

## **Responses to ORR's consultation on updating the regulatory arrangements for land disposal by Network Rail, March 2019**

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23 April 2019

## **ORR's REGULATION OF LAND DISPOSALS BY NETWORK RAIL**

This letter constitutes the response of DB Cargo (UK) Limited ("DB Cargo") to the consultation document entitled "*ORR's Regulation of Land Disposals by Network Rail*" issued on 25 March 2019.

### *Introduction*

1.1. DB Cargo supports the need for there to be in place an appropriate level of regulatory oversight in respect of any proposed land disposals by Network Rail. The current arrangements that were implemented by ORR in December 2013 appear to provide adequately that level of regulatory scrutiny to ensure Network Rail does not dispose of its land inappropriately. DB Cargo is, therefore, pleased that ORR, in reviewing those arrangements in light of the recent changes to Network Rail's network licence, is proposing to leave the vast majority intact. Notwithstanding this, DB Cargo nevertheless wishes to raise the following representations:

### *General consent*

1.2. DB Cargo understands that ORR is proposing to include further categories of land disposal in the general consent (disposal of property rights for railway purposes – freehold retained). These categories are:

- for the purposes of constructing or enhancing a station facility or a freight facility for the purposes of providing services to railways; and
- to provide network connected rail freight activities and rail infrastructure activities

1.3. DB Cargo has no objections in principle to the addition of these two categories to the general consent (disposal of property rights for railway purposes – freehold retained). However, it is concerned to ensure that land disposals under these categories can be made subject to further scrutiny (and reversed if necessary) if the specified railway purposes which enabled the general consent to be used originally do not materialise. If such further scrutiny was not possible, it appears that there would be little in preventing



2/2 -

the relevant third party from developing the land for other purposes, including non-railway purposes.

1.4. DB Cargo supports ORR's proposal to remove the following category from the general consent (disposal of property rights not necessarily for railway purposes – freehold retained):

- grant of consent to a lessee under an existing lease permitting the lessee to sublet all or part of the leased premises;

1.5. DB Cargo considers that relevant persons who operate railway facilities connected to the network should also be included in the list of consultees contained in ORR's decision criteria. Such persons would normally hold connection contracts with Network Rail in respect of those facilities and the disposal of any land located nearby could have a material effect on the operation or development of such facilities.

1.6. Given the permanence of land disposals whether by way of ORR's specific or general consent, DB Cargo considers that all such proposals should be consulted in advance by Network Rail. The current arrangements appear to imply that Network Rail is only required to consult the stakeholders listed in ORR's decision criteria in the case of proposals not covered by general consent. Furthermore, DB Cargo considers that all categories under the general consent should only proceed where the prior consultation with relevant stakeholders has left no issue unresolved. Currently this proviso appears to be limited only to a few such categories.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nigel Oatway', with a horizontal line underneath.

**Nigel Oatway**  
**Access Manager**



# Department for Transport

Licensing.enquiries@orr.gov.uk

Oliver Mulvey  
DEPUTY DIRECTOR  
RAIL MARKETS STRATEGY  
DEPARTMENT FOR TRANSPORT  
DIRECT LINE: [Redacted]  
[Redacted]  
Web Site: www.dft.gov.uk

24 April 2019

## ORR's regulation of land disposals by Network Rail

Thank you for the opportunity to comment on the proposed updates to Office of Rail and Road's (ORR) publication setting out its regulatory arrangements for dealing with Network Rail's (NR) land disposals. We appreciate the highly constructive engagement to date between ORR and the Department for Transport (DfT) on the review of Network Rail's licence.

The Government welcomes ORR's updates to the land disposal condition, while recognising that there is a strong degree of continuity. In responding to this consultation, we first set out our overall position on the amendments, before responding to the key updates proposed. DfT is highly supportive of the Regulatory Arrangements to streamline the disposals process and provide further clarity on the decision criteria. We believe that this will help provide more certainty and enable better planning for timescales in the disposals process, whilst protecting the interests of the operational railway and its users.

