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Sir David Higgins
Chief Executive
Network Rail Infrastructure Limited
Kings Place
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Dear David,

ORR Board decision on Network Rail's performance in the long distance sector in 2012-13 and 2013-14.

I am writing to notify you that ORR has decided that Network Rail is likely to be in breach of Condition 1 of its network licence with regard to its Public Performance Measure (PPM) commitment for the long distance sector in 2013-14. We are proposing to make an enforcement order requiring you to deliver the committed target to the greatest extent reasonably practicable, including further review and development of your plans. We are also proposing to include in the order a requirement to pay a reasonable sum if you fail to meet the target, depending on the level of PPM you actually achieve. You were required to deliver a PPM of 92% in the year ending in March 2014 and we have set the sum to be £1.5m for every 0.1 of a percentage point below that.

In relation to performance in 2012-13, we accept that, although you will not meet your commitment, you are planning to do all that is reasonably practicable, given the circumstances, to improve performance. We have therefore concluded that you are not currently in breach of your licence in respect of 2012-13 performance but this is critically dependent on delivery of the joint performance improvement plan commitments you have made, and on doing the work to deliver further improvement. We will be watching this closely and if necessary will take further action, including possibly imposing a further penalty.

We recognise that you have achieved a lot in the current control period. Performance and passenger satisfaction have improved alongside accommodating extra trains on the network, tighter timetables and growth in the number of passengers. I would also like to thank your team for the work they have done to produce a better plan than hitherto, and to answer our questions about it.

However, the plan you submitted on 30 March, and subsequent documents, state that you will not achieve the output for long distance sector PPM (91.5%) in 2012-13 and that there is a very low probability (10%) that you will meet the relevant target in 2013-14 (92%).



INVESTOR IN PEOPLE

We have assessed your plan with the help of the independent reporter and have held a number of meetings with Network Rail and industry colleagues. In the light of this work we are concerned that you say you are unlikely to deliver the target that you agreed and for which you were funded. Passengers should be experiencing better levels of train performance, benefiting from the performance commitments which they and taxpayers have funded.

We are not satisfied that you are doing all that is reasonably practicable to improve performance by the end of March 2014. In particular, we are not convinced by the quality of the plan or the proposed pace of delivery and consider that you could and should do more to increase your confidence in achieving 92% PPM in 2013-14. We therefore consider you are likely to be in breach of your licence with regard to long distance performance in 2013-14.

I enclose a draft enforcement order at Annex A requiring you to deliver your committed target to the greatest extent reasonably practicable, including continuing to work with the industry to further review, develop, deliver and bring forward both the initiatives in the plan and new initiatives. The order also requires you to pay a reasonable sum should you fail to meet your commitments, set on a sliding scale of £1.5m for each 0.1 of a percentage point that you fall below the target. There is provision to reduce the sum payable if you can demonstrate that you have done all that is reasonably practicable having regard to all relevant circumstances – this might for instance apply to failure to meet the commitment for reasons beyond your control.

In reaching our decisions we looked at the circumstances of the poor starting point for the plan, including missing your committed target in 2011-12. There are several factors, such as the severe weather in previous years and an increase in external factors, which were outside of your control. But evidence submitted by you on 30 March and at our meeting with industry colleagues on 27 April, shows that the circumstances were at least partly of your own making. In particular, Network Rail did not identify or understand the emerging changes to delay per incident and so were unable to react promptly or effectively. There were also a number of projects designed to improve performance, such as the roll-out of remote condition monitoring, that were delayed. You have acknowledged that you did not take a holistic approach to assessing the impact of this on performance. We have therefore concluded that the reason why performance is currently below target is at least partly due to shortcomings on Network Rail's part that a best practice operator could, and should, have identified sooner and acted upon more promptly.

I have set out the reasons for our decisions in Annex B. We will publish the evidence report that supports this separately.

Delivery of the long distance plan

Delivery of the commitments in the Joint Performance Improvement Plans (JPIPs) agreed with the train operators this year is essential to the success of the plan. This will still mean that you are likely to be going into 2013-14 below target so any slippage this year will be difficult to make up. The first two periods of 2012-13 have already fallen below plan. We will therefore monitor delivery very closely throughout the year supported by independent reporters and quarterly reports from you on progress against the planned initiatives. If we think that you are not delivering the initiatives or they are not having the impact planned, and particularly if it looks like

you are unlikely to deliver even the JPIP commitment for the sector, we will if necessary take further enforcement action, including possibly imposing a further penalty.

