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Dear Les

ORR's regulation of land disposals by Network Rail

Thank you for your letter of 30 November 2012, inviting views on ORR's regulation of land disposals made by Network Rail.

Introduction

Network Rail's purpose is to generate outstanding value for taxpayers and users by continually improving the railway. We therefore support revisions to the regulatory regime which will enable Network Rail better to deliver this purpose.

One of the key principles which we have established for control period 5 is simplicity and effectiveness of the regulatory and contractual regime within which Network Rail operates. The revisions in this consultation go some way to supporting this principle but we believe that some targeted amendments could further improve the regulatory arrangements for land disposal. Suggested amendments are set out in this letter and the supporting appendix.

ORR last reviewed the regulatory arrangements for land disposal in 2010. The changes made at that time resulted in Network Rail taking responsibility for industry consultation and assessment as to the appropriateness of any land disposal before deciding how to proceed. We believe this has gone well.

The result is that to some extent ORR has now stepped back from formal regulatory control of land disposals and Network Rail has acted responsibly (as evidenced by ORR's recent land disposal audits). We are keen to see wider application of this



approach which we believe will make the process more efficient whilst still protecting the interests of our stakeholders and indeed Network Rail.

General Consent under Condition 7 of Network Rail's network licence

We believe that the proposal to extend the general consent (with the inclusion of a new general consent ground 1(q)) to cover land disposals where there is a clearly identified railway related or other integrated transport use for the land will be beneficial.

We have reviewed the amendments proposed to the general consent and would comment firstly on the proposed new general consent ground 1(q). As currently drafted, the effect is such that any proposal to which 'an issue' has been raised, even if resolved, has to be referred to ORR. To address this point we propose that paragraph 1(q) is amended as set out in Annex A.

For consistency with ground 1(q), we consider that ground 1(e) should be amended to refer to Permitted Business and ground 1(p) should be amended to refer to the resolution of objections and substantial issues raised during prior consultation, as set out in Annex A.

Network Rail and ORR have previously discussed the widening of the general consent ground 1(p) to include disposals as well as dedications. We believe that ORR supported this amendment. For the avoidance of doubt, we would continue to follow our usual procedures for such types of disposal which include undertaking prior consultation and complying with all statutory obligations for such types of disposal before considering use of the general consent mechanism.

Procedural Changes

Since we took on a greater responsibility for the consultation process, we have identified ways in which it could be improved. We carried out a survey of consultees earlier this year and a number of consultees stated that the duration of 42 days for a consultation was too long for the majority of land disposals. We therefore propose that the standard industry consultation period for land disposals is reduced to twenty eight days. We recognise that we would need to be satisfied that, in each case, 28 days was a sufficient period for a full consultation and where necessary, a longer consultation period would be given.

The survey of consultees also revealed that difficulties have been encountered by consultees who receive multiple consultations relating to the same site. Complex

disposals can include land disposal, station change, minor modification and network change for the same site or scheme and to date these have been dealt with as separate sequential consultations (sometimes months apart). Where appropriate, we believe that multiple consultations for a single scheme could be undertaken simultaneously in order to provide consultees with an accurate view of the scheme in its entirety. We propose to adopt this approach (where possible) in future.

Separately, we have seen an increasing number of cases where, despite efforts to obtain consultation responses from stakeholders, a number of these remain outstanding. This results in a lengthy administrative process with consequential costs and delays for what is often a simple transaction. At present, our approach is to use reasonable endeavours to elicit responses from consultees and it has been acknowledged by ORR that this approach is acceptable. In order to reduce administrative costs from unnecessary and avoidable delays, we consider that ORR's regulatory arrangements should provide clarity on this issue.

In order to document these improvements to the consultation process, it is suggested that additional paragraphs be added in chapter 3 of ORR's regulatory arrangements document (perhaps as 3.2 and 3.3) to read:

3.2 "We would expect Network Rail to consult for a minimum period of 28 days and to use reasonable endeavours to elicit responses from consultees by the end of the consultation period. ORR will consider an application made for land disposal by Network Rail where Network Rail can demonstrate that it has used such reasonable endeavours".

3.3 "Where there are multiple consultations relating to the same site or scheme and where Network Rail considers it appropriate, consultations may be issued simultaneously".