### Key Updates

We note ORR's amendments to the general consent which allows NR to dispose of land without prior notice in certain situations and/or following specific arrangements. DfT has no objection to including disposals that would allow construction and/or enhancement at a station or freight facility for the purposes of providing services relating to railways; and including disposals that would provide network connected rail freight activities and rail infrastructure activities. This amendment provides further detail to the arrangements already in place.

DfT supports the amendments made to the decision criteria ORR will use to decide whether to grant consent to a land disposal but proposes one change. The Government proposes an adjustment to the ORR's criteria in section 3.5 (b) (ii), we suggest this be amended to (new text in bold): 'Department for Transport, Transport Scotland, the Welsh Government, PTA/PTE or other local transport authority provides evidence that the site may **reasonably be** needed for future development of the railway network or for the development of integrated transport facilities'. We consider this alternative wording to offer the relevant bodies further scope and better describe the range of evidence that could be provided.

DfT welcomes ORR's update to the Application of Policy section relating to major air rights and disposals required under or related to an enactment. This amendment gives further guidance and structure to the policy already in place.

### Concluding remarks

The Government is committed to placing passengers and freight users at the heart of rail and therefore supports land disposal in appropriate circumstances, where necessary to secure benefits. DfT welcomes ORR's direction of the review, providing further clarity and strengthening the tests for land disposals and endorses the updates provided in the consultation. We have offered one amendment which we hope will be of use.

Yours sincerely,

**Oliver Mulvey**



a Genesee & Wyoming Company

Our Ref:  
Your Ref:

The Licencing Team  
Office of Road and Rail

Sent by e-mail

23 April 2019

**Freightliner Group Limited**

3rd Floor

90 Whitfield Street, Fitzrovia  
London W1T 4EZ

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Dear Sirs

## **ORR's REGULATION OF LAND DISPOSALS BY NETWORK RAIL**

This letter constitutes the response of Freightliner Group Limited - including subsidiary companies Freightliner Limited and Freightliner Heavy Haul Limited ('Freightliner') - to the consultation document entitled "*ORR's Regulation of Land Disposals by Network Rail*" issued on 25 March 2019.

### *Introduction*

1.1. Freightliner supports the need for there to be in place an appropriate level of regulatory oversight in respect of land disposals by Network Rail. The current arrangements that were implemented by ORR in December 2013 provide that level of regulatory scrutiny and on the whole work well in ensuring Network Rail does not dispose of its land inappropriately. Freightliner is, therefore, pleased that in reviewing those arrangements in light of the recent changes to Network Rail's network licence, ORR is proposing to leave the vast majority intact. Notwithstanding this, Freightliner wishes to raise the following representations:

### *General consent*

1.2. Freightliner understands that ORR is proposing to include further categories of land disposal in the general consent (disposal of property rights for railway purposes – freehold retained). These categories are:

- for the purposes of constructing or enhancing a station facility or a freight facility for the purposes of providing services to railways; and
- to provide network connected rail freight activities and rail infrastructure activities

1.3. Whilst Freightliner supports in principle to the addition of these two categories which will help facilitate third party investment in the freight network, it is concerned to ensure that land disposals under these categories can be reversed if the specified railway purposes which enabled the general consent to be used subsequently do not materialise and instead the third party develops the land for other purposes, particularly non-railway purposes. These

disposals should be conditional on freight restricted user clauses and should contain break clauses operable in the event the sites cease to be used for freight activities.

1.4. Freightliner supports ORR's proposal to remove the following category from the general consent (disposal of property rights not necessarily for railway purposes – freehold retained):

- grant of consent to a lessee under an existing lease permitting the lessee to sublet all or part of the leased premises;

1.6. Freightliner considers that relevant persons who operate railway facilities connected to the network should also be included in the list of consultees contained in ORR's decision criteria. Such persons would normally hold connection contracts with Network Rail in respect of those facilities and the disposal of any land located nearby could have a material effect on the operation or development of such facilities.

1.7. Given the permanence of land disposals where the freehold may be divested, Freightliner considers that all such proposals (save for 2.1 (m)) should be consulted on in advance by Network Rail. The current arrangements appear to imply that Network Rail is only required to consult the stakeholders listed in ORR's decision criteria in the case of proposals not covered by general consent. Furthermore, Freightliner considers that all categories under the general consent where the freehold may be divested should only proceed where the prior consultation with relevant stakeholders has left no issue unresolved. Currently this proviso is limited only to a few such categories.

