



# ORR's Holding Network Rail to Account policy - impact assessment on the use of ORR Hearings

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This impact assessment should be read in conjunction with our [Holding Network Rail to account policy](#).

Policy	Holding Network Rail to Account
Policy area	ORR Hearings
Background	<p>Network Rail operates under its network licence, which requires it to comply with the licence conditions set in the public interest. These licence conditions underpin our approach to holding Network Rail to account and in monitoring and assessing compliance.</p> <p>ORR routinely monitors Network Rail's performance across the main areas of its activity to assess how it performs, and is likely to perform, against its obligations. Where we identify a potential concern through our monitoring, or from stakeholder representations, we will investigate to understand the nature of the concern and decide whether we need to take any action.</p> <p>In CP6 we are introducing ORR hearings to provide an opportunity for the different parties to present their positions, to collect evidence from each party, and for stakeholders to question Network Rail on the issue under investigation.</p> <p>This impact assessment sets out our assessment of the impact of introducing ORR hearings in our regulatory toolkit (as compared to not using hearings).</p> <p>This document is structured in two parts. First, we assess the impact of holding a hearing at distinct different stages of the investigation and enforcement process compared to relying on existing regulatory tools only. The second part compares the alternative approaches of using</p>

	introduce specific criteria to determine whether to hold a hearing, or using our discretion, retaining some flexibility.
<b>Objectives</b>	<ul style="list-style-type: none"><li>• reinforce route/System Operator (SO) accountability to customers and stakeholders at a senior level within Network Rail and support the involvement of the affected stakeholders in considering appropriate action;</li><li>• where appropriate, enable early resolution of issues to minimise the impact on passengers and freight operators; and</li><li>• provide strong reputational incentives for Network Rail managers to take prompt action to address performance concerns, avoiding the need to escalate issues further.</li></ul>

## Issue under consideration – The impact of introducing ORR hearings

We assess the impact of holding a hearing at different stages of the investigation and enforcement process as compared with the current approaches the ORR uses to hold Network Rail to account. To do so, we compare three different options against the status quo, i.e. to use other regulatory tools other than hearings.

The three main stages we have considered in this assessment include:

- **Option 1 ‘Holding a hearing at an early stage’;**
- **Option 2 ‘Holding a hearing at a later stage (pre enforcement)’;** and
- **Option 3 ‘Holding a hearing at the enforcement stage’.**

The table below categorises the main impacts we have considered for hearings at each of these stages, and our assessment of the relative scale of that impact across the different options.

	1) Holding a hearing at an early stage	2) Holding a hearing at a later stage (pre enforcement)	3) Holding a hearing at the enforcement stage
<b>Impact on Network Rail’s performance (in relation to the topic of the hearing)</b>	Medium-high. Holding a hearing at an early stage could directly address the problem under consideration, avoiding the need to escalate further.	Medium-low. Due to later timing, it is likely that holding a hearing at this stage would produce remedial actions rather than preventive ones.	Low. Holding a hearing at the enforcement stage would only produce remedial actions.
<b>Impact on Network Rail’s future performance (in relation to similar issues)</b>	Low. Introducing hearing at this stage may incentivise Network Rail to resolve similar issues early in the future, but is unlikely to provide a very strong deterrent effect.	Medium-low. Hearings at this stage may act as a deterrent, incentivising Network Rail to address similar issues earlier.	Medium-high. Holding hearings at the enforcement stage would be likely to act as a strong deterrent, incentivising Network Rail to address similar issues earlier.