We are pleased that the time taken for ORR to consider applications for specific consent has reduced over the past few years from an average of ten weeks to an average of four weeks. We consider this to be an important step which has improved the process. In line with a reduction to the duration of a standard consultation, we would invite ORR to consider reducing the maximum three month period in which it considers applications for specific consent to two months which we believe would still allow ORR time to consider complex cases. We note that this would require a change to be made to our Network Licence and we suggest that this is considered as part of the forthcoming wider review.

Disposals potentially covered by the General Consent

Rights relinquished by Network Rail

There are a number of cases where we have relinquished a right of access over another's land where the access is no longer required by Network Rail for railway purposes. In the past, there has been debate with ORR as to whether this constitutes a disposal under ground 1(g) of the general consent. It is our view that this is an example of a disposal that should not need to be referred to ORR.

Furthermore, where the access referred to has no direct impact on an industry stakeholder (e.g. where it is a track-side access and therefore the only party who could be affected by the disposal is Network Rail) then there should be no obligation on Network Rail to undertake an industry consultation. In contrast, where the access directly impacts on stakeholders (e.g. where it is access to a station or freight facility) then Network Rail should only be required to consult the relevant beneficiaries.

We would suggest that for these types of cases, a note in chapter 3 of ORR's regulatory arrangements document is included to reflect the proposed consultation arrangements and to clarify that these types of disposal need to comply with the licence condition.

Rights Reserved by Network Rail

As part of good portfolio management, we are increasingly seeking to retain (or indeed may be offered) access rights over disposal sites. It is unclear as to whether the reservation of such rights can properly be dealt with under the existing general consent regime.

During discussions with ORR, it has been suggested that such reservations could be dealt with under ground 1(g) of the general consent mechanism. AS ORR will of course recognise, the use of ground 1(g) requires us to be satisfied that the disposal site has no reasonably foreseeable railway use. We are therefore uncertain whether it is technically correct to use the general consent mechanism when we are disposing of a freehold or leasehold interest in a site but reserving access rights over part of the area.

We intend to reserve such rights of access more frequently in the future and therefore suggest that a paragraph should be added to ORR's regulatory arrangements document which sets out that "nothing shall prevent ground 1(g) from

applying to a disposal of land where a right is reserved by Network Rail or separately granted to Network Rail for the purpose of accessing the railway”.

Test Track

There are also cases where we grant leases or licences of land associated with train testing and these do not fall within any of the existing grounds of the general consent. It is our view that these are disposals for railway purposes which should not need to be referred to ORR. We suggest that these disposals could be included under a new general consent as ground 1(r), as set out in Annex A. Alternatively, it would be useful if ORR could confirm that these types of disposal are covered by ground 1(n) of the general consent, i.e. that they are for the purpose of providing services relating to railways.

We would be happy to meet with you to discuss anything contained in this response in more detail.

I am copying this response to Paul Plummer at Network Rail and to Cathryn Ross and John Larkinson at ORR.

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

Kara Johnson
Regulatory Specialist

General consent under Condition 7 of Network Rail's network licence

1. ORR directs that for the purposes of condition 7 of the network licence, Network Rail may dispose of land by entering into any of the following arrangements without giving prior notice:

(a) a lease, which incorporates the Station Access Conditions, of all or part of a station to a passenger train operator providing railway services under a franchise agreement with the appropriate franchising authority or under a concession agreement with a Passenger Transport Executive or Transport for London (or its successors). The lease must be capable of termination on or before the termination of the relevant franchise agreement or the concession agreement. For the purpose of this paragraph a franchise agreement or a concession agreement shall not be treated as being terminated if, when it comes to an end, it is replaced by an agreement between the passenger train operator and the appropriate franchising authority, or a Passenger Transport Executive, Transport for London, or Docklands Light Railway (or their successors), on similar terms;

(b) a lease or licence of part of a station of which Network Rail is the station operator to a train operating company for the purpose of providing services relating to railways;

(c) a lease or licence:

