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Dear Gordon

A greater role for ORR regulating passenger franchises in England & Wales – ORR and DfT joint consultation

Thank you for the opportunity to respond to the ORR/DfT consultation on a greater role for ORR regulating passenger franchises in England and Wales. We apologise for the delay in submitting our response.

We have noted the proposals outlined in the consultation; in particular, that it seeks views on the potential for an expanded role for ORR, with the stated objective of putting passengers at the heart of regulation. The consultation argues that, if appropriately targeted, this approach has the potential to simplify and better align industry accountabilities, giving greater flexibility in how customer needs are met, while giving assurance that passenger needs are protected.

Network Rail's views on the proposed approach are outlined below. We have focused on what we consider to be key principles of such an approach. We have also provided a response to some of the specific questions raised within the consultation, outlined in an appendix to this letter.

1. **Purpose:** Network Rail sees its ultimate purpose (i.e. why we exist) as to generate outstanding value for taxpayers and users by continually improving the railway, and our role (i.e. what we do) as to develop, maintain and operate rail infrastructure in partnership with our customers, suppliers and other stakeholders. Accordingly, we consider that the purpose of any change in the roles of ORR and government should be to improve value for money to taxpayers and rail users and that proposed changes should be evaluated explicitly against this purpose. Any changes in this area could have radical implications for the way in which the industry works and this evaluation should include a rigorous regulatory impact assessment.

2. **Regulation of Network Rail:** Network Rail believes it is essential that it has a capable and confident regulator which is able to make difficult decisions to hold it to account where necessary and to help it to highlight key choices where appropriate. Potential changes in the role of ORR should not therefore be allowed to diminish or distract from the importance of



effective regulation of Network Rail as a monopoly provider of infrastructure and the need for ORR to provide appropriate protection to its customers and funders where appropriate.

3. Alignment: The lack of alignment between industry parties has consistently been identified as an obstacle to improved value for money. Accordingly, we consider that any evaluation of changes in regulatory responsibilities should focus strongly on the extent to which it would make it easier to facilitate stronger cooperation/partnerships/alliances between these industry parties. The industry's two regulatory bodies should also consider their role in this – a more constructive and seamless relationship will also contribute to greater alignment of industry objectives. These issues are particularly important where there are strong inter-relationships between different parts of the industry in delivering system outputs at the minimum whole-life, whole-system cost. Equally, however, improved alignment may be achievable without changed regulatory responsibilities.

4. Flexibility: The lack of flexibility for industry parties to deliver the outputs required by government in the most effective way is also commonly cited as a key obstacle to improved value for money. We therefore propose that any evaluation of changes in regulatory responsibilities should focus strongly on whether changes would improve this flexibility by improving the clarity of output specification and reducing the need for intervention in detailed implementation issues. Again, however, improved flexibility may be achievable without changed regulatory responsibilities.

5. Stability and confidence: As noted above, much can be done to improve alignment and flexibility without changing regulatory responsibilities and the temptation to see such changes as a simple solution should be resisted. Network Rail is committed to a radical programme of reform which will deliver substantial improvements over the next decade building on progress in the first ten years since Railtrack and it needs a period of stability to deliver this change. Refranchising provides the opportunity to make further radical improvements but this will involve key choices for both government and ORR. Any changes in regulatory responsibilities should therefore be evolutionary rather than revolutionary and it should reinforce rather than undermine confidence in the industry. For example, there may be some areas where ORR could provide a more formal advisory role to government at least in the first instance.

6. Principles of good regulation: The principles of good regulation are well established (transparent, accountable, proportionate, consistent, targeted). Ultimately, the regulatory and contractual regime should incentivise delivery of changes which offer good value for money to rail users and the taxpayer. Any changes in regulatory responsibilities should avoid the risks of double jeopardy (e.g. through regulation through both ORR and government); arbitrarily shifting goal posts (e.g. by changing the arrangements after letting a franchise without providing for appropriate compensation); and creating a continuous regulatory ratchet effect (e.g. where regulation is introduced in response to a specific issue but where reducing unnecessary regulation is difficult). These issues are fundamental to the credibility and effectiveness of the regulatory and contractual regime and any change in responsibilities should take these matters seriously so that they do not create additional regulatory risk or other unintended consequences. Failure to give adequate weight to these principles would make the current arrangements worse.

