paragraph 3 of the proposed decision). The Railways Infrastructure (Access and Management) Regulations 2005 (the '**Infrastructure Regulations**') establish the presumption that track access contracts should normally not exceed five years. In the interests of transparency GNER requests that ORR provide details of the specialised grounds which it considers justifies the approval of access rights for Grand Central in excess of five years. GNER is not aware of any specialised grounds that would justify this, leading it to conclude that the proposed decision is contrary to the Infrastructure Regulations and ORR's published policy on long-term access contracts ("*Long-term Access Contracts : Final Conclusions*" published in June 2005).
- 15 As referred to in the executive summary above, until ORR is able to provide proper clarification of the phrase "*commercially useful paths*" the output required by the proposed decision is entirely unclear and thus meaningless. In particular, that output appears to override the provisions of the Network Code which applies its Decision Criteria to the development of the timetable. The proposed decision prejudices the operation of the Network Code and appears to afford preferential priority to Grand Central above all other operators.

- 16 In paragraph 3 of the proposed decision ORR states that Grand Central could begin operations in the first half of 2007. GNER requests that ORR explains the steps it has taken to satisfy itself that this will be the case. In paragraph 4.21 of ORR's "Criteria and Procedures" document published in June 2003 the Regulator stated that he would not normally approve firm rights unless a train operator satisfies him as to its intention and ability to use the capacity. Otherwise, scarce capacity would be wasted by Network Rail's obligation to stand ready to accommodate the operator's bid to take up the unused rights. A theme of GNER's and other respondents' responses to the consultation process is the obvious risk in granting firm rights to a new operator which on the face of it does not appear to have any of the necessary licences, safety certificates, safety case, route clearance, financial backing, rolling stock, rolling stock maintenance arrangements or staff required to exercise those rights. In this regard, the statement made by Grand Central to "The Guardian" and reported on 28th January 2006 is instructive. The Guardian reported that *"The company's Chief Executive, Ian Yeowart, cheerfully admits that he doesn't know how many trains he needs, what rolling stock or the cost"*. GNER also believes that the rolling stock that Grand Central may have intended to use may not now be available. GNER seriously questions whether Grand Central will be in a position to commence operations in 2007 with new rolling stock given minimum order requirements and delivery times for new rolling stock.
- 17 GNER assumes that ORR has satisfied itself as to the viability of Grand Central's business plan in the context of the revised rights proposed to be approved by it and of the impact on Grand Central's business of it having to meet its share of the fixed charge. GNER notes ORR's proposal to include an access charge re-opener in the Grand Central contract in this regard.
- 18 GNER strongly urges ORR to confirm that it has satisfied itself as to the operational and financial viability of the proposed decision and to explain the steps that it has taken to do so. Without this there can be little confidence in the proposed decision.

CAPACITY

- 19 ORR's conclusions on capacity are unsound for the reasons referred to below.
- 20 ORR has based its conclusions on capacity on an out of date timetable. As GNER has mentioned in earlier responses the timetable has changed. ORR's conclusions fail to take into account these changes. Contrary to the statement in paragraph 10 of the proposed decision ORR has not based its decision on the *"present level and patterns of utilisation of the Doncaster to Leeds route"*. This point is critical as the ORR decision not to approve GNER's additional rights is based on ORR's understanding that the capacity for the GNER services does not exist on the Doncaster to Leeds route (see paragraphs 3, 18, 61 and 66 of the proposed decision).
- 21 GNER and Network Rail have worked together to demonstrate that capacity is available on the Doncaster to Leeds route for GNER's services without a *"major"*, *"complete"* or *"total"* revision of the timetable. The, or one of the, fundamental

assumptions on which the proposed decision is based is demonstrably incorrect. Appendix A contains GNER's detailed study of the available capacity on the Doncaster to Leeds route. The draft Network Rail ECML capacity study considered the route between Leeds and Doncaster. It stated that *"It is clear from this analysis that the routes between Leeds and Doncaster are very heavily used. It is clear that there will be a number of significant challenges to be overcome if GNER's proposals are to be viable"*. Importantly it went on to state that *"Finally, it needs to be noted that when the analysis for this route section was undertaken in mid November, a major freight recast of Anglo-Scottish coal was still taking place for December 2005. It is clear from recent analysis of the database that a number of coal trains in the Hare Park area have been subsequently retimed. Now that the recast has been completed, there would therefore be benefit in repeating the analysis"*. As a result of the reasons cited in the ORR's proposed decision, GNER carried out its own detailed analysis of the six required paths between Leeds and Doncaster and came to an early conclusion that changes had indeed occurred in the freight paths between the draft capacity study and the final version of the December 2005 timetable, and that the six additional paths now appeared totally viable.

Following this analysis, GNER approached Network Rail, who agreed to undertake a joint detailed analysis of the viability of the six paths now that the December 2005 timetable was completed.

