

## Land Disposal by Network Rail: The Regulatory Arrangements

### Introduction

1. On 30 June 2006, the Office of Rail Regulation (ORR) published *Land Disposal by Network Rail: The Regulatory Arrangements*. This document accompanies that publication and provides the background to the regulatory arrangements.

### Summary

2. In revising the arrangements, ORR has taken into account the views and comments of railway industry stakeholders and other interested parties through an open and transparent consultation process. Having taken into account the comments received, we have:

- amended some of the general consent provisions to reduce some of the administrative burden on Network Rail, ORR and the wider industry but without weakening the safeguards to protect land for railway use;
- amended the general consent so that disposals of major air rights developments are specifically excluded;
- set out our policies covering:
  - how we expect Network Rail to handle proposed Compulsory Purchase Orders for its land;
  - our approach as to whether Network Rail should be compensated for loss of value following a refusal of consent under Condition 26; and
  - Network Rail's role in land disposals and arm's-length regulation.

### Background

3. Condition 26 of Network Rail's network licence ensures that land which may be needed for the continuing operation and future development of the network remains available to Network Rail by requiring regulatory consent to disposal. The way in which the Condition operates was set out in *Land Disposal by Railtrack PLC: The Regulatory Arrangements*<sup>1</sup>.

4. In December 2005, we set out and consulted<sup>2</sup> on our proposals to update those arrangements. The consultation closed on 31 March 2006. Responses were received from Network Rail, passenger train operators, Passenger Transport Executives (PTEs), Passenger Focus, the Rail Freight Group and local authorities. A

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<sup>1</sup> *Land Disposal by Railtrack PLC: The Regulatory Arrangements*, published November 2001. This can be accessed from our website at <http://www.rail-reg.gov.uk/upload/pdf/137-landdis.pdf>

<sup>2</sup> *Land Disposal by Network Rail: ORR's Review of the Regulatory Arrangements*, published December 2005. This can be accessed from our website at [www.rail-reg.gov.uk/upload/pdf/268.pdf](http://www.rail-reg.gov.uk/upload/pdf/268.pdf)

list of the respondents can be found at Annex A. Copies of the responses can be found on our website<sup>3</sup>.

5. A summary of the consultation responses and our assessment of them are provided below.

### **Responses to the consultation questions**

*Are consultees content with the approach we are taking in monitoring Network Rail's compliance with Condition 26? (para 3.14)*

6. There was broad support from consultees, including Network Rail, that we had taken the right approach. Passenger Focus suggested that we should consider increasing the sampling proportion of completed disposals should doubts emerge about the company's compliance with Condition 26. Strathclyde Passenger Transport Executive (SPTe) commented on the lack of visibility of Network Rail's register of interests as it was not available from the company's website and SPTe was unable to check what it had registered.

7. From the responses received, we consider that our overall approach to monitoring does not need to be changed from that set out in the consultation document. With regard to SPTe's point about the register of interests, our requirement of Network Rail is that the company must have a process, with which we must be satisfied, that allows other parties to register an interest in rail-related developments for particular sites<sup>4</sup>. Network Rail can then take such interests into account in its land disposal screening processes. The company may wish to make the register available on its website, particularly if that leads to an overall reduction in information provision costs.

*Do consultees agree with the proposal to clarify the general consent so that major air rights developments are specifically excluded? (para 3.22)*

8. Respondents broadly agreed that 1(j) should be amended. Chiltern Railways thought that developments above the railway had far greater potential to disrupt the operational railway compared with land disposals adjacent to it and agreed they had a greater potential to affect the railway's future expansion. Chiltern Railways referred to the seven weeks' disruption to its services in the summer of 2005 after the collapse of part of the tunnel being constructed at Gerrards Cross. Great North Eastern Railway (GNER), The Go-Ahead Group and Peterborough City Council suggested that it would be helpful if the term "major" was defined, with The Go-Ahead Group suggesting that new tunnels or any constructions above stations should be excluded from the general consent.

