



2018 periodic review final determination

**Review of network licence:
conclusions from consultation**

October 2018

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About this document

The [2018 periodic review](#) (PR18) is the process through which we determine what Network Rail¹ should deliver in respect of its role in operating, maintaining and renewing its network in control period 6 (CP6)² and how the funding available should best be used to support this. This feeds through into:

- the service that passengers and freight customers receive and, together with taxpayers, ultimately pay for; and
- the charges that Network Rail's customers, including passenger, freight and charter train operators, will pay for access to its track and stations during CP6.

In June 2018, we consulted on our [PR18 draft determination](#)³, setting out our proposed decisions in all of the main areas of PR18. Following receipt of consultation responses, we have reviewed stakeholders' comments and these have helped to inform the final decisions set out in our final determination. We are grateful to all those who responded to the consultation.

Accordingly, the [final determination](#) sets out our overall decisions on PR18. Among the documents that we have published is an [overview document](#), setting out:

- our decisions in all the main areas of PR18;
- a summary of how we will regulate Network Rail's delivery in CP6; and
- next steps in PR18.

In addition, there are high-level summaries of our main decisions for each of [England & Wales](#) and [Scotland](#).

We have also published a [document](#) summarising stakeholders' comments on the PR18 draft determination and our response to these.

The full set of documents that form the final determination is set out in the box overleaf⁴.

¹ All references to Network Rail in this document are to Network Rail Infrastructure Limited.

² CP6 will run from 1 April 2019 to 31 March 2024.

³ The full suite of PR18 draft determination documents are available from this [webpage](#). To access earlier consultation and conclusions documents that led up to the PR18 draft determination, please see the map of these documents [here](#).

⁴ Our policy on managing change will be published in November 2018. Some documents, such as the consultancy and reporter studies, will be published shortly after the final determination.

Our final determination documents (includes weblinks)

PR18 final determination overview document		
England & Wales summary	PR18 draft determination consultation – summary of comments and our response	
Scotland summary (and settlement details)	Supplementary documents	
Settlement documents	SBP assessment	
FNPO route		
System Operator		
England & Wales		Scorecards and requirements
		Health & safety
	Review of NR's proposed costs	
	Other single till income	
	Stakeholder engagement	
	Policy	Financial framework
		Review of network licence: conclusions from consultation
Overview of charges & incentives decisions		
Infrastructure cost charges conclusions		
Variable usage charge conclusions		
Anglia route	Other documents	
LNE & EM route		
LNW route		
South East route		
Wales route		
Wessex route		
Western route		
Glossary		Managing Change Policy
Consultancy & reporter studies	Grading of Network Rail's route and System Operator strategic plans for CP6	

1. Introduction

Context

1.1 In our [2018 periodic review](#) (PR18), we are making significant changes to how we regulate Network Rail for control period 6 (CP6).⁵ PR18 is the process through which we determine what Network Rail⁶ should deliver in respect of its role in operating, maintaining and renewing its network in CP6 and how the funding available should be best used to support this. This feeds through into:

- the service that passengers and freight customers receive and, together with taxpayers, ultimately pay for; and
- the charges that Network Rail's customers, including passenger, freight and charter train operators, will pay for access to its track and stations during CP6.

1.2 Alongside, and in connection with PR18, we are proposing changes to Network Rail's network licence which contains a set of conditions under which Network Rail must operate. The changes we propose to make to the licence will mean that:

- The licence will clearly identify those obligations which apply to routes⁷ and the System Operator (SO), and in future help to identify more clearly which management teams should be held to account if there is a breach.
- The licence will require the company to maintain both the structure of its business and its governance arrangements in a manner which supports devolution, including complying with new requirements on how the company makes changes to the business (set out in ORR's Managing Change Policy).
- The licence will align with the PR18 outcomes and ORR's regulatory approach in CP6.
- The licence will reflect the reclassification of Network Rail as a public sector arms-length government body.

⁵ The period 1 April 2019 to 31 March 2024

⁶ All references to Network Rail in this document are to Network Rail Infrastructure Limited

⁷ The revised licence will refer to the devolved parts of Network Rail's network as "routes" and the business units set up to manage the routes as "route businesses". For simplicity, in this document we refer to "routes" only.

Purpose of this document

1.3 We consulted on our proposals to revise the licence in June and July 2018 (our consultation), alongside consulting on our PR18 determination. This document sets out our conclusions on the policy questions we consulted on, and the related issues raised by respondents, to provide clarity on the planned changes in conjunction with the PR18 final determination.

Overview of responses

1.4 We received 24 responses to our consultation⁸. A list of respondents is in the Annex. We would like to thank all those who responded. All views expressed have been carefully considered and factored into our conclusions, and this document sets out our response on the policy issues raised. We are also reviewing further a number of specific drafting suggestions from Network Rail and some other respondents. We will conclude on the legal drafting before we launch the formal statutory consultation process to change the licence (see below).

1.5 In general the responses showed strong support for the rationale and principles for our proposed changes to the licence, including a number of comments on particular policy areas, which we respond to in detail in the following chapters. Some respondents, including Network Rail and the Rail Delivery Group, requested that ORR commits to a formal review of the revised licence early in CP6 to assess how well the changes are working. Our views on this proposal are that:

- There is an inherent trade-off between creating flexibility to make further licence changes and the need for long term regulatory certainty that a licence should provide. To ensure sufficient long term certainty, we confirm that we have no plans to carry out another formal review of the whole licence in early CP6. However, in the event that any further significant changes are proposed to Network Rail's structure or operating environment we will of course consider whether it would be appropriate to make licence changes at that point.
- In addition, Network Rail has the ability to request that ORR considers specific licence modifications at any time (including, but not limited to, where it is going through the processes in ORR's Managing Change Policy). There is also scope within certain licence conditions for ORR to consent that Network Rail may depart from specific requirements if appropriate. Such a consent may be the appropriate way to effectively deal with some of business changes.

