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Dear Peter

### **Local Output Commitments and the provision of information – draft conclusions**

This is the response of English Welsh & Scottish Railway Limited (“EWS”) to the above consultation document published by the Regulator in December 2002. I can confirm that EWS gives its consent for this response to be placed in the Regulator’s public library and on his **website**.

#### **1. Introduction**

- 1.1 EWS supports the intention to introduce Local Output Commitments (“LOCs”) and to require the provision of information. We particularly welcome the proposals to make these requirements part of the contractual relationship between Network Rail and operators through the combined mechanisms of track access agreements and the Network Code. However, we believe that the LOCs do not go far enough. The indication by the Regulator that he is minded to omit any commitment on asset condition other than track quality within the core elements of the LOCs and the absence of commitments on the characteristics and capabilities of the network will significantly diminish the **usefulness** of LOCs.
- 1.2 Notwithstanding these comments, we note that the Regulator **expects** his conclusions not to restrain the agreement of bespoke formats for LOCs and the drafting of Part L certainly includes the option for including capability within Class B Local Outputs. We assume the Regulator had freight operators particularly in mind when including this requirement as the freight operating constraints of the Network (i.e. the “advertised” freight capability) which Network Rail is funded to provide is of key importance as an output to freight operators in general and EWS in particular. EWS would therefore urge the Regulator to ensure that advertised freight operating constraints are included within the **core** elements for freight operators.

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- 1.3 Whilst we support the requirement to provide information, EWS finds the conclusions too wide-ranging, particularly in respect of material and requested information, making it impossible for any party to gauge what information they will be obliged to provide and how they should resource the gathering of such information.
- 1.4 Section 2 contains our comments on the proposals relating to LOCs and our comments on the proposals for the provision of information can be found in Section 3.

## 2. Local Output Commitments

### ***General/ approach to the content of local output commitments***

- 2.1 We are disappointed that the Regulator believes that commitments to inputs would be the exception rather than the rule. We remain concerned that by the time outputs and output measures show a deteriorating trend, it will be too late to take action against Network Rail to rectify any deficiencies before the effects on the performance of trains becomes too great. The deterioration of the network following the incident at Hatfield in October 2000 is a case in point. Key indicators of performance prior to the incident did not highlight the impending level and extent of the disruption that was to follow the incident. By including the monitoring of speed restrictions and condition of structures, in LOCs there will be an early warning of the potential breach of a LOC in time to enforce corrective action before it is too late.
- 2.2 EWS supports the Regulator's proposal that LOCs should cover a "rolling" three-year period and that LOCs will contain two categories of commitments, operational and non-operational.
- 2.3 Whilst EWS recognises the benefits of some standardisation of the form of LOCs, the core elements will need to recognise that freight in general and EWS in particular is a national operation with very different characteristics to passenger train operation. Any standardisation will need to reflect both of these elements.
- 2.4 EWS supports the Regulator's view that the inclusion of LOCs from train operators to Network Rail are not necessary.

### ***Process for establishing local output commitments***

- 2.5 EWS is a national operator and its requirements are developed on a national basis. Over half of our trains cross at least one zonal boundary and LOCs produced on a zonal or route basis will need to be consistent with LOCs produced for an adjoining zone or route. Therefore there needs to be a mechanism whereby LOCs are reconciled for consistency. Whilst the joint boards may be useful in co-ordinating local or zonally based consultation, they will not be appropriate forums for co-ordinating the national output commitments required by EWS and other national operators.

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- 2.6 The requirements of the rail freight business can change rapidly reflecting the nature of the market in which it operates. Unlike passenger operation where needs are changed once, perhaps twice a year, freight customers' plans can change throughout the year and their transport needs change with them. Freight customers are looking for the rail industry to match, or exceed, the flexibility of road. The annual business cycles of the rail industry are irrelevant to the freight shipper. Therefore there needs to be a mechanism allowing for the amendment or adjustment of **LOCs** for freight operators outside the annual process proposed by the **Regulator**. Whilst the proposed Part L allows modifications by agreement between the operator and Network Rail, there appears to be no mechanism to allow for changes if Network Rail is reluctant to agree.

### ***Content of local output commitments***

#### ***Operational performance***

- 2.7 EWS supports the **ORR's** proposals that Network Rail should provide a performance plan based around a three-year projection for operational performance with an annual floor level that would be used to trigger the liability regime. We are not clear how this will be achieved for a national operator such as EWS and would welcome the opportunity to discuss with both Network Rail and the **Regulator** how this part of the **LOC** would be calculated and expressed for a national operator.
- 2.8 It is not clear what level of performance the **Regulator** regards as normal. Options include the performance levels pre-Hatfield, post- Hatfield performance or the levels currently achieved. It would not be acceptable for the base or norm to be set at a level that freight customers find uncompetitive with road.