- (i) of all or part of a light maintenance depot (LMD) to any person for the purpose of providing services relating to railways; or
- (ii) of land for the construction of an LMD provided that there are no plans to use the land for other railway purposes and the land is used only for such purposes as are permitted by the National Depot Access Conditions (December Standard) or such other depot access conditions as may be approved by ORR;

(d) a reversionary or concurrent lease pursuant to an obligation contained in any such lease referred to in paragraphs 1(a) and 1(c) provided that the grant of the reversionary or concurrent lease does not interfere with or restrict the carrying on of railway services at the station or LMD;

(e) a lease or a licence which contains a materially unfettered right permitting Network Rail to terminate the lease or licence if the land is required by Network Rail to conduct its Permitted Business and/or for the purposes of railway and/or integrated transport related redevelopment;

(f) a lease or licence of all or part of a building which will be used by the lessee as office accommodation;

(g) the disposal of land which has no reasonably foreseeable use:

- (i) for, or in connection with, services relating to railways; or
- (ii) for any other public transport use, which would provide benefit for rail passengers, through better integration of public transport modes;

(h) the renewal or extension of any lease where the renewal is required by operation of law;

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(i) a licence where that would not have a material adverse effect on the ability of Network Rail, any network operator, any beneficiary or a holder of a licence under the Act or the Railway (Licensing of Railway Undertakings) Regulations 2005 to use or develop the land for the purpose of providing services relating to railways;

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(j) the grant of sub-surface or air rights that do not infringe on the space which may be needed to facilitate the provision of services relating to railways (major developments are excluded from such grant);

(k) the disposal of any land made solely for the purpose of boundary rectification of land in which Network Rail has an estate or interest;

(l) a wayleave, easement or servitude which would not have a material adverse effect on the ability of Network Rail, any network operator, any beneficiary or any holder of a licence under the Act or the Railway (Licensing of Railway Undertakings) Regulations 2005 to use or develop the land for the purpose of providing services relating to railways;

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(m) a lease or licence of a freight depot, freight terminal or freight sidings for the purposes of providing services relating to railways;

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(n) a lease or licence to a person providing network services for the purpose of providing services relating to railways;

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(o) any disposal of land to the extent it comprises a network or railway facility (or part of a network or railway facility) which has been the subject of a decision on closure under section 43(9) of the Act (or the effect of the provisions set out in sections 22-35 of the Railways Act 2005 is that it is permitted to be closed or its use discontinued) and that decision (or effect of those provisions) does not explicitly require that the licence holder does not dispose of the land;

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(p) the disposal or dedication of land to a governmental or local authority, agency or department for the purposes of or in connection with a highway including approaches to level crossings, where such land does not form part of the operational rail network and where any objections and substantial issues raised by recent prior consultation have been resolved;

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(q) the disposal of land wholly or substantially for a public transport use, which would provide benefit for rail passengers through better integration of public transport modes, and where:

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(i) the disposal would not hinder Network Rail's ability to conduct its Permitted Business; and

(ii) prior consultation with all relevant stakeholders has not identified a reasonably foreseeable competing railway or integrated transport use for the land and any objections and substantial issues raised by any consultee have been resolved; or

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(r) a lease or licence of:

(i) test track to be used for the purpose of providing services relating to the testing of vehicles, trains or other equipment relating to railways; and

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(ii) land for the construction of test track or to be used for other purposes relating to the testing of vehicles, trains or other equipment relating to railways.▼

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2. ORR may after consulting the licence holder modify or revoke this general consent if it appears to ORR requisite or expedient to do so by reason of any change of circumstances having regard to the duties imposed on ORR by section 4 of the Act.

3. In this direction:

“the Act” is the Railways Act 1993;

“lease” includes a tenancy;

“prior notice” means a notice to ORR under condition 7 of Network Rail’s network licence, or condition 28 of a station licence;

“Station Access Conditions” means the National Station Access Conditions 1996 (England and Wales) lodged with ORR on 30 January 1996, or the National Station Access Conditions 1996 (Scotland) lodged with ORR on 4 March 1996 as appropriate, and in both cases, modified from time to time with the approval of ORR;

“Depot Access Conditions” means the National Depot Access Conditions (December Standard) lodged with ORR, and modified from time to time with the approval of ORR;

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and any other words and phrases in this direction shall have the same meaning as in the Act or network licence.