⁸ We have published the consultation responses along with those received from the draft determination: respondents beginning A-L [here](#) and those beginning M-Z [here](#).

Structure of this document

1.6 The remainder of this document sets out our conclusions on the issues raised through the consultation and is structured as follows:

- the structure of Network Rail and allocation of responsibilities (chapter 2);
- the SO (chapter 3);
- Freight and national passenger operators (chapter 4);
- stakeholder engagement (chapter 5);
- information requirements (chapter 6);
- industry obligations (chapter 7);
- restrictions on activities (chapter 8); and
- corporate matters (chapter 9).

Statutory process and next steps

1.7 Prior to the start of CP6 we propose to follow the procedure for licence changes set out in section 12 of the Railways Act 1993 (the Act) to make changes to Network Rail's licence in line with the policy positions in this document. Under this procedure, licence changes come into effect following a statutory consultation and Network Rail's agreement. If Network Rail does not agree, then ORR can consider making a reference to the Competition and Markets Authority under section 13 of the Act.

1.8 We plan to issue the statutory consultation on the proposed licence changes in December 2018.

2. Structure of Network Rail and allocation of responsibilities

Introduction

2.1 In our consultation, we outlined our proposals to change the licence by:

- Restructuring the existing obligations to better reflect the day-to-day responsibilities of Network Rail's routes and the SO. This aims to improve clarity about the allocation of responsibilities across the business and enhance accountability of the management teams for meeting those obligations. Network Rail remains a single legal entity with a single licence.
- Including new obligations that require Network Rail to maintain its business structure, with routes and an SO responsible for certain functions, so that governance arrangements support that structure. Reflecting the structure in the licence will allow us to regulate Network Rail more effectively.
- Introducing additional requirements for managing relevant changes that may take place during a control period, including requiring Network Rail to comply with our Managing Change Policy. It is important that Network Rail is able to respond to changing circumstances. However, it is important that changes have sufficient transparency and are discussed appropriately with Network Rail's stakeholders and ORR. To this end, the Managing Change Policy sets out a process that focuses on changes that have the potential to undermine the PR18 settlements, in particular, changes to the accountability or funding of routes and the SO.

2.2 Alongside our proposals to ensure the licence reflects Network Rail's structure and aligns with our regulatory approach for CP6, we proposed to raise the prominence of three general duties within the existing licence to 'core duties'. To ensure that the different business units within Network Rail follow the strategic direction set by these conditions, we proposed that the routes and the SO would be required to comply with them. The core duties are:

- network management (securing the operation, maintenance, renewal and enhancement of the network in a timely, efficient and economical manner);
- stakeholder engagement (discussed further in chapter 5); and
- information for passengers (enabling train operators to meet their obligations to passengers).

Summary of stakeholders' views

2.3 There was strong general support in the responses we received for our approach to update the licence to better reflect Network Rail's structure, ensure clear accountability and align the licence with changes to our regulatory approach. Network Rail, the Rail Delivery Group, several operators, the Department for Transport and ASLEF explicitly stated support for principles behind our proposals to revise the licence.

Structure and allocation of responsibilities

2.4 There were a number of specific issues raised in responses relating to our proposals around the structure of Network Rail's business and allocation of responsibilities:

- **Route areas:** Network Rail agreed with the proposals to designate Scotland as a route, and for England and Wales to be designated to one or more route areas. Arriva sought clarification that the lack of prescription in the licence over the number of routes in England and Wales is designed to allow flexibility to potentially combine some routes, rather than to revert to only one route.
- **Allocation of licence obligations:** the Department for Transport strongly agreed on the importance of allocating specific responsibilities between Network Rail's routes and the SO in a granular manner, supported by effective change control. However, Network Rail's response expressed a concern that the allocation of responsibilities to individual business units may not adequately allow for processes that make up a system (i.e. spanning several Network Rail business areas) to be represented by a single licence obligation;
- **Choice over goods and services:** ORR proposed a new obligation on Network Rail, through its licence, to:
 - enable the routes and the SO to choose how to procure the goods and services they need (including those provided by central functions); **unless**
 - Network Rail demonstrates this would be inconsistent with the licence or with another legal enactment.

Network Rail's consultation response argued this could be inconsistent with its current business processes. It proposed that the licence should give routes and the SO 'an appropriate level of choice' as to the goods and services to be procured for them and how those goods and services should be procured. In contrast, the Department for Transport's response stressed the importance that the routes 'become informed and empowered customers of the SO and central functions... supporting contestability'.

- **Allocation of assets:** ORR proposed a requirement to allocate assets to routes and the SO as appropriate. In its response Network Rail suggested that ‘assets’ for this purpose should be limited to operational railway assets (such as track, bridges, tunnels and stations) or equivalent operational assets.
- **Sufficient resources:** Network Rail asked that ORR acknowledges that licence obligations to secure sufficient resources must have regard to all relevant circumstances, including the funding available and ability to finance activities (given that borrowing in CP6 is highly constrained). DB Cargo’s response welcomed the specific obligation that Network Rail assigns sufficient resources to the geographic routes and the SO.
- **Managing change:** in respect of the new licence condition requiring Network Rail to comply with our Managing Change Policy, the Department for Transport supported for the need for change control, embedded through the licence. There was also wider support for the principle of change control within a number of responses to our consultations on PR18. Network Rail’s response expressed the view that the licence drafting of the managing change licence provision is unduly negative and that the policy could be perceived to be prohibitive, rather than enabling.