Yours sincerely

Matthew Hill  
Group Property Manager  
Freightliner Group Limited

**From:** Tim Bellenger [Redacted]  
**Sent:** Wednesday, April 17, 2019 1:05 PM  
**To:** Licensing Enquiries <licensing.enquiries@orr.gsi.gov.uk>  
**Cc:** [Redacted]  
**Subject:** Regulating Network Rails land disposals

Dear Sir / Madame,

Thank you for the opportunity to comment on this consultation. London TravelWatch has no objection to the principles behind the proposed changes, however, in paragraph 3.2 this needs to be clarified to reflect our statutory area which is not necessarily analogous to the Greater London Authority area. It is defined in law as the London Railway Area and this can be found on our website at [http://www.londontravelwatch.org.uk/documents/get\\_lob?id=4694&field=file](http://www.londontravelwatch.org.uk/documents/get_lob?id=4694&field=file)

Yours sincerely

**Tim Bellenger**  
Director, Policy and Investigation

Follow us on [Twitter](#) and [You Tube](#).



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17 April 2019

Dear Les

### **ORR's regulation of land disposal by Network Rail**

Thank you for your letter of 25 March 2019 inviting views on ORR's regulation of land disposals by Network Rail. We welcome the opportunity to respond to the consultation, no part of our response is confidential, and we are content for it to be published in full.

### **General Consent under Condition 17 of Network Rail's Network Licence**

We are generally supportive of the changes which ORR is proposing to make to its regulatory arrangements for land disposal, particularly the additional specified grounds for use of the general consent. We are aware and appreciate that ORR's objective is to protect land that may be required for future development of the railway network and to prevent the disposal of land against the public interest. We have well established internal governance processes surrounding the disposal of Network Rail land which includes, where appropriate, using ORR's general consent mechanism under condition 17 (LC17) of our Network Licence (or indeed seeking specific consent from ORR under the same licence condition).

We welcome the addition of the two new grounds, b(vi) and b(vii). Constructing and enhancing station and freight facilities is a frequent activity and one which we believe is necessary and appropriate to be included within the general consent. In CP5, we sought specific consent for this type of activity. The inclusion of this ground of the general consent supports Network Rail's aims of being an organisation that is easy to do business with and that encourages opportunities for third party investment in the railway to reduce the burden on the taxpayer. Additionally, in CP5, we sought specific consent for lettings to freight end users seeking to provide network connected rail freight activities. We believe this new ground assists the delivery of our commitment to provide the best possible service for freight users and passengers.

As per previous discussions we agree with the removal of the ground which required your consent to a subletting. We thought this to be unnecessary given that the original letting is the 'disposal' for the purposes of condition 17 of the licence and by granting a lease to a third party, we are confirming that we are content that the terms of that lease (whether dealt with through the general consent mechanism or by seeking specific consent) would not have a reasonably foreseeable adverse effect on, or in connection with, services related to railways. Our leases contain appropriate alienation provisions which do not compromise our ability to comply with our Network Management Duty.

We welcome the inclusion of release of covenants in proposed ground (f) to formalise the agreed position adopted in CP5. However, we also think that this ground should include the surrender of leases which we believed was already an informally agreed position. We welcome further conversation with ORR in this regard.

Under ground (k), we are able to dispose of land wholly for a public transport use where this would provide benefit for rail passengers through better integration of public transport modes, where the disposal wouldn't hinder our network business and where no competing railway or integrated transport use for the land is identified



through prior consultation with stakeholders. Where a stakeholder identifies a competing use which can be reasonably accommodated by the proposed public transport use (i.e. a tram train conversion) then we believe it to be appropriate to continue to rely on the general consent and suggest that some additional wording is incorporated to this effect.