<p><b>Reputational impact on relevant management (those attending hearing)</b></p>	<p>Medium. Holding a hearing at this stage signals that there is a potential problem that Network Rail's senior staff has not yet addressed, whilst it is clear that there still time to do so.</p>	<p>Medium-high. Holding a hearing at this stage signals that there is a clear problem, which the relevant Network Rail management has not sufficiently addressed.</p>	<p>High. Holding a hearing at this stage signals that there is a clear licence breach, which the relevant Network Rail management is being held to account for.</p>
<p><b>Net administrative costs</b></p>	<p>Medium-high</p> <p>There would be administrative costs for ORR to enable the hearing.</p> <p>There would also be a cost to participants (Network Rail and affected parties), in terms of time to prepare for and attend the hearing. However, a hearing at an early stage could enable swift resolution to an issue which has the potential to negate the need for further escalation which would reduce the financial impact of further investigation for all parties, including the ORR.</p>	<p>High</p> <p>There would be administrative costs for ORR to enable the hearing.</p> <p>There would also be a cost to participants (Network Rail and affected parties), in terms of time to prepare for and attend the hearing. The cost may be highest in this scenario as the hearing could potentially lead on to an enforcement decision by ORR, providing a strong incentive to prepare thoroughly.</p>	<p>Medium-high</p> <p>There would be administrative costs for ORR to enable the hearing. Holding a hearing at the enforcement stage would require attendance of members to the ORR Board, which would have some additional administrative cost for ORR. However, hearing from affected parties may make it easier for the ORR Board to make its decisions on what action it will take in response to the licence breach. A hearing would also ensure that the ORR Board makes the most informed decisions.</p> <p>There would also be a cost to participants (Network Rail and affected parties), in terms of time to prepare for and attend the hearing. While the outcome of the hearing could be significant (incentivising thorough preparation) the issues in scope are likely to be more limited than a 'later stage' (pre enforcement) hearing.</p>

<p><b>Behavioural impact on performance of Network Rail managers – anticipating a potential hearing</b></p>	<p>As senior managers are unlikely to want to be held to account if Network Rail's performance is below expectations, they will exert effort to avoid a hearing in the first place. Effect is likely to be proportionate to reputational cost of hearing (i.e. medium-low).</p>	<p>As senior managers are unlikely to want to be held to account if Network Rail's performance is below expectations, they will exert effort to avoid a hearing at this stage. Effect is likely to be proportionate to reputational cost of hearing (i.e. medium-high).</p>	<p>As senior managers are unlikely to want to be held to account if Network Rail's performance is below expectations, they will exert effort to avoid a hearing at this stage. Effect is likely to be proportionate to reputational cost of hearing (i.e. high).</p>
<p><b>Behavioural impact – longer term Network Rail recruitment</b></p>	<p>ORR hearings at an early stage in the investigation would be likely to have only minor implications on Network Rail's recruitment in future. Positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance could moderately discourage applications from those who know themselves to be unsuitable for the job.</p>	<p>ORR hearings at the pre-enforcement stage could have some potential implications on Network Rail's recruitment in future. Positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance could discourage applications from those who know themselves to be unsuitable for the job.</p>	<p>ORR hearings at the enforcement stage could have potential implications on Network Rail's recruitment in future. Positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance could discourage applications from those who know themselves to be unsuitable for the job.</p>

## Part One: Holding a ORR hearing at specific stages

### Options to be considered

#### Option 0: 'Do nothing'

This is the baseline against which other options are considered. The 'do nothing' option is to use other regulatory tools other than hearings to hold Network Rail to account.

When we decide it is appropriate to investigate further, we will take a proportionate and risk-based approach, with a range of possible actions that we may consider appropriate depending on our assessment of concerns.

Under this option, we would rely on existing regulatory practices used in CP5. For example, in the investigation phase we would request in-depth information from Network Rail collected predominantly through correspondence and/or meetings. In addition, we may decide use independent reporters to get a better understanding of certain concerns or provide us with independent specialist advice. For CP6 we have also introduced the possibility of writing to Network Rail to explicitly call on it to establish a formal improvement plan (prior to formal enforcement action).

#### Option 1. Hold ORR hearings at an early stage the investigation.

Under this option, we would introduce hearings between route/SO and affected parties as part of our regulatory toolkit for CP6 to gather evidence and explore the issues further to enable swift resolution where possible. At a hearing, we will set out the concerns under investigation.

Hearings can provide an opportunity for the different parties to present their positions, to collect evidence from each party, and for stakeholders to question Network Rail on the issue under investigation.

Hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality).

#### Assessment of Option 1:

ORR hearings would bring senior representatives from Network Rail face to face with senior representatives from the affected party(ies)<sup>1</sup> to discuss the issue and provide an opportunity to understand the problem under consideration from both parties' perspectives. This should help develop a better informed solution, avoiding the need to

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<sup>1</sup> Affected parties could be any of the stakeholders listed in annex A of the Holding to Account policy, available [here](#).

escalate further. This is important because if issues are resolved earlier, then the harm to passengers or freight operators can be minimised.

Holding hearings in the earlier stages of an investigation could provide Network Rail with an incentive to resolve similar issues early in future, setting the expectation that it is more effective to take early action but is unlikely to provide a very strong deterrent effect.

Even if not publicly held, ORR hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality). Thus, senior representatives from Network Rail are unlikely to want to be held accountable if performance is below expectations. This could increase motivation in Network Rail's senior staff to avoid a hearing in the first place.

However, holding a hearing at this stage would only signal that there is a potential problem that Network Rail's senior staff has not sufficiently addressed, while it is clear that there still is time to do so. Whether Network Rail did/did not behave as expected will be determined at the hearing. Therefore, we expect that the introduction of hearing at this stage would only provide moderate reputational incentives to Network Rail's relevant management.

The introduction of hearings would likely to have only minor implications on Network Rail's recruitment in future. Indeed, positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance would in principle discourage applications from those who know themselves to be unsuitable for the job. Nevertheless, we believe that holding hearings at an early stage could have minor implications on the behaviour of future applicants.

There are likely to be net administrative cost and resource implications (for both ORR and attendees) associated with the planning, running and follow up of these meeting. It is likely that Network Rail senior management and the senior management of affected parties would be required to spend time preparing for and attending the hearing. The introduction of hearings will require notable change to ORR, Network Rail and relevant affected parties' internal processes. In particular, management time required could be significant. However, a hearing at an early stage could enable swift resolution to an issue which has the potential to negate the need for further escalation which would reduce the financial impact of further investigation for all parties, including the ORR.

Finally, introducing hearings in our regulatory toolkit will support ORR to be closer to local issues arising across routes that involve Network Rail's customers and/or stakeholders in the process of escalation.

## **Option 2: Hold ORR hearings at a later stage (pre-enforcement)**

Under this option, we would introduce hearings between route/SO and affected parties as part of our regulatory toolkit for CP6 to gather evidence and explore the issues further to enable swift resolution where possible. At a hearing, we will set out the concerns under investigation.

In this option, ORR would use hearings at a specific stage, i.e. at a later stage in the investigative phase, to gather evidence to inform our regulatory decisions.

Hearings can provide an opportunity for the different parties to present their positions, to collect evidence from each party, and for stakeholders to question Network Rail on the issue under investigation.

Hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality).

### **Assessment of Option 2:**

Compared to Option 1, this option would introduce hearings at a later stage in the investigative phase.

Similarly, ORR hearings would bring senior representatives from Network Rail face to face with senior representatives from the affected party(ies) to discuss the issue and provide an opportunity to understand the problem under consideration from both parties perspectives. However, due to later timing, it is likely that holding a hearing at this stage would produce remedial actions rather than preventive ones. Thus, the immediate impact on Network Rail's performance in relation to the topic of the hearing would be moderate.

Knowing that ORR will hold hearings at later stages of an investigation could provide a deterrent effect that may incentivise Network Rail to address similar issues earlier.

Even if not publicly held, ORR hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality). Thus, senior representatives from Network Rail are unlikely to want to be held accountable if performance is below expectations. This could increase motivation in Network Rail's senior staff to avoid a hearing in the first place.

Holding a hearing at a later stage would signal that there is a clear problem that Network Rail's senior staff has not sufficiently addressed. Thus, we expect that the introduction of hearing at this stage would provide medium-high reputational incentives to Network Rail's relevant management.

