

# **A Greater Role for ORR in Regulating Passenger Franchises in England and Wales**

## **Response from Rail Freight Group**

**February 2012**

1. Rail Freight Group is pleased to respond to the DfT and ORR consultation on a greater role for ORR in regulating passenger franchises in England and Wales. This response can be placed on the relevant websites in full.

### ***General Comments***

2. Although RFG does not have a particular interest in rail franchising, the roles and powers of both DfT and the ORR are important in ensuring that rail freight businesses can thrive. DfT has a vital role in ensuring a supportive Government framework for rail, and for freight and logistics generally, and in supporting network investment for rail freight through the Strategic Freight Network.
3. The role of the ORR as an independent regulator is also vital to business growth, and to encouraging customer confidence in the sector. This is in two key areas;
  - a. the regulation of Network Rail, ensuring fair, non discriminatory charges for freight, ensuring that Network Rail delivers regulated outputs and preventing abuse of monopoly position,
  - b. the regulation of access, to ensure that all operators are able to gain access to the network, and to facilities on a fair and non discriminatory basis.
4. In this latter role in particular, ORR's independence from Government is vital. As DfT is the funder of passenger services, and receives income from its franchises through premia and cap and collar arrangements, it is inevitably somewhat partial in its view of access applications. ORR's duties require it to take account of the requirements of funders, but also enable it to take other public interests and wider social outcomes into account. This balance of duties ensures that ORR can take access decisions on a properly impartial basis.
5. Proposals which cause ORR to have any greater commercial interest in franchised operators over other operators would therefore be of concern as it might fetter their discretion in their approach to regulation of access and other areas.
6. Clearly the two specific proposals in this consultation stop far short of giving ORR any significant role in passenger franchising. To that end, we are largely indifferent around the proposals on Disabled Persons Protection Policy and Complaints Handling. However, we would be concerned if this was seen as the start of a programme for transferring other further powers to ORR.

7. We do not support moving performance management to ORR. We consider that this impact on their decisions in awarding access particularly on busy routes, as they would have a particular interest in the performance of franchises over non franchised operators. Given the inevitable ministerial interest in performance, we are also concerned that ORR would be placed under some pressure to act in support of the franchises. Whilst these may appear to be subtleties, the impact could none the less damage the perception of ORR's independence, which is so vital for business confidence. For similar reasons, we are concerned by proposals for ORR to become involved in assessing franchise costs.
8. We also note that ORR's role in the regulation of Network Rail remains significant. There are still large ongoing issues of governance, performance, efficiency, and data and asset information. In addition, the programme of structural reform is likely to require considerable input from ORR in its design and operation. PR13 is itself a significant project with numerous workstreams. We question whether therefore ORR has the capability at this time to extend into other new areas, or whether it is not best focussed on the considerable work already in hand.

### **Specific Questions**

#### *Publication*

9. *May we publish your response?* Yes, in full.

#### *General principles*

10. *Please comment on the general principles against which changes in responsibility for regulation of passenger franchises should be assessed.* As described above, ORR should only take additional responsibilities where it can be demonstrated that there would be no actual, potential, or perceived change to ORR's independence.
11. *Do you see any potential benefits or drawbacks in moving towards giving ORR an enhanced role in respect of franchise change?* As outlined above, we are concerned that ORR must not have any greater interest in franchised operators than non franchised operators, other than through the balance of their statutory duties. An enhanced role in franchising, including franchise change, would in perception if not reality, give ORR a financial interest in the performance of franchises, and, as such, we do not support it.
12. *Are there any representations you would like to make concerning ORR's role in holding Network Rail to account?* We note that further consultation in this area is expected after the Command Paper. In the context of this consultation, we consider that ORR's role is significant, and, with structural reform and the continued challenges of efficiency, there will continue to be a large agenda for ORR in the regulation of Network Rail. ORR will need to show a strong hand.
13. *Should ORR consider any revisions to its enforcement and penalties policies if it takes on a wider role? In particular, should ORR consider how and whether it could accept commitments to make improvements for passengers as an*

*alternative to levying a penalty?* Although we do not generally support a wider role for ORR, if some areas transfer then the necessary changes should be made to ensure ORR can effectively regulate in the best interests of passengers.

14. *Are there any specific points on which DfT and ORR should set out their proposed approach during the transition period?* We have no comment on this area.
15. *Should ORR review its funding arrangements in the light of the changes proposed in this consultation?* As changes to funding arrangements are unlikely to affect freight operators, we have no comment on this area.
16. *Do you have any comments on the proposals for regulating complaints handling procedures?* We have no specific comments on this proposal.
17. *Do you have any comments on any of the proposals for regulating DPPPs?* We have no specific comments on this proposal.
18. *Do you agree that the regulation of punctuality and reliability performance should be brought together in one place? Could this proposal work and what refinements could be made? Are there any alternative ways of doing this?* As outlined above, we are concerned that this proposal could compromise ORR's independence in awarding access, as it would have a particular interest in the performance of some, but not all, network operators, which may impact on its ability to balance its duties impartially and fairly.
19. *What are the key areas that should be covered by service quality measures and commitments? How should Government decide what to include in each franchise? Is there merit in having a core set of requirements that apply to all?* We have no comment on this area
20. *Please comment on the specific benefits and disbenefits of the requirements on service quality measurement and commitments being enforced by licence rather than by contract.* As above, we are concerned to ensure that ORR's independence is not fettered by an increase in their responsibilities for franchised operators over other operators.
21. *Do you believe that the proposed licence condition would provide effective and proportionate accountability for delivery of service quality standards? Would a transparency obligation, relying on reputational incentives, be adequate? Or should it be supplemented by a compliance obligation? Should the compliance obligation be subject to doing what is reasonably practicable to deliver it, for instance through a purposive approach similar to that being considered for performance?* We have no comment on this area.
22. *What would need to be set out in guidelines to ensure credibility and consistency of reporting against service quality measures and transparency for passengers? How do we ensure that we give sufficient clarity and flexibility for franchisees in guidelines?* We have no comment on this area.

23. *Do you agree with the approach set out on monitoring of compliance with the service quality commitments? In particular do you think that an adapted safety management maturity model could be applied in this context? We have no comment on this area.*

24. *Do you agree with ORR's proposed approach for service quality commitments of requiring improvement plans as a prelude to formal enforcement action? We have no comment on this area.*