



Responses to ORR's 29 May 2024 consultation on draft final order following ORR's investigation on Network Rail's Wales & Western region's compliance with the network licence

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Network Rail

This letter constitutes Network Rail's representations¹ in response to the ORR's decision dated 29 May 2024 (the Decision Letter) that Network Rail is contravening condition 1 of the Network Licence in relation to the Wales & Western region, and the proposed decision to make a Final Order as set out in the Notice dated 29 May 2024 (the Notice).

1 INTRODUCTION

- 1.1 Network Rail makes it clear that we share the ORR's vision and values, working collectively to improve the safety and performance of the railways by ensuring that they are operated, maintained, enhanced and improved in accordance with best practice and in a timely, efficient and economical manner.² Nothing in this letter should be seen to detract from our commitment to working collaboratively with the ORR (and others) to this end.
- 1.2 Network Rail has openly and fully co-operated with the ORR in respect of the Wales & Western region. The ORR has not needed to utilise its formal powers to obtain information from us.³ Our constructive engagement with the ORR has included sharing extensive details on our improvement plans, being open as to the additional challenges we have faced, the investigations we have undertaken, and the actions taken or plans to address them.

¹ The ORR is required by virtue of s56(1) of the Act to consider these representations.

² Holding to Account policy for CP6 at page 1[2].

³ S58 of the Act. See also Holding to Account policy for CP6, page 21[18], FN14: "*We expect the accountable unit(s) to respond to our information requests to the timescales we require. In the event of non-compliance within a reasonable timescale, we will escalate to Network Rail centre and may apply our information gathering powers. Failure to provide us with this information would continue to constitute a licence breach. We have powers under the Act to request information from Network Rail but expect Network Rail to continue to cooperate with requests for further information without us having to invoke these powers*" and Holding to Account policy for CP7, page 19 [3.36].

Additionally, we have worked, and continue to work, together with our train operator partners and other stakeholders.

- 1.3 We make it clear that Network Rail takes this investigation very seriously. Significantly in advance of the outset of the formal investigation Wales & Western performance has, and continues to, receive close attention from our Board.
- 1.4 We have worked extremely hard in particular since we were informed on 29 November 2023 that the ORR had opened a formal investigation into the Wales & Western region to do our best to respond to extensive and detailed questions within extremely challenging timescales, including over Christmas and New Year, the network's busiest period for engineering works and associated management oversight.⁴
- 1.5 Whilst Network Rail has candidly accepted that its performance in some parts of the Wales & Western region has not been at the level that it expects, we strongly dispute that this amounts to a breach of licence condition 1.
- 1.6 These representations focus on three main points:
 - (a) the ORR has not properly applied the statutory and regulatory framework in its management of the investigation which has led it into error in finding a breach of condition 1;
 - (b) the evidence does not justify a finding of breach of condition 1; and
 - (c) if the ORR disagrees with our assessment, that the stage of formal enforcement action has not yet been reached such that it is appropriate and necessary to impose an order. Put another way, this is not the point of "*last resort*,"⁵ warranting enforcement action as per the Notice.

2 PRELIMINARY OBSERVATIONS

- 2.1 Before we address the ORR's finding of a breach of condition 1, we make the following important points.
- 2.2 **First**, we are pleased to see that the ORR, in the investigation report dated 28 May 2024 (the Investigation Report), has concluded that: "*From our investigation and engagement with Network Rail, it is clear there is a strong drive to turn performance around in the*

⁴ We invite the ORR to consider our written submissions of 29 January 2024 (and attachments), 29 April 2024, 13 May 2024 and our evidential submissions of 16 February 2024 and 13 March 2024 in conjunction with this letter.

⁵ See for example, Holding to Account policy for CP6, page 4[3].

region."⁶ Given that an enforcement order's sole purpose is to secure compliance, this important and unequivocal recognition of Network Rail's commitment strongly supports our view that the threshold for the imposition of an order has not been reached.

- 2.3 **Secondly**, the ORR has recognised the positive impact the current leadership team in the Wales & Western region has had, for example, "*in arresting the decline in Network Rail's contribution to train performance*"⁷, and has also recognised "*effective leadership can take time to make an impact in the context of infrastructure management.*"⁸ Further, in the Investigation Report in respect of the Wales route, the ORR has seen that "*where new, focused leadership has been in place for longer, there are signs that this is starting to deliver improved contribution to train performance. This is supported by the views of stakeholders.*"⁹ We agree. We have seen that in Wales the level of CRM-P stabilised in mid 22/23 and the MAA has now fallen for seven consecutive periods. On Time performance is now exceeding target at P02 YTD 2024/2025. Together this is beginning to reverse the historic declining MAA trend in recent periods. There are signs of improvement in Thames Valley and staff engagement is also measurably improving.
- 2.4 What this demonstrates is that in the complex and challenging environment in which we are operating (see below), Network Rail *is* making improvements and heading in the right direction *without* the need for a formal order.
- 2.5 **Thirdly**, as recognised by the ORR,¹⁰ whole-industry collaboration and alignment is required to deliver the most effective outcomes and that good operational performance arises from effective working between all stakeholders at the route, region and network level, and this underpins our support for the establishment of Great British Railways as the "single guiding mind".
- 2.6 As the Investigation Report¹¹ makes clear, the issues affecting train performance are complex, inter-linked and involve all parties across the railway system, including the ORR which has a role in the consideration and approval of track access contracts. Improvement in performance therefore requires a whole industry approach, requiring responses across

⁶ Investigation Report, page 5[5].

⁷ Investigation Report, page 35[3.7].

⁸ Investigation Report, page 35[3.7].

⁹ Investigation Report, page 8[2] and page 35[3.8].

¹⁰ Investigation Report, page 109[7] generally and for example at [7.2]: "*Wales & Western has engaged extensively with stakeholders on train performance*" and [7.3] "*We assess Network Rail against four principles of stakeholder engagement: inclusive, transparent, well-governed and effective. In our most recent assessment, covering April 2022 to March 2023, we scored Wales & Western consistently well across the four principles of stakeholder engagement.*"

¹¹ Investigation Report, page 22[1.16]: "*we recognise that delivering train service performance relies on cross-industry collaboration.*"

the breadth of the railway system (including fleet, resources, timetable, external factors and change management).

