

**John Larkinson**  
**Chief Executive**

Andrew Haines  
Chief Executive  
Network Rail  
1 Eversholt Street  
London NW1 2DN

28 November 2018

Dear Andrew

**Apparent breach of condition 1 of Network Rail's network licence**

- 1.1. I am writing to advise of the decision the ORR Board made this week with regard to Network Rail's performance management capability.
- 1.2. As set out in our November Monitor, published alongside this letter, performance across GB has continued to decline this year and some routes are currently experiencing the lowest levels of performance in this control period. The Monitor also sets out the wider context to this order, acknowledging that passengers rely on both Network Rail and train operators to deliver performance but ORR's role is to examine Network Rail's contribution.
- 1.3. ORR will continue to examine Network Rail's delivery of its performance obligations for the rest of the current performance year (2018-19). However, there is now sufficient evidence (by way of a number of reviews<sup>1</sup> that have been undertaken over the last 18 months) that point to weaknesses in Network Rail's underlying performance management capability; which ORR considers must be addressed as a matter of urgency in advance of introducing the new regulatory framework for CP6.
- 1.4. In particular, it appears to ORR that there are current systemic issues in relation to Network Rail's:
  - approach and commitment to performance planning; and

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<sup>1</sup> Listed in the annex of the Provisional Order.

- capability to recover service from incidents on the network (in conjunction with train operators).

### **Basis for ORR's Breach decision and enforcement action**


- 1.5. In the past 18 months we have investigated two of Network Rail's Routes (South East and Wessex) for their delivery to various train services. At the same time, there have been a number of independent reviews commissioned by either the Secretary of State or by Network Rail itself, only now culminating in a range of evidence that is available from which to draw conclusions. Each review consistently highlights issues with Network Rail's performance planning and service recovery plans, as well as many issues for train operators (of which some are inter-related and some are distinct for train operators).
- 1.6. One of these reviews (Steer) examined all available performance strategies, between 19 train operators and all of Network Rail's Routes. It concluded that the Performance Planning Reform Programme was no longer working sufficiently effectively. In the next control period there will be a core role for some form of route performance action plans to help Network Rail achieve targets set locally in its scorecards. These strategies or plans need to identify what action to take and therefore Network Rail needs to ensure it has the right tools in place and competence to analyse causes of delay and identify steps required to drive improvement.
- 1.7. As well as being identified in three of the reviews (Gibb, Holden and Donovan) it is widely accepted that current performance data highlights a major issue with management of increased delay per incident across most routes. Evidence from our own investigations and other independent reviews point to weaknesses in how Network Rail responds to and recovers from incidents.
- 1.8. **ORR has therefore concluded that it appears that Network Rail is contravening Condition 1 of its network licence (Network Management) due to the weaknesses in its performance management capabilities.**

### **Content of the provisional order**

- 1.9. There are steps we require Network Rail to now take to provide us with greater assurance that it is taking action to improve its performance management processes and doing all it can to address the issue of increased delay per incident. We consider that if Network Rail's underlying capability in these areas does not improve, there is a significant risk that it will start CP6 unprepared to achieve its performance obligations.

- 1.10. In accordance with Section 55 of the Railways Act<sup>2</sup> and our current published economic enforcement policy<sup>3</sup> we consider it is requisite to impose a provisional order on Network Rail. ORR has considered its Section 4 duties and in particular, the extent to which any person is likely to sustain loss or damage in consequence of the contravention before a final order can be made. ORR considers that the time it would take for a final order to be made would mean that Network Rail has insufficient time to improve its capability before the beginning of CP6 and therefore passengers and/or stakeholders could sustain loss or damage as a result.
- 1.11. The provisional order is attached to this letter and will take effect from Wednesday 28 November until Thursday 28 February 2019. If at the end of this period, the ORR is satisfied that Network Rail is compliant with its licence obligations the provisional order will fall away.
- 1.12. However, if at the end of this period, ORR is satisfied that Network Rail is still contravening condition 1 then it will consider formally confirming the order. In this scenario, ORR would publish a notice setting out its intention to impose a final order at least 21 days before the end of the provisional order. Should the ORR be unable to determine if Network Rail is still in breach prior to the end of the 3-month period, ORR may revisit it after the cessation of the order.
- 1.13. This order requires Network Rail, including its Route Managing Directors, to step up engagement and work with train operators and deliver a report to ORR by **15 February 2019** detailing how it is:
- identifying the common underlying issues relating to performance planning and service recovery; and
  - addressing and implementing the conclusions of its report going forward into CP6.
- 1.14. We will engage with your team to agree the best way for Network Rail to keep ORR updated during the period of the order. A copy of this letter and attached provisional order will be published on our website.

