Responses to consultation on PR18 draft determination - non Network Rail (A - L)

PR18 draft determination consultation: pro forma

This pro forma is available to those that wish to use it to respond to our draft determination consultation, structured around the main areas of the draft determination. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed below (where you wish to comment), to aid our review of responses.

Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Rebecca Holding
Job title*	Head of Infrastructure, Access Management and Strategy
Organisation	Abellio UK
Email*	

*This information will not be published on our website. Please see Appendix B of our overview document for details on how we will treat information provided to us as part of this consultation.

Our approach to producing Network Rail's determination and to regulating Network Rail in CP6

For further information, please see chapters 2 and 3 of our overview document.

We support the RDG response but would like to draw emphasis to the below points:

As a public sector body; how does ORR plan to effectively regulate and penalise Network Rail when appropriate?
We endorse the requirement for the System Operator to be well resourced.
We would welcome clarity on how the System Operator and Routes will be regulated simultaneously; particularly to avoid finger-pointing internally within Network Rail.

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

We support the ORR proposal to update the Network License to better reflect the structure of Network Rail and CP6 regulatory framework.
We endorse the RDG response; however, we do not believe the stakeholder engagement requirements are too prescriptive.
We agree with the proposed changes to the management incentives condition; we believe ORR should make it optional for Network Rail to continue to have a management incentive scheme.

Our review of Network Rail's stakeholder engagement

For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.

We support the principle of ORR's not being overly prescriptive in terms of exact requirements for stakeholder engagement (we don't believe this to be the case in the DD), however, we would like to understand how the scorecards will feature in the evaluation of Network Rail's engagement, particularly in scorecard metrics that have failed to be agreed.
We would like to understand what interventions will be made, should the ORR feel that Network Rail have not adequately engaged with Train Operators; given that this is a subjective measure that could be applied inconsistently across Network Rail Routes.

Our review of Network Rail's scorecards and requirements

For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.

We believe the performance trajectories provided by Network Rail that failed to gain agreement from Abellio operators were unambitious and lacked engagement at an early stage to ensure Operator plans were adequately reflected. This has still yet to be progressed to an acceptable level.

Considering Network Rail's deteriorating performance over recent years, we question whether the 'floor' for breach of regulatory targets should be set slightly higher? Also, the potential for inclusion of a 'trigger' to allow accurate monitoring against current performance levels.

Our assessment of health and safety

For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.

We support the ORR proposals in this area.

Our review of Network Rail's proposed costs and income

For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.

We support ORR's findings in this area.

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

We support the budgetary flexibility that has been outlined for CP6, with the view that this will drive efficiencies. We have concerns regarding how ORR will regulate and measure volume and efficiency of expenditure and would like further clarity on how ORR proposes to manage this.

We endorse the movement of £0.9bn risk funding from the centre to the Routes allowing further devolution and accountability.

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

We support the comments made by ORR in this area and have no further comment.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents

For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.

Scotland

No further comment.

Freight & National Passenger Operator route

System Operator

No further comment.

England & Wales routes

No further comment.

Any other points that you would like to make

Thank you for taking the time to respond.

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Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Cllr Adam Brookes
Job title*	N/A
Organisation	None
Email*	

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Our approach to producing Network Rail's determination and to regulating Network Rail in CP6 For further information, please see chapters 2 and 3 of our overview document.
No comments to make

Our review of Network Rail's network licence Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.
No comments to make

Our review of Network Rail's stakeholder engagement For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.
No comments to make

Our review of Network Rail's scorecards and requirements For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.
No comments to make

Our assessment of health and safety For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.
No comments to make

Our review of Network Rail's proposed costs and income For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.
No comments to make

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

No comments to make

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

No comments to make

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents

For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.

Scotland

No comments to make

Freight & National Passenger Operator route

No comments to make

System Operator

No comments to make

England & Wales routes

Re: LNE&EM Route

I would like to see both greater clarity and greater ambition regarding the proposed level crossing closures on the East Coast Main Line. It is clear that level crossings present significant risks to both the railway and crossing users. Eliminating crossings can frequently be beneficial *to the reliability, capacity, and maintenance of the railway. Subject to the provision of suitable alternatives, this can often also be beneficial to surrounding communities and the local economy.*

I would like to highlight specifically Tallington Crossing on the ECML. This is situated on an important route between the towns of Spalding, Market Deeping and Stamford in Lincolnshire. This additionally provides access to the A1 road for those locations and a wider part of South Lincolnshire.

Tallington Crossing is closed for a significant portion of each hour. This disrupts travel in the area; making journey times hard to predict and negatively impacting the response of the emergency services.

Network Rail has undertaken significant consultation and design work for a scheme to replace the crossing with a bridge. It remains unclear when work to explore this further will proceed. I would like to see greater clarity on this and engagement with the local community.

It is clear that the local community favour a bridge crossing alignment that either links to a road bypass of the village or at the very least does not rule out such a possibility. A significant local landowner has shown a willingness to provide land for this bypass but it is clear that this option may not remain on the table indefinitely. This makes the timing of the construction of the bridge, or at least a timetable for doing so, very important. It would be unfortunate if the timing was such that when, as seems inevitable, the level crossing is replaced by a bridge but then the bypass cannot be delivered and Tallington continues to experience significant through traffic.

This is important because of the disruption that the crossing continues to cause but particularly now following the recent approval of the Werrington Grade Separation project. That project will see capacity constraints at the Werrington junction south of Tallington resolved. This will enable four more paths per hour on the ECML and therefore further exacerbate the problems at Tallington crossing. It is expected to be completed within CP6 (early 2021).

Whilst the impact of the four additional paths is hard to accurately predict, for example on occasions these may correspond with movements already requiring the crossing to be closed to road traffic, it is clear this won't always be the case. This will see the crossing closed for greater periods.

Therefore I would like to see efforts to close Tallington Crossing and its replacement by a bridge delivered in CP6. It is not clear whether the current plans provide for this and so I would encourage the ORR to seek greater clarity from Network Rail and seek the inclusion of this project in CP6 if it isn't currently in their plan.

Any other points that you would like to make

Thank you for taking the time to respond.

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Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Adam Stead
Job title*	Founder and CEO
Organisation	Apollo Rail Ltd
Email*	

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Our approach to producing Network Rail's determination and to regulating Network Rail in CP6

For further information, please see chapters 2 and 3 of our overview document.

No comment.

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

No comment.

Our review of Network Rail's stakeholder engagement For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.
No comment.

Our review of Network Rail's scorecards and requirements For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.
No comment.

Our assessment of health and safety For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.
No comment.

Our review of Network Rail's proposed costs and income For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.
We were enthused to read about Network Rail's Research & Development ambitions within their Strategic Business Plan. The £440m requested by Network Rail would create huge opportunities to make rail more affordable. In signalling and train control, Network Rail announced in May 2018 that they need to spend £15bn from CP6 through CP8 to renew traditional lineside signalling using today's digital technologies.

New innovations in signalling and train control could reduce the cost of this by 50% to 75% which could save up to £10bn.

We feel that ORR's PR18 determination does not leave enough funding for Network Rail to achieve any real progress in R&D&I. ORR offering £100m would perhaps leave only £80m after governance costs, which would be only £16m/year for the whole programme. When split across track, signalling, telecoms, train control, civils, digital technologies, safety, this leaves barely £2m/year per discipline.

We agree that perhaps insufficient thought has been given to the governance of the R&D programme and how it might realise its benefits. This R&D programme perhaps should not be one £440m programme delivered only by Network Rail, but several parallel programmes by different organisations that gives an opportunity for ORR and DfT to evaluate which deliver the best value for money to the UK taxpayer for delivery of R&D&I such that ORR and DfT can determine through which mechanisms R&&I funding should be prioritised in future.

Despite this we feel that ORR's determination would not offer best value for money for tax payers. It would leave Network Rail with little choice but to spend the total £15bn required over CP6/7/8 to renew their signalling, and unnecessarily burden Network Rail with the cost of signalling renewals using today's technologies and missing out on the opportunity to save up to £10bn.

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

No comment

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

No comment.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents

For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.
No comment. **Scotland** **Freight & National Passenger Operator route** **System Operator** **England & Wales routes**

Any other points that you would like to make
R&D&I is a strategic investment to achieve benefits either via cost savings or value creation over long timescales that exceed the control period. A three-year innovation project may not deliver its benefits within the two remaining years of the control period so the case for spending on such a programme should be considered outside of the PR18 process – in a similar manner to the enhancement approvals now being separate to the periodic review process.

Thank you for taking the time to respond.

PR18 draft determination consultation: pro forma

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Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Simon Blake
Job title*	General Manager - Rail
Organisation	Aggregate Industries UK Ltd
Email*	

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Our approach to producing Network Rail's determination and to regulating Network Rail in CP6

For further information, please see chapters 2 and 3 of our overview document.

No comment

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

The treatment of the Freight and National Passenger Operators route identifies the FNPO as different to other routes and as a consequence this could lead to a weakening of its authority with the business.

It is of great importance to our and other freight customers interests, the increasing alignment of geographic routes with passenger businesses is balanced with the continued promotion and preservation of the Network for freight use.

Our review of Network Rail's stakeholder engagement

For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.

No comment

Our review of Network Rail's scorecards and requirements

For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.

