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Dear David,

Network Code Reform phase 2: Update and Emerging Conclusions

Before responding to the questions raised in the consultation document the DfT would like to add its thanks to the industry to those of the ORR for the work it has done on progressing the reforms made to the Network Code to date. The phase 1 and 2 reforms of the Network Code have been seen as critical to delivering the objectives of the Rail Review and the White Paper, particularly in encouraging closer working between Network Rail and Train Operators, and the publication of this update represents a significant milestone.

In respect of parts B, D, H & L we note the very good progress that has been made.

In response to the specific questions raised:

Chapter 2 (Phase 2 progress to date) – paragraph 3.23

Consultees are asked to identify any areas where they believe further work to reform the Network Code is required.

Further reform of the Network Code is a matter for the access parties, and the ORR. We will not comment.

Chapter 3 (Parts F and G) - paragraph 3.12

Views of consultees are sought on the objective in paragraph 3.11, and whether such an objective should be explicitly incorporated in parts F and G as the purpose of the relevant provisions.

We support the explicit incorporation of the objective set out in paragraph 3.11. We believe that this would help clarify the purpose of parts F & G of the Network Code, and further reinforce the “joint venture” approach that the other reforms to the Code encourage.

Chapter 3 (Parts F and G) - paragraph 3.24

Views of consultees are sought on the propositions that:

- (a) **existing network licence provisions give Network Rail the significant obligations in respect of general facilitation of new rolling stock and network commitments, and Network Rail should now make a statement setting out how it proposes to do this in the light of the obligations;**

The main issue is the extent where there is a reliance on the completeness and accuracy of data required when building new vehicles. This data needs to be supplied in a timely manner so new train builds are not delayed unnecessarily. Where the data supplied is not accurate there needs to be an acknowledgement of who will be responsible for any downstream costs. The statement should also include a demonstration of how Network Rail will apply skilled and appropriate resources to facilitate the introduction of New and Modified trains to the Network.

Network Rail’s obligations should include the reduction of the level of variability across the network of vehicle interface requirements (structure gauge, EMC, axle loading etc), to the extent that this is reasonably practicable in the course of renewal.

- (b) **project specific facilitation contracts should be available once a project has been specified and the risk allocation defined and whether the existing arrangements are adequate; and**

Agree in general with ORR comments however, resources need to be made available during tender and evaluation of bids as it can be too late once the contract for rolling stock is signed. It may be better to enter into these agreements when the design is being contemplated which then gives a better chance of success.

- (c) **ORR should not establish model contracts for bi-lateral VRACs, but that this should be dealt with through the Network Code.**

In the summary of responses¹ a number of parties commented that a VRAC may not be the most appropriate mechanism in all circumstances, for example small orders of relatively low capital value freight vehicles and small procurement deals where it would not be economic to negotiate a VRAC. It may be useful for Network Rail to produce some standard terms covering the matter covered by vehicle and route acceptance contracts, however as stated these should allow for flexibility as no contract is likely to be the same and sufficient incentives / penalties will need to be agreed where negotiated.

Chapter 3 (Parts F and G) - paragraph 3.30 and 3.31

ORR seeks views on:

- (a) **whether Part F of the Network Code should be changed:**
- (i) **to enable Network Rail to make proposals for vehicle change, and ultimately (subject to appeal) to require them;**

Throughout the process of reform of the Network Code both the SRA and DfT have consistently argued that the network and vehicle change provisions should be symmetrical, our position has not changed and the reasons why we believe this to be necessary are well summarised in paragraph 3.27. Whilst commercial negotiations may have been successful to date, this does not guarantee future success. Given Network Rail's greater role in planning for the whole industry, and increased obligation to deliver whole industry solutions the ability for it to propose vehicle change appears to us to be essential.

- (ii) **to extend the definition of vehicle change to include vehicle operation; and**

Extending the definition of vehicle change to include operation is consistent with a symmetrical approach to Network and Vehicle change, it is also necessary to enable Network Rail to propose industry efficient solutions.

- (b) **whether they see any merit of justification for the provision of a technical arbitration process in Parts F and G and, if so, the nature and scope of such a process, and its relationship with the existing dispute resolution mechanisms.**

¹ Model Clauses for track access agreements – July 2004, Office of the Rail Regulator

We believe that dispute resolution processes are a matter for the access parties and ORR.

In responding to consultation it would be helpful if:

- (a) **Network Rail could identify any changes which it considers have been, or are being, hindered, by the existing arrangements;**
- (b) **train operators and rolling stock companies could set out how they believe current arrangements can or could ensure that changes which are of wider industry benefit will be made.**

Chapter 3 (Parts F and G) - paragraph 3.34

ORR seeks views on its emerging conclusion that the separate F and G processes should be retained, but changes might be needed to ensure the processes work in parallel where appropriate.

SRA and DfT have previously argued for a single “system change” mechanism, and still believe that would represent a better long-term position. However, provided the parts F & G processes are similar and offer symmetrical rights we have no objection to parallel processes.

Chapter 3 (Parts F and G) - paragraph 3.42

ORR seeks views on the emerging conclusions set out above, particularly:

- (a) **the key principles set out in paragraph 3.36 above;**

We are satisfied that the principles set out in paragraph 3.36 are appropriate, although we have a reservation on respect of 3.36 (d). This effectively allows an access party to block a change to the network to preserve some degree of option value. It is government, not the access party who will pay for this option value. We would therefore anticipate that the extent to which such a blocking right could be exercised would be clearly defined.