- 2.7 Whilst you have acknowledged this, it is not evident that you have appropriately taken whole industry considerations into account when making your decision. Rather, you have appeared to have solely or disproportionately laid responsibility at the door of Network Rail.
- 2.8 The importance and necessity of its whole industry responsibility to the network is underscored by the "Recommendations to Industry" which are embedded in the Investigation Report. Indeed, we note that some of the areas of criticism upon which a breach of condition 1 has been based are directly reflected in the Recommendations to Industry, yet it is Network Rail which has been singled out for censure by the ORR e.g. incident learning¹² and planning.¹³ We also question the legal cogency of the inter- relationship between the industry recommendations and the requirements you are seeking to place on Network Rail, where ORR either does not have the power to enforce the pan- industry recommendations or hitherto has chosen not to exercise the power in so far as it exists.
- 2.9 **Fourthly**, in reviewing your decision, it is critical that the ORR gives *adequate* and *proportionate* consideration to the environment within which Network Rail is operating, many aspects of which are outside of our control. Whilst we recognise that the ORR has acknowledged some of these factors in the Investigation Report,¹⁴ in our opinion, it has not properly analysed and reflected the *actual* impact upon our performance in the Wales & Western region as a result.
- 2.10 That these factors are significant is reflected in the ORR's own publications in CP6 and going into CP7. We draw your attention to your published Annual Assessment of Network Rail,¹⁵ in which it is stated that:

"Network Rail's performance in Year 4 was impacted by coinciding pressures, many of which have impacted overall performance. These were:

- *industrial action which diverted management attention and impacted delivery, financial performance and train performance;*
- *extreme weather, including summer heat and flash floods which impacted assets, and disrupted delivery and train performance; and*

¹² Investigation Report, page 122 [9.15] and the Notice, Annex B page 14[4c].

¹³ Investigation Report, page 122 [9.13] and the Notice, Annex B page 13[4a].

¹⁴ Investigation Report, page 6.

¹⁵ <https://www.orr.gov.uk/sites/default/files/2023-07/annual-assessment-of-network-rail-2022-23.pdf> , page 3[4] and [5].

- *financial pressures, because of incentive payments due to poor train performance, industrial action and high inflation.*

Taken together, these factors presented a significant management challenge. All are likely to continue to affect Network Rail's overall performance in Year 5, with ongoing impacts of climate change and industrial action (including its legacy effects), and with financial pressures being managed by deferring renewals..." (emphasis added).

2.11 See also your letter approving CP7:

"Network Rail's CP7 delivery plan was published on 28 March 2024 following approval by the SOS. This has been developed in a challenging funding environment and against a backdrop of economic challenges (including inflation) and other uncertainties which have confronted the rail industry since the Covid-19 pandemic. Network Rail has had to make choices about how expenditure should be prioritised to deliver best value for the railway now and in the future. Network Rail must also meet the challenges of climate change by contributing to a low-emissions railway and planning for severe weather events."¹⁶ (emphasis added)

2.12 And in the Investigation Report:

"The deterioration in train service performance is driven by many different factors, including those within Network Rail's control as well as wider industry factors and external causes (such as extreme weather). There is not one simple or quick solution."¹⁷ (emphasis added)

2.13 Finally, the complexity of the railway system means that forecasting the impact of system-wide change is highly challenging. While extensive modelling has been undertaken, it has not always been possible to estimate impacts on people, systems, and technology across a fragmented but interconnected array of entities, operational disciplines, and geographies. As a result, a full understanding of the impacts of specific changes is only possible through observation of live operations. In recognition of similar challenges (which Network Rail has raised previously), we note that the ORR has been driven to alter its approach in CP6 (where its performance trajectories, which we maintain were undeliverable, were set for the entire five-year control period, 2019-2024) whereas in CP7, the ORR has reduced the trajectory period to initially two years.¹⁸

¹⁶ ORR letter accompanying approval of the CP7 delivery plan dated 28 March 2024.

¹⁷ Investigation Report, page 6[1].

¹⁸ PR23 final determination: Settlement document for the Wales & Western region, 31 October 2023, pages 8-9 [2.12-2.19].

- 2.14 The ORR monitored performance delivery in CP6 through the Consistent Region Measure (CRM-P). This metric captures passenger train delay for incidents whose cause is attributed to Network Rail. We have highlighted increases in reactionary delay including material drivers outside of Network Rail's direct control within the "whole industry" operation. An operator's ability to recover from any incident is impacted by reduced fleet availability, efficiency-led traincrew diagramming and availability, and extensive and prolonged operator industrial action. A typical incident recorded under CRM-P as a Network Rail attributed initial cause, often takes longer to recover because of compounding industry factors. This impact on Network Rail CRM-P is not reflected in baselines based on historic incident trends. In CP7 the move to On Time as a tier one success measure increases further the need for accurate differentiation between the causes and drivers of reliability at an industry level.
- 2.15 We strongly urge the ORR not to be drawn into consideration of breach of condition 1 through the lens of hindsight with the resultant danger of turning an unforeseeable event into one that could have been anticipated.

3 THE LEGAL FRAMEWORK

- 3.1 As you know, the purpose of an enforcement notice is to secure compliance with the licence. It should not be punitive and cannot be imposed to punish Network Rail for perceived past breach. The ORR must therefore assess whether Network Rail *is* breaching its licence or is likely to breach its licence.
- 3.2 Critical to the ORR's decision making process on the question of breach of condition 1 is the proper and rigorous application of the statutory and policy test as set out in s55 and s4 of the Railways Act 1993 (the Act) and its Holding Network Rail to Account (Holding to Account) policies for CP6 and CP7.
- 3.3 An assessment of the ORR's determination in the Decision Letter and the Investigation Report reveals that the appropriate legal framework has not been properly applied which has led the ORR into error, resulting in a conclusion of breach of condition 1 which cannot be justified.
- 3.4 To assist the ORR in its review, we have set out below the appropriate statutory framework and principles from the ORR's own policies which must be applied when reviewing your decision. In summary, you must ensure that:
- (a) The proposed order is within the ORR's powers.
 - (b) The required statutory procedure has been followed.
 - (c) The principles of fairness and natural justice have been followed.

- (d) The proposed order is consistent with the ORR's own policies.

Particularly, we draw your attention to the following:

- (a) The power to make an enforcement order derives from s55 of the Act.¹⁹
- (b) The duty to make an enforcement order in circumstances where a breach of a licence condition is found is subject to any of the four statutory exceptions applying:²⁰
- (i) where to do so would be in conflict with the ORR's *duties under section 4* of the Act;
 - (ii) where Network Rail *has agreed to take, and is taking, all steps* that the ORR considers can secure or facilitate compliance with a licence condition and the ORR considers that it is not appropriate to make an enforcement order;
 - (iii) where the licence breach will not adversely affect the interests of users of railway services or lead to an increase in public expenditure and the ORR considers that it is not appropriate to make an enforcement order; or
 - (iv) it is more appropriate to take action under the Competition Act 1998;
- (c) The s4 duties require the ORR to exercise its functions in the manner which it considers best calculated, amongst other things:
- (i) to impose on Network Rail the minimum restrictions which are consistent with the ORR's enforcement functions;²¹
 - (ii) to enable Network Rail to plan the future of its businesses with a reasonable degree of assurance;²² and

¹⁹ S.55(1) of the Act provides that: "*Subject to subsections (2) to (5C) and section 56 below, where the appropriate authority is satisfied that a relevant operator is contravening, or is likely to contravene, any relevant condition or requirement, it shall by a final order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.*"

²⁰ The four exceptions are contained in s55(5)-(5B) of the Act and are also set out at page 25[9] Holding to Account policy for CP6 and page 29[5.11] Holding to Account policy for CP7.

