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Dear Rob

**PERIODIC REVIEW – ORR CONSULTATION ON SCHEDULES 4 AND 8  
POSSESSIONS AND PERFORMANCE REGIME**

Thank you for the opportunity to respond to this consultation. I have provided some general comments below with answers to some of the specific questions attached in the Annex.

The Scottish Ministers are of the view that a more integrated approach to delivering railway services in Scotland will improve the quality, efficiency and resilience of these services and that greater local accountability for the management and operation of rail infrastructure will improve responsiveness to local issues and circumstances.

We welcome the recognition from the ORR that it may be appropriate for Network Rail and Train Operating Companies (TOCs) to agree bespoke performance and possessions compensation arrangements in their track access agreements. This is consistent with Transport Scotland's aspiration for a deeper alliance between Network Rail and the next ScotRail franchisee and we do not believe any areas consulted on in this document are likely to present any major barriers to such arrangements. We would expect any deeper alliance arrangement to strengthen the commercial incentive for both Network Rail and TOCs to manage the risks that they are able to influence. Therefore we continue to expect the ORR to work with the rail industry to identify how best the impacts and benefits of any maturing and deeper alliance arrangements should be reflected in the regulatory regime, particularly across areas that can be managed best through cooperation including performance and engineering blockades.

A further, general observation is that many of the industry processes to which this consultation relates are complex to address issues that are important across Great Britain. Transport Scotland believes that many of these mechanisms could be more simply and efficiently addressed were there an opportunity to do so discretely within Scotland, where it would be possible to tackle the specific issues impacting on the

Scottish network including the high level of financial support provided by the Scottish Ministers.

I can also confirm that Transport Scotland does not require any of this response to remain confidential.

Yours sincerely

A handwritten signature in black ink, appearing to read "Steven McMahon".

**STEVEN McMAHON**

## **ORR PR13 CONSULTATION ON SCHEDULES 4 AND 8 POSSESSIONS AND PERFORMANCE REGIME**

### **Transparency of possession management**

- While passenger and freight customers are consulted on the planning of possessions there is room for improvement, particularly in Scotland where there is a close geographical relationship between Network Rail and the ScotRail franchisee.
- Other bodies, particularly Regional Transport Partnerships, should be consulted, particularly in more remote areas to ensure that the needs of the wider local community are considered.

### **Setting Schedule 4 and 8 payment rates below 100% of financial impact to TOCs**

- Transport Scotland's response to previous consultations has made clear a need to ensure that both regimes provide a strong financial incentive to minimise disruption on the network. We are also clear that we would expect any future alliancing arrangement in Scotland to help reduce whole-industry costs in these areas.
- In principle (and in the absence of any bespoke alliancing arrangement) the ORR's emerging view that rates should continue to provide full compensation does follow from the conclusion of the SDG research; that reducing these rates will lead to increased risk to bidders, which will be reflected in their pricing.
- We also note that the SDG report suggests that this risk is unlikely to be offset by any savings elsewhere based on this strategy alone. Therefore, this approach would potentially add further risk to it. However the report does not identify the potential cost savings that might arise from this proposal to balance the risks.
- While reduced rates might incentivise TOCs to work more closely with Network Rail to improve Network Rail performance, conversely this could lead to lower incentive for Network Rail to work more closely with the TOC to improve Network Rail performance.
- Overall we note the general industry view; that reducing these rates is unlikely to alter current industry behaviours in terms of achieving good levels of performance.
- Network Rail and TOCs have potentially more valuable incentives to improve performance than the compensation arrangements, namely reputation and regulatory targets. These factors are more likely to drive behaviours, and we would expect to see this reflected in the development of regulatory activity.
- In general, a more pressing issue would be to ensure that the payment rates are well calibrated to suit each individual franchise.

### **Introducing a 'Joint Restrictions of Use' concept into Schedule 4**

- We note that the ORR's emerging view is not to introduce a Joint Restriction of Use (JRU) concept into Schedule 4, as defined by Network Rail, since the majority of TOCs do not believe it would achieve its stated objective.
- This issue is a pertinent one for Transport Scotland because, historically, the Scottish network has been significantly impacted by severe weather disruption. There appears to be some evidence that the current arrangements (effectively of who acts first to reduce the level of service ends up paying compensation) do not

work effectively and encourage brinkmanship, although we recognise that some new measures have been put in place in Scotland following the serious problems incurred in the Winter of 2010 with positive effects.

- For Scotland a concept along the lines proposed – where Network Rail and the TOC have a mechanism for jointly agreeing restrictions to the network in exceptional circumstances – may be a sensible avenue to explore but its effectiveness would be dependent on there being a real incentive for both parties to agree to a JRU under appropriate circumstances where this is in the interests of passengers.
- It is not clear that the approach proposed by Network Rail (specifically, the proposed a halving of Schedule 4 rates) is the most appropriate approach, as this may present a significant disincentive to the TOC seeking or agreeing to a JRU.
- Given that this is a particular issue that affects Scotland quite significantly, it may well be that such an arrangement could better be achieved on a bespoke basis within the bounds of the proposed deep alliance. However, in the absence of this then an improved baseline to the regulatory regime would be helpful.
- We would welcome further consideration by the ORR around the opportunities to develop an appropriate Scotland specific JRU mechanism to helpfully address the flaws in the existing process.