Core duties

2.5 On our proposal to set out three core duties within the licence, we received the following representations:

- **Network management duty:** Nexus questioned whether the licence should still include requirements to develop and deliver future enhancements in an efficient and effective manner, given that the PR18 determination does not cover enhancements funding. The Chartered Institute of Logistics and Transport’s response argued that it is vital that ORR ensures that Network Rail (through licence enforcement and monitoring, if necessary) gives equal attention to all current and potential funders of enhancements, not only the largest (government) funders.
- **Passenger information duty:** Network Rail’s response argues that whilst the provision of passenger information is undoubtedly a fundamental role within the industry, it is not of the same nature as the network management duty or the stakeholder engagement duty.
- A number of comments on the **stakeholder engagement duty** were made. They are addressed in more detail in chapter 5.

Our response

2.6 We welcome the strong support for our approach to revise the licence to reflect Network Rail's structure and our approach to regulation in CP6.

Structure and allocation of responsibilities

2.7 On the specific issues raised around conditions affecting structure and allocation of responsibilities:

- **Route areas:** We confirm that our intention in not prescribing the number of routes in England and Wales is to allow for flexibility in future over the exact number and boundaries of routes. Consistent with the flexibility for England and Wales, we also conclude it is appropriate to make a change to allow flexibility within the licence over the number of routes within Scotland. Any changes to the number or boundaries of routes would be covered by our Managing Change Policy.
- **Allocation of licence obligations:** Our overriding principle in allocating responsibilities under the licence is to provide clear accountability about what obligations the routes and the SO are responsible for. We recognise that the constituent business units in Network Rail need to cooperate (and there will be a *duty* for them to cooperate under the licence) to deliver certain processes. Our conclusion is that where the licence says a business unit (e.g. the SO) shall do something, this means the activity cannot simply be delegated to another part of Network Rail, as this would undermine the principle of clear accountability in allocating responsibilities. Nevertheless, it may have assistance from other business units.
- **Choice over goods and services:** The presumption that the routes and the SO should have a choice over how goods and services are procured, (unless this is demonstrated to be sub-optimal) is an important governance principle in our PR18 determination. We will clarify the licence requirement to reflect that the obligation is to:
 - enable the routes and the SO to choose how to procure the goods and services they need (including those provided by central functions); **unless**
 - they demonstrate this would be inconsistent with the licence (including the requirement of the network management duty to act in an efficient and economical manner) or with another legal enactment.

In practice, we would not expect Network Rail to demonstrate such an inconsistency for existing commitments made by central functions. However, when Network Rail (including a route or the SO) wishes to exercise discretion to renew/extend an existing arrangement and/or change or make new

arrangements, Network Rail would need to demonstrate that future goods and services are provided in line with the above requirement of the licence. This is intended to increase the transparency and accountability of the routes/SO, while also providing a mechanism for Network Rail to make decisions about goods and services centrally where, for example, scale economies mean that this is needed for the efficient operation of the network.

- **Allocation of assets:** We agree with Network Rail that operational assets should be the focus of the regulatory requirement. However, we also want to ensure that the licence drafting is sufficiently clear as to what assets are covered. We will seek to address this in the licence.
- **Sufficient resources:** The proposed licence drafting does not require Network Rail (or business units) to *have* sufficient resources, but to *act in a manner calculated to secure* sufficient resources. This is an important distinction: we recognise there may be externally imposed constraints on Network Rail's or a business unit's resources, but expect that they will always try to secure sufficient resources. For example, routes may not freely offer up resources to other parts of the business if this would leave them with insufficient resources to deliver their obligations. This is an important principle which underpins accountability for those deliverables.
- **Managing change:** Whilst we note Network Rail's concern about the tone of this condition, it is important to note that the condition is a constraint on Network Rail's ability to make changes that could fundamentally undermine the regulatory settlements in our PR18 final determination. Our Managing Change Policy, which will be published shortly after the PR18 final determination, is intended to increase transparency to affected stakeholders about changes to Network Rail's plans for delivery to customers, without adding unnecessary regulatory burden. The Policy will make clear that there remains significant flexibility for Network Rail to make changes to its business.

Core duties

2.8 On the specific issues raised around core duties:

- **Network management duty:** The general and broad network management duty, as drafted, offers protection to all different stakeholders, not only major funders, but would extend to enhancements funded by third parties. Our conclusion is that this condition remains fit for purpose and that to remove the requirements around enhancements would significantly reduce important protections for funders (whether they are national governments or other bodies).
- **Passenger information duty:** Passengers are at the heart of the railway. Whilst we accept Network Rail's argument that not every business unit within

Network Rail may contribute directly to this duty, similar points could be made for the other core duties that are not disputed. Our conclusion is that it is merited to make the provision of passenger information a core duty, due to its overarching importance in the successful running of the railway, for example, as demonstrated by disruption following the May 2018 timetable changes.

3. System Operator

Introduction

3.1 We consulted on a proposal for the licence to place a new requirement on Network Rail to maintain a business unit to fulfil the core functions of the SO, which are to promote the coordinated and integrated operation of the network and take primary responsibility for:

- long term planning;
- timetabling; and
- capacity allocation.

3.2 As well as setting out the core functions of the SO, we proposed to require within the licence that the SO undertakes its role in a way which is sufficiently independent from the rest of the business and in a non-discriminatory manner. We also proposed including requirements around governance arrangements for the SO, including around the use of commercially sensitive information.