This exercise was undertaken by GNER's Train Planning Manager (who has over 15 years of train planning experience on the ECML) and Network Rail's Advanced Timetable Manager (who is probably the most experienced employee in Network Rail with regard to ECML timetabling). The author of the Network Rail capacity study was also involved in the exercise.

The proposed six paths were each investigated in turn and for each path a conclusion was reached that the path was now achievable and that this could be done with only minor tweaks to other operators' services. Any such change would require no adjustment to any access rights and would be a totally legitimate change to make as part of any timetable development process under Part D of the Network Code.

As well as validating the paths to the approach of Doncaster station, each of the six paths was successfully validated through the station itself, where potential further conflicts with Northern, Transpennine Express, Virgin Cross Country and freight services could have arisen. Attached as appendix A to this document is a table showing the six validated paths between Leeds and Doncaster.

This whole exercise was exactly the method that GNER had expected and still expects to use to develop its service proposal, hence GNER's request for contingent rights.

GNER is confident that the operation of these paths would not conflict with the track access contracts of Central Trains, Midland Mainline or GN/Thameslink. In any event, as the additional Leeds services are a publicly specified requirement of Government, GNER would expect support from DfT and for DfT to use its ability to directly influence other franchised operators to facilitate these services if necessary.

The GN/Thameslink franchise was relet on the basis of these services coming into operation.

GNER supports ORR's view that *"freight access rights are more flexible than passenger access rights"*. This is clearly evidenced by the fact that freight services listed in the draft Network Rail capacity report are now operating in different paths.

Furthermore, two capacity enhancements are now in operation on the ECML (Allington Chord and Werrington bi-directional signalling) which provide further flexibility for GNER's additional services. Both of these enhancements were funded by the SRA in support of the additional Leeds services proposed by GNER.

GNER has demonstrated this in the limited time available provided by ORR to respond to its proposed decision. GNER is confident, given the time provided by the timetable development process, that it can complete the development of its proposed services.

GNER submits that achieving a workable operational plan for Leeds – Doncaster in the up direction is the most problematic, yet it has been achieved. GNER is confident that the trains can be pathed on the remainder of the route together with workable solutions at Kings Cross Station. GNER asks ORR to note that in the down direction paths can be found between Doncaster and Leeds as the timing can be varied by up to 20 minutes simply by altering the stopping pattern south of Doncaster.

ORR stated *"we would have been prepared to approve the rights sought had we been able to satisfy ourselves that they could be accommodated without a major revision of the timetable"*. The professional view of those with the experience and qualifications to judge this is that no such major revision is needed. We therefore expect ORR to approve the rights GNER has sought.

A commentary on the updated position on the trains mentioned as conflicts in Network Rail's draft report is given in Appendix B.

- 22** In paragraph 14 of the proposed decision ORR appears to adopt the logic that Grand Central's application is to be favoured over GNER's because GNER's application would involve GNER making alterations to its own services. In fact, the ability to alter its own services and particularly their pattern of station stops is one of the reasons why GNER is able to make more efficient use of the available route capacity while not adversely affecting the overall level of service to the public or the revenue generating capacity of the route. However, ORR produces no evidence to demonstrate that the exercise of the proposed firm rights to be approved for Grand Central would not involve the alteration of existing services. Indeed, quite the opposite as ORR proposes the inclusion of modification provisions in four existing operators' access contracts (see paragraphs 4 and 38 – 40 of the proposed decision) and envisages disruption to other operator's services (see paragraphs 4 and 6 of the proposed decision).