There is clearly a risk that extra focus on long distance PPM may adversely affect other train operators, or otherwise lead to detriments for users. In developing and delivering the plan, we expect you to take a holistic approach to meeting the target, balancing it with your wider obligations to your customers in other sectors, including the other targets you agreed to deliver in this control period, and your contractual and legal obligations. You will be aware that your train operator customers are particularly concerned that you should address the causes and handling of big delays which inconvenience passengers most, such as by reducing the number of "bad days" with very poor performance.

We will expect you to continue to follow your safety management and assurance processes to ensure that measures to improve performance do not create additional safety risks.

We will also expect you to continue to do all you can to accommodate your customers' future requirements for access to the network. Ultimately, of course, decisions on whether additional trains should be accommodated are a matter for ORR, and our policies in this respect are unchanged.

We are also aware of concerns that increased focus on long distance services – for instance in the case of train regulation where there is currently a trial in place on the London and North Eastern route – may adversely affect other operators. Changes in policies must be transparent, objectively justifiable and properly tested, taking account of the full range of both passenger and freight customer interests.

As part of our monitoring we will seek feedback from the operators and Passenger Focus about the impact of the initiatives in the plan on them and on rail users.

Performance is a whole-industry issue and JPIPs include actions for the operators to improve their performance. We expect them to work fully and constructively with you and to use the JPIP process to keep the pressure on delivery.

I should also advise you that we will be considering as part of the periodic review whether the failure to meet the committed targets for which Network Rail was funded should be reflected in our assessment of your CP4 efficiency and financial value added and your CP5 funding.

Any interested party may make representations or objections to the enforcement order. Please send responses, by 26 June 2012, to Abigail Grenfell at abigail.grenfell@orr.gsi.gov.uk.

I am publishing this letter.



Yours sincerely,

Richard Price
Chief Executive

Annex A – Draft enforcement order

RAILWAYS ACT 1993

SECTION 55

DRAFT ORDER

- A. In the 2008 periodic review Network Rail Infrastructure Limited (Network Rail) agreed to deliver annual public performance measures (PPM) in relation to passenger train services classified as the long distance sector. For this sector Network Rail is obliged to deliver a PPM of at least 92% for the year 2013-14 (“the period”). Delivery of the 92% 2013-14 PPM (“the output”) is a reasonable requirement of persons providing railway services and funders under condition 1 of Network Rail’s network licence which means that Network Rail must achieve it to the greatest extent reasonably practicable having regard to all relevant circumstances.
- B. The Office of Rail Regulation (ORR) is satisfied that Network Rail is likely to contravene condition 1 of its network licence (“the likely contravention”) in that it is not likely to deliver the output and is not currently proposing to take all necessary steps to deliver the output to the greatest extent reasonably practicable having regard to all the circumstances in that:
- (a) The long distance plan delivered to ORR in compliance with the order of the 19th January 2012 (“the Long Distance Sector Plan”) shows Network Rail has only a 10% confidence of delivering the output;
 - (b) The initiatives in the plan designed to improve performance for the period are not sufficiently developed to demonstrate that Network Rail is and will be taking all necessary steps to deliver the output to the greatest extent reasonably practicable taking into account all relevant circumstances; and
 - (c) ORR has concluded that further work could be carried out to accelerate delivery of initiatives in the plan designed to improve performance in the period so increasing the chance of Network Rail delivering the output
- C. Having had regard to the matters set out in section 55(1) of the Railways Act 1993 (the Act), ORR considers it is requisite for it to make a final order for the purpose of securing Network Rail’s compliance with condition 1.
- D. 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.
- E. Having regard to all the circumstances and, in particular, the factors set out in section 55(3) of the Act, it does not appear to ORR that it is requisite that a provisional order be made.
- F. ORR need not consider, under section 55(5B) of the Act, the appropriateness of making this order because:-
 - (a) ORR is not satisfied that Network Rail has agreed to take, 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 condition 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 likely contravention, pursuant to section 55 of the Act, ORR requires Network Rail to take all necessary steps to ensure it delivers the output to the greatest extent reasonably practicable having regard to all relevant circumstances. This should include, in particular:
 - a. Continuing to work with industry to further review and develop:
 - i. the initiatives outlined in the Long Distance Sector Plan which relate to delivery of the output and;
 - ii. any additional initiatives which, following consultation with industry Network Rail reasonably concludes are requisite to enable it to achieve the output to the greatest extent reasonably practicable having regard to all relevant circumstances