Summary of stakeholders' views

3.3 We received a number of responses on the treatment of the SO within the licence. Most responses strongly welcomed the proposal to specify the core functions of and the requirements for the SO within the licence, however Transport Scotland argued against embedding the SO within the licence at all, asserting that:

- Embedding the SO in the licence will dilute the effectiveness of the devolved structure and the flexibility and responsiveness of route decision makers.
- It will compromise single-point accountability within Network Rail for key outputs specified by the Scottish Government.
- There are significant issues with the effectiveness of the SO, as demonstrated by the need for an inquiry into timetable failures, and there is a risk of embedding a flawed system through the licence.
- It could be argued that ORR would be dictating an element of Network Rail's business model, and ORR may wish to consider whether this approach aligns with the better regulation principles and ORR's general duties under the Act.
- While accepting the need for the SO to act impartially, this should be in the context of supporting the delivery of the priorities for Scotland's railways as laid out in its High Level Output Statement (HLOS).

3.4 Beyond Transport Scotland's concerns, there were three main issues raised in responses: capacity allocation, timetabling and independent-mindedness of the SO:

- **Capacity allocation:** The Department for Transport's response strongly supported the principle that the SO retains responsibility and accountability for ensuring effective operation of the railway at a national level, including capacity allocation. However, it also said it would welcome routes taking a more active role in the capacity allocation process. Network Rail's position is that the SO should only be responsible for maintaining a framework for capacity allocation as it does not manage the operation of the framework once in place and as actual decisions on capacity allocation are taken by other parts of Network Rail's business, such as through its Sale of Access Rights (SOAR) panel. Network Rail also argues that the obligation to cooperate to identify ways in which reasonable capacity requirements could be met should be extended to include franchising authorities, which might not necessarily be funders. Passenger Transport Networks, York commented that references to capacity allocation should be broad enough to embrace research on alternative approaches.
- **Timetabling:** DB Cargo and Freightliner proposed that the licence should include an obligation to comply with the Network Code, which includes requirements in relation to timetable development/dispute resolution. They are concerned that unintended conflicts could otherwise occur. Passenger Transport Networks, York, also commented that references to the timetabling process should be broad enough to embrace research on alternative approaches (as for capacity allocation). The Department for Transport and Angel Trains said they would like to see the lessons from the May 2018 timetable change factored into the licence reforms, where appropriate.
- **Independent-mindedness:**
 - **Non-discrimination:** Network Rail agreed the SO should not unduly discriminate between Network Rail's different business units, but said it does not believe it is necessary to have an obligation on the SO over and above that which already exists in the licence and relevant competition legislation. DB Cargo commented that the SO should be obliged to operate as far as possible in a consistent manner across the network, to avoid operators encountering different rules across the routes.
 - **Commercial confidentiality:** Network Rail expressed concerns over the proposed condition to ensure any confidential information the SO obtains is not used for other purposes. Network Rail agrees with a general confidentiality requirement but is concerned that a blanket restriction in the licence would be impractical and inefficient, in particular restricting data use to only one activity. The Department for Transport's response

recognised benefits in a requirement for the SO to handle customers' information sensitively, but argued for a higher level (less prescriptive) requirement in the licence.

3.5 **Other matters.** In addition to the above areas, Network Rail proposed an addition to the SO's functions, to include 'promoting activities that would enable changes to network capability, capacity, and operation to be effectively and efficiently introduced'. Network Rail also pointed out that the duty of cooperation (to enable provision of information to train operators) is not a unique obligation on the SO and proposed integrating it with the passenger information duty.

Our response

Transport Scotland's concerns

3.6 We recognise that Transport Scotland has strong concerns around embedding the SO within the licence. These concerns were not shared by other respondents to the consultation, many of which took a differing view and provided strong explicit support for an SO embedded within the licence. In respect of the points raised by Transport Scotland our considerations are that:

- As the railway is a single integrated system, there is a need to take certain decisions at a system level in order to reconcile conflicts that can arise between the competing interests of different areas. In our view, it is not appropriate that in an integrated network, one part of that network, however operationally distinct, can have complete control over all aspects of the running of the railway. To do so could prejudice the needs of passengers and freight users who are not limited to one geographic area.
- The role of the SO forms a key part of the assumptions in our PR18 determination. It is important that the licence reflects the structural and governance assumptions in PR18. While we set out our views on the railway as a single integrated system above, it may be that subsequent decisions by Network Rail and/or government affect the structure of Network Rail. If that were to happen then it would be appropriate for us to consider the need for licence reform at that point, rather than anticipating future possible changes now.
- Recent weaknesses cited by Transport Scotland, as demonstrated by the current timetable inquiry, do not in our view undermine the case for the SO to be embedded in the licence. Arguably, recent experience strengthens the case for setting clear expectations and accountability on the SO for carrying out critical functions, including timetabling. Distributing such functions across routes could potentially serve to undermine clear accountability.
- Our proposal allows considerable flexibility for the SO to organise itself as appropriate to reflect the needs of its customers and funders. This includes

flexibility over the SO's management structure, as well as decisions on where best to locate SO staff and offices. The revised licence would actively support close SO engagement with stakeholders, including Transport Scotland, provided the SO fulfils the requirements of non-discrimination.

- We do not agree that embedding the SO in the licence is dictating part of Network Rail's business model. Network Rail has established its own business structure and we agree this structure has the potential to improve the running of the railway to the benefit of passengers and freight users. We have therefore carried out PR18 on the basis of Network Rail's current business structure and consider that revising the licence to embed this structure is entirely consistent with meeting our general statutory duties and the better regulation principles.

3.7 For these reasons, our conclusion is that it remains appropriate to embed the SO within the licence. This does not in any way detract from Network Rail's responsibility to deliver against the requirements set out in the Scottish Government's HLOS.