²¹ S4(1)(f) of the Act 1993.

²² S4(1)(g) of the Act 1993.

- (iii) the ORR is also required to act in a manner which it considers will not render it unduly difficult for Network Rail to finance any activities or proposed activities in relation to which the ORR has enforcement functions.²³
- (d) Enforcement powers will be used firmly but *fairly* and in a timely manner.²⁴
- (e) The ORR should adopt a *staged process* of review, investigation and escalation and consider the range of regulatory tools available before choosing the most appropriate.²⁵ Action the ORR will take depends on:
 - (i) the nature, severity and urgency of the concern;
 - (ii) the ability of stakeholders to resolve issues; and
 - (iii) Network Rail's response to the issue.²⁶ As stated, the ORR "*will always aim to take action to resolve concerns and secure improvements promptly without the need to resort to formal enforcement, particularly to minimise harm to passengers or freight customers*" and that the use of its statutory powers is a "*last resort.*"²⁷
- (f) *Risk-based* approach: the ORR must focus its resources where it considers the risks are greatest.²⁸
- (g) *Targeted* approach: the ORR must target specific concerns and the part(s) of Network Rail's business that it considers responsible, whether that is a particular route, business units in the corporate centre, or ultimately Network Rail's Board.²⁹
- (h) *Proportionality*: any actions the ORR takes must reflect the scale and nature of the problems it is seeking to address and the likely costs and benefits to different parties

²³ S4(5)(b) of the Act 1993.

²⁴ ORR's economic enforcement policy and penalties statement – Great Britain dated November 2017, page 13[52] and page 21[85].

²⁵ ORR's economic enforcement policy and penalties statement – Great Britain dated November 2017, page 13[49] first and second bullet points

²⁶ Holding to Account policy for CP6, page 7, Figure 2.1 and Holding to Account policy for CP7, page 10, Figure 2.1.

²⁷ That an order is a remedy of last resort is also clear from the statutory framework, which requires the ORR to be satisfied that none of the statutory exceptions under s55(5A), s55(5AA) and s55(5B) of the Act apply before it can make final order.

²⁸ Holding to Account policy for CP6, page 6[11] first bullet point and Holding to Account policy for CP7, page 8[2.5].

29 Holding to Account policy for CP6, page 6[11] second bullet point and Holding to Account policy for CP7, page 8[2.5].

of taking action.³⁰ This should be applied to enforcing all types of licence obligations, including those that require judgement or an assessment of the adequacy of the licence holder's performance.³¹

- (i) *Transparency*: the ORR must be clear with stakeholders about its view of Network Rail's performance, whether it has any concerns and what action it is taking and why enforcement action is proposed.³²

4 THE ORR'S APPROACH TO THIS INVESTIGATION

4.1 Importantly, the ORR is accountable in that it has an obligation to comply with the rules of administrative law in its decision-making process as ultimately, as you are aware, the ORR's decisions may be subject to scrutiny by the higher courts. As you know from our correspondence, we have concerns about the ORR's approach to this investigation. We make the following eight points.

4.2 **First**, we have asked the ORR to explain its investigation and decision-making process.³³ As a matter of natural justice and in compliance with your own policy which requires transparency, it is fundamental that we can understand *how* you have come to the decision that you have *in order* that we can respond properly.³⁴ We asked you to explain the process followed by the ORR Board in making its decision and for all the information that was put before the ORR Board. A partial response was provided on 14 June 2024 which did not satisfactorily explain the process.

4.3 **Secondly**, you have not explained how you intend to discharge your statutory obligation to consider these representations. We assume that the reviewer/s will not have hitherto been involved in the investigation and decision-making process, in other words, a "clean team" will be engaged to ensure independence and impartiality. Please confirm that this is correct, and if not, who will be considering these representations.

4.4 **Thirdly**, as you are aware, throughout this investigation, we have raised concerns about the timescales within which you have required us to respond to: (1) detailed multiple lines of enquiry; (2) a case to answer, in an investigation into events spanning the last 3 years (with

³⁰ Holding to Account policy for CP6, page 6[11] third bullet point and Holding to Account policy for CP7, page 8[2.5].

³¹ ORR's economic enforcement policy and penalties statement – Great Britain dated November 2017, page 14[59].

³² ORR's economic enforcement policy and penalties statement – Great Britain dated November 2017, page 16[67-68].

³³ NR/ORR letter 11.06.2024.

³⁴ ORR's economic enforcement policy and penalties statement – Great Britain dated November 2017, page 16[67-68].

the intervening challenges of the Covid-19 pandemic) and in the context of the ORR describing this as a "serious" breach; and (3) the Notice of proposed order.

- 4.5 Our reasonable requests to have a fair and proper opportunity to respond to your multiple lines of enquiries and questions have been unjustifiably refused.³⁵
- 4.6 It is not correct to state that you have given "*extensions to deadlines when requested*."³⁶ This is contrary to the ethos in the ORR published policy which requires the ORR during the monitoring stage to "*also take account of any supplementary information required to provide a rounded and balanced assessment*,"³⁷ in that inherent in the policy must be an ability for the recipient to have adequate time to provide the information *in order* for the ORR to make a balanced assessment.³⁸
- 4.7 Whilst we have endeavoured to provide as much information as possible both in writing and orally, in the time provided, there has not been fair and adequate opportunity to explain why we firmly believe we are not in breach of condition 1. This is in the context of an investigation which has not been labelled "urgent"³⁹ by the ORR.
- 4.8 **Fourthly**, this has been compounded by our repeated requests for disclosure of material provided by e.g. passenger and freight train operators, funders and passenger representatives referred to in the Decision Letter which was said to have been considered by the ORR.⁴⁰ Put simply, without sight of this material, we have been denied a proper opportunity to respond to the ORR's case to answer in what has been described by the ORR as a "serious" breach.⁴¹
- 4.9 **Fifthly**, the processes the ORR has used to evaluate, verify and assess the accuracy of the evidence and third-party views have not been shared with Network Rail. The evidence upon which third-party views are predicated is unclear. There is limited reference by the ORR to its rationale and evidence supporting wider assertions and draft conclusions. For example, there are various references to stakeholders' views, but no detailed evidence is referred to/attached (other than a precis of issues and engagement with a stakeholder workshop).

³⁵ We note that the ORR in the ORR/NR letter 08.05.2024 granted an extension of 1 day to respond on the accuracy of the draft Investigation Report. The ORR is incorrect to state that it has granted all extensions requested.

³⁶ ORR/NR letter 22.04.2024, ORR/NR letter 07.06.2024, and ORR/NR letter 26.04.2024.

³⁷ Holding to Account policy for CP6, page 11[15].

³⁸ Holding to Account policy for CP6, page 11[15].