The use of a single freight target FDM at geographic route is weak and provides no requirement / incentive to preserve and promote the route to freight traffic. Indeed perversely it could encourage a reduction to more easily manage this freight target. We recognise the difficulty in determining specific metrics which are within the gift of a route to deliver, but positively engaging at geographic route level to the opportunities and challenges presented by freight is important to our business. An independently scored narrative, reporting the engagement and resolution by the route to freight issues in the first instance would maintain focus, energy and effort on freight. In time this might be refined to a more quantitative metric if necessary.

Our assessment of health and safety

For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.

No comment

Our review of Network Rail's proposed costs and income

For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.

It is our understanding Network Rail are planning to generate increased revenue from their property assets. It is unclear within the Property Strategic Plan to what extent additional income is assumed from freight sites. However we are experiencing significant upward pressure in rents from sites. Many construction freight facilities are affected which provide a vital service to our growing urban environments, whilst reducing pollution, congestion and enhancing safe delivery of construction materials. There should not be a separation of the economic debates applied to Property and VUC charges which should be considered in the same calculation.

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

No comment

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

Construction traffic is extremely price sensitive with a low value product and often +50% of the cost to serve being made up of transport. It remains elastic and small cost movements will change supply chain decisions and investments to support the use of rail. The sector was exposed to an above average increase in CP5 and this is again proposed in CP6 & potentially 7 although the actual amount is unknown.

Construction rail growth in CP5 has benefitted from the contraction of the industry through the recession and returning volumes being disproportionately accommodated in large rail served quarries. As growth opportunities and confidence in the market returns further increases in rail costs will undermine future investment and supply chain choices.

It is noteworthy that with a single exception, no construction rail facility has been sufficiently attractive to fund a new connection to a privatised Network. The sector has generated growth from the re-purposing of facilities which had fallen in to disuse from other historic freight traffics. These opportunities are now largely exhausted and retention of existing and further construction rail growth will be increasingly price sensitive.

Delaying increases until later in CP6 is welcomed, but the sector is still to fully adjust to the affect of the CP5 increases as they wash through the sector. As mentioned earlier the full cost of the rail choice includes the cost of land and Network Rail's aspirations for rent increases must be tempered to be aligned to other charges.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.
Scotland **Freight & National Passenger Operator route** **System Operator** **England & Wales routes**

Any other points that you would like to make
No comment

Thank you for taking the time to respond.

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Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	John Collins
Job title*	Safety Manager
Organisation	Angel Trains Ltd
Email*	

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Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

2018 periodic review draft determination

Supplementary document – Review of Network Rail's network licence

3.31 Timetable Planning –

3.31 recognises that the development and production of the network timetable is one of the key outputs of the System Operator (SO). Also, that the licence sets out the broad requirements around timetable planning which would be allocated to the SO. The SO will be required to: run an efficient and effective process, reflecting best practice, for establishing a timetable, and any changes to it. Reflecting on the above, have these requirements been assessed against the June 2018 revised timetable changes at GTR and Northern Rail? Have the lessons learned from this been factored into these requirements, or are more obligations required in this area?

Network Rail network licence review Consultation on draft network licence

PART A:

Railway safety and standards

We welcome the clarity regarding the status of RISs i.e.

‘’require Network Rail to comply with applicable Railway Industry Standards or to consult with affected parties (for example train operators) where it proposes to deviate from a Railway Industry Standard in full or in part and to deploy equally effective means of achieving its purpose. 1.11 Recognising that it is important to achieve consistent approaches at the operator / infrastructure interface, we also propose to make similar changes to the equivalent conditions in other operator licences. ‘’ <u>PART B: Draft legal text of the revised licence -</u> With regards to Part D, 12. Safety and Standards, The licence holder shall comply with; the (RGS) Code; RGSs and subject to the condition set out in 12.3, RISs (or parts thereof). There is no reference to the licence holder complying with TSIs or, (as from the start of CP6 -April 2019) TSI Notice(s), should there be?

Any other points that you would like to make
None.

Thank you for taking the time to respond.

Arriva UK Trains – Response to ORR's CP6 Draft Determination

August 2018

Introduction

These comments respond to the ORR's Draft Determination. The response is provided on behalf of Arriva plc, its subsidiary Arriva UK Trains Limited and its wholly owned train operating companies (TOCs), Arriva Rail London Limited, Arriva Rail North Limited, Arriva Trains Wales/Trenau Arriva Cymru Limited (ATW), Grand Central Rail Company Limited, The Chiltern Railway Company Limited (CR) and XC Trains Limited (XC). Arriva is a wholly owned subsidiary of Deutsche Bahn AG (DB AG).

Arriva views the Periodic Review (PR18) process as an important element of a coordinated series of activities necessary to ensure that all elements of the Rail Industry structure work together to support the delivery of the vital contribution that rail needs to make to society in the UK.

Therefore, Arriva has played an active part in the PR18 process to date and intends to do so going forward. In particular, Arriva is supporting the coordinated industry activity being undertaken by the Rail Delivery Group (RDG).

On this basis, Arriva endorses the responses provided to ORR by RDG relating to the draft Determination issued by ORR and confirms that Arriva's views are firmly reflected in the RDG response.

Regardless, in addition to RDG's response, Arriva would like to take this opportunity to emphasise a few key points that have emerged through the work undertaken to date.

In addition, and as requested by ORR, Arriva Operators will be providing evidence to support why they have been unable to agree to the Performance trajectories included in the Scorecards in the Route Strategic Business Plans.

Network Rail financial settlement

Arriva agrees that the Determination should ensure that Network Rail is adequately funded to deliver the Outputs that its customers expect in an efficient manner. However, Arriva has some concerns as to how this balance has been achieved.

- Efficiency

  It is right that ORR should encourage a focus on delivering greater efficiency. Arriva is of the view that Network Rail's devolution programme, with its establishment of strong, locally managed Route businesses, will be an important enabler of efficiency improvements. The changes to the regulatory framework proposed by ORR to reflect Network Rail's devolution programme are therefore welcome.

  ORR should continue to work in a manner that enables Network Rail to embed effective collaborative working between Routes and Operators. Local efficiency plans must be delivered in a way that ensures not just efficiency but also cost effectiveness with a full reflection of the needs of both passengers and freight users in the short and longer-term.

In particular, the approach to monitoring renewal efficiency must not block the delivery of cost effective betterment where this is necessary to ensure that the Network can continue to deliver the outputs required of it. As highlighted in previous PR18 consultation responses, Arriva believes that a strict like-for-like approach will result in a reduction in Network capability over time.

- Budget flexibility

While Arriva recognises the constraints on Network Rail's ability to transfer funds from one year to another, we are concerned that the full implications of this, including the stability of the supply chain and longer-term access planning, have not yet been recognised. As a result, the mechanisms for managing the effects of these restrictions have not been sufficiently well developed either in Network Rail or ORR. Further work involving ORR, Network Rail and Network Rail's customers is needed to develop appropriate mitigations for the risks associated with these constraints.

- R&D Funding

Arriva recognises the ORR's concerns that Network Rail have not been able to clearly demonstrate the benefits that have been delivered by R&D funding to date. Arriva is concerned that the extra funds that ORR has allocated to deliver increased levels of asset sustainability may be at risk if the conclusions on R&D funding in the draft Determination were changed. Arriva also recognises that there are other R&D funding sources available in addition to those that might be directly allocated through the Control Period Settlement.

However, in a complex and increasingly technology enabled industry, R&D is essential to drive innovation if the rail industry is to remain relevant and cost effective in a changing world.

Arriva would therefore look to ORR to work with the rail industry as a whole and relevant third parties to develop the most effective approach to securing funding for rail R&D in the next Control Period, without reducing funding allocated in the draft Determination to deliver increased levels of asset sustainability.

Further, regardless of the level of R&D funding that is to be included in the final Determination, Arriva sees it to be essential that cross-industry collaborative governance arrangements are put in place to manage the deployment of these funds.

- Performance Innovation Fund

Arriva welcomes the establishment of a Performance Innovation Fund. Arriva sees this as a targeted aspect of the more general R&D funding discussed above.

As with the R&D funds, Arriva believes it is essential that cross-industry collaborative governance arrangements are put in place to manage the Performance Innovation Fund.

Monitoring the delivery of Outputs including Asset Sustainability and Train Performance

- Asset sustainability

Arriva welcomes the additional £1bn funding that is being allocated across the Routes to improve asset sustainability, as we remained concerned about the performance and safety implications of declining asset condition. However, Arriva suggests that ORR should allow individual Routes to determine how to deploy these funds in order to deliver this Output rather than specifying that it should be used to deliver additional renewals. For example, it may be more cost effective to invest in technological, operational and maintenance initiatives to grow asset sustainability in the context of traffic growth.

Given the importance of asset sustainability and the original expectation on Network Rail's part that it was acceptable to allow asset sustainability to decline over the course of the Control Period, Arriva sees it as essential that clear metrics and targets are established to monitor delivery in this area.

- Train Performance

Train Performance is one of the highest priorities for passengers, freight users and funders. As a result, Performance targets and trajectories form a core element of Franchise and Concession contracts. Further, these same Performance trajectories underpin many cost and revenue drivers in Franchise and Concession Business Plans. While some Franchise and Concession contracts attempt to address the contractual and financial impacts of revised Network Rail Performance Outputs determined by ORR in a Periodic Review, the mechanisms used are not all-encompassing.

Regardless, the reputational impact of lower-than-projected Performance levels will fall squarely on the Operators.