7. Risk: Regulatory risk is a key issue for businesses in the railway and for their investors. Rigorous application of the principles referred to above is key to achieving an appropriate

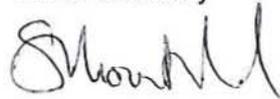
balance between these risks and the more obvious interests of taxpayers and rail users. Regardless of this, however, there is a danger that changes will not be well understood by the industry and its potential investors, passengers and Ministers. The perceived regulatory risk could therefore have a material adverse effect on franchise value with potential consequences for the affordability of further improvements in the railway. At the very least, this reinforces the need to avoid unnecessary change, for changes to be evolutionary rather than revolutionary, for a strong focus on key principles, for robust impact assessment and for effective communication.

8. Competences and capability: A key issue for consideration with any major organisation change will be the competences and capability required both to manage change and to discharge any changed responsibilities. The integration of safety and economic regulation has been positive but it has inevitably raised significant challenges for ORR. The capability reviews conducted by ORR and government are also welcome but changes in responsibility would necessitate further consideration of these issues. As with other organisation changes, the scale of the challenge should not be underestimated

In conclusion, Network Rail considers that there are strong benefits to rail users and taxpayers from improved alignment between industry parties and greater flexibility for them to meet government requirements in the most efficient way. Any changes in regulatory responsibilities between ORR and government should be judged in this context. However, the benefits should be evaluated robustly against what can be achieved within the existing allocation of responsibilities. In particular, careful consideration should be given to the need to provide stability and confidence to the industry and to avoid unnecessary risk whether this is actual or perceived. Inappropriate or badly implemented changes in regulatory responsibilities have the potential to make the current railway more expensive and therefore any change should be evolutionary.

We can confirm that no part of our response is confidential and we are content for it to be published in full.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sarah Mountford', written in a cursive style.

Sarah Mountford
Regulatory Specialist

Appendix – Network Rail’s response to immediate reforms

In addition to the substantive points outlined above, Network Rail’s proposed response on some of the specific questions raised within the consultation document is provided below.

Do you have any comments on the proposals for regulating complaints handling procedures? (Q.8)

We believe that responsibility for regulating complaints handling procedures could move from DfT to ORR through an amended condition within the station licence. This does not pose an additional burden to Network Rail.

Do you have any comments on the proposals for regulating DPPPs? (Q.9)

The interdependence of the various approval regimes for DPPPs needs to be understood and preferably consolidated in one organisation. A financial and regulatory impact assessment should be conducted before any final decision is made.

From a Network Rail perspective it could couple together the activity of DPPP facility/service regulation with ORR’s current infrastructure renewal/enhancement regulation of Network Rail. This current situation can create difficulties in establishing what constitutes reasonable physical adaptation (e.g. new lifts, access ramps, platform tactiles etc); when such changes should take place; and how they should be funded. If regulation of all these requirements occurred in one place, there would be greater opportunity for a joined up approach, reflecting both industry affordability and the need to meet growing demands.

Paragraph 4.33 of the document states “This arrangement means that responsibilities in relation to DPPPs are currently fragmented, being split between DfT and ORR”. However, on review of the proposal it would appear that this fragmentation will persist, given the statement made in paragraph 4.30 that responsibility for the preparation of the code of practice, as well as granting dispensations from it, will remain the responsibility of the Secretary of State. This seems disingenuous and we would propose that full accountability for all matters relating to DPPPs moves to one organisation. By way of example, when establishing its DPPP, the licence holder must have regard to the code of practice published by the Secretary of State. In the event of an alleged non-compliance with the code of practice it would appear to be the responsibility of the Secretary of State to investigate the individual circumstances of the case, as the ORR does not have the relevant skills or knowledge in relation to the document “Accessible Train Station Design for Disabled People: A Code of Practice” nor the process for granting dispensation from it. Having carried out this investigation, if it is established that a breach has occurred, the Secretary of State would report the matter to ORR who would then take enforcement action under the licence. If this is the intention of the proposal, then a split of responsibilities still exists.