9. Network Rail thought that the term "major developments" was vague and would leave it uncertain as to when it applied; it therefore thought the exclusion

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<sup>3</sup> The consultation responses can be accessed at [www.rail-reg.gov.uk/server/show/ConWebDoc.8162](http://www.rail-reg.gov.uk/server/show/ConWebDoc.8162)

<sup>4</sup> As stated in section 4(4) of *Land Disposal by Railtrack PLC: The Regulatory Arrangements*

would be inappropriate. However, it recognised that specific consent might be needed for major developments where a land interest would need to be granted for the space to be occupied by supporting structures. It also thought that it was appropriate that the general consent continued to allow the disposals of air rights in relation to bridges over the railway, which it regarded as routine in nature.

10. The company also expressed the view that an extended ORR interest in proposed air rights developments would not necessarily be beneficial to its existing risk assessment processes and subsequent formulation of disposal terms. It also suggested that once major airspace developments had been progressed sufficiently to form the subject of an application of consent under Condition 12 (*Ring Fencing and Accounting Records*), that issues of risk should be considered in that context and to seek to do so under Condition 26 as well would duplicate activity.

11. Having considered respondents' views, we consider that paragraph 1(j) should be amended. We expect that Network Rail should consider a "major development" to include the situation where it would need to grant an interest in its land to provide support for a structure that could not be regarded as being of a routine nature. We also expect Network Rail to refer to us its proposals for air rights disposals that would, for example, facilitate the construction of new tunnels or any constructions above stations so that we can consult the industry fully on issues of potential railway expansion and operational risk.

12. We would therefore wish to consult the industry for its views before consenting to a proposed disposal. Condition 26 exists for this purpose, with established processes and decision-making procedures. We therefore believe that we and the industry should consider operational risk as part of the Condition 26 procedures.

13. In considering the grant of specific consent, we may wish to see that Network Rail has, where appropriate, addressed the wider industry risks, including the position regarding economic loss for train operators, arising from construction work above the operational railway.

*Consultees are invited to comment on the proposed approach to handling Compulsory Purchase Orders (CPOs)(para 3.25)*

14. We proposed that when Network Rail becomes aware of a potential CPO affecting its property, it should determine whether the land concerned would qualify for disposal through the general consent and if it did not, that Network Rail should keep its customers and funders informed and appeal against the CPO if necessary.

15. Consultees generally agreed with the proposal, with GNER considering that Network Rail's default position should be to object to the CPO process unless it could obtain consent through the Condition 26 process. GNER believed that this would strengthen Network Rail's position in negotiations and that of any train operators with interests in the disposal. The Go-Ahead Group considered that there should be a specific obligation on Network Rail to keep potentially interested industry parties informed of CPO-initiated disposals. SPTE recognised that it might use CPOs to enable it to progress projects in its area and that its CPO powers can only be exercised with express permission from Scottish Ministers. SPTE questioned how consultations and appeals should operate in this context. Essex County Council

(ECC) said that it always sought to reach agreement with the rail industry and used its CPO powers to give certainty of taking a project forward. However, ECC commented that any decision to take forward proposals that were contentious would not rest with ORR if parliamentary procedures had been used to secure a CPO.

16. Network Rail explained that it had a procedure in place for dealing with CPO proposals which involved lodging a holding objection while its engineering and business clearance teams assessed whether the land in question was required for its business. It thought there was scope to extend its current procedures to notify industry parties more systematically about CPO notifications. However, Network Rail thought that we should not impose an explicit requirement for this as it could lead industry parties to believe that the cost of objecting and putting forward their case could be imposed on Network Rail.

17. We note that there is some variance between consultees' views as to the steps that we should require Network Rail to take when a CPO is served for the acquisition of its land. Having considered Network Rail's response we consider that Network Rail's proposed improved approach is reasonable and expect the company to implement improved processes so that it operates appropriate procedures for dealing with CPOs of its land, including notification to ORR, relevant customers and funders of a notice of a CPO.