- 23 ORR produces no evidence to support its conclusion that “*a small number of additional train services on the ECML can be accommodated*” (see paragraph 19 of the proposed decision). In addition, the proposed approval of Grand Central rights ignores the known capacity constraints on the section of Grand Central’s route north of Doncaster (which include Doncaster station, York station and its approaches, Skelton Bridge Junction, Northallerton High Junction, Eaglescliffe, the 15 minute absolute block section south of Sunderland and Sunderland station itself). The findings of the Network Rail capacity study with regard to capacity at Sunderland station are clear: it is impossible to accommodate Grand Central’s services at Sunderland without a retiming and replatforming of Nexus and Northern services and in any event Network Rail does not consider that the standing time required by Grand Central at Sunderland is an effective use of capacity. In this context it is worth noting the changes to the service pattern at Sunderland made at the time of the introduction of the Nexus service when a number of Northern services had to be withdrawn in order to provide a working arrangement for the station. An approval of rights by ORR for Grand Central’s services effectively reverses these changes. ORR does not produce any evidence to demonstrate that, contrary to Network Rail’s study (in particular see the summary of Network Rail’s comments in paragraph 14 of the proposed decision), capacity exists for the Grand Central services.
- 24 Further, ORR does not demonstrate that access can be granted by Network Rail without Network Rail being in breach of existing access agreements. GNER has in mind, in particular, the access contracts of One, Cross Country, Transpennine, Northern and Nexus. Any access contract granted in breach of the requirement contained in section 17(1)(b) of the Act would be illegal.
- 25 GNER notes ORR’s statements in paragraph 20 of the proposed decision but it is important to mention that no loop exists on the busy two track section between Doncaster and York.
- 26 In the light of ORR’s statement in paragraph 21 of the proposed decision that Network Rail has not fully explored the scope for introducing limited additional capacity, nor has it undertaken timetable development which would provide a better basis for making a performance assessment, it is difficult to see how the decision to approve firm rights for Grand Central has been arrived at on a rational or reasoned basis. In the absence of evidence as to the existence of capacity to deliver firm rights for Grand Central, GNER contends that the appropriate course of action would be for ORR to allow GNER to bid in to the timetable using the contingent rights sought by it. It is not fair or efficient to effectively set aside firm rights for Grand Central in order to enable it to develop a timetable and business case.
- 27 At the heart of ORR’s decision is the desire not to prejudge the outcome of the RUS (see paragraphs 19, 61 and 66 of the proposed decision). However, the proposed decision does exactly that by proposing firm rights for an open access operator for a period of 10 years. By approving the grant of very scarce capacity to an open access operator the proposed decision will severely constrain the RUS and, accordingly, the effective and efficient use of capacity on the ECML will be prejudiced. In particular,

GNER notes that ORR is not proposing any modification mechanism in Grand Central's contract to allow for the outcome of the RUS to be implemented. ORR appears not to have considered the fact that GNER's franchise agreement (and those of other franchised operators on the ECML) contains a change mechanism pursuant to which the outcome of the RUS may be enforced on GNER. ORR is wrong in its assertion that the approval of the contingent rights sought by GNER would have prejudged the outcome of the RUS (see paragraphs 19, 61 and 66 of the proposed decision). The proposed decision is particularly damaging for the RUS because:

- it could sterilise up to 40% of track capacity in the hour before a Grand Central train runs;
- it may prevent the development of a commercially useful standard hour timetable on the ECML;
- it may prevent the development of a new standard hour timetable involving the new Cross Country franchise; and
- it could result in a small train operating in the peak and preventing a much larger train to, say, Cambridge, Leeds, Newcastle or Hull from running.

It is not clear whether ORR is proposing that Grand Central should or should not be able to operate in the peak. If so, GNER would question the basis on which Grand Central is being afforded priority over other operators. This would certainly not make economic sense.

It is also important to note that GNER has never assumed that paths are available in the peak. The DfT has let the GNER and Thameslink/GN franchises on the basis that paths are not available in the peak. The relative economic benefits of GNER's proposals would of course be significantly increased in any comparison of the GNER and Grand Central proposals running in the peak given, in particular, the relative size and capacity of the rolling stock.

- 28** In the light of the above, the proposed decision is wholly illogical and is arrived at on the basis of mistaken assumptions and incorrect information.

ECONOMIC BENEFITS

- 29** ORR's consideration of the relative economic benefits of the competing proposals and its conclusions in relation to generation and abstraction are fundamentally unsound for the reasons given below. In particular, it is difficult to understand how any sensible economic analysis of the proposed Grand Central services can take place when no information is available for the departure times and journey times of those services.

Economic Appraisal

- 30 No explanation is given by ORR as to why the Arup economic appraisal was not a “*determinative*” factor in its decision (see paragraph 23 of the proposed decision). This of course begs the question as to why the appraisal was commissioned in the first place. GNER requests ORR to explain the basis on which it sees fit to ignore the findings of the economic appraisal. ORR’s position here, given that it is the economic regulator for the industry, is remarkable and clearly at odds with its primary duty.
- 31 The economic appraisal contains compelling reasons as to why GNER’s proposals should take priority over those of Grand Central. The positive net economic benefits of the GNER proposal vastly outweigh those of Grand Central. In addition, GNER has made it clear that the relative economic benefits of the GNER proposals are significantly understated in the Arup appraisal, although GNER notes that ORR has chosen not to respond to GNER’s comments in this regard.

