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Your ref:

Our ref:
NRS11-090

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By email
joe.quill@orr.gsi.gov.uk

Dear Joe

The potential for increased on-rail competition

Thank you for the opportunity to comment on your proposals for increased on-rail competition. I have focussed my response in 3 key areas:

- the Scottish Government's approach to Better Regulation;
- ORR's Section 4 duties under the terms of the Railways Act 1993, as amended; and
- in the context of the above, the effects of the Guidance to the ORR from the Scottish Ministers.

Principles of Better Regulation

Better Regulation is a crucial element of a more successful and sustainable Scottish economy: reducing and where possible removing unnecessary burdens on business are critical elements in supporting faster sustainable economic growth. And rail is no exception to this, particularly as you consider the vital role that it plays in the economic and social wellbeing of Scotland. In our response to your consultation on objectives for PR13 we expressed a very clear view that we must take the opportunity, particularly in the context of rail reform, to simplify the regulatory system where possible.

The point above is made even more acute given that the rail industry is facing a period of reform and change. It is critical therefore that the industry is able to focus on the issues of major importance with regard to securing greater value for money and offering improved services to customers. As a result, any fundamental change in regulatory arrangements should only be considered at this point in time where there is a compelling evidence base case, both in terms of increased efficiency and better regulation.

It is clear that the imperative for railways to deliver value for money is increasing and we acknowledge that competition could be a potentially important lever in helping to drive this. However, the evidence base which is presented in support of this consultation document does not, in our view, lead to a natural conclusion that (a) your proposals will lead to greater on rail

competition nor (b) that greater competition will automatically and in all circumstances lead to greater efficiency. The evidence base with regard to the effects on Scottish rail services is particularly limited, and this has constrained our ability to fully consider the issues in the context of the policies and priorities of Scottish Ministers.

In responding to your consultation on the review of track access policy in March 2010, we expressed the view that in certain circumstances competition within the rail industry may deliver additional benefits. In addition, we also expressed a strong view that the ORR must have the right regulatory levers to achieve proportionate moderation of competition, in particular to give full regard to the effects of competition on the finances of Scottish Ministers and the need to protect their investment in services and infrastructure. Our view on this has not changed.

In the context of balancing the promotion and moderation of competition, we are of the view that the 'not primarily abstractive test' remains largely fit for purpose. It is well understood, relatively simple and, as we articulated in our March 2010 response, could also be strengthened by evaluating wider economic, social and environmental impact with regard to both the proposed and existing services.

ORR's Duties under Section 4 of the Railways Act 1993

We fully recognise that under the terms of Section 4, the ORR has a duty to promote competition in the provision of rail services for the benefit of users. However, we also recognise that this has to be balanced with a range of other duties including to promote the development of the railways network, promote improvements in railway services and allow railway service providers to plan the future of their businesses with a reasonable degree of assurance.

Scottish Ministers are by any measure the main investor in rail services and infrastructure in Scotland. The economic, social and environmental case for such investment is often predicated upon the ability to secure the necessary track access rights to run franchised services. We are therefore of the view that protecting the investment made by Scottish Ministers in rail should be regarded as a key consideration and priority in developing your on rail competition policy.

Scottish Ministers' Guidance under Section 4 of the Railways Act 1993

A key purpose of the Guidance is to support the ORR as they look to balance their Section 4 duties, including where matters relate to Scottish Ministers' expenditure. This reinforces our view that, in considering their approach to on rail competition, the ORR should give priority to supporting investment in services and infrastructure.

In addition, the Guidance articulates how the ORR should discharge their duties in Scotland with regard to the policies and priorities of Scottish Ministers as notified from time to time. Clearly, these may in some cases differ from those which apply to other parts of the GB network. This among other things reflects the statutory responsibilities of Scottish Ministers, along with the role that rail plays in supporting faster sustainable economic growth in Scotland and the often distinct nature of the Scottish rail industry and services, reflecting the distinct Scottish geographic, economic and social structure.

The reality of competition on Scotland's railways is largely unclear and the evidence within this consultation does not support a full evaluation. Given this, we would welcome further dialogue with the ORR on this issue before any conclusions are reached. In particular, we would seek assurances that there will be sufficient flexibilities within any regulatory arrangements regarding Open access should GB wide conclusions result in a potentially adverse impact on the Scottish network and finances.

I hope you find the above helpful.

Yours sincerely

A handwritten signature in black ink that reads "Frances Duffy". The signature is written in a cursive style with a large, looped 'F' and 'D'.

Frances Duffy
Director, Rail