*Do consultees agree that the updated decision criteria are fit for purpose? (para 4.6)*

18. Some respondents suggested some refinements to the decision criteria but there was no suggestion that a general reconsideration of the criteria was required.

19. GNER suggested that the decision criteria at paragraph 4.4(b)(ii) should be extended to include incumbent train operators or, in a Franchise out to tender, short listed bidders. It said that incumbent TOCs or bidders were usually in a better position than the other named bodies in the paragraph to identify proposals requiring land as they may not be aware of, or be able to assess properly, deliverable plans that TOCs/bidders may have to improve their services, that are un-funded at that stage. GNER also pointed out how bidders' plans might need to be submitted in confidence.

20. Network Rail thought that the criteria had worked efficiently although some updating was appropriate, particularly regarding consultees.

21. The Rail Freight Group (RFG) said that its membership included terminal operators, developers, rail freight customers and others, and that these companies would, in many cases, have a greater understanding of the potential use for a land site than a rail freight operator. However, paragraph 4.4(d) suggested that where RFG was the only objector the presumption would be for disposal. RFG wished to see the criteria modified so that clear plans from rail freight customers would provide a presumption for retention.

22. Passenger Focus was pleased that consent to a sale where there was evidence of a transport need was unlikely. However, it recommended that the term 'evidence' be interpreted quite widely. It also expressed disappointment with the criteria in relation to the policy of being minded to consent where the only objection

raised came from a pressure group and considered that any objection raised should be assessed on its merits.

23. Peterborough City Council considered that none of the criteria were unfit for purpose. However, under paragraph 4.4(c), it considered that due regard had to be given to the likelihood (or otherwise) of actual delivery.

24. Essex County Council gave the view that it should be made possible for a local authority to request that the consultation process be placed 'on-hold', to allow it time to work up an alternative proposal for the land, for occasions when our consultations had made the local authority aware that land had become available.

25. SPTE considered it essential that it be consulted on any land disposal, reflecting its new role as Regional Transport Partnership (RTP).

26. We agree that the consultee list needs updating and will do so as set out in the consultation document and we will also add RTPs. In relation to our decision making criteria, we note the comments made but considers that the criteria do not need updating as they serve not to pre-empt our decision in any particular circumstances, but to give a clear indication of the factors that we will take into account in reaching a decision. We will assess all the relevant factors relating to each individual referral, before reaching a decision as to whether it is in the public interest to block the disposal of the land. We will expect Network Rail to consult all interested parties before making a submission to us. Under the wording of the Condition, we are committed to reaching a decision within three months. We do not propose to modify Network Rail's licence to change this as we believe that practice has shown this to be a reasonable period.

*We invite your views on our proposed revisions to the general consent - do consultees have any further suggestions? (para 5.6)*

27. Merseytravel and The Go-Ahead Group agreed with the proposed changes. Network Rail commented that the general consent had operated appropriately but required some fine-tuning to accommodate the passage of time and to improve the targeting of cases for regulatory approval.

28. Network Rail agreed the proposed changes to paragraph 1(a) of the general consent as being appropriate to cover the range of routine station leases. It also suggested that consideration be given to whether, by analogy with consent paragraph 1(c), provision could be made to cover the grant of a lease for the construction of a station. We consider that while Network Rail's proposed further widening of 1(a) could be beneficial in terms of reducing the administrative requirements of Condition 26, there may be issues arising from the construction of a station which may affect future railway developments. We consider that, on balance, the public interest would be better served by not further widening 1(a).

29. Network Rail had two comments on the proposed changes to 1(c): that the wording should allow for the addition of land to a Light Maintenance Depot (LMD) letting, as does paragraph 1(a); and that the wording in 1(c) does not contradict what the Depot Access Conditions or Depots Code would otherwise permit. We agree that these changes should be adopted.

30. For 1(d), Network Rail commented that it would not expect a lease under 1(b) to contain an obligation to grant a reversionary or concurrent lease, and we have removed this reference.