It is clear that more work still needs to be done to determine the level of Train Performance to be delivered in the next Control Period – Arriva is working closely with the Network Rail Routes to move this forward but has found it very difficult to reach agreement on appropriate performance trajectories. While there has been close and joint working on the development of performance strategies, reaching agreement on these strategies has been challenged by a lack of explanatory detail supplied by Network Rail.

Equally, reaching agreement on the modelling of the impact of other factors such as traffic growth across the industry has not been possible. Regardless, Arriva continues to look for a flow-through from the higher expected levels of asset condition delivered by the extra funding allocated to deliver improved performance outputs. Arriva is also expecting to see Network Rail do more to show how it plans to deliver its key role in managing traffic on the Network to reduce secondary delay, and for this to be reflected in Train Performance Trajectories.

Arriva is concerned that the approach taken by Network Rail in this area to incorporate Network Rail's forecast PPM into the forecasting of CRM-P and thus the impact on CP6

Network Rail benchmarks is problematic. Together with the challenges experienced in agreeing Train Performance Trajectories, Arriva is concerned that this will result in the setting of inappropriate Schedule 8 benchmarks that dilute the quality of the regime as an incentive for performance improvement.

Given this, Arriva would suggest that ORR formally includes some form of mechanism within the Final Determination to allow further review of the Schedule 8 parameters during the Control Period.

In this context, although ORR intends to set the CRM-P Regulatory Minimum Floor at 20% to reflect average CP4/5 performance, Arriva remains concerned that this will not generate sufficient incentive to ensure the delivery of the performance levels that end users, funders and Network Rail's customers should expect for the level of funding provided.

Alongside the restrictions on Network Rail's flexibility to move funds between years, the fact that Network Rail's funding is fixed has significant implications for Network Rail's customers if Outputs are not delivered. It is important the ORR and Transport Authorities recognise the inconsistency between this and the fixed targets and Output assumptions included in Franchise contracts. We note the ORR's shift towards reputational incentives but continue to have concerns as to the effectiveness of this approach. Further, as noted above, it is likely that the largest reputational burden will fall on Network Rail's customers.

In the recent past, Arriva has seen repeated delays to the delivery of key infrastructure projects as well as material cost overruns leading to reductions in scope. This, together with the failure to manage the delivery of major timetable changes, have materially affected Arriva train operators and their customers with significant impacts on Arriva's reputation. If the ORR's intended approach is to be more effective in the future in the context of a devolved Network Rail, then a stronger focus on clearly articulating which parts of Network Rail are accountable for delivering which Outputs will be necessary. Arriva is of the view that key milestones and efficiency targets should be regulatory outputs for the Network Rail Routes in CP6.

- Route Scorecards and Supervisory Boards

The roles of Route Scorecards and Supervisory Boards in monitoring the delivery of Outputs continue to develop and mature, however the presence of Supervisory Boards across the Routes does not always meet the needs of Network Rail's customers – for example there is a clear requirement for a North of England Supervisory Board as the current approach, where two Routes act as nearly equal suppliers to one customer, is not effective.

Similar problems are encountered by CrossCountry where the Freight and National Passenger Operators "Route" approach is not capable of securing appropriate focus on Cross Country's needs from the physical geographical Routes. We need to see a governance structure that makes clear how the FNPO route will engage more effectively with the geographical routes to deliver benefits for its national operating customers and hold them to account when they do not. Arriva would welcome a mechanism that would enable the FNPO to hold routes to account more effectively.

This links to the problems encountered with the concept of a “Lead Route” where there is insufficient focus on the needs of Operators for whom a Route is not “Lead”, and not enough evidence of positive joint working across what are, to Operators, often arbitrary Route boundaries. Arriva believes that a greater incentive should be developed to promote the sharing of best practice between Network Rail routes alongside comparison through Scorecards.

Therefore, greater clarity as to how these will work alongside ORR’s monitoring activity is required.

In addition, the imminent establishment of an LNER Partnership Board and the development of an ECML Partnership creates additional complexity that will require clarification if the mechanisms to be established through the Determination are to be effective.

Access Charges

- Structure and level of Charges

Arriva welcomes the simplification of the overall structure of charges and that the overall level of variable Charges for passenger operators is not to materially increase.

- Infrastructure Cost Charges

Arriva welcomes the ORR’s intentions in establishing a “market-can-bear” tested Infrastructure Cost Charge Mark Up for Open Access Operators alongside a revised access policy. When fully developed, this should allow Open Access Operators to make better use of the Network to deliver greater benefit to passengers while having a reduced impact on the funds available to the Secretary of State for Transport.

However, the arrangements set out in the Draft Determination are incomplete and lack important detail with no definitions for:

  - The scope of the “Interurban” market segment.
  - What would constitute a “significant” change to the Access Rights of an existing Open Access Operator.

It is unclear why the ORR believes that setting the Infrastructure Cost Charge for Interurban Open Access services at £4 per train mile is conservative given that the ORR’s own work in this area shows this would be a level of charge that no existing Open Access Operator could bear.

At present, there is no detail as to the structure and mechanism of a new Access Policy to be deployed in the context of the new Infrastructure Cost Charge.

ORR will be aware that this lack of detail is materially impacting on the development of proposals for new and expanded Open Access services. It is also creating uncertainty for the operators of and bidders for Franchise Contracts.

Increasing fixed costs on an annual basis with timetabled traffic will strengthen the incentive for Network Rail to facilitate traffic growth and boost capacity on the network. It is important that Network Rail quantifies and assesses this additional income when making decisions on Access Rights. Arriva is concerned however about the process for measuring and reconciling the costs associated with annual timetabled traffic growth. Clarity is required on how the annual increases will be calculated, and the process for franchised operators being held neutral against increases in charges over and above CP6 baseline traffic levels.

Arriva does not support the options proposed by ORR to either set a floor for decreases in timetabled traffic, or to not adjust operators' fixed charges for any reduction in timetabled traffic. These options will reduce the accuracy of the approach, and thus its quality as an incentive for traffic growth. A decrease in timetabled traffic can be driven by a number of causes. It would not be appropriate for operators to continue to pay charges associated with a specific traffic volume, if the actual volume of traffic was reduced due to reasons outside of its control. The two options set out by ORR also risk removing reflectivity between traffic levels and fixed charges following a decrease in timetabled traffic for an operator.

Arriva would therefore wish to work with ORR to develop detail in all these areas alongside other Operators.

Health and Safety

- Operator staff safety

Arriva supports the focus on the safety of Operator staff by provision of funds for improvements to depot access walkways. However, Arriva would suggest that this approach should be extended to include improvements to other parts of the Network where Operator staff undertake their duties such as lineside walkways and Signal Post Telephone bases.

Eliminating level crossing risk is a further example of where Network Rail requires an ambitious and tailored strategy. The ring-fencing of £109m to reduce level crossing risk in CP5, channelled through the Level Crossing Risk Reduction Fund, was an effective mechanism for addressing this key risk area. Arriva is therefore highly concerned that ring-fenced funding of this type is not available in CP6 and that Network Rail does not have a challenging target to reduce risk in this area.

It should also be noted that Level Crossing Risk is a major factor in restricting the growth of rail services on a number of routes.

National System Operator

- Role of the National System Operator

Alongside devolution to the Routes, the establishment of a fully functioning National System Operator is a key element of the Determination. The current challenges that the Industry is facing with delivering timetable changes underline just how important this is. Significant improvements in the effectiveness of the National System Operator's management of changes to what the Network delivers and in producing the timetable are clearly required.

It is therefore vital that ORR should establish specific processes to monitor progress in these areas to ensure that Outputs are delivered and that the available funding is deployed effectively.

In doing so, ORR should require Network Rail to establish absolute clarity as to the respective roles of Routes and of the National System Operator as a review of the current Strategic Business Plans shows a significant and worrying lack of clarity in this area.

In this context, it is essential that the National System Operator strongly and visibly takes "ownership" of the delivery of the Outputs it is accountable for as laid out in the draft Determination and the National System Operator's Strategic Business Plan. Arriva is concerned that this "ownership" appears to have been weakened and has become less evident since the problems encountered with the delivery of the May 2018 timetable change.

- National System Operator systems

Development of the capacity and performance modelling systems deployed by the National System Operator will be key to delivering the necessary improvements in the production of changed timetables and the development of business cases to develop the Network. Arriva therefore welcomes the ORR's focus on this area. Such system changes are complex and have often failed in the past with significant impact on all parties involved. It is therefore important that, in developing its plans and implementing the new systems, the National System Operator ensures the close involvement of all of its customers and that an integrated programme management process is established. This level of strategic oversight should drive Network Rail's Sale of Access Rights (SoAR) process, which is widely accepted by the industry as not fit for purpose; driven by technicalities and validation questions rather than a strategic fit of proposed paths against available capacity.

- National System Operator staffing

Alongside appropriate systems, the availability of sufficient competent staff will be essential if the National System Operator is to succeed in making the necessary improvements in the production of changed timetables. Arriva is not convinced that the National System Operator's plans in this area are sufficient and are therefore unlikely to deliver the outcomes required. Arriva would therefore suggest that ORR focuses on this aspect of the National System Operator's alongside its focus on system development.