³⁹ Holding to Account policy for CP6, page 17[3], page 24[Figure 5.2] and Holding to Account policy for CP7, page 9[2.8], page 28[Figure 5.2].

40 NR/ORR letter 11.06.2024 and NR/ORR letter 22.04.2024.

41 ORR/NR letter 29.05.2024, page 4.

Network Rail must be provided with such information so that it can meaningfully review and respond to it, allowing for a fair and reliable outcome.

- 4.10 **Sixthly**, we are entitled to know the basis on which the ORR makes its decisions. Inadequate reasons have been provided by the ORR as to why it has found on the evidence in this investigation, that none of the statutory exceptions apply.
- 4.11 **Seventhly**, in order to commence a formal investigation, the ORR must have decided that there was some evidence of a breach of conditions 1, 3 and 5 of the Network Licence. By 9 April 2024, we note that the preliminary view was limited to a contravention of condition 1. The ORR Board's concerns were satisfied that there was no case to answer in respect of conditions 3 and 5 (see letter of 29 May 2024). We pause to observe, first, that the preliminary view followed our detailed submissions in January 2024 and that the ORR Board's decision came after our submissions of 29 April 2024 were provided. Secondly, the no case to answer assessment is based on the (lack of) *evidence* as opposed to finding that despite there being sufficient evidence of a breach, enforcement was not justified because, for example, it was not in the public interest. Therefore, logically, it must follow that any factual matters which were considered by the ORR as relevant to a breach of conditions 3 or 5 cannot now form part of the consideration for breach of condition 1, if no case to answer was found for those conditions.
- 4.12 For instance, there is a distinction drawn in the Network Licence between the duty under condition 1 to secure the operation, maintenance, renewal and replacement, improvement and enhancement and development of the network (in accordance with best practice etc) and the separate duties under condition 5:
- (a) to *plan* on how it will comply with its Network Management Duty in the short, medium and long-term (condition 5.1); and
 - (b) its duty in respect of *asset management* (condition 5.5).
- 4.13 The allegations relied upon by the ORR to justify breach of condition 1 include that Network Rail "failed to plan sufficiently for cumulative changes on the network", "does not fully understand the extent to which different operational factors are driving increased delay" and "has weaknesses in its processes for learning lessons from incidents", all of which fundamentally relate to suggestions of deficient planning, i.e. the condition 5 duty. For example, the ORR's contention that we failed to properly plan for Nuneham Viaduct and that Project Brunel was not sufficiently developed. Furthermore, criticism is made of Network Rail's asset management of the overhead lines between Paddington and Airport Junction as part of the ORR's evidence relied upon to find a breach of condition 1, yet no

case to answer has been found in relation to the asset management duty under condition 5.

4.14 **Finally**, should a final order be imposed, we are unclear about what you specifically require by 31 August 2024. For example, it would be helpful to know what you mean by a "*robust and evidenced plan*" and whether, given the phraseology in the order "*in particular*" and "*but not limited to*" there are any other requirements not set out which you expect to be included.

5 **BREACH OF CONDITION 1**

5.1 We turn next to consider whether the ORR's finding of a breach of licence condition 1 is justified. Whilst Network Rail accepts that some parts of the Wales & Western region are not performing to the level that we expect, we do not accept that this amounts to a breach of condition 1 when properly analysed against the required regulatory framework.

5.2 We note that whilst the power to make an enforcement order under s55 of the Act only arises where the ORR is satisfied that there is a *current or likely future* breach of a licence condition, much of the investigation findings reflect *past* conduct and historic issues, which are therefore outwith consideration of breach of condition 1 for the purposes of an enforcement order.⁴² See the Notice dated 29 May 2024 which refers to a historic failure to plan for cumulative changes on the network, past incidents from which it is said lessons were not properly learned or implemented, previous iterations of Project Brunel and our performance recovery plans, and the prior leadership and governance structure. In our view, this is a material error of law.

5.3 It is critical to note that condition 1 does not impose upon Network Rail an *absolute duty* to achieve the Network Management Purpose. Its duty is to secure the operation and maintenance of the network *in accordance with best practice* and in a *timely, efficient and economical manner*. It must do so *to the greatest extent reasonably practicable* having regard to *all relevant circumstances*, including the ability of the licence holder to finance its licensed activities.

5.4 Network Rail strongly disputes that it has failed to act in accordance with *best practice*. We are committed to the application of best practice in all aspects of performance management and apply it throughout our business. We note that the ORR does not appear to have identified any specific examples of industry *best practice* that the Wales & Western region has failed to follow.

⁴² ORR/NR letter 29.05.2024 you refers to past consideration in respect of conditions 3 and 5: "*The ORR's Board also confirmed that there was not sufficient evidence to show that Wales & Western was or is in breach of licence conditions 3 and 5 in addition to condition 1*" (emphasis added).

- 5.5 In order to justify a breach of condition 1, the ORR must also be satisfied that Network Rail in the Wales & Western region failed to secure the Network Management Purpose *to the greatest extent reasonably practicable* having regard to *all relevant circumstances*. It is submitted that what is *to the greatest extent reasonably practicable* must be judged against what is appropriate in all the *relevant circumstances* as they exist at the relevant time, rather than what is appropriate with hindsight and is not to be assessed in a vacuum nor through a single narrow lens.
- 5.6 The ORR is obliged to take into consideration whether what was done by Network Rail to mitigate underperformance was (to the greatest extent) reasonably practicable in the context of *all* of the relevant existing circumstances, which include any relevant asset, finance and safety considerations. It is relevant, for example, that Network Rail must operate within the limits of its fixed funding arrangements. As you have stated in section 4, paragraph 6, of your Holding to Account policy for CP6, "*we have high expectations of Network Rail but we will also consider the constraints Network Rail is operating under in forming our judgements.*"
- 5.7 As recognised by the ORR in the Investigation Report, there is not "*a singular issue driving poor train service performance in Wales & Western which, if resolved, would turn around performance.*"⁴³ The deterioration in performance has been driven by a combination of many different factors, including those within Network Rail's control as well as wider industry factors and external causes. Over CP6 and CP7, multiple factors, not all of which are within our direct control, have combined to impact network punctuality and reliability. We have done our best to respond to these by adapting our range of approaches to address emerging issues and by learning lessons from less successful approaches.
- 5.8 The Wales & Western region has been operating through an unprecedented and exceptionally challenging period. There have been transformational changes including the Great Western Electrification Programme and the staged introduction of the full Elizabeth Line service and complex timetable uplifts leading to what has become an increasingly heavily used infrastructure.⁴⁴ The opening of the Elizabeth Line and introduction of through running from the Western route to Central London and the Great Eastern Main Line has been a generational transformation for the route. Whilst the changes have led to an

⁴³ Investigation Report page 6, heading 1.