(together 'the initiatives')
 - b. The delivery of the initiatives.
2. If, at the end of the period, ORR is satisfied that Network Rail has failed to achieve the output, Network Rail shall pay to the Secretary of State within one month of ORR's demand, a monetary penalty of £1.5m for each tenth of a percentage point by which it fails to achieve the output at the end of the period. This penalty may be reduced to the extent that ORR reasonably considers it was not reasonably practicable to achieve the output having regard to all relevant circumstances

3. For the purposes of the calculation in paragraph 2 above, the PPM Network Rail achieves at the end of the period will be rounded up to the nearest tenth of a percentage point.
4. Network Rail will deliver to ORR, at quarterly intervals within the period and in 2012-13, a report detailing its progress in delivering the initiatives. These reports may include representations regarding the extent to which it was not reasonably practicable to make progress towards achieving the output in that quarter, having regard to all the circumstances.
5. The content of these reports will be considered by an independent reporter appointed in accordance with condition 13 of Network Rail's Network Licence who will be instructed to comment, in particular, on Network Rail's progress in delivering the initiatives against the timetable set out in the Long Distance Sector Plan.
6. Network Rail shall deliver to ORR, within one month of the end of the period, any representations it wishes to make in respect of its delivery of the output and the extent to which it was not reasonably practicable to achieve the output having regard to all the circumstances.
7. Nothing in this order shall be taken to permit Network Rail to breach any licence, contractual or other legal obligation.
8. In this order, 'industry' means any passenger or freight train operating company or any body representing such companies.

This order shall have immediate effect.

Annex B - Reasons for ORR's decision

The relevant obligations

1. The relevant obligations are set out in condition 1 of Network Rail's network licence, our 2008 periodic review (PR08) determination and the 19 January 2012 enforcement order, with some clarification of the licence obligation set out in our enforcement policy.
2. The licence requires Network Rail 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.
3. It must do this to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.

In our enforcement policy we specify that reasonable requirements include:

- outputs established in a periodic review;
 - disaggregated outputs established as a result of the transfer of responsibility for funding infrastructure in Scotland to Scottish Ministers;
 - firm commitments (as opposed to aspirations) included in Network Rail's delivery plan (including route plans); and
 - effective communication with customers and funders about the delivery of these outputs and commitments.
4. In this case, the relevant regulatory target is the PPM annual average target for long distance passenger operators as set out in Table 4.1 of the PR08 determination. As Network Rail has now stated that there is a low probability it will meet the target in 2013-14, the relevant years are 2012-13 and 2013-14.
 5. ORR made an enforcement order on 19 January 2012 requiring Network Rail to produce and deliver to ORR by **30 March 2012** a plan setting out the steps it will take in the remainder of 2011-12 and for 2012-13 to deliver the outputs to the

greatest extent reasonably practicable, through operating and maintaining the network in a timely, efficient and economical manner and in accordance with best practice.

6. Network Rail was required to include in the plan:
 - (a) a clear explanation of the factors causing the current under performance;
 - (b) a clear assessment of external factors expected to influence future performance including risks and opportunities;
 - (c) details of actions proposed to improve performance; and
 - (d) fully quantified and substantiated forecasts including the impact of the above factors.

7. ORR and Network Rail appointed the independent reporter (Nichols/ AECOM) to carry out an evaluation of Network Rail's planning process and to assist in the assessment of the Long distance sector recovery plan.

Factors causing the current underperformance

8. Traffic growth in this sector has increased more than was expected at the start of the control period although performance has generally improved. However, Network Rail has underperformed in this sector for the last two years and has not met its committed targets, as shown in the table below:

Year	Actual PPM	Target PPM	Variance against Target
2009/10	88.7%	88.6%	0.1%
2010/11	87.7%	89.8%	-2.1%
2011/12	89.1%	90.9%	-1.8%
2012/13		91.5%	
2013/14		92.0%	

9. In terms of delay minutes, Network Rail has performed worse than the operators. This is the case for all operators in the sector (except Greater Anglia, where only a small proportion of its services are long distance). Thus the problem is essentially a Network Rail problem.