- Enhancements and Third Party funding

In the context of enhancements being channelled through DfT's 'Enhancements Pipeline' in CP6, it is essential that the National System Operator works closely with the Routes to proactively develop detailed business cases for presentation to third party funders. Amidst the shift towards Network Rail's 'Continuous Modular Strategic Process', Network Rail must utilise its asset management expertise to cost up schemes and promote a clear vision for what needs to be delivered.

- Franchising

It is essential that the National System Operator is effective in its role of informing Funders in the development of Franchise specifications so that Funders and Bidders can be confident that these specifications will be deliverable and that this delivery will be supported by all parts of Network Rail including the Routes.

Arriva UK Trains – Response to Consultation on Changes to Network Rail's Licence

30th August 2018

Introduction

These comments respond to the ORR's Consultation on proposed changes to Network Rail's Licence. The response is provided on behalf of Arriva plc, its subsidiary Arriva UK Trains Limited and its wholly owned train operating companies (TOCs), Arriva Rail London Limited, Arriva Rail North Limited, Arriva Trains Wales/Trenau Arriva Cymru Limited (ATW), Grand Central Rail Company Limited, The Chiltern Railway Company Limited (CR) and XC Trains Limited (XC). Arriva is a wholly owned subsidiary of Deutsche Bahn AG (DB AG).

Arriva views the Periodic Review (PR18) process as an important element of a coordinated series of activities necessary to ensure that all elements of the Rail Industry structure work together to support the delivery of the vital contribution that rail needs to make to society in the UK.

Therefore, Arriva has played an active part in the Periodic Review process to date and intends to do so going forward. In particular, Arriva is supporting the coordinated industry activity being undertaken by the Rail Delivery Group (RDG).

On this basis, Arriva endorses the responses provided to ORR by RDG relating to the consultation documents issued by ORR to date and confirms that Arriva's views are firmly reflected in the RDG response.

Regardless, Arriva would like to take this opportunity to emphasise a few key points that have emerged through the work undertaken to date.

Definition of clause 2.2(b)

Arriva supports the ORR proposal to update the licence to better reflect Network Rail's structure and to more generally align it with changes to the CP6 regulatory framework. This will help to make the licence more relevant, and clearer to interpret and apply, to make compliance more straightforward for those who are accountable and responsible for the licence obligations.

However, noting the above, we are concerned that 2.2(b) seems to suggest that reversion to one route for England and Wales would be permitted. Arriva seeks clarity that the intent of this would be flexibility to potentially combine some routes and not to revert to only one route.

Stakeholder Engagement

Arriva notes the ORR comments in its consultation that the licence will not be prescriptive on stakeholder engagement but expects that Network Rail, its routes and System Operator (SO) will be required to engage in a manner that is effective, inclusive, well governed and transparent. We fully support this intention and agree with the principles. However, we do not agree with how this is reflected in the current drafting of the licence. For example, we do not think the principles of engagement should be included as prescriptive activities within the licence. In addition, we believe some indication as to governance around this should be included with specific reference to timescales permitted for reasonable engagement and consultation activities.

Network Rail is currently doing a lot of work to develop a stakeholder engagement model, which includes a principles-based code of practice, stakeholder engagement strategies (for Route businesses and national functions) and an annual assessment of engagement. The proposed drafting in the licence undermines what Network Rail is seeking to achieve, particularly as its stakeholder engagement framework is yet to mature. Prescription takes away the purposive nature of the licence.

It is also worth noting that there is ongoing work to fully establish the SO and Route supervisory boards and their governance arrangements and so this remains an area where there will be continuing engagement between train operators and Network Rail. Arriva remains disappointed in the lack of progress specifically for FNPO route for establishment of these supervisory boards.

Arriva agrees with the principle that a stakeholder engagement duty should be a core and overarching duty in the licence. We agree that the existing stakeholder relationships licence condition is outdated and too narrow and therefore we are supportive of the principle of updating the definition of stakeholder in the licence.

Status of FNPO route

The proposed drafting in Clause 2 implies a different status for the freight and national passenger operator route (FNPO) compared to the geographical routes. Given that one reason for making changes to the licence is to improve clarity about the allocation of responsibilities across Network Rail's business and to protect the route businesses and SO financial settlements, then the representation of FNPO in the licence seems rather inadequate. The proposed licence condition simply requires Network Rail to structure itself to address freight and national passenger operators rather than stating that FNPO will be a Route Business. Network Rail treats the FNPO route as a Route Business and will continue to do so in the same way as for the geographic route businesses.

Further to this, 2.6 within the consultation draft states that FNPO route should properly take into account the interests of Freight and National Passenger Operators. Arriva believe this lacks definition, and clearer guidance should be provided as to what these 'interests' comprise of. This is also the case in 2.17.

Decision making

We agree with Network Rail that the licence should not restrict the company's ability to make decisions in the interests of efficiency and delivering for its customers. With regard to 4.3 Network Planning requirement, we consider that (b) would benefit from some guidance as to timescales around the consultation activity.

Arriva is pleased to see within section 5 and the System Operator obligations, the inclusion of section 5.1 to ensure that persons of sufficient expertise are employed for decision making in respect of the long term planning of the network, capacity allocation and timetabling on the network. We would like assurances as to how this will be implemented and maintained, given the current ongoing issues around timetable planning and demand on resource and staff turnover for the System Operator function.

<u>Further clarifications</u>

With specific regard to 5.9 and the requirement to reflect best practice for capacity allocation on the network, Arriva would like to understand where this best practice may be observed from?

Within 5.21(c) Arriva believe that this should also include provision of information for alterations as a result of special events or Bank Holidays.

The legal drafting of the licence will be critical, particularly the allocation of obligations, which is complex within Network Rail as a single legal entity. This is the case where more than one part of Network Rail's business has an accountability for processes that make up a system captured by a single licence obligation. Given the intended scale of change to the licence and the legal drafting being completed over a short period of time, we suggest that ORR carries out a formal review early in CP6 to assess how well the changes are working.

Finally in relation to the wording for the incentive scheme (22.2) Arriva would like clarity on if this will be related to weightings within the scorecards.

PR18 draft determination consultation: pro forma

This pro forma is available to those that wish to use it to respond to our draft determination consultation, structured around the main areas of the draft determination. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed below (where you wish to comment), to aid our review of responses.

Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Mick Whelan
Job title*	General Secretary
Organisation	ASLEF
Email*	

*This information will not be published on our website. Please see Appendix B of our overview document for details on how we will treat information provided to us as part of this consultation.

Our approach to producing Network Rail's determination and to regulating Network Rail in CP6 For further information, please see chapters 2 and 3 of our overview document.
PR18 is an important process because it determines what Network Rail will deliver and the funding available to it over the five-year control period from 1 April 2019 to 2024. There was too much ambiguity in CP5 about where efforts and funding would be focused and which projects were to be delayed or scrapped, which caused lot of problems, so stakeholders in the industry need certainty now about future direction and spending levels in order to make decisions about investing in skills, technologies and innovation for the future. ASLEF is pleased that steps are being taken to clarity what Network Rail is committed to deliver in CP6 and to smooth out the peaks and troughs in expenditure. Network Rail's transformation plan has raised a lot of questions about which activities and responsibilities are being devolved and what the devolved routes will be responsible for so we welcome the ORR's draft determination, which scrutinises the five-year strategic business plans (SBPs) prepared by the 8 geographical routes, the Freight & National Passenger Operator (FNPO) route and the System Operator (SO). This at least provides clarity to TOCs, FOCs, passengers and the wider industry about the spending plans and reassurance that the spending plans for renewals are realistic and justified. It is unfortunate that the government has not provided more clarity about its new framework for enhancements because stakeholders also need to know what its long-term objectives and strategic priorities are. ASLEF welcomed the initiative to move enhancements away from 5 year planning cycles, which are too restrictive because some projects span over two or three control periods, but we are concerned about the DfT's lack of transparency in its decision-making about enhancements. This is particularly paradoxical when the argument for devolution is that better and more efficient decisions are made when the stakeholders who really understand the issues are involved in transport and engineering decisions. We question whether the DfT has the specialised capacity to be able to take on assessing the cost efficiency and value for money of proposed enhancements and whether it is right to reduce the ORR's role to monitoring delivery. We also question what the DfT plans to do about enhancement projects if the third-party investment it seeks doesn't materialise.

In terms of renewals, however, the ORR has assessed what Network Rail's routes and SO propose to deliver and has deemed that the strategic plans were acceptable and meet the requirements of the high- level output specifications (HLOSs) of the Secretary of State and the Scottish Ministers. The budget for renewals for CP6 is more than £34bn (£30bn in England and Wales and £4bn in Scotland) and the ORR has agreed that the proposed expenditure set by each of the routes/the SO was appropriate for what they are expected to deliver for their customers, although greater scope was identified for Network Rail to boost reliability and safety. This is reassuring, but ASLEF is still concerned about the distribution of funding across for different routes: The regional disparity in rail infrastructure funding and the long- standing gap between the North and the rest of the UK that has resulted from years of inadequate investment. Transport can act as a key enabler in promoting growth in the economy and generating social benefits but only if the distribution of funding is distributed equitably between the regions.

ASLEF believes that strong planning is central to improving Network Rail's performance. While the ORR will be less prescriptive than in the past, it is essential that Network Rail is transparent in its planning process and that stakeholders are able to see the company learning from past mistakes and using M&E outcomes to inform future plans and activities. PR18 establishes the monitoring and reporting framework for CP6 and sets out how the ORR will oversee this, in compliance with the network licence. Route Managing Directors will be able to authorise 99% of all maintenance and renewals work on their routes but each devolved route / SO will have its own targets and regulatory settlement and the ORR will monitor their financial performance and cost efficiency and.