Other issues

3.8 **Capacity allocation:** Whilst we want to ensure clear accountability for capacity allocation, we do not wish to impose a new business model on Network Rail or mitigate against the proper involvement of routes in the capacity allocation process. We also wish to allow for evolution in the way capacity allocation decisions are taken, to reflect learning from experience. Our conclusion is to revise how we set out responsibility for capacity allocation within the licence so that:

- designing a best-practice process is the clear responsibility of the SO;
- ensuring the capacity allocation process is adhered to (in line with the general network management duty) is the responsibility of the licence holder (Network Rail), but Network Rail must also nominate an officer whose has responsibility for ensuring the process is followed; and
- the SO and the routes are responsible for complying with their roles in the capacity allocation process and providing high quality inputs to that process (such as information and advice).

We also agree with Network Rail's proposal to extend the SO's duty of cooperation to include cooperation with franchising authorities and that this duty should also be allocated to routes.

3.9 **Timetabling:** We do not propose to embed the Network Code in the licence. The Network Code provides a set of rules behind the relationships between Network Rail and train operating companies and these are incorporated into the access contracts agreed between the parties. There is also an existing well-established process for parties to make appeals to ORR under the Network Code in relation to timetabling

decisions. In addition, we can investigate a persistent or significant failure to comply with the Network Code as a potential breach of the network management duty in the licence. It is not clear how requiring Network Rail to comply with the Network Code through a distinct licence condition would add value to these established processes.

- 3.10 **Independent-mindedness:** We consider that decisions relating to long term planning, timetabling and capacity allocation should be made impartially, avoiding undue discrimination (including between routes) and that it is helpful to state this explicitly and clearly as part of the responsibilities set out in the licence, whether allocated to the SO or the routes. We consider that the concerns around commercial confidentiality conditions expressed by Network Rail and the Department for Transport can be effectively addressed by retaining a more general obligation to handle commercially sensitive information appropriately. Such an obligation would apply to both the SO and routes.
- 3.11 **Other matters:** In respect of Network Rail's proposed addition to the SO functions, we will reflect in the licence that the SO has responsibility for promoting the coordinated and integrated operation as well as the development of the network, and will consider the legal drafting further. We also agree with Network Rail's proposal that the duty of cooperation with train operators around passenger information on the SO does overlap with the passenger information duty and, on reflection, we agree that it would be clearer for the two provisions to be brought together in the licence.

4. Freight and national passenger operators

Introduction

- 4.1 There are no specific requirements within Network Rail's existing licence regarding freight and national passenger operators. Our consultation did not propose requiring Network Rail to establish a specific route business for these operators. Instead, we consulted on introducing an obligation upon Network Rail requiring it to put in place specific arrangements to ensure that the interests of freight and national passenger operators are properly considered.
- 4.2 We also said that freight and national passenger operators would continue to be protected under the licence through requirements placed upon Network Rail, its routes and the SO through the general duties, and in particular the stakeholder engagement duty. In addition, any changes Network Rail wished to make to the Freight and National Passenger Operators (FNPO) route, its outputs within the scorecards, or PR18 settlement, would be subject to ORR's Managing Change Policy in the same way as changes to geographic routes are handled.

Summary of stakeholders' views

- 4.3 Many of the consultation responses⁹ we received specifically commented on the protection of freight and national passenger operator interests. Whilst there was strong support for our proposal to reflect such interests within the licence, respondents argued that the proposed licence changes should be further strengthened to protect the interests of freight and national passenger operators. The main substantive points raised were:
- Although the FNPO route is not the same as geographic routes (for example, it has no asset management responsibilities), it is reliant on those geographic routes to ensure it can deliver for FNPO customers and therefore needs sufficient influence over the geographic routes and SO. There need to be governance protections through the licence so that all parts of Network Rail are obliged to deliver for freight and cooperate with the FNPO. (Respondents included Arriva, DB Cargo, Department for Transport, Freightliner, Rail Delivery Group, Rail Freight Group.)
 - The Department for Transport asked that the licence requires Network Rail to take into account the interests of freight customers, such as ports and the construction industry. Freightliner went further, and asked for explicit obligations on geographic routes to take into account the interests and reasonable requirements of freight operators and their customers. Arriva requested clearer

⁹ Aggregate Industries, Arriva, Nexus, Department for Transport, DB Cargo, Freightliner, Rail Delivery Group, Rail Freight Group.

guidance as to what falls within the ‘interests’ of freight and national passenger operators, although did not offer suggestions in this regard.

- Several responses (Rail Freight Group, DB Cargo, Freightliner) argued that specific obligations should be placed on the FNPO route in respect of its current roles including developing Network Rail’s freight property portfolio, its role as commercial lead for freight operator contracts and its role as sponsor for freight enhancements.
- Freightliner, Rail Freight Group, and DB Cargo argued that the FNPO route interests should be recognised through other conditions in the licence that require consultation with geographic routes over issues such as land disposals and asset management (since the proposal does not categorise FNPO as a route).
- There were differing views on the merits of requiring Network Rail to establish a specific FNPO route in the licence. Freightliner and Arriva argued for the licence to require a specific FNPO route. In contrast, the Rail Freight Group’s response stated that it is not necessary for the licence to be prescriptive about structure, noting and that there could be merits in other organisational structures, such as each route and the SO having specific FNPO responsibilities. The Department for Transport also noted that this is an area where a degree of flexibility may need to be preserved to allow practice to evolve over the course of CP6.