31. One comment was received in relation to general consent paragraph 1(f). GNER had concerns as to why the granting of a lease or licence of all or part of a building for use as office accommodation should always be the subject of a general consent, particularly in and around stations where train operators could have growing requirements to expand their own operational office and other accommodation. ORR considers that the purpose of the licence condition is to protect land which may be required for future rail development in the public interest. Leasing of accommodation in existing buildings will not hinder future rail development. In the event that such buildings form part of a station and would be used to provide a customer facility, any proposal to change their use to office accommodation would need to go through the minor modification procedures. We therefore consider that 1(f) does not need to be revised.

32. Four consultees gave comments concerning 1(g) of the general consent. GNER considered that Network Rail was not in a position to be able to make a 'reasonable' decision on the foreseeable needs of the railway industry - especially where innovative services might be involved - as the company did not operate commercial passenger or freight services and had limited or no contact with passengers. Network Rail thought that the inclusion of a reference to integrated transport would be sensible as it would be in accord with the Condition's objectives of protecting railway-related potential for the land and allow it to dispose of land for integrated transport use without the need for regulatory consent. Transport for London also welcomed the proposed revision, but commented that land disposals should not qualify under 1(g) where it has an alternative transport use, adding that "transport use" should be defined widely to include heavy and light rail, buses, transit systems, highways, water borne transport and aviation.

33. We note Network Rail's interpretation of the revised 1(g) but confirms that the revision to the general consent is to prevent land being disposed of where, although it may have no reasonably foreseeable use for or in connection with services relating to railways, it may have other public transport use through better integration of public transport modes.

34. Also in relation to 1(g), Peterborough City Council questioned what was meant by "reasonably foreseeable", and what future period that would cover. SPTE welcomed the amendment of 1(g) of the general consent so that Network Rail must refer a disposal to us if the land concerned may be of use in connection with another public transport use integrating with the provision of rail services. However, SPTE expressed slight concern about the ability for Network Rail to dispose of land for improving highways without consultation as this may lead to disposals that did not fit with the public transport provision's aspirations. SPTE would undertake strategic planning in relation to both rail and road and wished to be consulted on any disposal relating to both modes. We note this. With regard to the period of what can be determined reasonably foreseeable, we believe that it is not necessary to define such a period, but consider that land would have no reasonably foreseeable use (for or in connection with services relating to railways) if a person with the knowledge and

experience that is to be expected of a company like Network Rail, would have reasonably thought that there was no real risk of the land being so used.

35. Network Rail considered that the introduction of the terms “Network Operator” introduced uncertainty in consent paragraphs 1(i) and 1(l). The company considered that specific interface agreements for neighbouring networks would cover cross-rights and the ability to undertake (on each others’ land) necessary works. Network Rail suggested that the proposed revision would introduce confusion as to whether the general consent sought to protect something that would not be permitted under network interface agreements.

36. With reference to 1(m), Network Rail thought that the proposed revision was not sufficiently flexible to cover potential leasing structures for funding the construction of new railways facilities; it would be possible that leases might be granted to a funder or a special purpose vehicle (SPV). In such cases, an SPV might sublet management to a freight operator, in which case the SPV would not require a licence exemption as it would not be managing the facility. Network Rail noted that the revised consent would not cover this situation.

37. Essex County Council wished to see 1(o) removed from the general consent, stating that another authority might wish to protect land for railway purposes even though it had been through the statutory closure process. Network Rail agreed with our proposed revision.

38. Network Rail supported the addition of 1(p) to the general consent. However, GNER said it was unclear as to whether it captured any Network Rail land not currently forming part of the operational network. GNER did not support a revision of the general consent that would allow Network Rail to dispose of any land near a station to a local authority. GNER referred to a circumstance where a local authority was proposing to build a town bypass using some operational and some non-operational rail land. The bypass met a short-term need but would isolate the station from the town, taken land needed for station car park expansion and generally restrict the future ability of the station to expand and to provide adequate interchange for passengers.