10. We concluded in 2011 that Network Rail had not breached its obligation in 2010-11 because of the impact of the severe winter weather. Performance in 2011-12 missed the target (indeed it was only marginally above 2009-10) while the weather was generally benign. This entry trajectory will impact on Network Rail's ability to deliver its target in 2012-13.

11. The enforcement order required Network Rail to give an explanation of the factors affecting underperformance. In the supporting material submitted to us on 30 March, the company identified a number of factors causing the "current shortfalls". Our own analysis largely supports this:

- (a) Traffic growth was beyond the levels assumed when the outputs were set. Combined with tighter timetabling on some routes, Network Rail considers this to be a significant factor. We acknowledge that Network Rail has endeavoured to meet its customers' requirements by accommodating traffic growth and that this has made achieving the output commitment more difficult;
- (b) Linked to this was the failure to predict that the rise in delay per incident seen in 2010-11 would continue into 2011-12;
- (c) A change in the nature of the delay minute to PPM relationship means that, for the long distance sector, there has been a reduction in PPM despite an improvement in delays per 100km. For the 2011/12 LD PPM score of 89.1%, the historical relationship would suggest delay minutes be approximately 13% lower than those actually experienced by the sector i.e. a bigger reduction in delay minutes is required to achieve a given level of PPM. However Network Rail is in any case missing its delay minute targets;
- (d) Cable theft incidents exceeded assumptions;
- (e) The maintenance restructuring and operating cost reductions may have led to cuts being made too soon. Network Rail has accepted this;
- (f) The severe weather in 2010-11 may have masked emerging trends;
- (g) There has been an on-going impact of the introduction of the integrated train planning system (ITPS) (for which we have already found Network Rail to be in breach of its licence); and,
- (h) Roll out of some key projects, for example remote condition monitoring (RCM), has been delayed.

12. At the industry review meeting on 27 April, Network Rail emphasised that it believed extra train service capacity sought by train operators was of greater benefit to customers than further improvement in PPM. It noted that the sector was in good shape compared to previous years. But it also acknowledged that it had taken its eyes off improving performance and concentrated on doing things (for example major projects and maintenance restructuring) rather than the performance end point and, in hindsight, it should have kept a better eye on the overall effect on performance in the early years of CP4.

13. Although traffic growth is clearly a factor, we consider that Network Rail should have been able to deal with its consequences, and was funded to manage risks. Network Rail's Strategic Business Plan submission for PR08 stated; *"We also believe that, should growth be significantly higher than these forecasts, our strategy will still be robust. The interventions that we propose either create the potential to*

accommodate growth beyond the HLOS forecasts, or are at least consistent with what would need to be done should growth exceed the forecasts".

In summary, whilst the 92% PPM target was a challenge for Network Rail and there were a number of factors outside Network Rail's control which have contributed to the current situation, many of the reasons for the circumstances Network Rail now finds itself in appear to be of its own making.

Assessment of the plan and conclusions

14. Our review of the plan identified 5 critical areas, details of which are included in the evidence report:

- (a) Asset management: we concluded that the approach is reasonably sound but we could not assess what PPM the initiatives will actually deliver. There is a risk to delivery due to scarce resources and issues with productivity. We have noted that the plan appears to prioritise London North Western route (which includes the West Coast Main Line). We would expect the plan to be more balanced across all the long distance routes;
- (a) Train planning: the plan recognises there is a problem but it is light in detail of the 186 schemes, so there is a risk to delivery;
- (b) Operations and management control : this is treating the symptom not providing a cure but should give some quick wins. There is a risk that some initiatives will lose pace. In other cases, such as the Red Route concept, there seems to be a very wide spread of elements that will require considerable project management resource to integrate, with a risk of losing focus;
- (c) Externals: it appears that Network Rail is doing everything reasonably practical to mitigate delays but there are no radical new solutions. It will be difficult to assess whether the savings predicted have been realised and it is not clear how the 2013-14 figures have been calculated; and,
- (d) Fleet and other: the initiatives proposed seem sensible but there is not much detail behind the high-level assumptions and our view is that they may be optimistic.