Our response

- 4.4 We agree that it is appropriate that the licence provides strong protection for the interests of all operators, including freight and national passenger operators and their customers. Given the difference of views on whether there should be a structural requirement for Network Rail to establish an FNPO route in the licence, our view remains that it is not appropriate to introduce such a requirement, but to ensure the licence places strong obligations on Network Rail to consider the interests of these operators and their customers, without being prescriptive in how this must be achieved.
- 4.5 Reflecting on the comments received, we propose to further strengthen protection for the interests of freight and passenger operators with services crossing more than one route. We will:
- Build into the general network management duty an explicit requirement to take into account these interests when operating, maintaining, renewing and enhancing the network.
 - Introduce an obligation requiring Network Rail to put in place specific arrangements to ensure that the interests of freight and national passenger operators are represented.

- Make clear in the prohibition on undue discrimination (applicable to all activities contemplated under the licence) that this includes in particular, ensuring that these operators are not unduly discriminated against.

4.6 In addition to the above steps, there are already important protections in place for all operators through our proposed licence conditions, through which we could take enforcement action if necessary, in particular:

- The general network management duty requires Network Rail to operate its network in a manner which will meet reasonable requirements of all operators in relation to the quality and capability of the network and its performance.
- The general stakeholder engagement duty requires Network Rail to deal with all stakeholders (including operators and their customers) in ways appropriate to their reasonable requirements.
- Network Rail is required to take into account the views of all operators when it is undertaking planning.
- In adopting its assets management policies and criteria, Network Rail is required to show how it will comply with the network management duty (see above).
- Our regulatory arrangements for land disposal will continue to require Network Rail to appropriately consult operators before applying to us for a disposal of land.
- Network Rail is prohibited from unduly discriminating between different types of operator.

4.7 In finalising the drafting of the licence, we will consider whether it would be appropriate to set out any particular examples relating to freight interests and interests of passenger operators with services crossing more than one route to further clarify and emphasise the protections set out above.

5. Stakeholder engagement

Introduction

- 5.1 The stakeholder engagement duty is an important duty within the existing licence, and we have proposed increasing its prominence, placing stakeholder engagement as one of three core duties in the revised licence proposal (alongside the network management duty and passenger information duty). This supports our vision for CP6 that, over time, customers and other stakeholders can and should play a much more significant role in working closely with Network Rail to agree priorities and challenge performance.
- 5.2 In our consultation we made three main proposals with respect to stakeholder engagement requirements:
- We proposed a new shorter definition of ‘stakeholder’, which would cover any organisation, individual or community with which Network Rail has (now or in the future) a significant relationship, which can be impacted by the activities of Network Rail or which is proposing to become a railway operator/funder. Although the licence would remove explicit reference to some stakeholders, all of these stakeholders would be covered by the new definition.
 - We proposed removing the conditions specifically requiring cooperation with the Mayor of London, Transport for London and passenger representatives, on the basis that the more general protections afforded by the licence would continue to provide strong protection, with no material change for these stakeholders.
 - We proposed expanding the current duty to reflect the principles of stakeholder engagement as set out in our PR18 draft determination. We proposed that, as well as a requirement to treat stakeholders appropriately to their needs, Network Rail, its routes and the SO would be required to engage in a manner which is effective, inclusive, well governed and transparent. We proposed that the stakeholder engagement duty should have new requirements in these areas to support our approach of requiring effective stakeholder engagement in CP6.

Summary of stakeholders’ views

- 5.3 The consultation responses on the issue of stakeholder engagement reinforced the importance of meaningful stakeholder engagement by Network Rail, with support for elevating stakeholder engagement to one of three core duties in the licence. On the proposed shorter (but broader) definition of stakeholders, there were a range of views expressed in responses:
- Network Rail proposed a narrower requirement that to be considered a stakeholder, it should be necessary to have a significant relationship with

Network Rail and also be impacted by its activities (arguing that one of these on its own was insufficient).

- The Rail Delivery Group, Arriva and Nexus supported the proposed new broader definition of stakeholders, while DB Cargo argued in favour of the current definition on the basis it lacks ambiguity.
- Midlands Connect argued that sub-national and statutory transport bodies should be referenced as part of the definition.

5.4 On the removal of specific requirements, Transport for London disagreed with the proposal to remove the requirement for cooperation with the Mayor of London and Transport for London.

5.5 On the issue of principles for stakeholder engagement there were also a range of views:

- The Department for Transport was highly supportive of the principles for high quality stakeholder engagement set out in the PR18 draft determination (effective, inclusive, transparent, well-governed) and asked that these are explicitly and directly set out in the licence.
- Network Rail, the Rail Delivery Group and some operators (including Arriva) said that whilst they agreed with ORR's high level principles for stakeholder engagement, the proposed licence requirements for engagement were overly prescriptive. They argued for a more purposive condition, giving Network Rail more flexibility to decide how to discharge its obligations.
- Abellio did not agree with other respondents that the stakeholder engagement requirements were too prescriptive.

5.6 Chartered Institute of Logistics and Transport expressed a wider concern that with Network Rail's public sector status and revised structure, it could become exclusively focused on the requirements of the Department for Transport and Transport Scotland to the exclusion of other potential funding bodies. In particular, it stated that late implementation of enhancement schemes does not meet the reasonable requirements of stakeholders.

Our response

5.7 Considering the points raised about how to define stakeholders, our conclusion is to keep the shorter, but broader, stakeholder definition that we proposed. We do not agree with Network Rail's proposal, which we consider would unduly narrow the definition of 'stakeholder'. We are confident that our definition will provide direct protection for all relevant stakeholders, because it allows for the possibility that the range of bodies with legitimate interests in Network Rail's activities may evolve over

time. We are also concerned that listing certain individual stakeholders may inadvertently skew Network Rail's attention towards these groups at the expense of other legitimate stakeholders.