39. We note that GNER’s point accords with the one raised by SPTE under 1(g): that it is not desirable for land to be disposed of under the general consent for improving highways, as these may not fit with its public transport aspirations. Having considered consultees’ responses, we consider that, on balance, it is not clear that widening the general consent as proposed - to allow Network Rail to dispose of land to local authorities for the purpose of improving highways - would clearly be in the public interest. We will therefore not proceed with this part of the proposed amendment to the general consent.

*We invite views from consultees on:*

- *our proposed policy clarifying where Network Rail would be unlikely to be compensated for loss of value;*
- *whether there are any circumstances where compensation for the refusal of consent should properly be payable; and, if not,*
- *whether the reference to compensation in Condition 26 should be removed, either now or in the course of the next periodic review (para 6.9)*

40. Cardiff County Council and East Sussex County Council were not in favour of Network Rail being paid compensation under any circumstances, with the latter believing it therefore appropriate to delete the reference to compensation from Condition 26.

41. Peterborough City Council thought that consideration should be given to the payment of compensation in situations where a judgement call is made, such as the likelihood of a foreseeable project coming to fruition. The Council also considered that an appeals process should be made clear in the revised regulatory arrangements.

42. Network Rail considered there to be limited circumstances in which compensation was likely but believed that the compensation element of Condition 26 continued to serve a purpose and should be retained. It held the view that the compensation provision served as a reminder to customers and funders that the forced retention of land carries a penalty in terms of unrealised value. Network Rail also noted that Condition 26 did not place any constraints on the grounds on which ORR may refuse consent and if ORR were to refuse consent on the basis other than that the land was required for railway purposes, then it might be appropriate for compensation to be awarded.

43. The Go-Ahead Group thought that Network Rail should be planning its property income on the basis that some of its land disposals would be refused and that no compensation should be anticipated. The Go-Ahead group therefore suggested that the reference to compensation in Condition 26 should be deleted.

44. GNER had no comment on the payment of compensation but suggested that Network Rail's change of company status could be a relevant consideration. GNER asked us to consider how Network Rail should compensate train operators and other users where either an inappropriate disposal was made or full value of the land was not extracted, adding that the company should be incentivised to take full account of train operators' and others' aspirations for network enhancement. It also gave the view that we should be interested in the value of the land concerned so that when it was disposed of, the value realised was appropriate. GNER considered ORR to be the only body likely to be able to determine whether the benefits would be adequate for the whole railway and that Network Rail had taken into account the aspirations of train operators' and others' aspirations for network enhancement when negotiating the financing of its schemes.

45. We consider that the purpose behind Condition 26 is to ensure that land which may be needed for the continuing operation and future development of the network remains available to Network Rail (and therefore to the railway) by requiring

regulatory consent to disposal. ORR will not intervene in determining the optimum value for Network Rail's disposals - the company is already incentivised to do so. When Network Rail refers proposals to us for consent, we will consult stakeholders for views. We also expect that Network Rail will have consulted stakeholders prior to submission.

46. Rail Freight Group considered that there should be no compensation payable.

47. Having considered the responses to the consultation, we consider that we should not at this point remove the reference to compensation from Condition 26, although will keep open the option to do so. While the award of compensation to Network Rail would not generally be granted, it remains a possibility. Should Network Rail have valid claims for compensation, these would be recorded and assessed by us, taking independent advice as appropriate. We would then establish at the end of the control period whether Network Rail had outperformed its property income targets. Should Network Rail outperform its targets, any income foregone as a result of blocked disposals should not be an issue as the company will have nevertheless made a net profit on its property operations. However, should there be circumstances where Network Rail is eligible for compensation following one or more blocked disposals and it also underperforms against its property income targets over the course of the relevant control period, then we will consider at the end of that control period whether or not a Regulatory Asset Base adjustment is appropriate.