Yours sincerely



**John Larkinson**  
Chief Executive

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<sup>2</sup> <http://orr.gov.uk/about-orr/what-we-do/the-law-and-our-duties>

<sup>3</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0018/4716/economic-enforcement-statement.pdf](http://orr.gov.uk/data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf)

**RAILWAYS ACT 1993**

**SECTION 55**

**PROVISIONAL ORDER**

A. Performance has been declining over CP5 and this decline has worsened even further so far in 2018/19. During CP5 a series of relevant reviews have been undertaken in relation to the delivery of train service performance across the whole industry. These have identified, amongst other things, in particular a number of issues with Network Rail Infrastructure Limited's (Network Rail) performance management capability, and have recommended a number of remedial actions Network Rail should take. While Network Rail has committed in general terms to improving its capability, it is not sufficiently clear that it is specifically addressing the common underlying causes that manifest in the findings of the relevant reviews and improving its performance management capability in an efficient, effective and timely manner. CP6 begins on 1 April 2019 and Network Rail needs to be ready to meet performance requirements set out for CP6. Failure to do so will have an adverse impact on users of the railway, train operators and funders.

B. In light of the above it now appears to the Office of Rail and Road (ORR) that Network Rail is contravening Condition 1 of its network licence which states:

**1. Network Management**

*Purpose*

1.1 The purpose is to secure:

- (a) the operation and maintenance of the network;
- (b) The renewal and replacement of the network; and
- (c) The improvement, enhancement and development of the network,

In each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders, including potential providers or potential funders, in respect of:

- i. the quality and capability of the network; and
- ii. the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

*General duty*

1.2 The licence holder shall achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities

C. From the relevant reviews, a number of common underlying issues have been identified. In particular, it appears to ORR that there are current systemic issues in relation to Network Rail's performance management capability, in particular its:

- a. approach and commitment to performance planning; and
- b. capability to recover service from incidents on the network, in conjunction with train operators.

D. Having regard to the matters set out in section 55(1) of the Railways Act 1993 as amended (the Act,) ORR considers it requisite to make a provisional order for the purpose of securing Network Rail's compliance with Condition 1. In considering whether it is requisite, ORR has considered its section 4 duties and in particular, the extent to which any person is likely to sustain loss or damage in consequence of the contravention before a final order can be made. ORR consider that the time it would take for a final order to be made would mean that Network Rail has insufficient time to improve its capability before the beginning of CP6 and therefore passengers and/or stakeholders could sustain loss or damage as a result.

E. ORR considers the following section 4 duties to be relevant to this decision:

- a. promote improvements in railway performance;

- b. otherwise protect the interests of users of railway services;
- c. promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that is considered economically practicable;
- d. promote efficiency and economy on the part of persons providing railway services; and
- e. enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

F. ORR is satisfied that:

- a. the duties imposed on it by section 4 of the Act do not preclude the making of this order; and
- b. the most appropriate way of proceeding is not under the Competition Act 1998.

G. ORR need not consider, under section 55(5B) of the Act, the appropriateness of the making of this order because:-

- a. ORR is not satisfied Network Rail has taken, and is taking, all such steps as appear to ORR for the time being to be appropriate for Network Rail to take for the purpose of securing or facilitating compliance with Conditions 1; and
- b. ORR is not satisfied that the contravention will not adversely affect the interest of users of railway services or lead to an increase in public expenditure.

Therefore:

1. In respect of the contravention, pursuant to section 55 of the Act, ORR requires Network Rail, including its Route Managing Directors, to:

- a) Engage and work with Train Operating Companies (TOCs) to further review and develop actions to address the underlying causes that have led to the findings identified in the relevant reviews;
- b) Deliver a report to ORR by **15 February 2019** detailing the following:
  - i. how it is identifying the common underlying issues relating to performance planning and its capability to recover service from incidents on its network. In doing this, Network Rail must take into account of the findings of all the relevant reviews and their application across the whole of its business, whether or not the relevant review was limited to a single Route;

- ii. how it is addressing and implementing the conclusions of its report going forward into CP6, ensuring that the conclusions are agreed and being embedded throughout each of the Routes and share best practice between all of its Route businesses;
  - c) Provide ORR with regular updates on progress in delivering its report.<sup>4</sup> These updates may include any interim findings and representations regarding the extent to which it considers it is doing everything reasonable practicable to meet its obligations in condition 1 in relation to its performance management capability.
2. In this order “relevant reviews” means the reviews set out in Annex 1
  3. Nothing in this order shall be taken to permit Network Rail to breach any licence, contract or other legal obligation.

This order has effect on and from Wednesday 28 November 2018 and shall cease to have effect (if not previously confirmed under section 55 of the Act) on Thursday 28 February 2019.



**John Larkinson**  
**Chief Executive**

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<sup>4</sup> At least monthly updates; to be provided by Network Rail on 18 December 2018 and 18 January 2019

## **Annex 1 – Relevant Reviews**

The [Gibb review](#), (December 2016)

[ORR review of NR's delivery](#) to Southeastern (July 2017)

The Donovan review of ScotRail performance (March 2018) [Donovan recommendations](#)

[ORR investigation](#) into NR's delivery to SWR (July 2018)

[Holden review](#), published (August 2018)

The Steer review of NR's performance strategies (September 2018).

[ORR's PR18 review](#) of performance trajectories (October 2018)