#### **Disposals pursuant to an enactment**

As LC17(1)(a) permits the disposal of land where it is required by an enactment, then we welcome the proposal to remove this as a ground of the general consent and to regularise the position such that it is aligned with that in the Network Licence. In accordance with best practice we shall continue to follow our existing internal governance processes for these cases which includes appropriately documenting such dealings. This aligns with ORR's intention to continue to audit transactions conducted under CPOs and we presume that this will also include 'enactment related' disposals. As such, we believe that 'enactment related' disposals should also be referenced within paragraph 4.12.

#### **Stakeholder engagement**

Our vision, as shown by our commitments to 'putting passengers and freight users first', is to be a customer focused business demonstrably meeting stakeholder needs, with clear accountabilities, able to make decisions quickly. Engaging with our stakeholders is critical to the delivery of outcomes that matter to them and is a fundamental part of how we seek to continuously improve our business performance. Our internal commitments to stakeholder engagement, included within the principles of our Stakeholder Relations Code of Practice, align to the expectations set out in paragraph 3.2 of the arrangements. Our internal governance processes are also consistent with our Network Licence obligations, particularly our core duty to act in accordance with our Network Management Duty when determining whether it is appropriate to dispose of land. In addition, we act in accordance with our Stakeholder Engagement Duty, thereby making sure that stakeholders are treated in ways appropriate to their reasonable requirements and that our engagement is effective, inclusive, well governed and transparent.

Good quality stakeholder engagement is a two-way process that is reliant on our commitment and that of our stakeholders. We recognise that there may be occasions where circumstances prevent stakeholders from being able to prioritise engagement with us. Therefore we have to have transparent arrangements in place for dealing with 'nil' responses to consultations. When dealing with a 'nil' response to a land disposal consultation, in accordance with our Network Management Duty, we assess whether a response is required because it is 'key' to determining that it is appropriate for us to dispose of land (meaning the party from whom a response is required is a 'key stakeholder'). We can separately share with ORR the detailed criteria that outlines how we make this assessment.

As agreed with ORR, where the assessment is that such response is not key to determining whether it is appropriate for us to dispose of land, and that the stakeholder is not deemed a 'key stakeholder' for the purposes of the proposed disposal in question, then we will be treating that response as being "no objection" to our proposals.

As further agreed with ORR, we will contact 'key stakeholders' to allow an additional reasonable period of time (we propose 14 days) to elicit a response from them but if there is still a nil response then we will notify the consultee(s) of our submission of an application to ORR (for specific consent) or, where appropriate, our use of the general consent mechanism, together with full rationale for the particular general consent ground used.

In accordance with our core duties under the Network Licence, we use all reasonable endeavours to deal with any objections that we receive in relation to a proposed disposal. Where an objection remains unresolved due to us being unable to agree with a stakeholder how it can be addressed then, following the exercise of judgment that we have used all reasonable endeavours to resolve an objection, we will submit an application to ORR for its determination. As was agreed with ORR as a policy position during CP5, where there are instances of objections being submitted but the stakeholder subsequently fails to engage or respond to our efforts to address an objection within 28 days of Network Rail engagement then we will treat the objection as being withdrawn.

#### **Procedural changes**

To make the arrangements as clear as possible for those who are responsible for discharging LC17 obligations, we believe that paragraph 3.4 should be amended to make clear that the two-month decision making period commences upon receipt of a Disposal Notice from Network Rail, and that any further information requests are

included within this period. Additionally, we believe that paragraph 3.3 should be updated so that references to information provided by Network Rail is information that ORR may 'reasonably require' so as to be consistent with condition 8 of our Network Licence.

ORR proposes that the circumstances to which it will have regard when considering evidence of a reasonably foreseeable railway related use, will include a site featuring in a strategy being developed by a third party and that there are plans, milestones or timescales to either include or eliminate the site from a confirmed strategy. Our internal governance arrangements for making applications to ORR contain high thresholds and therefore we do not submit applications where there is evidence that there is a foreseeable railway related use. The circumstances to which ORR will have regard need to be as clear as possible so that we can be confident of the criteria for assessing evidence of reasonably foreseeable railway related use and maintain high thresholds. We consider that a party having plans to include or eliminate the site from a confirmed strategy is somewhat vague and does not allow us to confidently conclude that ORR will reach a decision of "no foreseeable railway related use", even if we believe this to be the case. We believe that the criteria should be more definitive so that there are "plans with milestones and/or timescales" which is consistent with previous discussions with ORR on this policy issue.