‘Not Primarily Abstractive’ Test

- 32 As referred to above, it is impossible to arrive at an informed view on the abstraction levels of the Grand Central services in the proposed decision as the services are not sufficiently defined. On this basis ORR is not in a position to rule on whether the services pass the test or not. Further, GNER and others find the lack of transparency regarding the ORR’s view as to the precise generation: abstraction level at which services pass or fail the test wholly unacceptable.
- 33 On the evidence presented to date it is difficult to see how the proposed Grand Central services meet the requirement set out in paragraph 3.17 of ORR’s “Moderation of Competition : Final Conclusions”. This states that the test is “*whether the overall effect of approving the proposed rights is likely to attract sufficient new patronage to rail that this could be considered the primary impact of the proposal*”.
- 34 ORR’s conclusions on generation and abstraction are based on incorrect information and mistaken assumptions. ORR does not produce any convincing evidence to justify or quantify the move from the MOIRA generation:abstraction ratio of around 0.1:1 to a level which is not primarily abstractive. ORR’s arguments in this regard are weak and inconsistent. In particular, ORR does not explain where stage two of its five stage test takes it and the basis of its evidence for its assertion that DfT’s and other parties’ predicted ratios of 0.1:1 and below under-represent generated traffic. GNER contends that the outcome of the benchmarking process undertaken by ORR in stage three of its test is incorrect. When assessing generation and abstraction ORR makes reference to the introduction of Hull Trains services as a comparator. Since the introduction of Hull Trains services in Autumn 2000, the London to/from Hull rail market has grown from £3.4m to £6.6m in 2005. Adjusting for inflation (2.5% p.a) and underlying rail growth (3% p.a) the market has grown just over 50% in these 5 years with now 6 trains per day each way.

GNER, using MOIRA analysis of the Grand Central proposal, predicts generative growth in the combined Sunderland, Hartlepool, Eaglescliffe, Northallerton and Thirsk markets of about 30% giving a generation to abstraction ratio of 0.1:1. If the Hull/London example is used as a comparator model (even though it is 6 trains per day rather than the 3 of the Grand Central proposal) 50% market growth would not increase the generation to abstraction ratio above 0.2:1.

Even allowing for any underestimation of generation by MOIRA, GNER has seen no evidence to suggest that the generative growth from the Grand Central proposal would come close to achieving a generation to abstraction ratio of 0.3 to 0.4.

The reason for the lower Grand Central generation:abstraction ratio, even if the same levels of growth are seen as for Hull Trains, is that the Grand Central proposed services are highly abstractive from both York and Northallerton to London services, more so than Hull Trains abstracts from Doncaster services. There is no evidence that MOIRA overestimates abstraction.

It may be relevant to compare generative growth rates for new services - it is not appropriate to compare generation:abstraction ratios. ORR's conclusions are, therefore, unsound.

35 Set out below in tabular form is a summary of some of the reasons related to the current service offering which GNER considers will inevitably result in the proposed Grand Central services being primarily abstractive:

LOCATION	CURRENT SERVICE OFFERING
York	30 fast trains per day averaging 2 trains per hour
Thirsk	Hourly connectional service to/from York operated by Transpennine. Little opportunity for growth as car park is very limited. This station is only 8 miles from Northallerton and only has 8 car park spaces
Northallerton	5 through trains per day and half hourly connectional service operated by Transpennine. Little opportunity for growth as car park almost full
Eaglescliffe (for Middlesbrough)	The facilities at Eaglescliffe are not attractive for Intercity passengers. Middlesbrough has a frequent connectional service to Darlington and an hourly service to York
Sunderland	The journey time proposed compares with that currently available via Newcastle. The high frequency metro service to Newcastle provides excellent connectivity

In addition to the current service offering, the relative size of the relevant rail markets is very important. The market for rail travel to London from east of Doncaster is far greater than that from the north east of Northallerton.

CATCHMENT	REVENUE	JOURNEYS 000'S
Beyond Doncaster HT Stations	£9.6M	346.9
Doncaster All	£13.8M	395.0
Beyond York Proposed GC Stations	£2.0M	57.5
M'bro	£1.4M	37.0
York All	£39.2M	941.8

The table above shows the current size of the rail markets for each of the areas to and from Greater London. It is based on gross ticket sales for the financial year 2004/05. The market served by Hull Trains beyond Doncaster is only marginally smaller than the Doncaster market itself – approximately 88%. The market Grand Central proposes to serve is currently 6% of the York and Northallerton market. Even if Middlesbrough is included that percentage only increases to 10%.

ORR's assertion that the positions of Hull Trains and Grand Central are similar is clearly false. The market from York to London is so great compared to that from

Thirsk, Eaglescliffe, Hartlepool and Sunderland that the Grand Central services cannot be anything other than primarily abstractive.

Finally, GNER questions whether the figures redacted from the proposed decision are based on the original proposal for four paths each way. If this is the case then the tests should be re-calculated based on the services proposed by the proposed decision.