#### ***Asset condition, serviceability and age***

- 2.9 EWS recognises the importance of track quality even though EWS is primarily a freight operator. Poor condition of track has led to wide spread blanket and differential speed restrictions being applied to freight services. We have written to the **Regulator** requesting that EWS be included in the discussions with Network Rail and **ATOC** referred to in paragraph 3.36 of the consultation document so that appropriate measures can also be developed for freight operators. For example, cyclic top is a particular condition of track which has a significant effect on many freight vehicles as it results in the imposition of operating restrictions
- 2.10 EWS is extremely disappointed that the **Regulator** has restricted **LOCs** solely to track quality. The quality of other parts of Network Rail's assets are also extremely important to freight-for example, the condition of structures and embankments has a direct bearing on the speed, weight and axle-load of freight trains. There have been a number of recent examples where Network Rail, or its predecessor, has unilaterally

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reduced the advertised freight capability of the network because of asset condition. EWS does not accept the exclusion of other assets from LOCs.

**Commitments to capability and capacity**

- 2.11 Having confidence about the capability and capacity of the network is fundamental to our ability to sell rail freight transport to our customers. We need certainty that the network will provide the advertised freight capability that Network Rail is funded to provide. This would include:
- o Train weight and trailing loads
  - o Axle weight/Route Availability
  - o Loading gauge – both height and width
  - o Speed
  - o Power supply for electric traction
  - o Opening hours of signalboxes
- 2.12 If freight operators cannot have certainty about these fundamental network characteristics then they will not be able to enter into any firm commitments with their customers. Without those commitments customer confidence in rail freight will therefore be undermined. EWS is therefore extremely concerned by the omission of commitments to capability and capacity as part of LOCs. The Regulator suggests that the Part G Network Change process provides sufficient protection and breaches would attract compensation for proven loss. This seems at odds with paragraph 2.11 of the consultation document where the Regulator states with reference to an earlier consultation:
- “The overriding principle was that the most important remedy for a breach or anticipated breach of contract was for the default to be put right, if that could be done. Securing compensation was agreed across the industry to be a second best. It was therefore proposed that there should be a right to secure specific performance to remedy the breach”*
- 2.13 We also note that later in the consultation document, in paragraph 3.52, the Regulator states
- “that it is desirable, where Network Rail is in breach of contract, for that breach to be remedied and for the committed performance to be delivered”*
- 2.14 Instead, by relying on compensation the Regulator has given Network Rail tacit permission to reduce the capability and capacity of the network in cases where Network Rail believes that the financial benefits of doing so will outweigh the payment of compensation to operators. This is a position that EWS regards as unacceptable and will immediately place the freight capability and capacity of the network on notice for erosion.
- 2.15 EWS has argued strongly in previous consultations that the Part G Network Change process does not provide adequate protection for freight operators against a determined monopoly network provider. For example,

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changes to the capability of the network of a temporary nature such as reducing route availability or imposing speed restrictions can last up to six months before becoming Network Change. Even then Network Rail may only commence implementing the Network Change procedure rather than being obliged to (Part G1.8). Reductions in route availability for up to six months can seriously undermine the economics of freight traffic as wagons are downloaded and consequently customer requirements become more difficult to meet.

- 2.16 In addition, Part G does not protect against closures of parts of the network and unlike passenger closures, freight-only closures do not have alternative safeguards included elsewhere within railway legislation.
- 2.17 Notwithstanding these points, we believe that the purpose of LOCs is to ensure that Network Rail delivers the network to an acceptable standard. By omitting capability and capacity from LOCs, Network Rail will have the choice to avoid its commitments to freight operators. Therefore EWS disagrees with the Regulator's conclusion that there is adequate protection for capacity and capability within the contractual framework. The Regulator will recall that he excluded from EWS's track access agreement our proposals to include a schedule of Freight Operating Constraints on the grounds that Model Clauses and LOCs would provide this protection.
- 2.18 EWS strongly believes that it is essential that LOCs for freight operators contain the advertised freight capability of the network that Network Rail has been funded to provide through the Periodic Review. We urge the Regulator to include this requirement as a core element of the Class B Local Output for freight.

### ***Enhancements***

- 2.19 EWS supports the Regulator's conclusions that funded enhancements should be included in the LOCs.