15. In assessing the plan we were mindful of the views of the operators in the sector. At the meeting on 27 April they told us they were content with their 2-year joint performance improvement plans (JPIPs) although Cross Country Trains has only signed up for the first 4 periods. They were unable to identify significant initiatives to improve long distance performance over and above those in the plan, but they shared the independent reporter's concerns about quality of planning, and there was some concern about pace. They considered that passengers would be content with less than 92% PPM, but that "bad days" are an issue and they wanted consistency of performance. They did not think we should push for perfection and risk distracting Network Rail from JPIP delivery or risk unexpected consequences for them or other TOCs. Subsequently, we understand, train operators have pressed Network Rail to plan and deliver improvements over and above the JPIPs, particularly in 2013-14.

16. The plan covers two years, but as the enforcement order only covers the first year, we have considered each year separately. 2012-13 requires consideration of whether Network Rail has met the requirements of the enforcement order whilst

2013-14 requires consideration of whether there is a further likely future breach of its network licence.

Position for 2012-13

17. For 2012-13 our conclusion is heavily influenced by the operator views and the results of our own investigations. Network Rail has made significant improvements in producing the 2 year JPIPs and securing the support of the operators in the sector. It has agreed that it needs to push performance beyond the levels in the JPIPs and to that end has developed the “Base+” and “Base++” plans. These initiatives are complex and require time to develop, test and implement and we accept Network Rail’s view that the impact on 2012-13 performance will be modest. Network Rail has put robust governance arrangements in place to facilitate and support delivery of the plan and develop the additional initiatives in the Base + and Base++ plans.

18. Thus, we accept that the plan demonstrates adequately that, for 2012-13, Network Rail is, as of now, planning to do all that is reasonably practicable in the circumstances, despite acknowledging that it will miss the target. We agree with the operators that trying to push for more this year could have an adverse impact on delivery of the JPIPs and the development of the further initiatives.

19. However, we will continue to monitor delivery of the plan and development of further initiatives closely and if we believe that Network Rail is not doing what it has committed to, we will if necessary take further regulatory action. In particular, it is essential that Network Rail delivers at least its JPIP commitment for the long distance sector, and indeed for all sectors, this year.

Position for 2013-14

20. The order did not require Network Rail to produce a plan for 2013-14 but it is commendable that it did so, openly admitting to continuing problems. It has now stated that it has only 10% confidence of meeting the target in that year. On 2 May we informed Network Rail that we must now consider whether the potential shortfall in 2013-14 amounts to a further potential breach of condition 1 of its network licence. Network Rail responded on 8 May that it believed the work carried out to produce the long distance recovery plan and the continuing work to implement that plan demonstrated that it was doing everything reasonable practical to secure compliance with its licence.

21. We have reviewed the plan submitted for that year and have concluded that, although it has its merits, it appears to be deficient. We consider that the projected shortfall against the target commitment could be further reduced if the company were able to consolidate and bring forward at least some of the initiatives in the Base+ and “Base++” plans. We have also identified where it could do more, for example by addressing the apparent imbalance in infrastructure schemes between London North West and other routes.

22. This is largely in line with the operators’ views; they have indicated (at the industry review on 27 April) that although they are generally content with their JPIPs, but wish to see more through delivery of the benefits detailed in the Base+ and Base ++ plans.

23. Furthermore, we have identified some shortcomings with the plan such as:

- (a) the strategic assessment of the LD sector in general, and the routes in particular, could be more comprehensive, It is difficult to understand how individual initiatives pull together to form the overall figures;
- (b) the explanation of the strategic approach to the resolution of known network wide issues (such as asset reliability, timetabling errors, external threats, freight issues, incident response, contingency planning, restrictive rules, loss of focus on right time railway and sub-threshold delay, etc) could be more comprehensive;
- (c) the link between the individual initiatives and the impact that they have on overall delay minutes and PPM could be more clearly set out.

24. In essence our view is that the 2013-14 plan is still 'work in progress' and that the pace of improvement can and should be accelerated. Thus, on balance, we do not consider that Network Rail is planning to do all that is reasonably practicable to deliver the long distance PPM target at the end of 2013-14.

25. It is important that Network Rail now gets on with delivering the plan and identifying ways to improve it. We are not asking to see a further plan as we believe that this will distract from delivery of the core initiatives. We are therefore proposing to make an enforcement order that requires Network Rail to take steps to ensure it meets the CP4 long distance PPM target to the greatest extent reasonably practicable having regard to all the circumstances. The enforcement order makes provision for close monitoring of this by us and the independent reporter.