⁴⁴ The Western Route is now operating more trains than ever before and the number of station stops on the route is 18% higher than the pre-pandemic peak. It is the only region in which the traffic is higher than it was pre-Covid-19. The opening of the Elizabeth Line has seen this part of the railway grow from 50 million journeys a year to a projected 200 million a year for 2023/24, with more growth anticipated throughout CP7. Paddington Station has become the second most used station in the country with 59.2 million entries- exits in 2022/23 compared to 24 million the previous year.

improved level of service opportunity for passengers, they have led to a whole system change in the nature of the operation (to a metro-style railway in the Thames Valley). The cumulative, transformational, effect of these unique factors has significantly impacted on our (and the industry's) ability to accurately forecast which we do not think has been sufficiently accounted for in the ORR's decision-making process. Its impact cannot be underestimated and had these relevant circumstances been properly taken into account, the ORR could not have made the decision that Network Rail is in breach of condition 1.

- 5.9 In addition, we have had to deal with wider whole-industry factors and other uncertainties that have confronted the rail industry since the Covid-19 pandemic, which include but are not limited to: uncertainty around whole network future passenger performance expectations; forecasted increases in passenger demand; constrained funding against a backdrop of economic challenges, including inflation; train crew issues; continuing industrial action; the introduction of new rolling stock fleets; trends in extreme weather in the region as a result of climate change; and trends in external impacts including trespass and fatalities. We believe these have impacted more significantly in the Wales & Western region than on other regions because of the challenging environment within which it has been operating, as described above.
- 5.10 Taking industrial action as a specific example, the railway has been through an extraordinary period recently. Network Rail and operator employees have staged multiple days of industrial action, which continues amongst the operators, and which has directly resulted in cancellations to services across all regions, a reduction of levels of scheduled maintenance work, service recovery and associated operational resilience. It is important to note that the impact of any industrial action goes beyond the day of any strike itself. Both Network Rail and our operator partners believe that the impact of loss of goodwill and flexibility among staff on service recovery is underestimated but is important in explaining the increase in reactionary delay. These impacts are likely to persist as goodwill typically takes a long time to restore.
- 5.11 Another relevant example is our implementation of the Modernising Maintenance programme which, while it is set to bring undoubted long-term benefits, has created some immediate resourcing challenges. We explained these in some detail in our earlier submissions, and of course the ORR is aware of the programme, but here again we do not believe the ORR has given due weight to the impact on Network Rail's ability to maintain performance levels.
- 5.12 All of the above factors are highly relevant to the reasons why the Wales & Western region may not be performing as well it should be, yet the ORR has not stated whether or how these factors formed part of the assessment process. We believe that, had all of these

relevant factors been given due consideration, you would not have come to the conclusion that we are in breach of the licence.

5.13 Doing our best to understand how the ORR has found Network Rail in breach of condition 1, we make the following points, in relation to each of the four alleged particulars of breach.⁴⁵

5.14 We have focussed on the four areas set out in the Notice, and in particular Annex B, but we note that the Notice refers to several other unidentified factors. See paragraph 8 (page 4) of the Notice "*Several areas of concern and deficiencies were identified. These include the following...*". We are unable to respond as no indication is given of what other factors played a part in the ORR's decision.

Weakness in leadership and governance

5.15 We agree with the ORR that "*Leadership is essential to any organisation's setting of priorities.*"⁴⁶ As the attached diagram reflects, we have given careful thought to, and strengthened the route leadership structure and capability in the Wales & Western region over the last eighteen months such that we are confident that the region *is* set up to drive optimised train performance outcomes.

5.16 We are pleased to note that the ORR has recognised that: "*where the region's leadership has had time and opportunity to provide clear direction, accountability and effective governance, such as on the Wales route, this has had a notable impact on arresting the decline in Network Rail's contribution to train performance*"⁴⁷ and that, "*on the Wales route, there are signs that cultural changes made are starting to deliver improved contribution to train performance. This is supported by the views of the stakeholders.*"⁴⁸ We are confident that led by Rob Cairns the team will continue to build on the already positive work in delivering our network duties in the Wales & Western region.

5.17 Some of our work and consequential improvements includes:

- (a) A 100-day review of the Wales & Western region by Rob Cairns, including of whether the operational model is delivering core purposes and whether the structure is supporting the operational model. This concluded that both Route Directors brought drive and energy under challenging circumstances and have continuously improved their structures including strengthening their top line teams. The Route

⁴⁵ We note that paragraph 7[7a] of the Notice and Annex A, paragraph A, page 9[A] of the final draft order do not accurately replicate the requirements of condition 1.

⁴⁶ Investigation Report, page 34[3.1].

⁴⁷ Investigation Report page 35 [3.7].

⁴⁸ Investigation Report page 35 [3.8].

Directors have been given accountability levers for the command of operations, maintenance and renewals so they can directly influence outcomes.

- (b) Changes are in place to align operations and asset management in the organisational structure and to create new roles directly aimed at performance consolidation. Accountability for asset management is being devolved to the routes, in line with other regional models. Infrastructure Directors at route level will be responsible for engineering and asset management leadership. This will improve performance (and safety) by creating clear accountability within each route for asset engineering lifecycle during CP7, whilst maintaining clear line of sight to the regional engineering team.

5.18 The ORR has stated that it considers that the Nuneham Viaduct closure "*demonstrated substantial weakness in the region's approach to understanding and managing the network effects of engineering decisions and how it identifies and escalates resultant performance risks both internally and with operators.*"⁴⁹ It is further suggested that "*the severity of the issue was not recognised earlier.*"⁵⁰

5.19 Whilst we accept that a short notice ad hoc blockade was not optimal for our passenger and freight customers, we strongly dispute the above characterisation of our approach to the Nuneham Viaduct closure, for the following reasons:

- (a) Senior leadership were aware of the risk and the potential impact of closure.
- (b) The initial engineering to inject the polymer grout to support the structure was an established and proven approach and was expected to be effective in keeping the viaduct operational while a permanent and complete solution was developed.
- (c) We subsequently took independent advice from Southampton University, supporting the Technical Authority engineers.
- (d) The issues and options were discussed with operators at the TSR Board. Alternative engineering interventions were considered but would also have involved planned route closure.
- (e) However, the acceleration of the degradation of the viaduct was unexpected and led directly to the short notice route closure.

⁴⁹ Investigation Report, page 8[4].

⁵⁰ Investigation Report, page 47[2].

- 5.20 We are confident that management of the Nuneham Viaduct was timely, efficient and economical to the greatest extent reasonably possible having regard to all relevant circumstances.
- 5.21 Importantly, the closure of the Nuneham Viaduct was a past event (April 2023) which does not go towards proving that Network Rail is currently in breach of condition 1. Given the leadership and governance structure in place, asset management and operational decision making is now much more aligned.
- 5.22 The ORR has sufficient evidence of the impact of the changes that we have already made to demonstrate that we are not in breach of our network duties under condition 1 and that we are taking or have agreed to take all proportionate steps to ensure compliance. In following your stages process of review, we suggest that this is not a situation requiring formal enforcement given that we have demonstrated our ability to resolve the issues of concern to the ORR.