- 36** As mentioned above, since the date of the proposed decision ORR has issued the final version of the Arup economic appraisal. The final version of the appraisal has not taken account of the comments GNER made in its response to the final draft. In particular, it has not addressed the incorrect appraisal assumptions in appendix A. The rail journey purpose split used in the report is sourced from the DfT webTAG data which is a national average for UK rail. This is not an accurate reflection for ECML rail services and, although GNER has supplied a more accurate split in its reply, ORR has ignored this without explanation. The effect of this is to overstate the benefits of Grand Central's proposal and understate the benefits of GNER's proposal. Further in paragraph 3.5.3 of the appraisal (the appraisal results for the GCR services) the report states that "*It should be noted that our analysis did not include certain other factors, such as revenue loss to other TOCS*". This is a significant omission which further results in the appraisal materially overstating the benefits of the Grand Central proposal and means the proposed decision is based on incorrect information.
- 37** The overriding objective of ORR in the proposed decision appears to be the provision of new journeys to poorly served areas which do not have a direct service to London (see paragraph 36 of the proposed decision). GNER would like ORR to explain the economic or statutory basis of this objective as it does not appear in its section 4 duties or its own published criteria, procedures or policy. The passage from the "Moderation of Competition : Final Conclusions" quoted by ORR in paragraph 36 of the proposed decision only states that ORR "may" give additional weight to this consideration, not that it must be the overriding policy objective. The ORR policy adopted in the proposed decision also appears at odds with current DfT policy which has seen the closure and proposed closure of lightly used services into London.
- 38** GNER also seriously questions whether Sunderland can be described as 'poorly served'. Sunderland has the benefit of the excellent and frequent Metro service to Newcastle. It is unlikely that the proposed Grand Central services will result in any journey time saving. This is recognised by ORR in paragraph 48 of the proposed decision. Indeed, the proposed decision may result in increased journey times, particularly if changes to GNER or other services are required.

OTHER AGREEMENTS

- 39** The ORR's requirement of GNER to include the modification provision referred to in paragraph 38 of the proposed decision is an abuse of ORR's power and falls outside the scope of powers conferred on ORR by the Act. Pursuant to section 22 of the Act ORR has the power to approve or not approve amendments to an access agreement. Whilst ORR has the power under section 21(5) of the Act to require the

inclusion of model clauses it does not have the power under the Act to require the inclusion of other provisions. In particular, it does not have the right to deprive existing operators of their contractual access rights in this way.

- 40 In addition, the modification provision constitutes a breach of GNER's right to protection of property under European human rights law (Protocol 1, Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

ACCESS CHARGES

- 41 ORR does not explain the basis on which it is content that its operation of a different charging framework for open access operators is compliant with relevant law. GNER maintains that the current pricing regime which does not require open access operators to pay any element of fixed charge (while enjoying the income benefits of interavailable fares set at the level necessary to recover these charges and the franchise premium – in fact the majority of Grand Central's income would flow through this channel) is contrary to EU and domestic law, in particular Directive 2001/14 (the **'Directive'**) and the UK implementing regulations, the Railways Infrastructure (Access and Management) Regulations 2005 (the **'Regulations'**). Both the Directive and the Regulations are based on the principle of non-discrimination between operators of railway services, and require that operators in the same market segment be charged the same access charges. Discriminating in the charges applied to operators of scheduled passenger train services, one under franchise and the other not, is not consistent with the non-discrimination principles of the Directive and the Regulations. It follows that those open access operators which operate services in competition with franchise passenger train services should not receive the benefit of a discriminatory charging policy, as this would be inconsistent with, in particular, Article 8(3) of the Directive and Regulation 4(1) of the Regulations. GNER also notes that paragraph 4.4.10 of the "Future of Rail" White Paper stated that *"Open access operators should bear a fair share of the costs of the railway through the access charges they pay. The ORR will apply these principles in considering future open access applications"*.
- 42 GNER notes that ORR does not deal with GNER's argument that the relief for open access operators from the burden of having to make a contribution to the fixed costs of running the railway infrastructure amounts to unlawful state aid, contrary to Article 87 of the EU Treaty. Again, GNER would welcome an explanation from ORR as to the reasons why it considers its current charging frameworks are compliant with the state aid rules.
- 43 In addition, the discrimination as between franchised operators and open access operators referred to above amounts to discrimination within the meaning of Article 82 of the EC Treaty on the basis that it directly impedes competition between GNER and open access operators providing scheduled passenger services in competition. It is Government policy, supported by the Office of Fair Trading and following the lead of the EC Commission, that legislation must not produce outcomes which are incompatible with competition policy and which distort or restrict competition within

a market. ORR has failed to reflect these considerations and objectives in its policy of track access charges.

- 44 The inclusion of an access charges re-opener in Grand Central's track access contract does not address the issue of discrimination. It would be discriminatory if Grand Central is charged less or on a different basis to GNER, and if the implementation of the access charges pursuant to the re-opener is restricted to the implementation of the 2008 Periodic Review.