26. The enforcement order also requires Network Rail to pay a reasonable sum within 1 month of the end of the control period if it does not deliver the target. We have set this sum on a sliding scale, with the amount payable increasing for every 0.1 percentage point by which it fails to meet the target. We recognise that contractual performance payments to train operators through schedule 8 of track access contracts provide a strong incentive to improve performance but consider there should be a further incentive to deliver the committed target.

Calculation of the reasonable sum

27. In calculating the reasonable sum, we have followed our penalties statement. This first requires us to ask whether a reasonable sum is appropriate. The primary objective is to change future behaviour to deter future non-compliance and to incentivise compliance with licence obligations generally. We consider that a reasonable sum is necessary to incentivise Network Rail to seek further improvements so that it reaches, to the greatest extent reasonably practicable having regard to the circumstances, its long distance PPM target at the end of the control period.

28. Our starting point for a penalty or reasonable sum is normally the seriousness of the breach. This falls into the "moderately serious" (with a starting point of between £2m and £10m) to "serious" (between £10m and £25m) categories, depending on what PPM is actually achieved. This is for a number of reasons, in particular that there will be an adverse impact on a significant number of passengers across large parts of the network and we consider that a best practice operator would have seen the problems and started to address them earlier. There are also significant implications for performance into the next control period.

29. We applied several mitigating factors. Network Rail has responded positively to the requirements of the order and the train operators agreed that it has made a great effort to engage with them to produce better JPIPs than in the past. It has identified a number of reasons why it is in this position and is putting measures into place to address them and prevent repeats. Senior staff have been involved in all of this work for some time. We also took into account that, although Network Rail is not meeting its regulated targets, performance in the long distance sector was at the highest ever level in 2011-12 (albeit only just above 2009-10) and that it has worked hard to try to accommodate its customers' additional requirements.

30. However, we also considered that there were a number of important aggravating factors. Network Rail has claimed that it is doing the best it reasonably can in the circumstances but we consider that the circumstances are at least partly of its own making. It identified a number of failures from the start of the control period which have contributed to the low entry point from which the plan is starting. We consider that a best practice operator should have identified these and acted on them much sooner. We expect Network Rail to carry forward the lessons from this into the next control period. We have concluded that the aggravating and mitigating factors balance each other.

31. We consider that a sliding scale penalty is proportionate and provides the right reputational and financial incentive on Network Rail to get as close to the target as possible. The closer it gets to the target, the less serious the breach becomes and the less it will have to pay. We have concluded, based on our assessment of the likely incentive effects, the implications for passengers and our previous penalties that achieving the JPIP target of 90.4% would suggest a penalty of £24m which is at the upper end of the 'serious' range. On a sliding scale, this equates to £1.5m for each percentage point as summarised in the table below:

PPM achieved in 2013-14	Penalty to pay
92%	£0
91.9	£1.5m
91.5%	£7.5m
91%	£13.5m
90.4%	£24m

32. The penalties statement allows for mitigation in setting the amount of the penalty, but we acknowledge that there may also be justifiable reasons to mitigate the amount at the end of the control period. We have therefore included a provision in the draft order to allow us to reduce the amount at the end of 2013-14 to the extent that we consider it was not reasonably practicable, in all the circumstances, for Network Rail to achieve the target. The sorts of factors we are likely to take into account are a significant increase in events outside Network Rail's control that cannot be predicted and addressed now, such a very severe winter beyond the

reasonable ability of Network Rail to mitigate the effects on performance. In considering whether to reduce the penalty, we would expect a key factor to be the extent to which Network Rail has considered passenger needs, including giving greater benefits to passengers in other ways.

33. There is a possibility that Network Rail will also fail to meet its JPIP commitments and deliver less than 90.4%. In this case the reasonable sum payable would rise accordingly –if performance in 2013-14 did not improve above the 2011-12 level it would be £43.5m. We have considered, in the light of our duty not to make it unduly difficult for Network Rail to finance its activities, whether we should cap this. We have concluded we should not do so, but consider that the provision to reduce the penalty when Network Rail has done all that is reasonably practicable provides comfort in cases where Network Rail is clearly not culpable.

A draft order is attached to our letter of 29 May 2012. Any representations or objections to any aspect of the enforcement order must be made by 26 June 2012. Any representations or objections should be made to Abigail Grenfell at abigail.grenfell@orr.gsi.gov.uk.