5.8 In the interests of clarity, we expect that Network Rail, in complying with this licence condition, will consider that stakeholders include, but are not restricted to:

- passengers, and their representative groups
- freight customers
- all operators (including passenger, freight, open access and prospective operators)
- line-side neighbours
- current and potential and national and local funders
- sub-national and statutory transport bodies, including Transport for London and the Mayor of London.

5.9 In considering the requirements the licence places on Network Rail as to how it should undertake stakeholder engagement, we do not agree that specific obligations should be retained and propose to remove the requirements for engagement or cooperation with specific bodies from the stakeholder condition. Given the broad range of stakeholders which Network Rail has and the broad range of scenarios in which it must engage with them, we do not agree that listing a small number of specific cases in this condition is appropriate or helpful. On the updated 'stakeholder engagement duty' we agree that it is beneficial to change the licence drafting to more closely reflect the four principles of stakeholder engagement from our PR18 determination. We will ensure this condition is drafted in purposive language.

6. Information requirements

Introduction

6.1 This chapter covers responses to proposed amendments to licence conditions on: information requirements; regulatory accounts; periodic and annual returns; and independent reporters¹⁰.

Summary of stakeholders' views

6.2 **Information for ORR:** We received no substantive comments on this condition.

6.3 **Regulatory accounts:** Network Rail pointed out that the 1 July deadline for provision of financial statements and regulatory accounts could not be met in practice during the last two years, due to factors outside their reasonable control, and they proposed that the licence permits a later date of end July.

6.4 **Periodic and annual returns:** Network Rail's response makes the case that it should have certainty over what data ORR needs before the data collection period (for an annual or periodic return starts), rather than facing the possibility of a change in data requirements during the period.

6.5 **Reporters:** Network Rail proposed changes to simplify the scope of reviews by independent reporters. Network Rail also considered that it would be more appropriate for the corporate centre to manage the appointment of independent reporters than routes or the SO.

Our response

6.6 **Regulatory accounts:** We appreciate that it has not been possible for Network Rail to provide financial statements to ORR by the 1 July for the last two years, and in practice we have consented to a later date to reflect the factors outside Network Rail's control. While we wish to retain the principle that statements should normally be provided by 1 July, we will change our proposals to make the licence explicit that ORR may in appropriate cases consent to alternative arrangements for the Network Rail providing financial statements (and the other relevant documents).

6.7 **Periodic and annual returns:** We agree with Network Rail's principle that they should have clarity on data requirements prior to the start of the data collection period, and will reflect this in drafting. This does not affect ORR's ability to request additional information in appropriate cases, under the 'information for ORR' condition.

¹⁰ Independent reporters provide ORR with professional advice on the quality of Network Rail's service provision, as specified in the licence. They are engaged for particular work by Network Rail at ORR's request and with ORR's approval.

6.8 **Reporters:** We agree with Network Rail that it is desirable to simplify the scope for reporter investigations and replace with a more general provision. We also agree that the licence does not need to specify which parts of Network Rail's business should have responsibility for managing the independent reporter process.

7. Industry obligations

Introduction

7.1 This chapter covers responses to our proposed modifications to licence conditions concerning: information on stakeholder dealings; safety and standards; the environment; and the Rail Delivery Group.

Summary of stakeholders' views

- 7.2 **Information on stakeholder dealings:** Beyond the wider points made in respect of stakeholder engagement (see chapter 5) there were no other substantive comments on this condition.
- 7.3 **Safety and standards:** The Rail Safety and Standards Board's (RSSB) response welcomed and endorsed ORR's proposed changes to this condition. The Rail Delivery Group's response proposed a further change to make an explicit link to the existing industry process for reviewing rail industry standards through RSSB Standards Committees. Angel Trains queried whether TSIs (Technical Standards for Interoperability) should be mandated in the licence.
- 7.4 **Environment:** Natural England's consultation response commented that any monitoring of Network Rail's performance should seek to see how it is demonstrating compliance with its statutory duty to have regard to preserving biodiversity (under the Natural and Rural Communities Act 2006). Natural England also commented that asset management could have a more ambitious vision for lineside vegetation management.
- 7.5 **Rail Delivery Group:** We received no substantive responses on this condition.

Our response

7.6 **Safety and standards:** our proposals for updating this licence condition were the culmination of an inclusive industry-led process, coordinated through RSSB, to review and consider amendments to the current requirements. On the Rail Delivery Group's suggestion, while we have no in principle objection to a role for Standards Committees in discussing proposed alternatives to Industry Standards, we do not consider it appropriate to mandate this in the licence. On Angel Trains' proposal to require compliance with TSIs, it has never been the case that TSIs (or notified national safety or technical rules) have needed to be mandated in the licence. These regulatory requirements on Network Rail (and other mainline licence holders) are set out in the Railways & Other Guided Transport Systems (Safety) Regulations 2006 and the Railway Interoperability Regulations 2011, and we do not consider that it is necessary to repeat these in the licence.

7.7 Environment: Whilst we recognise that Network Rail has important statutory obligations in regard to biodiversity, we do not consider that it is appropriate for the licence to repeat all of Network Rail's legal obligations. The licence continues to contain a requirement for Network Rail to have a policy to protect the environment, and maintain the operational and management arrangements to give effect to this policy.

8. Restrictions on activities

Introduction

8.1 This chapter covers responses to our proposals relating to licence conditions on: the financial ring-fence; land disposal; interests in railway vehicles; cross-subsidy; non-discrimination; restricted use of protected information; and financial indebtedness.

Summary of stakeholders' views

8.2 **Financial ring-fence:** We received no substantive comments on this condition.

8.3 **Land disposal:** We received representations that the land disposal condition should explicitly ensure that the FNPO route gives its approval to such disposals. This issue is covered in chapter 4 above. Network Rail requested that the provision should require routes and the SO to be consulted and not to have objected, rather than requiring explicit approval in every case, as this better reflects existing processes.