Failure to plan sufficiently for cumulative changes on the network

- 5.23 We do not agree that we failed to plan sufficiently for cumulative changes on the network in relation to timetabling, asset management or operation. We have previously submitted extensive documentation to demonstrate that we did duly consider and plan for the changes, including by way of advanced timetable development and performance modelling, which was carried out by Treno Labs and shared with the Event Steering Group, operators and funders. We have also provided you with material relating to planning for asset management which includes, for example, analysis of Thames Valley core route asset performance and an OLE peer review. For operations, information provided includes Elizabeth Line preparedness modelling, operational co-working and whole industry preparation and planning sessions.
- 5.24 The criticism appears to be that the Wales and Western region has "*consistently overestimated the performance improvement it would achieve*", reflecting both an "*over-optimism of the impact*" that the performance recovery plan (PRP) actions would have and an "*under-estimate of the impact that contributory factors to poor performance would have, including new services and increased network busyness.*"⁵¹
- 5.25 We remain of the view that the development planning and timetable modelling conducted by the Wales & Western region was robust and appropriate, and in accordance with *best practice*. However, as the ORR knows, future performance is extremely difficult to accurately predict and the full impact of changes is often not seen until they are in operation.

⁵¹ Investigation Report, page 103[6.25].

- 5.26 In the case of the Wales & Western region, performance has been good on many days and weeks, however, on days of industrial action (see page 15), the impact to performance caused by reactionary delay has been severe. The Wales & Western region is therefore working extremely hard to address the issue of reactionary delay. The extraordinary and unprecedented nature of the industrial action (with operator action ongoing) could not have been predicted and therefore planned for.
- 5.27 In August 2022, Network Rail produced consolidated PRPs for the Wales & Western region. These were acknowledged by the ORR to be comprehensive with quantified, timebound actions for each of the key areas of attributed delay. The PRPs provided a framework for the ORR to monitor performance improvement and we provided you with regular updates on the progress on the PRPs. Although the updates to the ORR were paused as a result of the commencement of the formal investigation in November 2023, the iterative updates and improvements to them continued and are continuing.
- 5.28 As acknowledged by the ORR, Network Rail delivered well against the plan, completing 116 actions out of 140 as at December 2023.⁵² Whilst implementation of the plans did deliver benefits to delivery for passengers and freight, they have not reversed the decline in overall train performance because, as the ORR points out correctly in the Investigation Report, the failure to reverse declining performance is due to new issues arising, including those that are beyond Network Rail's control.⁵³
- 5.29 We note that the ORR specifically states that: "*Network Rail is failing to demonstrate that it is taking and will take all necessary steps across the region to improve performance to the greatest extent reasonably practicable taking account of all relevant circumstances, because its plan to address poor performance in the Thames Valley (known as 'Project Brunel') is not sufficiently developed to address longer-term asset sustainability, asset reliability and operational practices, and it is limited to the Thames Valley area of the Western route*"⁵⁴ in order to demonstrate a failure to plan sufficiently for cumulative changes on the network and breach of condition 1.
- 5.30 We disagree and Project Brunel needs to be understood in its proper context. In December 2023, Network Rail developed a bespoke recovery team and programme of works known as "Project Brunel" to tackle the asset failure issues in the critical section of track in the Thames Valley area. We make it clear that Project Brunel was not in response to regulatory scrutiny,

⁵² Investigation Report, page 7[1].

⁵³ Investigation Report, page 7[1].

⁵⁴ ORR/NR letter 29.05.2024, page 2.

rather it was designed to address performance improvement in that specific area because that is the location of some of the key asset reliability issues and biggest operational issues.

- 5.31 We believe there may be a misunderstanding by the ORR that Project Brunel is our *only* performance improvement plan currently in place, which it is not. Project Brunel is incremental to other performance improvement plans already delivered (and in progress). Aside from Project Brunel, performance planning continues to evolve and applies across the whole geography of the Wales & Western region and Network Rail has provided substantial evidence of this during the investigation.
- 5.32 The first iteration of Project Brunel shared with the ORR in February 2024 demonstrated *emerging* work focusing on assets. The work developed considerably further through March and April 2024 and Project Brunel continues to evolve, directed by data led insights. In our response to the case to answer letter we outlined some of the additions relating to improvements to operational management including a focus on reducing the risk from trespass and vandalism, and improving the industry response to incidents and on reducing the impact of disruptions. We also outlined maturing the organisational structure, and producing a defined schedule of works for the three phases of the Project Brunel programme (stabilise, improve, and sustain), the focus being on performance improvement and alignment to resilience/readiness for the construction and opening of Old Oak Common station. However, this development of Project Brunel has not been reviewed in any detail by the ORR.
- 5.33 We welcome the opportunity to share regular updates with ORR to both Project Brunel and the Wales & Western region-wide PRPs. The data from CP7 indicates an encouraging start to the year with the Wales & Western region seeing an improvement in performance outcome measures, notably in Wales. Whilst there is more to do, particularly on the Western route, the above indicates that we are heading in the right direction and we urge the ORR to allow the Wales & Western region to continue its work towards improving performance.
- 5.34 With respect to planning for overhead lines from Paddington to Airport Junction, the ORR is aware that replacement of the headspans is included in our CP7 Delivery Plan. We are currently working with suppliers to develop the scope and timing of the works and will update the ORR as this plan is developed.
- 5.35 We welcome observations in the Investigation Report that:
- (a) It is clear that there is a strong drive to turn performance around in the region.⁵⁵

⁵⁵ Investigation Report, page 5[5].

- (b) The PRP sets out actions to address all the main delay categories.⁵⁶
- (c) The Wales & Western region has shown good discipline in delivering its actions (under the PRP). Levels of delivery slippage have been low, have been accounted for and transparently communicated to the ORR.⁵⁷
- (d) The Wales & Western region has been pro-active since the inception of the PRP to identify further interventions that could be made to improve train performance, recognising that more needed to be done to improve performance.⁵⁸

5.36 We are therefore unclear why, notwithstanding the positive comments referred to above, the ORR is of the view that Network Rail is not acting to secure the operation and maintenance of the network to the greatest extent reasonably practicable having regard to all relevant circumstances. It is a continuing learning process and we believe are doing everything reasonably practicable, and in accordance with best practice, to improve performance. Furthermore, there is no need to for the ORR to make a formal order because adequate plans already exist and are being continually developed.