- (b) **the right to seek to block a change being subject to specific criteria as set out in paragraph 3.38 above; and**

Whilst we endorse criterion (a) we find it difficult to envisage the circumstances where (b) would arise, assuming that the performance regimes are properly calibrated. Our concerns with (c) are essentially the same as with the principle set

out in 3.36 (d). Clearly we would not expect Network Rail to progress any change inconsistent with the efficient use and development of the railway in any case, as this would be inconsistent with its duties under the Network Licence.

(c) **no change to the existing compensation arrangements for changes of law.**

There does not appear to us to be any reason for making such a change.

Chapter 3 (Parts F and G) - paragraph 3.45

ORR seeks views on its emerging conclusion that there should be a mechanism for adjusting Network Rail's outputs by giving them the right to make changes to access rights subject to compensation, and appeal to ORR.

We support the inclusion of such a mechanism. It is complementary to the provisions in the Franchise Agreement and consistent with the future approach to the DfT's setting out its specification of Network Outputs. Such a provision will be necessary to deal with the consequences for holders of track access agreements of any reduction of network capability which leads to Network Rail being unable to deliver all their access rights.

Chapter 3 (Parts F and G) - paragraph 3.49

ORR seeks consultees view on our emerging conclusion that there should be bespoke arrangements for larger and more complex projects?

We support the ORR's conclusion that there should be bespoke arrangements for large projects. It is particularly important to recognise that such arrangements may be required where the duration of a project spans more than one franchise, and the interaction of access and franchise agreements will need to be considered. However, any such arrangements should seek to address the complexity of the project and not change the principles of parts F & G.

Chapter 3 (Parts F and G) - paragraph 3.52

ORR seeks views of consultees on the way changes to Parts F and G should be implemented.

We consider that it would be more appropriate that the industry led the implementation of the changes. The ORR power under C8 should only be used if absolutely necessary.

ORR seeks views of consultees on:

- (a) **the circumstances under which third parties may require Network Rail to facilitate changes to the network or to vehicles operated on it;**
- (b) **whether a scheme specific contractual mechanism is the appropriate means;**
- (c) **what rights and obligations these contracts should contain and whether they are different from those enjoyed by and imposed on train operators under Parts F and G of the Network Code;**
- (d) **what the appropriate mechanism for doing this is.**

In particular ORR would welcome a statement from Network Rail of the approach it proposes to adopt in relation to scheme-specific contracts for third parties in respect of facilitating vehicle change and facilitating and delivering infrastructure improvement. The approach would of course need to be able to reflect ORR's economic framework for investment in the network (to be published in August 2005).

In considering the circumstances under which third parties may require Network Rail to facilitate changes, we expect to see:

A right for third parties to receive support or facilitation from Network Rail (as your para 4.5);

A right to expect that facilitation to accommodate the lack of industry specific knowledge that some third parties will have; and

A right for that facilitation to be provided in a timely and economically efficient manner.

We would also expect to see a process that gives an early assessment of the overall viability and cost of the proposals at modest cost to both the promoter and Network Rail.

In providing such rights, there must be a corresponding degree of protection to Network Rail and other affected parties, with a test on the reasonableness of

demands on Network Rail's own resources and of the impact on other current or planned users and funders of the network.

All schemes promoted by third parties, and for which Network Rail is expected to provide services, should be covered by some form of formal agreement. That agreement must ensure that development is undertaken through the discipline of a staged process (such as OGC Gateway or Network Rail GRIP stages – but not both) with absolute clarity of responsibilities, allocation of risk, and decision criteria at each stage.

It is also important that a formal agreement should clearly define an appropriate duty of care to apply to the services that both Network Rail and the promoter undertake.

Whilst supporting the need for formal agreement between Network Rail and third parties, we are keen to see efficiency in administration costs. There should be no need for bespoke agreements during the development phases of projects, and little need for bespoke agreements on all but the very largest or innovative projects at the construction phase. We would like to see standard templated agreements adopted in most cases, with a set of schedules completed to give project specific information.

Contracts should include a duty of care on Network Rail to undertake its work efficiently, to procure the work of specialist consultants and suppliers efficiently and to give due priority to work undertaken for third parties. Network Rail should also have a duty of care associated with provision of asset information, with that duty possibly becoming more onerous as the scheme development progresses; and reflecting the third party's knowledge and understanding of railway project risks.

Consideration should also be given to how government and other parties interests are to be protected, such that third party schemes are not allowed to proceed where they will adversely effect network capability, the cost of operating passenger rail services, or the freedom of others to use network capability that they have funded or have reasonable expectation of using (protected access rights).

Chapter 4 (third parties) - paragraph 4.17

ORR seeks the views of consultees on the proposal that Network Rail and train operators develop a code of practice setting out how they will consult interested third parties in respect of industry processes in the Network Code and, what the code should contain.

We support the proposal that Network Rail and train operators develop such a code of practice. The code should build on what is currently done and should in particular build on the experience of operators who have been engaged in consultation with specifiers and funders such as PTEs.

Chapter 5 (Part K – Information) – paragraph 5.12

ORR seeks views on the broad approach and specifically:

- (a) **on whether ORR should be switching on Part K;**
- (b) **what the content of the annual information report, and the regular monitoring reports should be;**
- (c) **what provision should be made for specific information flows.**

It is undoubtedly important that a proper flow of information exists between Network Rail and the train operators to ensure that the railway operates efficiently and effectively and as a joint venture.

It is for the access parties to consider whether part K should be switched on, and in considering this they should consider whether part K creates an obligation to provide information beyond what is produced for the industry information network, and in the case of Network Rail, beyond what it is obliged to produce as its business planning process.

The access parties should also consider whether, if a greater information flow is required between them, part K as it is currently drafted is appropriate to deliver what is required.

Yours sincerely,

Timothy Wellburn