As with Option 1, the introduction of hearings could potentially have an impact on Network Rail's recruitment in future. Indeed, positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance could



in principle discourage applications from those who know themselves to be unsuitable for the job. We believe that holding a hearing at this stage could have moderate implications on the behaviour of future applicants.

There are likely to be cost and resource implications (for both ORR and attendees) associated with the planning, running and following up of these meeting. The introduction of hearings will require notable change to ORR, Network Rail and relevant affected parties' internal processes. In particular, management time required could be significant. The cost may be highest in this scenario as the hearing could lead to an enforcement decision by ORR, providing a strong incentive to prepare thoroughly.

Finally, introducing hearings in our regulatory toolkit will support ORR to be closer to local issues arising across routes that involve Network Rail's customers and/or stakeholders in the process of escalation.

### **Option 3. Hold ORR hearings only at the enforcement stage.**

The final decision on whether there is, or has been, a licence breach, and what action to take, is made by ORR's Board.

Under this option, we would introduce hearings between route/SO and affected parties as part of our regulatory toolkit for CP6 in order to allow affected parties and Network Rail an opportunity to state their views on what would be the most appropriate action following a licence breach (for example whether that be an enforcement order, financial penalty, financial sanction or some form of reparation offer from Network Rail).

In this option, ORR would use hearings at a specific stage, i.e. in the enforcement stage following a licence breach.

Hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality).

### **Assessment of Option 3:**

This option would introduce hearings at the enforcement stage (i.e. following a decision of licence breach).

ORR hearings would bring senior representatives from Network Rail face to face with senior representatives from the affected party(ies) to discuss the issue and provide an opportunity to understand the problem under consideration from both parties perspectives. However, holding a hearing at this stage would only produce remedial actions. Thus, the immediate impact on Network Rail's performance in relation to the topic of the hearing would be low.

However, knowing that ORR will hold hearings at the enforcement stage could provide a strong deterrent effect that may incentivise Network Rail to address similar issues earlier.

Even if not publicly held, ORR hearings will be 'on the record' and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality). Thus, senior representatives from Network Rail are unlikely to want to be held accountable if performance is below expectations. This could increase motivation in Network Rail's senior staff to avoid a hearing in the first place.

Holding a hearing at this stage would signal that there is a clear licence breach, which the relevant Network Rail management is being held to account for. Thus, we expect that the introduction of hearing at this stage would be likely to act as a strong deterrent, incentivising Network Rail to address similar issues earlier.

The introduction of hearings could have an impact on Network Rail's recruitment in future. Indeed, positions for which it is known that Network Rail's senior management will be held publicly accountable for their performance would in principle discourage applications from those who know themselves to be unsuitable for the job. We believe that holding a hearing at the enforcement stage would have moderate implications on the behaviour of future applicants.

There would be administrative costs to ORR to enable the hearing. Holding a hearing at the enforcement stage would require attendance of members to the ORR Board, which would have some additional administrative cost for ORR. However, hearing from affected parties may make it easier for the ORR Board to make its decisions on what action it will take in response to the licence breach.

While the outcome of the hearing could be significant (incentivising thorough preparation) the issues in scope would be likely to be more limited than a 'later stage' (pre enforcement) hearing.

There are also likely to be cost and resource implications (for both ORR and attendees) associated with the planning, running and following up of these meeting. The introduction of hearings will require notable change to ORR, Network Rail and relevant affected parties' internal processes.

However, hearing from affected parties may ensure that the ORR Board makes informed decisions on what action it will take in response to the licence breach.

Finally, introducing hearings in our regulatory toolkit will support ORR to be closer to local issues arising across routes that involve Network Rail's customers and/or stakeholders in the process of deciding appropriate remedy to any licence breach.

## Conclusion

- As all three options present merits compared to Option 0, we recommend to initially hold hearings during both the investigation (with no distinction between early and late stage) and the enforcement processes. Maintaining this flexibility will ensure that ORR hearings can be used in the right circumstances.
- We will be mindful of the costs and resource implications involved when deciding whether to hold a hearing.