While ASLEF believes that devolution can bring many benefits, we have voiced concerns about the separate regulatory settlements and route-level performance targets for each route being developed on an ad-hoc basis in preparation for the start of CP6. We have highlighted the need to ensure that route managers are given as much information, guidance and support as possible to ensure that high standards are maintained. Striking the right balance between devolving responsibilities and retaining cohesive national standards where necessary (e.g. security against terrorism and cyber-attacks) is a challenge.

In CP6 Network Rail is expected to engage more with stakeholders so it is disappointing that agreeing key performance targets for new scorecards is proving so challenging to accomplish. The majority of train operators have not yet been able to reach an agreement with Network Rail on train performance trajectories and the ORR and Network Rail have not yet succeeded in agreeing what specific information they should use on scorecards to monitor delivery and financial assessments. ASLEF hopes that the consultations are soon able to establish a satisfactory way forward.

The draft determination sets out some decisions on the charges that train operators should pay for using the network, as well as contractual incentives for them and Network Rail to improve their performance but it important that the ORR finalise decisions around the charges and inform all concerned of the cost of charges as soon as possible. ASLEF campaigns against increases to freight access charges and we call for an affordable cap to be introduced on variable usage charges because higher costs would have a detrimental impact on the rail freight sector and could result in a modal shift from rail to road. Charges that impact on profitability of the rail freight industry could be very damaging so it is important that the ORR stop delaying decisions and provide certainty and stability that stakeholders need.

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

Network Rail operates under a network licence which requires it to manage the rail network in a timely, efficient and economical manner, in compliance with conditions set by the ORR, who monitor its performance and hold it to account when there are breaches.

Network Rail's core obligations within the licence relate to securing the operation, maintenance, renewal and enhancement of the network. There are additional requirements around information sharing and stakeholder engagement.

With PR18 the ORR is restructuring the regulations within the network licence to reflect the reclassification of Network Rail as a central government body and to make accountabilities clearer, reflecting the creation of routes and the SO in the company's licence and ensuring the right management team are held to account. The amendments will also accommodate the changes in funding arrangements and the roles of DfT and Transport Scotland.

ASLEF believes that devolution can be important in giving local communities more say over how their transport network functions - so long as it doesn't create further fragmentation within an already overly fragmented system. We have previously raised concerns about the problems that arise with fragmentation within the railways. Indeed, we would rather see a single unified, vertically integrated public system that does not enable money to be taken out of the industry in the form of dividends to shareholders. Nevertheless, we do welcome efforts to make the system transparent and to make it clear where responsibilities lie.

Our review of Network Rail's stakeholder engagement

For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.

The ORR has asked that Network Rail routes and the SO engage meaningfully with local customers and stakeholders in order to identify their requirements, and they must use this to inform future activities.

We have already mentioned above ASLEF's concerns about the pitfalls of fragmentation within the railway system and about whether the amount of information, guidance and support available to inexperienced new route managers is adequate for them to successfully set standards and maintain performance when route-level systems are still in development. The SO's advisory board and the route- level supervisory boards will bring together Network Rail routes and customers but it is not yet clear how this collaboration will be assessed.

The ORR is not prescriptive about how this is done, but will monitor and assess the quality of stakeholder engagement. Different approaches have different strengths and weaknesses, but the quality of stakeholder engagement in the routes' strategic business plans will be assessed by considering the scope and methods of engagement, and how information is analysed and interpreted.

Network Rail will use scorecards to facilitate engagement with customers and to assess performance against its strategy. The measures contained in scorecards and the appropriate targets for delivery will be developed and agreed with passenger and freight train operator customers (and Transport Scotland). It is important that all stakeholders are given confidence that they can influence plans and that scorecards will be amended in accordance with M&E outcomes.

The challenge that comes with consulting different stakeholders and attempting to address their needs is that their priorities are likely to be extremely varied, depending on who they are, their activity and their geography, making it unrealistic to expect to be able to satisfy all expectations. For example different stakeholders disagree over which improvements and investments are necessary, how much each stakeholder should contribute, and who should get priority in access and timetabling. In the development of the CP6 SBPs, for example, routes and customers in most cases did not agree performance trajectories.

Irrespective of the challenges, ASLEF welcomes this shift towards more meaningful engagement between Network Rail and a wider range of stakeholders. A lot could be gained from more consideration being given to the views of those who work on and use the transport system; not just passengers but also trade unions and railway workers. For example, recent problems with the May 2018 timetable caused much disruption to passengers, through cancelled and delayed services. Better engagement with trade unions over the development of plans for journey time improvements could have been extremely valuable. In CP6 the SO will be strengthening its timetable planning and reducing the number of errors in the timetable, so its strategic plan will have to take account of lessons learnt from the May timetable failures. ASLEF enjoyed regular meetings with Managing Director Phil Hufton and as a continuation of that, following the structural changes within Network Rail we would welcome quarterly meetings with Andrew Haines, Chief Executive of Network Rail, Andy Thomas, Managing Director of Strategic Operations, and the Route Managing Directors.

Our review of Network Rail's scorecards and requirements

For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.

Network Rail is expected to develop route scorecards that support the requirements of PR18 are designed to reflect the range of outcomes that each route and the SO is required to deliver, covering passenger and freight performance; network sustainability; network capability; and network availability. These customer-focused scorecards must be agreed with passenger and freight train operator customers and other stakeholders and must capture requirements specified in the HLOSs and include consideration of health and safety, passenger satisfaction, financial and other appropriate measures. The transport secretary's HLOS for England and Wales focused on high-level outcomes (safe operation of the network, increased volumes of renewals, work with stakeholders to agree performance targets), whereas the Scottish ministers' HLOS was much more detailed (including service performance, journey time improvements, freight growth, a Scottish gauge requirement and a reduction in carbon emissions). The ORR appears satisfied that the scorecards in the strategic business plans (SBPs) are mostly adequate, but the draft determination makes some important points that ASLEF has raised previously elsewhere:

It is important to identify the strengths, weaknesses, achievements and challenges on each route for a range of different purposes. The data collected can be used not only to assess performance and monitor delivery over time but can also be used to provide support to route boards wanting to share best practice, compare ideas and identify possible solutions. Unfortunately, like-for-like comparisons are impossible to make because circumstances and challenges vary nationwide and are constantly changing. The pressures and constraints of congestion, age and condition of infrastructure, nature of rolling stock, line speed, gauge, electrification type, geography, weather, and other factors make direct comparisons of performance between operating routes problematic and unfair. This means that initiatives that prove a success on one route aren't necessarily always transferable, but many can be adapted. Unfortunately, Network Rail's route comparison scorecards are still not satisfactory for showing how different geographic routes are performing against targets and against each other because routes do not all use the same definitions in their measures – which undermines comparability and transparency.

In CP4, Network Rail deferred a significant number of planned renewals, and did again in CP5. These deferrals have a knock-on effect on the sustainability of safety, reliability and value for money on the network over the long-term, which is clearly of great concern to ASLEF. We therefore welcome the ORR's requirement for CP6 that Network Rail should include a network sustainability measure on geographic route scorecards, to assess whether sufficient renewals are being delivered to counter the on-going deterioration of network assets through ageing and wear.

Disruption on the network has a major impact on passengers and freight customers so it is important that Network Rail has effective incentives to minimise the impact of engineering work. In CP5 the ORR set output requirements in relation to passenger and freight disruption, but in CP6 Network Rail will review levels of reactionary delay to assess whether they are adhering to commitments to manage reactionary delay effectively, regardless of cause. In order to compare all routes' contributions to passenger train performance, Network Rail is being asked for a route measure for passenger performance (CRM-P) for Scotland. ASLEF believes it is important to have measures both for delays Network Rail causes to operators that run over its routes, and for delays caused by train operators.

Setting network-wide targets for the FNPO is problematic because it has overall responsibility for the performance of freight customers across the network but does not manage operational assets or control the movement of trains. It is the geographic routes that have responsibility for freight performance within their routes. Freight performance is affected by different factors on different geographic routes so targets that may be realistic in one place will not be achievable elsewhere. Going forward freight performance levels are likely to be put under further pressure by increasing volumes of passenger traffic and related congestion. Unfortunately, many of the FNPO's commitments in CP6 – such as stakeholder engagement, advocacy and resolving issues as they arise - are hard to quantify. Similarly, the SO has responsibility for overseeing the planning and coordination of the rail system and ensuring that controls and processes are in place, and their performance is also difficult to measure. To address this problem and provide greater transparency, in addition to the use of scorecards the ORR has proposed that they publish a combination of action plans, annual stakeholder surveys, governance and reporting frameworks, and annual narrative reports that discuss performance in activities and achievements that do not lend themselves to quantified measurement on scorecard reporting.

When targets are set it is important that they are challenging but also realistic and achievable, and that they take into consideration whether everything reasonably practical has been done and steps have been taken to improve performance. Network Rail is still consulting with stakeholders over measures that should be contained in the scorecards and the appropriate targets for delivery. Unfortunately, to date, the majority of train operators have not been able to reach an agreement with Network Rail on the specific information they should use to monitor how well the routes are performing against their targets, in particular for cost drivers, unit costs, productivity measures and leading indicators of performance. If train operators and Network Rail are unable to address this and reach an agreement they will have to be determined by the ORR, but ASLEF supports the ORR's preference for not intervening because stakeholders should feel more ownership and more invested if they have agreed the scorecards themselves.