### **Methodology for disaggregating the Access Charge Supplement (ACS)**

- The proposal is consistent with the principle of having no cross-subsidy between Scotland and England & Wales. However, this would be dependent on the approach being underpinned by adequate data; otherwise an imbalance may be embedded in the calculations. In particular we need to be clear how ACS and Schedule 4 & 8 payments work for Cross Border operators in Scotland.
- This mechanism should work so that the value of the ACS and Network Rail Schedule 4 payments should be approximately neutral over a reasonable timescale.
- As you will appreciate, Transport Scotland is running a separate franchising competition for the Caledonian Sleeper services. At this stage it is not clear that these services would be strongly affected by this change. We would, however, welcome confirmation from the ORR as to how the revised methodology will apply to the planned Caledonian Sleeper franchise.

### **Replacement bus cost compensation**

- In principle, Transport Scotland is supportive of the proposal to calculate bus mile payment rates based on actual amounts paid in CP4.
- We note the intention of ORR to refrain from addressing an issue previously raised; that Schedule 4 has previously overcompensated due to the availability of Bus Service Operators Grant (BSOG) for operating the replacement bus services. This intention is based on the ORR's understanding that the DfT plans to withdraw entitlement to BSOG for operation of rail replacement services. Accordingly, we will reflect on our own policy position with respect to BSOG entitlement in Scotland, including any interaction with the development of a deeper alliancing arrangement, and provide further advice to the ORR.

### **Replacement bus revenue loss compensation**

- Without undertaking detailed analysis, it is unclear whether the current approach to calculating revenue loss compensation incentivises the provision of replacement buses rather than diverted rail services. However any such incentive

would be unhelpful, particularly given extensive planned works in Scotland between now and 2019 (between Edinburgh and Glasgow, for example, where alternative routes may be available).

- Increasing the complexity of compensation mechanisms would be unhelpful and other measures may be more effective in ensuring appropriate incentives (for example, obligations on Network Rail through its license and the TOC though the franchise agreement to make reasonable endeavours both to make diversionary routes available and to operate diverted services in preference to replacement bus services).

### **Notification factors and thresholds**

- Clearly it would also be unhelpful for there to be an incentive on Network Rail to book possessions and cancel these at short notice and at present there is little penalty for them to do so.
- Allowing for the TOC to claim costs incurred on an evidenced/negotiated basis may be a balanced way of achieving this but would add an administrative burden for all. This may itself be a practical and financial barrier to TOCs making such a claim. We therefore suggest that the ORR considers alternative options.
- In principle, it seems reasonable that new working timetable notification factors should be updated to reflect changes to delay multiplier values in the Passenger Demand Forecasting Handbook (PDFH). This should be part of an ongoing calibration of this regime.

### **Sustained Planned Disruption (SPD) threshold**

- The proposal to maintain the SPD revenue loss threshold, with the cost compensation up-rated by RPI seems sensible.

### **Schedule 4 freight possessions regime**

- It is important that freight customers are confident in using rail services, including having confidence that planned train services will run broadly to time. As such any planned disruption should be notified in sufficient time to allow alternative services to be planned accordingly.

### **Compensation during Sustained Poor Performance (SPP)**

- Although it is appropriate that an SPP mechanism is in place to insure TOCs against serious performance failures impacting on their revenue (certainly in the case of Scotland where weather is a major issue), the detail of the level of the trigger would seem to be almost arbitrary based on our experiences through CP4.
- In ScotRail's case, whether the trigger is 10% or 25% appears to make little difference; it is likely to be performance significantly worse than either of these which would give rise to a real need for the TOC to invoke this mechanism.
- This suggests that a single approach across GB may not be appropriate. We would therefore welcome further consideration of a financial case specific to Scotland.

### **Introduction of a time delay on Schedule 8 payments**

- We note the ORR emerging view that such an alteration to Schedule 8 is an unnecessary complication to an already complex process and this appears to be a sensible judgement.

### **Amendment to paragraph 17 of Schedule 8**

- We note the ORR's emerging view that this paragraph should not be tightened to only allow changes under certain circumstances (i.e. major timetable change). There does indeed appear to be little benefit of amending this paragraph and it could lead to known problems / errors with benchmarks remaining in the system for up to 5 years without recourse for action.

### **Compensation for passenger charter payments**

- Transport Scotland is content with this proposal.
- We note the ORR's confirmation that, should this be removed from Schedule 8, TOCs would be free to come to bespoke arrangements with Network Rail if this were deemed appropriate.

### **Treatment of cancellations by train operators of their own trains**

- This approach appears sensible. However, we are concerned, in principle, that there is apparently a large cost attached to this change (system changes and updates to existing work to recalibrate benchmarks – which should be simple to vary) and which is driving regulatory policy. In this case we note that any change will have little impact on financial money flows.

### **Compensation for charter operators**

- We note that, while the Schedule 8 performance regime applies to charter operators, there is currently an incident cap where the amount of compensation per incident paid by these operators to Network Rail is capped at £5,000. Network Rail proposes to remove this cap, and we are aware that the ORR is minded to agree with this position.
- However, liabilities under Schedule 8 could be prohibitively expensive to charter operators if this cap was removed, to the point where this may impact on their ability and/or willingness to operate such services on the Scottish network.
- We would like to understand the basis of the suggestion that Charter Operators could obtain insurance (at a price that would retain a viable charter operation), both for this instance, and possibly for wider application as the industry moves to a more commercial, less regulated model.
- Given the importance of charter trains in Scotland this is an area where we would welcome further discussion with the ORR to ensure that any risk to the future operation of such services is minimised.