## **Other comments**

### *Arm's-length regulation*

48. Network Rail thought that in the medium to long-term we could adopt an approach that was more "light touch" than predicated by the consultation, consistent with our Corporate Strategy consultation<sup>5</sup> which looked at the potential to "step back from activities which are best left to the industry" (discussed further at paragraph 51 below). Network Rail said that providing detailed comments in its land disposal consultation response could be premature at this stage, but considered that a greater degree of self-regulation could be possible when the reorganisation of its property-related activities had settled down.

### *Timing of implementation*

49. Network Rail also asked that the timing of the implementation of the revised arrangements be considered, saying that it might face practical difficulties if the revised arrangements were to be given immediate effect. It thought that the changes in the general consent would require internal briefing, as would the updating of its evaluation forms. Network Rail added that there could be a further difficulty for those cases where it had already carried out an evaluation of the general consent position and was proceeding towards disposal under the old general consent. This was particularly the case where 1(g) was concerned. If Network Rail needed to re-evaluate any disposal that on the publication date was progressing towards

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<sup>5</sup> *Updating our Corporate Strategy: a consultation*, published December 2005 and available from our website at [www.rail-reg.gov.uk/upload/pdf/263.pdf](http://www.rail-reg.gov.uk/upload/pdf/263.pdf)

completion, then it might find that additional consultations could be required, leading to delays that would be unwelcome to its stakeholders and others involved in that transaction.

50. We consider that the new arrangements should take immediate effect as they will lead to efficiency gains for rail industry stakeholders in general. However, there may also be some administrative and financial benefits to Network Rail by allowing a 'dual-running' of the general consent for some time to allow it complete transactions currently at an advanced stage of progress under the old general consent. We consider that land qualifying for disposal under the old general consent must be disposed of on or before 30 September 2006. This period is consistent with the one allowed for the 'excluded land'<sup>6</sup> when Condition 26 was introduced in November 2001. After 30 September 2006, such cases must qualify for disposal under the new general consent for them to be concluded under that mechanism.

### **Condition 26 casework: a simplified approach**

51. In our December 2005 consultation document *Updating our Corporate Strategy: a consultation*, we outlined proposals to move to a more 'arms-length' regulatory approach while at the same time striking the right balance in regulating the industry. Until now, we have had considerable involvement with Network Rail and the industry on land disposal casework and there have been many occasions where we have issued a consent, perhaps with conditions attached, after we have investigated the issues concerned and determined resolutions acceptable to both Network Rail and industry stakeholders. However, we think that this approach has not incentivised Network Rail to act as thoroughly in the first instance as it could.

52. We consider that there is scope within Condition 26 to simplify the approach to consultation and regulation. As a first step we are adopting an 'arms-length' approach whereby, instead of us engaging with various parties to resolve issues, we will refer all issues to Network Rail for resolution with users and funders.

53. We require Network Rail to submit to us information (three weeks before the three-month deadline) that shows clearly how it has addressed any issues raised, using all reasonable endeavours to include with that information a sign-off by the relevant parties showing unambiguously their satisfaction with Network Rail's response to the issues they raised. We would then examine this and consider whether Network Rail's response was adequate for us to make a robust decision that would protect the public interest, in accordance with our section 4 duties. We consider that this simplified and reduced involvement by ORR is consistent with the Government's better regulation agenda. This is a first step and we propose to keep the approach under review.

## **Office of Rail Regulation**

**30 June 2006**

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<sup>6</sup> As detailed in *Land Disposal by Railtrack PLC: The Regulatory Arrangements*

## ANNEX A

### **List of respondents to the consultation *Land Disposal by Network Rail: ORR's review of the Regulatory Arrangements***

Cardiff County Council  
Chiltern Railways  
Cornwall County Council  
East Sussex County Council  
Essex County Council  
Go-Ahead Group  
Great North Eastern Railway Limited  
Merseytravel PTE  
Network Rail  
Passenger Focus  
Peterborough City Council  
Rail Freight Group  
Strathclyde PTE  
Transport *for* London