STATUTORY DUTIES

- 45 GNER contends that the proposed decision does not comply with the ORR's statutory duties as set out in section 4(1) of the Act, not least because in coming to its decision ORR fails to take account of material relevant considerations and facts and gives significant weight to irrelevant considerations. In addition, the proposed decision does not appear to have proper regard to the statutory guidance issued to ORR or to the funds available to DfT (as is required by sections 4(5)(a) and (c) of the Act). GNER notes that the requirements in section 4(5) are to be applied objectively and are not qualified by the same wording that appears at the start of section 4(1) which refers to ORR exercising its functions in the manner which it considers best.

Section 4(1)(zb) – to promote improvements in railway service performance

- 46 GNER notes that the statutory definition of this duty includes reliability and avoidance or mitigation of passenger overcrowding. GNER's proposal is for twelve, 9 coach trains per day. The proposed decision turns this down and is proposing six, 5 coach trains (but effectively 4 coaches for passenger use) and two, 4 coach trains. The carrying capacity of a GNER train is 530. Grand Central trains would have less than half this capacity. Kings Cross to Leeds services suffer from overcrowding problems. In addition a regular, half hourly service would result in greater reliability for the passenger.
- 47 ORR states that no detailed operational performance assessment has been undertaken by itself or Network Rail. It is astounding that there has been no proper performance assessment. The duty to consider performance is one of ORR's statutory duties. ORR has based its conclusions on a purely speculative assumption that the performance of Grand Central may be similar to Hull Trains.

Any such assumption is incorrect because:

- ORR does not know what rolling stock Grand Central will use;
- Hull Trains' initial operations were supported by the Anglia franchise including the supply of train sets, train crews, driver training, maintenance support, telesales and a control office;
- Sunderland station is more intensively used and capacity constrained than Hull;

- the route between Sunderland and Hartlepool includes a block section of 15 minutes; and
- Grand Central will pass through a more intensively used area (off the ECML) than Hull Trains. For comparison, Gilberdyke on the route between Selby and Hull has 171 planned services. Eaglescliffe (a more complex area) on the route between Northallerton and Hartlepool has 230 planned services.

Equally, if ORR believes that the implementation of a robust timetable for new services will improve performance for Grand Central, this is as relevant, if not more relevant, to GNER's services.

- 48** ORR has misinterpreted GNER's PPM in its comparison with Hull Trains. Hull Trains' PPM is measured as trains arriving at destination less than 10 minutes later than their scheduled arrival time (not five minutes), the same as GNER. It is not a more challenging measure.

GNER's West Yorkshire Service Group (a more comparable Service Group to Hull Trains than all of GNER's services) is operating at just under 88% PPM MAA (as at the end of period 11). This includes operation over a route which ORR refers to as "busy". This is higher than the 81.4% PPM quoted by ORR and only marginally below the PPM quoted by ORR for Hull Trains.

GNER has agreed challenging performance targets in its franchise agreement and is fully committed to their delivery. These will of course apply to the new Leeds half hourly services. GNER has developed a partnership approach with Network Rail setting out a ground-breaking accord to deliver improved performance for customers' benefit. DfT can, and will, hold GNER to account on these targets. In addition, GNER's franchise extension is judged solely on meeting prescribed performance targets. No such public accountability or scrutiny applies to open access operator performance.

A full half hourly service to Leeds would reduce generalised journey times by rail to London for the whole population of West Yorkshire. The benefits for this large population are clear.

Section 4(1)(a) – to protect the interests of users of railway services

- 49** The proposed decision does not take into account the loss of the Leeds half hourly service from December 2006 (or even earlier) which would benefit all locations between Leeds and London. In addition, no disbenefit which may result from GNER needing to maintain journey times of services which are flexed or whose rights are modified has been taken into account. This could result in reductions of service levels at intermediate stations south of York. Sunderland's gain despite being well connected by Metro and Northern services, may well be Retford's, Newark's or Grantham's loss. In the absence of any detailed timetabling work on Grand Central's

proposals and the consequential impact on GNER it is impossible to comment in detail and therefore for ORR to comply with this duty.

Section 4(1)(b) – to promote the use of the network

50 It is GNER's view that the Grand Central proposal may well be fatal to the proposals to electrify the route between Leeds and Hambleton Junction and to build a new Intercity station adjacent to the M1 and A1(M) on that route. The land needed for the new station is owned by Leeds City Council which is supportive of the electrification and station scheme. Leeds City Council is under pressure to sell the land and has agreed not to do so provided progress is made in 2006. It is unlikely a business plan for the electrification and new parkway station can be constructed with the loss of capacity south of Doncaster caused by Grand Central's proposed services.

GNER has kept ORR up to date on the progress being made with the electrification and station scheme and offered a site visit.

The ORR's proposal will result in a marginal increase in the use of the network potentially at the cost of:

- a new electrified route between Leeds and Doncaster;
- electrification between Leeds and York, and Leeds and Selby;
- a new intercity station for the Yorkshire region described by leading transport consultants MVA as the most exciting new station for over 30 years; and
- an electrified diversionary route between Leeds and Doncaster and Doncaster and York.