Understanding of the extent to which different factors are driving increased delay

- 5.37 The ORR acknowledges that there are many different factors⁵⁹ driving increased delay, some of which are within Network Rail's control and others that are wider industry factors or external causes such as extreme weather. The ORR further acknowledges that there is no one simple or quick solution and that the primary factors driving the current poor performance and the opportunities for improvement have been identified by Network Rail in its PRPs.⁶⁰
- 5.38 The criticism appears to be that Network Rail does not *fully* understand the extent to which different operational factors are driving increased delay. However, it is not possible to precisely quantify the impact of each as they interact to lead to a cumulative impact. In line with *best practice*, we have undertaken a systematic evaluation of the causes and impact of incidents, which takes into account operational factors, including primary and reactionary delay, and reviewed significant incidents as well as less obvious ones, with focus on process learning. The methodology behind the reviews is designed to provide a linkage

⁵⁶ Investigation Report, page 101[6.17].

⁵⁷ Investigation Report, page 1026.22].

⁵⁸ Investigation Report, page 106[6.31].

⁵⁹ Investigation Report, page 6[1].

⁶⁰ Investigation Report, page 6[1].

between the delay and the causal factors enabling us to design interventions to reduce the number and impact of incidents and to support sustainable long-term improvement.

- 5.39 There are a range of factors contributing to increasing delay when incidents occur, including the complexity of the train plan, availability of traincrew, complexity in accessing parts of the route, the operational leadership and processes and industrial action. The approach to managing stranded trains and significant disruption is also more complex on a railway with a combination of train services (e.g. metro trains without toilets/ limited battery life) and with an intensive service pattern.
- 5.40 Specific actions have been completed, lessons and actions from past learning have been embedded and there are actions ongoing.⁶¹ Improvement actions have also been completed and others are progress to deliver improvements. These include issues within operator control (e.g. fleet diagrams) that we can question/challenge but cannot resolve ourselves.
- 5.41 Through the work carried out, Network Rail understands the factors as best we can (or *to the greatest extent reasonably practicable*) and have explained them to the ORR⁶². Network Rail has provided extensive analysis of the factors driving the increase in delay per incident, including illustrations of the impact of factors outside our control. Network Rail has data on factors such as time to site and time to fix that informs its action plans.⁶³ It is not clear what the ORR thinks is missing from this analysis.
- 5.42 In addition to Project Brunel, Network Rail has carried out other initiatives which are providing insight into the causes of operational performance. These include:
- (a) A deep dive into service recovery which is looking at data, good practice and applicable lessons.
 - (b) An external review of Service Recovery Metrics (April 2024) which focuses on control centre processes.
 - (c) A deep dive into the operation of the base plan to understand the key pinch points in the timetable. This approach has been successfully applied in Kent and South Western Railway.
 - (d) Revisiting the National Operations Quality Assurance Review (NOQAR) of the Thames Valley Signalling Centre in March 2024. The NOQAR identified

⁶¹ NR/ORR letter 29.04.2024, page 7.

⁶² NR/ORR letter 29.04.2024, page 5, item 2.

⁶³ NR/ORR Technical Appendix 29.01.2024, pages 177-178.

improvements which have been made in the management of operational capability and safety since the last review 14 months ago.

- (e) Use of the RM3, and where applicable RM3-P, to support the Wales & Western region to put in place the leadership, cultural and governance structure to make the recent improvements sustainable.

5.43 Importantly, these reviews have enabled Network Rail to have a better understanding of the relationship between primary and reactional delay. Network Rail is doing *everything reasonably practicable*, and *in accordance with best practice*, to reduce the impact of incidents on performance.

Weaknesses in processes for learning lessons from incidents

5.44 We are pleased to read in the Investigation Report that:

- (a) You have seen evidence that Network Rail conducts Incident Learning Reviews (ILRs) and Significant Performance Incident Reviews (SPIRs), in collaboration with operators and that we have processes in place that track the implementation of lessons identified.⁶⁴
- (b) The sample you reviewed shows that these reviews are generally being conducted to a good standard with clear actions and recommendations.⁶⁵
- (c) We have provided good examples of certain actions being incorporated into our risk management process and others resulting in specific actions, such as the replacement of failed hydraulic hoses.⁶⁶
- (d) We have shown that we can effectively embed learning on a multilateral basis, for example, in relation to the fatality at Pangbourne in January 2024.⁶⁷

5.45 We note what you say about learning from incidents not being applied consistently and we make the following comments in reply.

5.46 In our April submissions, we set out Network Rail's processes for learning lessons from incidents, which include undertaking reviews after each significant operational incident. The reviews draw on data and first-hand experience and generate a range of tactical and strategic outcomes which are then implemented within the routes and where applicable

⁶⁴ Investigation Report, page 94[5.144].

⁶⁵ Investigation Report, page 94[5.145].

⁶⁶ Investigation Report, page 94[5.145].

⁶⁷ Investigation Report, page 96[5.152].

across the network, and vice versa. The lessons from the Great Western Electrification Programme, the Elizabeth Line deployment and other changes across the network, such as the ongoing HS2 works at Euston, the ETCS programme on the East Coast and the East Coast timetable recast have all been reviewed extensively, covering both asset and operational incidents. The lessons are embedded into our future ways of working.

- 5.47 We have applied lessons learned from major programmes to our planning for the impact of HS2 on the Western route and will continue to do so. At the end of 2023, we commissioned two independently led reviews into different aspects of the work to deliver (and ultimately operate) Old Oak Common station which will provide connectivity between HS2, the Elizabeth Line and Great West Mainline services. The review reports emphasised the benefits of a cross-industry collaborative approach to planning and delivering the new infrastructure, noting that success can only be achieved through a cross-industry effort involving multiple organisations, needing the whole sector to come together in an integrated way. The reviews, which were led by independent experts, have enabled Network Rail to develop the plan for Old Oak Common with cross-industry consensus.
- 5.48 In respect of the incidents you cite, including Nuneham Viaduct, we commissioned an independent report and we have embedded learning. Given that every incident is different, our incident learning is a continuing process which we are committed to. Following Nuneham we have carried out further work on the safety of structures to improve the measures and insights available to monitor patterns of safety risk and intend to carry out further work in the regions and routes to keep these insights up to date and make them regularly available to decision makers. Through CP7 we will use this alongside reporting on our critical structures to gain greater insight into the effectiveness of our asset management strategies and refine our plans.
- 5.49 Network Rail has reviewed its incident learning process and governance to ensure that knowledge is effectively shared and implemented and where possible, results are tracked through a number of different routes.
- 5.50 The System Operator team are developing the sharing of lessons between routes and regions building on the Performance Improvement Management System (PIMS) framework to ensure that not only practice lessons are shared between devolved route businesses but further thematic lessons are collated and shared in a usable and pragmatic way.
- 5.51 In conclusion, we strongly believe that the evidence demonstrates we are not in breach of condition 1. We have demonstrated that we are implementing or have implemented solutions that effectively deal with concerns raised, and you can be satisfied that Network Rail is taking all steps to the *greatest extent reasonably practicable* to improve performance. We have delivered unprecedented change in the Wales & Western region in the face of

significant headwinds and without the control of all the levers necessary to manage all aspects of the situation. Our performance must be judged in that context, taking into consideration *all relevant circumstances*.