Our assessment of health and safety

For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.

Network Rail has a duty to ensure it can achieve its maintenance, renewals and operational output to support a safe infrastructure and that it complies with legal obligations under health and safety legislation.

Although it now has a devolved structure, Network Rail remains the single duty holder for legal safety obligations, responsible for identifying and implementing controls to eliminate or prevent risks arising from its activities and for ensuring the safety of employees. ASLEF has previously raised concerns about how Network Rail will balance its legal accountability for health and safety issues with a structure that now devolves much of risk management to route level, and we were not surprised that the ORR has raised concerns about asset management, level crossings and depot walkways after its review of health and safety in Network Rail's strategic business plans (SBPs) for PR18.

Effective asset management is key to controlling many of the precursors to catastrophic risk on infrastructure, but Network Rail's SBPs did not include the volumes of renewals that its modelling indicated would be needed to maintain asset condition. When challenged Network Rail said that it had targeted its available funding at those assets prioritised by risk, but acknowledged that it had residual concerns regarding structures and earthworks. The volume of renewals planned were below the level considered necessary to maintain current levels of risk exposure. Similiarly, in some routes overall affordability constraints have led to some major structural interventions being omitted from the CP6 plans. While some safety mitigations are planned, the ORR identified risks of failure and related impacts on safety and performance and voiced concern about the impact of deferrals on future control periods. And on level crossings, Network Rail revised its strategy to reflect that there is currently no additional specific funding for reducing safety risk for CP6. Their revised level crossing strategy removed some of the targets for routes to achieve improvements. ASLEF is pleased that the ORR has asked Network Rail to give more consideration to sustainability and prioritise the renewal of assets where the consequences of failure would be most serious but we are also deeply concerned that Network Rail's original proposals were constrained by affordability.

On issues relating to basic health and safety legal compliance, the FNPO assigned work relating to making depot walkways safe as 'optional' spend and the LNW and Wales routes did not include this work in their core plans on the grounds of affordability. We congratulate the ORR for requesting that schemes relating to level crossings and depot walkways be moved into the 'core' spend and that an extra £1bn of committed expenditure should be put into improving asset sustainability.

For ASLEF safety on the railways and the sustained maintenance and improvement of the railway network paramount. The success of Network Rail's SBP for CP6, and continued safe asset management in subsequent control periods, is dependent on continued monitoring and efficient budgeting, but it is not acceptable that that a 'gap' in funding should constrain necessary safety work.

Our review of Network Rail's proposed costs and income

For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.

Following problems with cost, delivery and budget overruns we have seen projects deferred from one control period to the next, putting an already creaking system under strain with implications for passengers, because poor infrastructure affects service quality and reliability. The cost of these delays is difficult to price and difficult to reflect in comparisons of productivity over time, but the knock-on financial implications are substantial. Clearly, it is difficult to forecast over a five-year period when so many financial, environmental and political factors beyond the company's control can come into play and unit costs change over time, but in this periodic review, it is crucial that plans for operations, access and costs are efficient and realistic. This is why comprehensive ongoing monitoring and evaluation is crucial, to assess performance, pick up on early warning signs of potential problems, and use to inform decision-making about whether to review assumptions and plans that are no longer realistic.

Network Rail has performed poorly over recent years in terms of delivering efficiently against its plans and the ORR puts this down to poor preparation at the start of CP5, poor improvement plans, problems with efficiency, and increased pressure on access to the railway to carry out work. The reclassification of Network Rail into the public sector, with the introduction of fixed borrowing limits, meant that plans had to be reviewed in order to stay within the new funding constraints. Following these changes to Network Rail's income and expenditure the ORR highlighted the long-term shortfall in asset sustainability, which – thankfully - was taken on board by both governments and contributed to an increase in funding for asset sustainability.

Moving forward, we are pleased that having assessed Network Rail's forecast costs and income in CP6, the ORR has pronounced the company's asset management planning, cost planning and delivery planning to be efficient and the plans for total expenditure to be affordable in the context of both governments' high level output specifications

(HLOSs) and SoFAs, which set out the funding available for the control period. The ORR considers that the inclusion of bottom-up planning, increased involvement of stakeholders and ongoing comparisons in route-based strategic plans are an improvement compared to the business plans for CP5. Similarly, the volume of maintenance and renewals appears to be within the capability of what can be delivered and the planned support costs (such as human resources, information technology, etc.) are reasonable.

We note, however, that the ORR believes that Network Rail's costs have been overstated by the routes and further long-term efficiency savings are possible, which may be indicative of inefficiency or may be a precautionary measure following past experience of poor performance in delivering overambitious plans. The ORR is confident that greater savings are likely to be realised from the company's ongoing transformation, but this is not reflected in Network Rail's plans because the data available does not yet show these savings. Also the ORR recommend that Network Rail should seek opportunities to smooth out the peaks and troughs in activity and expenditure which create added costs and inefficiencies along the supply chain.

While ASLEF have called longer-term planning for stability and certainty within the railway sector and we would like to see the eradication of inefficiencies that have caused Network Rail's difficulties in the past, we also understand the temptation to err on the side of caution because of the risks associated with deliverability. The current delivery planning processes generally has a limited time horizon because of the uncertainty attached to longer-term planning, and the possible effects of future decisions by governments on enhancements. The efficiency targets that the routes set themselves may not be sufficiently challenging in all areas, but there is an incentive for all parties not to set unduly stretching cost targets. It remains to been seen whether the comparisons between routes do provide them with greater incentive to improve their overall efficiency.

For ASLEF another area of concern is that the ORR flagged pressure on access to the railway to carry out work as a contributing factor to the efficiency problems in CP5 and now, again has questioned whether Network Rail's access plans will appropriately support improvements in renewals efficiency.
The ORR has requested assurances that the proposed work volumes for CP6 can be accommodated and asked for the feasibility of the broad level of access required to be confirmed by discussions with train operators and other stakeholders, but we know that this is a point of contention that has not yet been resolved.

Obviously as a union ASLEF is concerned that all work required to maintain a safe and reliable network should be completed on time and to the highest possible standard, so it is important that Network Rail and the ORR pick up on any problems as soon as they arise. We hope that the ORR reviews of Network Rail's performance will assist in addressing issues as they arise and keeping Network Rail within budget.

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

It is reassuring that so far Network Rail's spending plans for CP6 have been declared to be consistent, well-developed and affordable in the context of the governments' high level output specifications (HLOSs) and SoFAs. At the beginning of CP5 Network Rail was a private company limited by guarantee and had full budgetary flexibility. The reclassification of Network Rail into the public sector in 2014, with the introduction of fixed borrowing limits, meant that the company's plans within CP5 had to be reviewed in order to stay within the new funding constraints. Unfortunately, ongoing problems with cost, delivery and budget overruns led to projects being deferred from one control period to the next, with a knock-on effect in terms of financial implications. As a union ASLEF strongly believes that transparency is important when it comes to accounting for public money and it is right that going forward, plans and forecasts should be more closely scrutinised on its spending - particularly given the current economic pressures on budgets. We therefore support improvements to performance reviews in PR18 that will assist Network Rail and the ORR to pick up on any problems and identify possible improvements which allow for more benefits at a lower cost.

Since its reclassification Network Rail is no longer able to borrow money and is no longer able to raise new finance on its own account so the funding available to it is effectively fixed. The company needs appropriate provisions in place to manage the risks it faces, such as inflation, cost shocks and adverse events, such as the storm damage at Dawlish, so in its strategic business plans, Network Rail included a contingency fund which will only be used if risks materialise. Appropriate risk provisions are needed to protect against cost overruns but the ORR decided that in England and Wales (and maybe Scotland) half of the balance held in the centre should be moved to the routes so that route managing directors are involved in the management of financial risk. This means that funding for risks such as those associated with severe weather events will be held at the centre and funding for expenditure level risks such as inflation, will be held at a route level.

Historically renewals spending has seen peaks and troughs and we have been concerned about the extent to which the postponement of planned work in CP5 will affect the resilience of the network so we are pleased that at the funding being made available for maintenance and renewals in CP6. ASLEF has been critical of these peaks and troughs and the lack of information available about long term strategic plans for enhancements on the railways, which has undermined confidence along the supply chain and affected investment in recruitment, skills and technology, so we welcome steps to address this.

In CP5, Network Rail used the retail prices index (RPI) measure of inflation but the ORR's decision is that in CP6, the consumer price index (CPI) should be used instead. The switch from RPI to CPI indexation should have a limited direct impact on Network Rail because expenditure forecasts will increase because of indexation increases; and fixed track access charges and/or annual network grants will take account of lower levels of income from variable track access charges so there would be a relatively higher increase for access charges at the start of CP6 and a relatively lower indexation increase after that. It is ASLEF's view that the choice of inflation index measure is not as important as ensuring that the reality of costs is reflected fairly and funding levels for maintenance, construction and infrastructure projects are maintained. The actual inflation experienced by Network Rail (general inflation plus incremental input price effects) is not necessarily equivalent to either RPI or CPI and the case for using CPIH should be kept under review. A switch to CPI would result in a higher increase for access charges at the start of CP6, but relatively lower indexation increases during CP6, so the end result will be similar.