The lack of car parking at Leeds and York for which GNER's proposals provided a solution will be a serious impediment to the growth of intercity journeys by GNER, Transpennine and Cross Country.

The proposed decision therefore fails to promote the use of the network.

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

51 GNER notes ORR has made no comment. GNER's proposal for the additional Leeds services is to deliver a regular interval service between London and Leeds as a precursor for a standard hour timetable for the whole of the ECML. The additional 12 trains can be achieved with 2 additional diagrams (2232 miles total). This compares with the Grand Central proposal for 1590 miles with at least 2 diagrams. The ORR's proposed decision results in GNER being unable to deliver the efficiencies and economies assumed in its franchise agreement.

- 52 The choice of 6 small capacity hungry trains which do not contribute to industry funding versus 12 large trains contributing to a regular interval service which results in significant additional income to DfT is neither efficient use of the network nor economic.

Section 4 (1)(d) - to promote competition for the benefit of users of railway services

- 53 Whilst ORR notes that competition must be for the benefit of users of railway services the proposed decision only states “*We consider that approval of Grand Central’s services would significantly promote competition*” (see paragraph 51). There is no attempt to demonstrate how this would be for the benefit of users of railway services. For ORR to satisfy this duty it should balance the benefit to the users of the proposed Grand Central services with those of GNER’s proposed services. GNER also submits that in balancing the benefits of users ORR must consider that Intercity services actually serve the region and not just the immediate location. The North East has a half hourly frequency to London already. GNER is seeking to deliver the same benefits to West Yorkshire.

GNER questions how Grand Central’s proposed service which may be more than 90% abstractive, can be given a higher priority than GNER’s proposals. In addition, ORR has not taken into account any detrimental effects resulting from the introduction of the modification wording (which, in any event, as referred to above, GNER considers to be unlawful). GNER also refers to its earlier comments on risks to service levels at Retford, Newark and Grantham and other stations on the ECML.

- 54 GNER asks ORR to note that there is already considerable competition from the North East to London. GNER faces rail competition on all parts of the route on which it operates. GNER believes it is unique among franchised passenger train operators in this respect. There are also air services from Newcastle and Durham Tees Valley and Leeds/Bradford to London. It would be a perverse outcome if the proposed decision benefited the internal air network.

Section 4.(1)(e) – to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator

- 55 Again GNER notes ORR has made no comment. This duty has not been discharged as the connections opportunities afforded by GNER’s proposal at Peterborough, Doncaster, Wakefield and Leeds far outweigh those which will be available from the Grand Central proposal. GNER asks ORR to note that GNER is seeking to deliver a half hourly frequency into Leeds to match the (in general) half hourly frequency on all connecting routes radiating from Leeds.

Section 4.(1)(g) – to enable providers of railway services to plan the future of their businesses with a reasonable degree of assurance

56 Again GNER does not agree that ORR has discharged this duty. Whilst the delay is regrettable, further delay of one year of waiting for the outcome of the RUS is preferable to the wrong decision which will inhibit the RUS and affect the ECML for 10 years.

In addition the SRA assured GNER that the franchise commitment to Leeds half hourly would be included in the RUS, which at the time was the responsibility of the SRA. The developmental RUS at that time included the Leeds half hourly services and the Leeds-Hambleton Junction electrification.

The proposed decision has very serious consequences for the future of the passenger rail franchising process. As ORR recognises, the proposal to include a modification provision would adversely affect the ability of four passenger train operators to plan their businesses with a reasonable degree of assurance. However, the impact of the proposed decision goes much wider and indicates that although franchised operators may be working with DfT to a public specification, that specification can change at any time. This level of uncertainty introduces a very significant additional level of cost to the industry for the first time.

Section 4(5)(a) – to have regard to any general guidance given to it by the Secretary of State about railway services or other matters relating to railways

57 The proposed decision would appear to be in conflict with section 4(5)(a) of the Act. It is noticeable that ORR does not refer to this section in the proposed decision. The Secretary of State's general directions to the Rail Regulator were issued in 2002. The directions require ORR to work with DfT to make the best use of available funds. The proposed decision means that DfT will lose a significant amount of premia (see below) than it would otherwise have received from GNER which DfT would have used to finance services elsewhere on the national network. In addition, by encouraging open access operators to undercut franchised operators' fares, ORR is effectively preventing franchised train operators from implementing DfT's policy of changing the balance of railway funding from tax payer towards the passenger.

58 The ORR stated in its Corporate Strategy dated April 2005 that "*The Government's Rail Review and the Railways Act 2005.....confirm that the rail industry is a public and private sector partnership, delivered by private sector companies in response to a public sector specification and the needs of paying customers*". In addition ORR has stated that one of its aims is to "*To engage actively with the Government, Network Rail and other stakeholders to support effective franchising through the alignment of Network Rail's development of RUSs, the Government's future franchising programme and the consideration of track access agreements, and through the development of an effective franchise arbiter role*".