### ***Criteria for appeals***

- 2.20 EWS agrees with the Regulator's proposals that appeals should be dealt with in the first instance by the Access Disputes Resolution Committee with a further chance of appeal to the Regulator himself.

### ***Suspension notices and mandatory variations***

- 2.21 EWS would expect to enter into traffic contracts on the basis of the delivery of LOCs relating to operational and non-operational performance. Unlike the transport offer to passengers these contracts are binding. We are therefore concerned that the Regulator could retrospectively overturn or alter a commitment made by Network Rail in the event of over commitment. Freight customers require certainty. The imposition of this further risk will question the underlying value of LOCs to freight operators and their customers.

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### ***Enforcement and liability***

- 2.22 EWS supports the Regulator's conclusions although the limited nature of LOCs, as proposed, means that we would expect the procedures to be used very rarely. In many cases severe delays to freight services caused by Network Rail's poor performance are hidden as freight trains are moved out of the way into off-network yards and sidings. When such freight services are allowed to recommence their journeys, they are replanned and retimed thereby removing any previous delay. The Regulator's presumption that the injured party is receiving compensation through its Schedule 8 performance regime is not always true therefore in respect of freight operators.

### ***Implementation of the Regulator's conclusions***

- 2.23 EWS prefer the Condition C7 route for the implementation of the proposals. The Regulator points out that this is the faster route and as we believe there is industry consensus that LOCs are an essential contractual development there should be no material objections for the Class Representative Committee to consider.

### ***Questions for consultees***

2.24

- (a) *network code – is the attached drafting proposed for a new Part L of the network code clear and adequate in its coverage*

EWS is content that the drafting of the proposed Part L is clear and covers the Regulator's proposals contained in chapter 3 of the consultation document. However, EWS would want to see Part L incorporate the key issues for freight operators we have outlined above, in particular the inclusion of asset condition, characteristics and capacity measures as Class B Local Outputs. EWS also believes that Part L should include a mechanism to allow freight operators to propose changes to their LOCs during their term. Whilst changes by agreement are permitted under Condition L8.1, this mechanism does not address situations where there is disagreement.

- (b) *core format/content – do consultees agree that Part L should not specify the format and content of local output commitments, and that sufficient steer would be provided through the Regulator publishing his appeal criteria?*

EWS agrees that Part L should not specify the format and content of the LOCs given the differences that may be proposed by each train operator. EWS believes that it would be beneficial for the Regulator's appeal criteria to be expressly included within Part L in the same way that the Decision Criteria are included within Part D of the Network Code.

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- (c) *criteria – do consultees consider the Regulator’s proposed appeal criteria to be adequate and accurate in coverage and clear in intent?*

Whether the criteria are adequate or not will become clear over time through their application when appeals are made. At present they appear sufficient although EWS would like to see commitments made by train operators to customers which rely on the achievement of LOCs to be included. The inclusion of the appeal criteria within Part L itself (see answer to question (b) above) would allow proposals for change to be made by the industry or the Regulator if necessary in the light of experience.

- (d) *operational performance – do consultees consider the delay-minutes local output commitment a sufficient initial measure of operational performance?*

Yes, although EWS would like the option to agree Class A LOCs based on either a total for EWS or at Service Group/Commodity Level.

- (e) *timescales – do consultees agree with the proposed timescales and process for introduction and establishment of local output commitments?*

EWS is concerned that only a month is allowed (end of September to the end of October) for Network Rail to carry out consultation meetings for all LOCs. National operators such as EWS will no doubt be affected by the vast majority of other operators’ LOCs across the network and will therefore be expected to attend the majority of meetings. To allow Network Rail a month for this process is, we believe, insufficient and would suggest a further two months is allowed to complete this process.

- (f) *operational commitment – do consultees agree the proposal for the ‘floor’ level to be set at 20 per cent beyond the projected level of operational performance?*

EWS believes that 20% may prove to be too generous a floor level for some operators and that therefore there should be the ability for operators to negotiate a floor level with Network Rail within set boundaries say 10% to 20%. There should also be the ability for the floor level percentage to reduce as performance improves providing an even greater incentive to perform.

### **3. Provision of information**

#### ***Regular provision of information to train operators***

- 3.1 The provision of information by Network Rail about its activities and plans is crucial to enable operators to plan their businesses with a reasonable degree of assurance. A key element of EWS’s section 17 application in February 2002 was the obligation on Railtrack to provide information. A mechanism to allow EWS to obtain the information it needs in relation to exercising its rights to bid was approved by the Regulator and

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incorporated as Schedule 12. EWS would hope that the proposed Part K will be complimentary to our Schedule 12 rather than as a substitute.