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

In CP5, Network Rail's fixed costs have been met through a mix of direct grant from governments, mark- ups (i.e. charges above costs directly incurred) paid by freight services carrying specific commodities, and fixed charges paid by franchised passenger operators. For CP6 the Secretary of State's SoFA set out Network Rail's income from all sources, with £34.7 billion coming from government grants and the remainder coming from passenger and freight operators' fees and charges and Network Rail's commercial property. As part of PR18 the ORR has sought to simplify the way charges are calculated for operators who pay to access the rail network and charges that recover some of the fixed network infrastucture costs (i.e. those costs that do not vary with use in the short-term) will be collectively known as infrastructure cost charges (ICCs). Network Rail proposes to continue to levy ICCs on freight services carrying electricity supply industry coal, iron ore and spent nuclear fuel. Freight services carrying biomass for the electricity supply industry will also be subject to fixed cost charges (ICC).

It is important to remember that although these charges are a source of income for maintaining the network, charges must be kept to a sustainable and predictable level for train operators.

The variable usage charge (VUC) is a charge designed to recover the operating, maintenance and renewal costs that vary with changes in traffic. The charge is disaggregated, so heavier and/or faster vehicles incur a higher VUC, reflecting the relatively higher levels of damage that they cause. The ORR is consulting on the proposal to phase in a VUC for freight operators. Under the proposed policy, the VUC for freight are set to increase to reflect the full costs of wear-and-tear on the network towards the end of CP7 but the increase in costs will be introduced over a transition period of 10 years, reaching full total cost by the end of CP7.

ASLEF welcomes this cap because at the current time rail freight operators need stability and confidence that the industry will not be detrimentally impacted by increases in charges. Rail freight is cleaner, safer and more efficient than road freight but in spite of the potential for growth, this sector currently faces a lot of uncertainty. ASLEF would like to see the rail freight sector grow but this will be dependent on freight charges being affordable and barriers to growth being removed. Without this, there is a real possibility that more freight could be moved from rail to roads, forcing freight on rail into further decline.

The reclassification of Network Rail means the ORR will make more use of reputational incentives rather than financial penalties. One way of holding Network Rail to account will be using regulatory sanctions at the route and SO-level, which would have the effect of reducing the profit recorded in the relevant business unit (while not reducing the financial resources available to the route/SO). We agree that providing contractual incentives for train operators and Network Rail to improve their performance and use network capacity more efficiently is far preferable to using financial penalties that reduce the resources available to the company.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents

For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.

The process of route devolution has led to changes in the funding, governance and delivery of rail infrastructure investment. One aspect of Network Rail's ongoing transformation is to open the railways to more third-party investment (e.g. investing in station and car park redevelopment, a third-party electrification scheme, new stretches of line, and digital signalling). The DfT has issued a call for proposals from the private sector, arguing that it will relieve the burden on taxpayers and fare payers but ASLEF is opposed to this model because it paths the way to further fragmentation and privatisation, which leads to inefficiencies and pushes up interface costs. The likelihood is that investors may be interested in some enhancement projects but other less profitable or more complicated projects - such as changes to track layouts or reconstruction of bridges - will continue to require central government funding. Unfortunately, there is no secure funding if third-party investment doesn't materialise, and there is therefore a risk that rail infrastructure won't receive the investment it needs for enhancements.

Although we have raised concerns above, there are aspects of devolution that have been positive. The Scotland route has been devolved for a number of years but more devolution across the whole network has meant that there is a much more detailed route plan in Scotland, clarifying what the Scotland route is responsible for delivering and the role of the SO and FNPO are clearer.

ASLEF has previously raised concerns about how the devolved structure of Network Rail will impact on the freight sector so we welcome the commitments in the FNPO's plan to support freight growth, increase average freight train speed and develop strategic freight corridors to boost performance.

ASLEF's reservations about devolution are based on the unworkable complexities that arise when different operators are competing on the same route. The FNPO is not responsible for managing any operational assets, nor does it control the movement of trains. It represents a number of groups that operate across geographic routes and works with the geographic routes and SO to encourage growth in rail freight, support improved performance by removing bottlenecks and improving journey times and reliability. In a situation where many stakeholders are involved, it is challenging to reach a consensus over who should get priority in access and timetabling, particularly when all are accountable to different shareholders. Our concern is that passenger services, which are more profitable than freight services, will be given priority access to paths.

The SO's role is to maintain the benefits of having an integrated national network with a focus on system planning and timetabling which means managing a busy network, accommodating new services and integrating enhancements projects. In its strategic plan the SO sought an increased budget in order to invest in technology for more automated timetable processes and to work on more accurate and resilient timetables and journey time improvements. The late finalisation of the May 2018 timetable and consequent disruption to passengers through cancelled and delayed services illustrates the need for this. Vast amounts of funding have already been invested in the digital railway programme and unfortunately implementing this technology on our Victorian railway structure is proving to be an ongoing challenge. There have been delays to the introduction of this technology across much of the country and much more investment will be needed. ASLEF considers that this technology will be vital for the future of our railways but as it is gradually introduced it is crucial that the SO work with all stakeholders, including trade unions, and remember that all railway staff must receive adequate training to prepare them for the changes it will entail.

Any other points that you would like to make

Thank you for taking the time to respond.

Submission by the Chartered Institute of Logistics and Transport to two ORR consultations: 'Invitation to comment on roles and responsibilities for enhancements in CP6' and 'Network Rail network licence review – Consultation on draft network licence'

1. The Chartered Institute of Logistics and Transport (CILT) is a professional institution embracing all transport modes whose members are engaged in the provision of transport services for both passengers and freight, the management of logistics and the supply chain, transport planning, government and administration. Our principal concern is that transport policies and procedures should be effective and efficient, based on objective analysis of the issues and practical experience, and that good practice should be widely disseminated and adopted. The Institute has a number of specialist forums, a nationwide structure of locally based groups and a Public Policies Committee which considers the broad canvass of transport policy. This submission has been prepared by the Strategic Rail Policy Group.

2. CILT(UK) recognises the changed nature of Network Rail (NR), both in its revised and devolved structure and also in its existence as a public sector arm's length government body and acknowledges that this requires changes to the network licence.

3. CILT(UK) is however concerned that these changes could result in NR becoming exclusively focussed on the requirements of the DfT and Transport Scotland to the exclusion of other current and potential funding bodies. These include the Welsh Government, Merseytravel, Transport for London, Transport for the North and Transport for the West Midlands. There are similar concerns over non-DfT/TS rail funders such as Train Operating Companies and customers of Freight Operating Companies (eg for network connections). The re-designation as a public body means that independent enforcement action is the only sanction available to these bodies and it needs to remain available to ensure that NR delivers. We believe it is vital that the ORR ensures, through Licence enforcement, that equal attention is paid by NR to these other bodies, particularly in the case of enhancements to the rail infrastructure that these bodies are funding.

4. Experience has shown that, while NR will deliver agreed enhancement schemes for such bodies, they are often dilatory in progressing the early development of these schemes and this could be because of over-attention of resources to DfT/TS schemes. Late implementation due to delays in developing schemes does not meet the reasonable requirements of such Stakeholders. CILT(UK) believes that timely and efficient early development should be an output subject to monitoring and licence enforcement action. This should therefore be added to the changes being proposed to the NR Licence.

5. CILT(UK) is concerned that the ORR has excluded all non-DfT/TS Stakeholders from its draft "Enhancements in CP6: Roles and responsibilities" paper published in June 2018. It is of further concern that the ORR proposes NOT to monitor the cost efficiency of enhancement projects or take action in relation to specific milestones (para 1.18, fourth bullet point). While we recognise this is the position agreed between the ORR and DfT we believe this could be taken as a precedent for other bodies. CILT(UK) would therefore wish to see an OVERT statement that the ORR will provide this monitoring for non-DfT sponsored schemes. As indicated above, monitoring (and enforcement action) should be applied to the early development of such schemes.

Submitted by:
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August 2018

CrossCountry position on CP6 PPM trajectory proposed by FNPO route on behalf of Network Rail

We have been unable to agree to the trajectory proposed for the following reasons:

<u>Build up from the forecast exit position from CP5</u>

For CrossCountry, the current rail year has been exceptional so far in terms of poor performance delivery, not least because of issues with the commissioning of BASRE at Bristol Temple Meads, the introduction of the May 18 timetable plus the always difficult to quantify but inevitable impact from the sustained hot weather which is only comparable to the heatwave of 1976 some 42 years ago. No evidence has been presented thus far to show that we would expect another heatwave of such severity through CP6 and there are a number of plans in place to recover from BASRE and May 18. Therefore to effectively determine this year as a new baseline level of performance without applying a quantified reversal of these impacts or evidence to support them being considered as 'baseline performance' is not agreeable to CrossCountry.