## Part Two: Criteria for holding an ORR hearing

This part considers the pros and cons of introducing specific criteria for holding a hearing (i.e. making hearings an automatic consequence of certain criteria being met), or using our discretion and retain flexibility over when to hold hearings (taking a principle-based approach as to when to hold hearings).

### **Option 1. Decisions to hold ORR hearings are discretionary, based on the broad principles which align with our Holding to Network Rail to Account Policy.**

Under this option, we would introduce hearings between route/SO and affected parties as part of our regulatory toolkit for CP6.

ORR would use hearings at specific stage in the process, but not automatically (i.e. not set out the exact circumstances that would trigger a hearing) to retain flexibility over if (but not when) we use it applying the principles of regulatory best practice<sup>2</sup>, including:

- **risk-based**, meaning that we focus our resources where we consider the risks are greatest;
- **targeted** at specific concerns and the part(s) of Network Rail's business that we consider responsible, whether that is a particular route, or business units in the corporate centre. This is to reinforce accountability and strong performance incentives at all levels within Network Rail;
- **proportionate**, so that any actions we take reflect the scale and nature of the problems we are seeking to address and the likely costs and benefits to different parties of taking action; and
- **transparent**, so that we are clear with stakeholders about our view of Network Rail's performance, whether we have any concerns and what action we are taking.

We would not specify the circumstances/examples from previous experience in which we may consider holding a hearing during the investigation and enforcement process.

#### **Assessment of Option 1:**

- Holding hearings without being prescriptive about the precise circumstances as to when a hearing would be initiated will enable ORR to use this regulatory tool when is best to do so (proportionate response to issue), rather than being held to specific circumstances that have been predefined in advance. This will allow the ORR to consider a range of tools before choosing the most appropriate one.
- Holding hearings without being prescriptive will also allow ORR to maintain a balance between being too present and allowing Network Rail the space to

<sup>2</sup> Principles for Economic Regulation, April 2011, available [here](#).

resolve local issues with relevant stakeholders. Thus, it is likely we will use this tool in a timely and effective way.

- It is important to note that ORR hearings are a new regulatory tool and are untested in our regulation of Network Rail, therefore retaining greater flexibility will enable the approach to hearings to evolve and learn lessons from each hearing that we hold. If we were to be prescriptive about the circumstances in which we hold a hearing then the ability to learn lessons or evolve our approach would be to some extent restricted.

### **Option 2: Decisions to hold ORR hearings based on prescriptive criteria.**

ORR would use hearings at specific stages in the process and be explicit about the circumstances in which we would initiate a hearing. To do this we would signal upfront (embedded as part of our Holding to Account policy) the circumstances/examples from previous experience in which we may consider initiating a hearing during the investigation and enforcement process.

Setting out in advance when a hearing would be initiated, means that this regulatory tool would automatically be selected in the circumstances specified in the Holding to Account policy.

### **Assessment of Option 2:**

- By signalling upfront the circumstances/examples from previous experience in which we may consider holding a hearing, we could increase transparency in our monitoring and enforcement process. It would also ensure a greater level of predictability in our approach.
- While this option aligns with our strategic objectives, by signalling in advance the circumstances/examples in which we would use the hearings could be restrictive and result in unnecessary regulatory burden to Network Rail and affected parties. Indeed, we would be forced to resort to initiate hearings in predefined situations when it may not be the best option, thus reducing our regulatory powers.
- Being prescriptive about the circumstances in which we hold a hearing could reduce our ability to learn lessons or evolve our approach as the circumstances in which we hold a hearing would have to be predetermined in our Holding to Account policy. Given that this is a new regulatory tool that has yet to be tested, this could present significant risks.

## Conclusion

- Option 1 is preferable. While Option 2 provides a greater level of predictability for Network Rail and affected parties, we consider that there is greater merit in retaining a degree of flexibility in deciding when to initiate a hearing. We consider that this will ensure that hearings are initiated when most appropriate to do so, which in turn means that there are only resource and cost implications for ORR, Network Rail and affected parties where absolutely necessary.



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