8.4 **Interests in railway vehicles:** We received no substantive comments on this condition.

8.5 **Prohibition of cross-subsidy:** We received no substantive comments on this condition.

8.6 **Non-discrimination:** We received no substantive comments on this condition.

8.7 **Restricted use of protected information:** Network Rail proposed that it should be permitted to disclose protected information not only where the person who provided it consents but also where the person who owns or is responsible for the information consents.

8.8 **Financial indebtedness:** We received no objections to our proposal to remove a number of licence provisions which are not relevant to Network Rail's status as a public sector body.

Our response

8.9 **Financial ring-fence:** We flagged in ORR's July consultation that we were considering updating the references to RPI to CPI in the licence, consistent with the approach taken across PR18. We propose to make this change.

8.10 **Land disposal:** As noted in chapter 4, our regulatory arrangements for land disposal ensure the need to appropriately consider the interests of freight and national passenger operators. Since we are not requiring Network Rail to maintain a specific FNPO business unit, we do not propose a specific requirement to consult such a unit. On Network Rail's proposed change, we agree that the approach of consultation and

no objection is consistent with other parts of the land disposal regulatory arrangements and we agree to this change.

- 8.11 **Restricted use of protected information:** We agree with Network Rail that it would be appropriate to more closely reflect the ability for the person to whom the protected information relates being able to consent to its disclosure. We will consider appropriate drafting further.

9. Corporate matters

Introduction

9.1 This chapter covers responses to proposed amendments to licence conditions on: corporate governance; incentive schemes (i.e. management and staff bonus schemes); fees, insurance; claims allocation and handling; regulatory undertakings; and change of control.

Summary of stakeholders' views

- 9.2 **Corporate governance:** We received one response (requesting anonymity) arguing that the requirements to comply with the UK Corporate Governance Code include certain requirements that are appropriate for private companies but not for public bodies, suggesting specific exemptions within the licence.
- 9.3 **Incentive schemes:** Network Rail's response made the case that the requirement to align any management incentive schemes with the interests of customers and end users needs to be broadened to support alignment with the network management duty to avoid conflicting with its wider licence obligations. Network Rail also wishes to retain the provision requiring it to have regard to ORR's views on performance. Abellio's response agreed with the proposed changes to this condition, and argued that it should be optional (within the licence) for Network Rail to have management incentive schemes. Arriva's response sought clarification that incentive schemes will be related to weightings in Network Rail's scorecards.
- 9.4 **Fees:** Network Rail stated that the Department for Transport may wish to omit the state financial indemnity fee from CP6 funding arrangements.
- 9.5 **Insurance:** We received no substantive comments on this condition.
- 9.6 **Claims allocation and handling:** We received no substantive comments on this condition.
- 9.7 **Regulatory undertakings:** Network Rail's response expressed concern about the change in drafting from "Ultimate Holding Company" to "Ultimate Controller" and asked whether the current wording is appropriate following reclassification. Although not specifically commenting on this condition, the Department for Transport's response showed general support for the licence to reflect Network Rail's status as a public body and the Secretary of State as the sole member of the company.
- 9.8 **Change of control:** We received no objections to our proposal to remove a licence provision which is not relevant to Network Rail's status as a public sector body.

Our response

- 9.9 **Corporate governance:** Whilst we agree that some aspects of the UK Corporate Governance Code are not obviously applicable to Network Rail (such as the requirement to produce half-year accounts), rather than provide specific exemptions within the licence, we consider it would be more appropriate to rely on the existing principle within the Code to comply with or explain its provisions. In addition we consider it would be straightforward, if needed, to use the licence provision for ORR to provide regulatory consent to depart from specific provisions. This approach also has the benefit of allowing flexibility in response to any updates to the Code.
- 9.10 **Incentive schemes:** Whilst we believe it is important that any incentive schemes should reflect the interests of Network Rail's customers and end users, we are content to broaden this to encompass the general network management duty, as requested by Network Rail, to avoid any potential conflict of obligations. This sets a more purposive requirement than using the licence to specify a link with Network Rail's scorecards (incentive schemes are currently driven by scorecard weightings and can continue to be) – the precise mechanisms of schemes are for Network Rail to determine, provided the schemes meet these objectives. In respect of Abellio's response, we agree the licence does not need to make it mandatory for Network Rail to have financial incentive schemes: we consider this decision is for Network Rail's management, its board and the Department for Transport in its capacity as Network Rail's shareholder. On the same basis, we do not see the case for the licence to mandate that ORR's views must influence decisions on management incentives. We remain happy to continue providing any information on performance that Network Rail management, its board or shareholder would find helpful in this regard.
- 9.11 **Fees:** We are liaising with the Department for Transport and propose to remove the state financial indemnity fee from the licence if the Department confirms that this will no longer form part of CP6 funding arrangements.
- 9.12 **Regulatory undertakings:** We propose to remove the definition of 'ultimate holding company' and associated requirements altogether on the basis that the control of Network Rail is clearly understood, on the basis Network Rail is a public body with the Secretary of State as shareholder.

Appendix: Responses to network licence consultation

Respondent
Anonymous (1 response)
Abellio
Aggregate Industries
Angel Trains Ltd
Arriva
ASLEF
Chartered Institute of Logistics and Transport
DB Cargo
Department for Transport
Freightliner
Kent County Council
Midland Connect
Natural England
Network Rail
Nexus
Open Access Rail
Passenger Transport Networks, York
Rail Delivery Group
Rail Freight Group
Rail Safety and Standards Board
Transport for Greater Manchester
Transport for London
Transport Scotland
West Midlands Rail Executive



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