#### **General**

To strengthen our internal governance and to support those who are responsible for discharging Network Rail's land disposal obligations we require ORR's regulatory arrangements to be as clear as possible. As a general remark, where a ground of the general consent has multiple 'sub-grounds' it would be beneficial if ORR could make clear, through the inclusion of 'or' / 'and', whether or not one or both criteria need to be satisfied in order to rely upon that ground of the general consent. This is to address a commonly raised query, particularly under proposed grounds d(i) and d(ii) as this has previously caused confusion.

We note that the general consent conditions are now a single list of alphabetical grounds which is helpful, but there remain other alphabetical lists within the document. Whilst we appreciate you appear to be mirroring the current arrangements, we believe that having only one alphabetical list would help distinguish the general consent conditions to the remainder of the policy document and therefore be more user-friendly to colleagues including new employees.

#### **Implementation of new arrangements**

For the avoidance of doubt, we will be relying on the existing arrangements until such time as we are advised that the new arrangements will be implemented. We expect to have discussions with you to understand how our comments are being considered ahead of implementation and expect that there will be sufficient notice of implementation, such that we have the appropriate opportunity to reflect the arrangements in our internal guidance and governance processes.

Yours sincerely



Stuart Kirkwood  
Director, Development

**From:** Maggie Simpson [Redacted]  
**Sent:** Wednesday, April 10, 2019 2:56 PM  
**To:** Licensing Enquiries <licensing.enquiries@orr.gsi.gov.uk>  
**Cc:** [Redacted]  
**Subject:** RE: ORR's regulatory land disposal arrangements

Many thanks for this,

Clearly we are keen to see all processes enacted as efficiently as is sensible, and there is good reason to consider whether the general approval should be extended to include the potential to dispose of land for freight purposes. Many of the land sites under NR's freehold are already captured by other requirements, for example by virtue of being strategic freight sites, and so the risk of inappropriate disposal is relatively small.

However, in changing NR's licence (and I reference last year's consultation), ORR decided not to make any specific reference in the licence to the FNPO route, and included some more general words regarding the management of freight. The consequences of this are that, in the licence condition regarding land disposal, the consultation is not required to include the FNPO route, only the route business units and SO. This appears to mean that NR could sell land under the general consent without FNPO having been consulted at all.

Although this may be seen to be unlikely, I do think it is a loophole, and whilst it exists I am uncomfortable with extending the general approval to include freight sites. I would suggest that some specific reference needs to be included in the consultees to make sure that this is captured properly.

Many thanks,

Maggie

Maggie Simpson  
Director General  
Mobile [Redacted]



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**From:** Miles Stephen [Redacted]  
**Sent:** Monday, April 15, 2019 6:20 PM  
**To:** Licensing Enquiries <licensing.enquiries@orr.gsi.gov.uk>  
**Cc:** [Redacted]  
**Subject:** Consultation on ORR's regulation of land disposals by Network Rail

Dear Les,

Thank you for inviting Transport for London to comment on ORR's proposed update of their regulatory arrangements for dealing with Network Rail's land disposals.

After circulating a link to the consultation around the business, we can confirm we only wish to comment on one paragraph, as follows:

3.5b(ii) As is the case elsewhere in the document, we would like to see specific reference to "Transport for London" made in this paragraph. We would also urge consideration be given to a slight rewording of the text, replacing "is needed" with "may reasonably be required" to reflect the fact that in an environment of continued passenger and freight growth across the network, particularly in and through London, infrastructure solutions may be identified in future years for which there would not necessarily be a case today.

Please don't hesitate to contact us should you require any further information.