GNER's application for access rights is to facilitate the delivery of the train services specified by Government and provided for in GNER's franchise agreement. This

specification is referred to in the SRA's letter to ORR dated 1 July 2005 which stated that *"The Leeds services that GNER are contracted to provide represent better value for money, increase the franchise premium received by the SRA and are a better use for the capacity since they will increase the number of trains and provide more seats on one of the fastest growing routes in the country"*. The letter concluded by saying that *"we therefore believe that the Grand Central application should be rejected"*.

On the one hand ORR has accepted the Government's rights to specify but in the proposed decision chooses to ignore this right. GNER finds this particularly surprising in view of a speech made recently by Chris Bolt in which he quotes John Swift, the first Rail Regulator: *"As John Swift, the first Rail Regulator, told the House of Lords Constitution Committee: "Independence of the regulator survives so long as and only so long as the actions of the Regulator do not produce results which are at odds with what a democratic system expects"*". He went on to say that: *"Therefore a regulator who takes no account of Government wishes or concerns as to the future of "his" industry is acting irresponsibly"*.

Section 4(5)(c) – to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services

- 59 ORR states in the proposed decision that it has concluded that the impact of the proposed decision on the funds available to the Secretary of State was not so significant as to outweigh the other benefits of that decision. Attached as Appendix C to this document is GNER's estimate of the impact of the proposed decision in terms of the total estimated loss to DfT. The amount of this estimate is £1.65 billion. GNER is astonished that ORR considers this amount not to be persuasive and submits that the loss of revenue will have a significant effect on the funding of the rail industry in the context of the 2008 Periodic Review.

CONCLUSION

As set out above, ORR has not taken into account all relevant matters and has made incorrect assumptions in relation to key issues. In addition, the manner in which ORR has arrived at the proposed decision is inconsistent with its statutory duties, contrary to domestic and EU legislation, discriminatory and constitutes the grant of state aid. For all these reasons, the proposed decision should not be confirmed by ORR as the final decision in whole or in part, the basis of the decision should be reviewed in its entirety, and a hearing should take place in order that all relevant matters can be aired and debated in a proper and fair manner.

APPENDIX A

Joint timetabling exercise undertaken by GNER and Network Rail to re-examine the proposed six additional paths between Leeds and Doncaster

Train ID	1A16	1A19	1A32	1A35	1A38	1A44
Rolling Stock	HST	225	225	HST	225	225
LEEDS (dep)	08.40	09.40	14.40	15.40	16.40	18.40
Leeds West Jn	08/41	09/41	14/41	15/41	16/41	18/41
Whitehall Jn	08/41½	09/41½	14/41½	15/41½	16/41½	18/41½
Holbeck Jn	08/42	09/42	14/42	15/42	16/42	18/42
WAKEFIELD W (arr)	08.51½	09.52	14.52	15.51½	16.52	18.52
WAKEFIELD W (dep)	08.53	09.53½	14.53½	15.53	16.53½	18.53½
Hare Park Jn	08/57½	09/58	14/58	15/57½	16/58	18/58½
South Kirkby Jn	09/03	10.01½	15/04	16/01½	17/01½	19/02
Adwick Jn	09/06	10/04½	15/07	16/04½	17/05	19/05
Adwick	09/06½	10/05	15/07½	16/05	17/05½	19/05½
DONCASTER (arr)		10.14	15.11½		17.09½	
DONCASTER (pass)	09/09½			16/08		19/08½

APPENDIX B

Commentary on Current position with conflicts identified in Network Rail draft report.

0840 LDS-KGX: 4L85 this train has been re-timed.

0940 LDS-KGX: 4M90 this train has the same path in the current timetable as the previous timetable. It is a Q path, so runs as required. In the last week it hasn't run at all. NR report says "scope for a solution".

1440 LDS – KGX – 6E14: this is an inter yard train, running WFO. When it runs it can be up to 150" early demonstrating alternative paths exist.

1540 LDS-KGX – 6V25 has the same path in the current timetable as the previous timetable. Again a Q path, booked for 3 days of the week MWFO. This train spends an hour in Eastfield yard at Peterborough. Whilst the problem listed is shown to be south of Peterborough the hour spent at Eastfield offers a solution.

1640 LDS-KGX: 4M75 has a different path to that of the previous timetable. The problem is listed at Welwyn, and in the previous timetable it ran via Hertford (avoiding Welwyn). This train could revert to the Hertford route. It is not unusual for this train to run to 138" early, indicating alternative paths.

1840 LDS-KGX – 7L84 has a similar path (problem listed Loversall Carr – Stoke). This train is now routed via the joint line between Doncaster and Newark. In any event this is a Network Rail internal infrastructure train.