- 3.2 EWS is pleased that the Regulator has identified in paragraphs 4.9, 4.12 and 4.14 some general information provisions that match with those that we identified in our section 17 application. However, we do not think that this information goes far enough and believe that the information we identified in our Section 17 should also be able to be **requested** under the proposed Part K. This would include:
- o Information about the operational characteristics and capabilities of the network, including loading gauge, route availability, trailing loads, length limits, axle weights restrictions, maximum line speeds for freight, availability of traction power supply, extent of electrification, speed and any other route restriction information affecting the operation of freight trains;
  - o Relevant financial and cost data relating to freight activity on the network by commodity;
  - o Information about the actual use of the network by freight;
  - o Network facilities for freight including detailed maps and track diagrams showing what is available along with ownership/maintenance boundaries;
  - o Timetabling information including the amount of strategic capacity for freight/ availability of standard freight paths;
  - o Documentation including Rules of the Route, Rules of the Plan, Sectional Appendices, Weekly/Periodic Operating Notices, Signal Box Opening Hours Book and Freight Train Loads Book;
  - o 3.3 Much of the information outlined above would be crucial in allowing EWS to monitor Network Rail's compliance with its freight capability commitments under the LOCs (see comments under paragraphs 2.11 to 2.18 above).
- 3.4 EWS supports the Regulator's intention not to propose a standard form of report. Freight operator information requirements will be different to those of passenger operators and requirements will also differ between individual operators in each class.

***Sharing information***

- 3.5 EWS is not convinced of the benefits of this "catch -all" proposal by the Regulator. The requirement to provide material information and requested information is extremely open ended and as currently described could lead to considerable expense, both in terms of time and money, in gathering information that might be defined as material or reasonable.

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- 3.6 The Regulator describes the relationship between Network Rail and operators as a joint venture. We do not see it in quite the same way. Network Rail is a monopoly supplier of infrastructure to EWS. EWS also has many other suppliers. We might expect our suppliers to provide information on a regular basis, we might expect to supply information to them but this would be negotiated as part of the contract. We would not expect to have an obligation to supply information to our suppliers imposed by an external authority.
- 3.7 Therefore we reject the proposal that operators should be obliged to supply information to Network Rail and we believe that any obligation on Network Rail to supply information to operators should be more closely defined than "material or relevant".

**Questions for consultees**

3.8

(a) *periodicity and content*

EWS agrees with the proposed periodicity

(b) *stewardship measures*

The proposals need to be supplemented for freight operators (see comments under paragraph 3.2 above).

(c) *practical application*

The information supplied will be used by EWS in many different ways. For example, the stewardship information would be used to monitor Network Rail's compliance with its advertised capability commitments under the LOCs or its obligations under Part G of the Network Code. Information about network facilities will be used by EWS when developing new traffic flows with existing or potential customers.

(d) *format*

Given the differing requirements of operators, EWS firmly believes that a standard format would not be appropriate.

(e) *derogation*

Whilst EWS is content with the derogation proposed by the Regulator, we believe that there ought to be an appeal mechanism in respect of material and requested information which would allow either party to appeal against an information request from the other on the grounds of reasonableness, cost or availability.

(f) *drafting*

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Whilst Network Rail Annual Information and Network Rail Quarterly Information are defined we believe that material and requested information is too widely drawn (see comments in paragraphs 3.5 to 3.7 above). In addition, as mentioned in our answer to question (e) above, EWS believes there ought to be an appeal mechanism included within Part K in respect of requests for material and requested information. Otherwise there is no means whereby an operator or Network Rail could question the reasonableness of the information request and ask to demonstrate why the other requires it.

#### 4. Summary

4.1. In summary, EWS supports the introduction of LOCs through a combination of a new Part L to the Network Code and model clauses. These provisions however need to **recognise** that the requirements for freight differ from those of passenger operators. EWS believes that freight LOCs should contain four key elements:

0 Performance targets

0 Track & Asset Quality – including cyclic top

0 Capability & capacity commitments – advertised freight capability of the network as at April 2001 (and as amended by network change)

0 Enhancements -funded by Network Rail, EWS or jointly

4.2 EWS supports the introduction of the provision of information through a new Part K to the Network Code. We are however concerned about reciprocity (i.e. the supply of information from the operator to Network Rail), the wide-ranging requests that could result for material and requested information and the lack of a dispute process.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graham Smith', written over a white background.

**Graham Smith**  
Planning Director