5.52 To the extent that the ORR maintains its position that there is a breach, it is our view that enforcement action is avoidable and that the point of "last resort" has not been reached.

6 OUR PROPOSED WAY FORWARD

6.1 We began this letter by reiterating our commitment to work with the ORR and all other stakeholders for the benefit of the network and all its users.

6.2 We are confident that having reviewed this letter, together with our previous submissions, the ORR will conclude that:

- (a) Network Rail is not in breach of condition 1 of the Network Licence; or
- (b) the point of "last resort" has not yet been reached such that an order is necessary.

6.3 Whilst we understand that the ORR may consider that there has already been a significant period of time for the Wales & Western region to improve performance across all areas, the analysis we have detailed above cogently demonstrates that the circumstances (including those outside our control) have meant that there is "*not one simple or quick solution*"⁶⁸ but that the strong indicators of drive, commitment and some significant improvements by us are highly indicative that overall improvement in the Wales & Western region *will* be achieved. Put another way, we do not need an incentive to improve because we are already implementing solutions that are effectively dealing with the issues you raised and taking all steps to secure and/or facilitate compliance.

6.4 We truly believe that the most effective way to bring performance to an acceptable level (which is distinct from compliance) is to continue to work with you and others collaboratively, focussing resource and time in an acknowledged challenging environment on further improvements. As explained above, our region-wide performance improvement planning, which includes Project Brunel, continues to be developed (page 20).

6.5 We ask that the current leadership is given the appropriate time to continue its good work without the need to focus on this process (and a potential statutory appeal) which, we strongly suggest, is the appropriate targeted and proportionate response to performance concerns in the Wales & Western region.

⁶⁸ Investigation Report, page 6[1].

- 6.6 We submit that in accordance with the Holding to Account policies for CP6 and CP7, focussing on continued voluntary engagement with us is in line with regulatory best practice (which involves acting in a risk-based, targeted, proportionate and transparent manner) and will achieve a fair and reliable outcome allowing Network Rail to plan its business with the requisite degree of assurance.
- 6.7 We therefore invite the ORR to continue its dialogue with us, welcome constructive new ideas or recommendations to improve performance, and seek a timely and appropriate conclusion to the investigation process.
- 6.8 We look forward to resuming our focus in earnest with the ORR to deliver an optimal network for passengers, users of freight services, our operator partners and stakeholders.

Railfuture

Railfuture is an independent voluntary organisation campaigning for better rail services. We would like to make the following input to your consultation on the ORR investigation of Network Rail's Wales & Western region's compliance with the network licence.

We consider that the amount of £3m is paltry when compared with the Network Rail budget, and is actually a disbenefit to rail users. It makes no sense for Network Rail to return money which it has been given by one arm of the state to a different arm of the state.

We propose that instead of paying the £3m to the state, Network Rail should be required to invest the money in physical measures around the Wales & Western region to improve facilities for the rail users as more direct 'compensation' for poor performance. A similar scheme was implemented several years ago when GTR were to be 'fined' for poor performance.

Transport Focus

Thank you for the opportunity to further contribute to the ORR's investigation into train performance in Wales & Western Region.

Transport Focus welcomes the comprehensive findings set out in the ORR's report. As we highlighted in our initial submission punctuality and reliability is central to passengers' experience and sense of value. Passengers in the Wales and Western region have experienced unacceptable levels of disruption and it is vitally important that the root causes flagged in the ORR's report are fully addressed in a timely manner.

While we recognise that the region has taken steps to address the manifold infrastructure related issues we welcome the ORR's requirement that Network Rail's recovery plans are enhanced to address longer term asset reliability and operational processes, as well as the wider region beyond the Thames Valley.

We would also suggest that part of the response to be submitted by Network Rail in August should include a clear plan outlining how they, working with train operators, intend to communicate with passengers as well as stakeholders. As we suggested in our previous response, the objective should be to give passengers some reassurance that a) their problems have been recognised, b) that improvements are coming, and to foster a sense of transparency and accountability. This would also demonstrate a joined-up approach, in line with the single guiding mind concept of rail reform.

Transport for London

Thank you for your communication of 29th May regarding the outcome of the ORR Investigation into Network Rail's Wales & Western region's (NRWWR) compliance with the network licence and for the opportunity to make representations on the content of the draft Final Order.

Transport for London (TfL) welcomes the findings of the ORR investigation which reflect our experience with operating Elizabeth line services over the section of the Western route from Westbourne Park Junction to Reading. The impact of the shortcomings cited in the investigation are felt more broadly by Elizabeth line customers on other sections of the Elizabeth line network as far afield as Abbey Wood, Ilford, Romford, and Shenfield. All of which have been significantly and directly affected by the adverse impacts of NRWWR performance and poor asset reliability.

In terms of the draft Final Order in Annex A of the Notice, TfL's representations are as follows:

Sections A-E

TfL has no comment on the legal basis of the Notice as stated and the authority of the ORR to take this action. TfL welcomes the ORR taking positive action to address the performance shortfall.

Section F

Para. 1a(i) TfL welcomes the focus on the Thames Valley section for further development of the improvement plan. In addition to specific focus on the replacement of the headspan-type overhead line equipment, TfL would like to see the Order give an explicit consideration to incident response, asset reliability and performance between Paddington and Heathrow Airport Junction at the critical junctions. This is critical to mitigating the wider impact to customers mentioned above.

Para. 1a(ii) The Project Brunel programme of asset refurbishment, renewal and resilience works in the Thames Valley has necessitated additional access to the railway above and beyond that provided for in the Engineering Access Statement. With this work ongoing and the potential expansion of the approach requirements under this Order anticipated, requests for additional access are expected.

Track Access, where additional is required, should be proportionate, clearly justified and represent an efficient use of the railway with demonstrable benefit and outcomes aligned to delivery of the recovery plan. It is critical that improvement plans under the Order should not offer an open invitation to shutting the railway at the inconvenience of our customers. TfL expects the provisions of Part D of the Network Code to be respected.

Para. 1a(iii) TfL supports the points raised on the governance of performance delivery, learning reviews and prioritised plans. With the impact of Thames Valley performance affecting the entirety of the Elizabeth line beyond the boundaries of NRWWR, appropriate governance and engagement with operators on the Brunel plans, implementation and performance is essential and warrants specific provision in the Order.

Para. 1a(iv) Related to the governance of performance delivery, it is imperative that

performance regime benchmarks in Schedule 8 of the Track Access Contract are appropriately set. The Elizabeth line is shortly due to undertake a recalibration exercise where the calibration data period will fall in the period of contravention. The benchmarks should be set at the expected performance level and incentivise improvement. They should not be baselined at the level of the contravention period as this will set an unreasonably low bar against which recovery back to a 'normal' level would drive significant windfall payments to Network Rail.

Para. 1b, 2 and 3 TfL has no comment.

TfL as an industry partner and critical ally remains committed to working with Network Rail to support the recovery of performance on this vital rail corridor.