Kind regards

Steve

Link to consultation: <https://orr.gov.uk/rail/consultations/open-consultations/regulating-network-rails-land-disposals>

Steve Miles  
Principal Planner, Rail Network Development

-----  
Transport for London  
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Auto: Direct Dial:Email: [Redacted]





## Summary of key points and ORR's view

Respondents	Summary of views	ORR view
<b>DB Cargo; Freightliner</b>	<ul style="list-style-type: none"> <li>Both DB Cargo and Freightliner welcomed in principle the addition of general consent Grounds relating to the provision of freight/station facilities and rail infrastructure activities. However, both were concerned that, having qualified for a general consent disposal, and with the transaction completed, the land might subsequently be used for other or non-railway purposes. Freightliner suggested adding conditional clauses in leases to protect against that event.</li> <li>DB Cargo and Freightliner proposed that the category of 'rail connected parties' is added the list of stakeholders whom we expect Network Rail to consult. Further, Network Rail should consult all relevant stakeholders for every general consent activity.</li> </ul>	<ul style="list-style-type: none"> <li>In ensuring that a disposal is for a purpose under 2.1(b), Network Rail will, as now, include conditional clauses in its disposal documentation to restrict the land's use to that proposed. So far, on occasions when a material change has been proposed to land that has already gained consent for disposal, Network Rail has informed us. To acknowledge such situations we have amended our <i>Application of policy</i> section to state our expectation that Network Rail should revert to its consultees to determine whether it should rely on an existing consent or whether to resubmit a new application to ORR.</li> <li>We consider that the addition of 'rail connected parties' to the list of stakeholders will help to protect their interests at the earliest stage. We do not consider that it is necessary to require Network Rail to consult all stakeholders for every general consent disposal as some categories do not need this approach. For example, boundary rectifications are effectively a legal/administrative tidying; and in reaching closure decisions, a consultation by the funding or national authority is required under the Railways Act 2005, so we do not need to specify one.</li> </ul>
<b>Rail Freight Group (RFG)</b>	<ul style="list-style-type: none"> <li>RFG noted that Condition 17 requires Network Rail to consult its Route Businesses and System Operator, but not the Freight and National Passenger Operators (FNPO) virtual route. RFG saw this as a loophole and Network Rail could dispose of land without consulting the FNPO. Consequently, RFG was uneasy with the proposal to extend the general consent in paragraph 2.1(b).</li> </ul>	<ul style="list-style-type: none"> <li>Network Rail has confirmed to us that its internal consultation would include the business function responsible for FNPO. We have amended paragraph 3.2 of the regulatory arrangements document to secure this.</li> </ul>
<b>Department for Transport (DfT); Transport for London (TfL)</b>	<ul style="list-style-type: none"> <li>DfT and TfL requested an amendment to the paragraph now numbered 3.6(ii), relating to evidence where land is needed for future development of the railway. Preferring the wording "<i>is needed</i>" to be placed by "<i>reasonably be needed/required</i>".</li> </ul>	<ul style="list-style-type: none"> <li>We consider that the suggested wording is unnecessary as paragraph 3.7 (in which we give our consideration points), allows us to take into account plans that are at a relatively early stage and have not been confirmed.</li> </ul>
<b>Network Rail (NR)</b>	<p>NR requested:</p> <ul style="list-style-type: none"> <li>that we add the surrender of a lease to Ground (f) of the general consent. This would cover scenarios where NR is not the freehold owner of land and the provisions of its lease with the owner can require NR to surrender its interest in respect of the land to facilitate, for example, a transport project;</li> <li>adding wording to Ground (l) to include a scenario where a 'competing' transport use could be accommodated into an already-proposed transaction;</li> <li>that ORR's decision criteria and procedures be as clear as possible, and suggested formatting improvements.</li> </ul>	<ul style="list-style-type: none"> <li>We are content to add this category to Ground (f).</li> <li>We consider that Ground (l) is not weakened by adopting Network Rail's recommendation and have amended it accordingly.</li> <li>We have revised the regulatory arrangements to make them even clearer. Paragraphs under Chapter 2 are now numbered to improve referencing and some text has been simplified for clarity.</li> </ul> <p>We also reviewed Network Rail's internal guidelines for its engagement with stakeholders and have made suggestions to improve its robustness.</p>
<b>London TravelWatch (LTW)</b>	<ul style="list-style-type: none"> <li>The reference to LTW in section 3.2 could benefit from the clarification that its statutory area is not necessarily analogous to the Greater London Authority area.</li> </ul>	<ul style="list-style-type: none"> <li>We have amended the text to acknowledge this.</li> </ul>