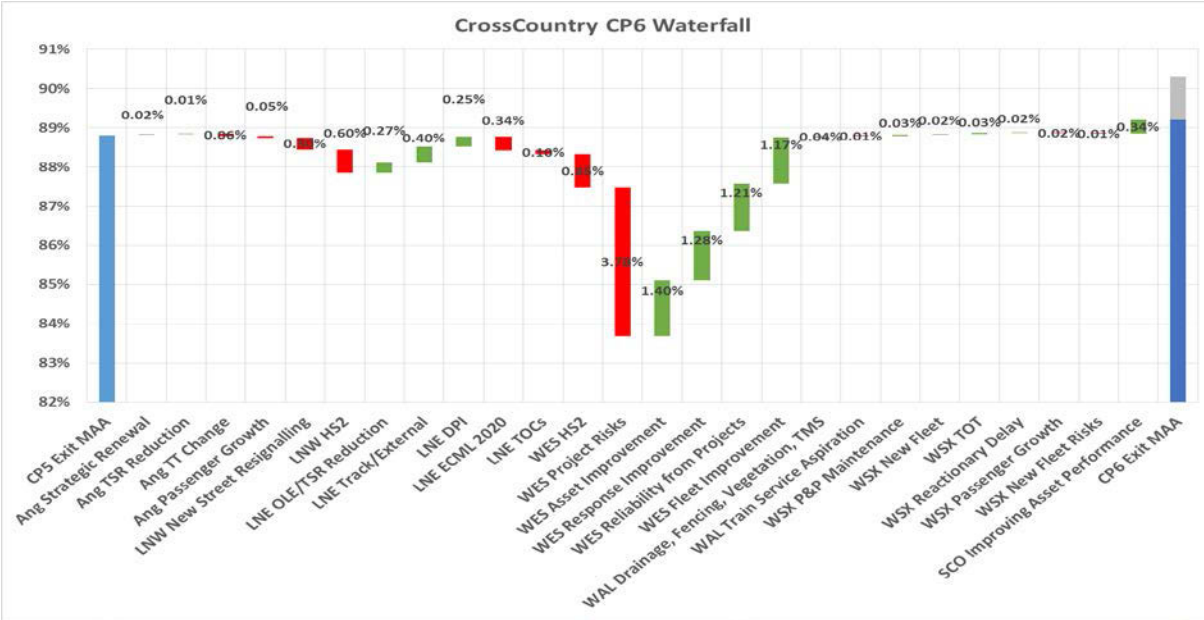
<u>The methodology used by FNPO to assess geographical route impacts on CrossCountry PPM</u>

The methodology applied by the FNPO team is described in their paper on the revised trajectory:

Details are based on review of the routes' Strategic Business Plans and in only a small number of cases route submissions for CP6 Performance Strategies as most are currently being developed to the same timescale as CrossCountry's performance strategy. Many of the numbers are based on expected outturns for other long distance operators. Visibility of exact numbers (-/+) of PPM failures has been limited.

It is clear to CrossCountry that the trajectory has very little detail behind it. The methodology of using route calculation for other long distance operators (as no numbers are available from the routes for CrossCountry specifically) creates a trajectory with a high risk of inaccuracy. For example, for LNW the only TOC used was VTWC to assess the LNW impact on XC (this is the second largest impacting route on CrossCountry) but we do not operate on large parts of VTWC network on LNW and we also operate where VTWC does not. Also, as per the graph below, one of the biggest impacting areas on CrossCountry on Western (the 3rd largest impacting Route) is the impact of HS2 at 0.85%. This seems incredibly high considering this will only be reactionary delay. The HS2 impact for LNW has been added in but we attended a risk workshop for HS2 impact on 28th August to start quantifying the performance risk so we would question what this impact has been derived from if the work hadn't started at the time the trajectory was calculated.

The FNPO team admit that the trajectory in its current form is a very high level assessment lacking a suitable level of quality information to support it as this hasn't been available from the geographical Routes. They are continuing to work on refining their methodology and improving on the level of detail and foresee further revisions to be made as this work progresses.



<u>TOC on Self assumption</u>

The assumption has been made by the FNPO route that there will be no TOC on Self improvement due to the franchise change early in CP6. Once the level of improvement that TOC on Self will deliver in CP6 has been determined through the franchising process, the whole trajectory and Network Rail's Schedule 8 benchmarks will have to be fully recalibrated.

Conclusion

The work undertaken so far by Network Rail and its key Routes is completely inadequate as a basis of setting a baseline position for CP6 and then the performance trajectory through the Control Period. CrossCountry operates an all diesel, high performing and flexible fleet of trains which are now under new ownership with a Lessor investing with us in performance improvements, despite the length of franchise currently remaining. A poorly defined Network Rail performance plan and inappropriate calculations for benchmark setting will undermine the commitments still being made by the TOC which is a completely unacceptable position.

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31 August 2018

2018 PERIODIC REVIEW DRAFT DETERMINATION – OVERVIEW OF APPROACH AND DECISIONS

1. This letter contains the response by DB Cargo (UK) Limited ("DB Cargo") to the PR18 consultation document entitled "*Draft Determination - Overview of Approach and Decisions" ("the draft determination")* issued by the Office of Rail and Road ("ORR") in June 2018.

2. DB Cargo is the largest rail freight operator in the UK and is a wholly owned subsidiary of Deutsche Bahn, the second largest mobility and logistics group in the world. DB Cargo operates over 5,000 trains per month in the UK conveying everything from cereals to aggregates, consumer products to biomass and petroleum to steel. DB Cargo employees over 2,100 people, providing freight, infrastructure, rail support and charter passenger services within the UK and freight services to and from continental Europe via the Channel Tunnel. DB Cargo also provides a range of logistics, supply chain and associated services, including warehousing and terminal management.

3. DB Cargo in common with other rail freight operators is a wholly private sector activity receiving no material direct government support in the UK. In this respect, rail freight is different to passenger rail as it has a very different, less direct relationship with Governments, funders and other devolved bodies. In a heavily-capital intensive industry, DB Cargo owns and operates its own assets, including depots and rolling stock, and has invested heavily in new locomotives, wagons and facilities over the years since UK privatisation.

General Comments

4. DB Cargo is pleased to have the opportunity to respond to the draft determination. This response may be placed on ORR's website in full.

5. The UK rail freight industry is a success story of the post-privatisation era, described by the former CEO of the Office of Rail & Road "*as the most transformed sector in the industry*". It has attracted private sector investment of c £2bn and in fifteen years has grown to account for a market share of surface transport of around 11% (up from 8% at privatisation). Such growth has been achieved by a relentless pursuit of efficiency, striving towards customer satisfaction and strong control of costs.

6. Stability, certainty and confidence in the future are crucial aspects for an industry that depends almost entirely on the private sector (whether in the form of shareholders, customers or debt providers). The Periodic Review process itself, as well as proposals and outcomes, can have immediate and serious impacts on the attitudes and confidence of customers (and potential customers) that directly affects the financial position of the sector.

7. The rail freight sector is highly competitive, with five main rail freight operating companies (FOCs) competing vigorously in all market segments. However, the rail freight industry's main competition is from road haulage or road based logistics services which set the price and service expectations in almost all market segments.

8. Key to maintaining growth and achieving further modal shift from road will be the ability to match the prices and flexibility/simplicity of road haulage. Maintaining a simple structure with a competitive level of freight charges or other costs/incentives is fundamental in helping to achieve this.

9. In this context, it is important to remember that rail freight is strategically important for GB PLC and provides an essential service to industry. The rail freight industry delivers £1.6bn per annum in benefits to the UK economy and conveys goods worth over £30bn per annum.

10. Rail freight has a vital role to play in tackling transport-related carbon reduction, helping the UK Government to meet its climate change commitments and underpinning a greener economy. Given that rail freight produces 76% less carbon dioxide than road freight, it is clear that every tonne of cargo carried by rail rather than road makes a positive contribution towards reaching the targets.

11. Rail freight operators generate very low margins; in fact last year the sector overall

operated at a loss. This is vital in assessing the ability of rail freight and its customers, to absorb the impact of increases in access charges.

Rail Freight Market Changes

12. The rail freight sector is undergoing structural change with the well-documented reduction in the movement of coal to power stations which commenced in April 2015 as the result of changes in energy generation policy. This, combined with the simultaneous impact of a globalized steel manufacturing market has impacted seriously on traditional, core rail freight markets. The disruption to cross-channel services caused by the migrants' crisis at Calais in autumn 2015 has also impacted severely on international rail freight services, with traffic levels being only 60% of the pre-crisis levels despite the resumption of unimpeded transits. The above two elements have had a seriously detrimental impact on FOC finances.

13. Other market segments have, however, exhibited strong growth in recent years, and this is forecast to continue. Growth market segments include Construction (e.g. aggregates and cement), maritime and domestic intermodal and automotive. As well as exacting price and service requirements, these segments have a different operational geography, broadly characterised by an increasing density southward from a line between the Humber and the North West.

14. The structure and level of access charges will be key to determining the ability of the sector to thrive in these growth markets. Customers, and potential customers, already find the rail access and access charging regime complex and difficult to understand; injecting additional complexity or increasing the overall level of charges will likely reinforce preconceptions that already inhibit rail growth.

Wider Regulatory Context

15. The structure and level of access charges are important for freight operating companies such as DB Cargo. Not only are they are an important cost element, but they send signals to customers and potential customers as to the wider rail industry's interest in moving freight

16. As such, the regulatory framework together with effective and appropriate independent regulation is important for the rail freight industry.

17. In almost all rail freight markets, and especially in the key growth markets for the future, customers have choices between rail and other modes, particularly road. Therefore the entire regime, not solely the structure and level of access

charges, has to allow, and incentivise, the use of rail to enable it to be competitive with road transport.

Summary

18. Taking account of the above representations, DB Cargo is pleased that ORR in the draft determination has (1) taken into account its earlier representations made during the PR18 process that ‘pricing caps’ and the ‘phasing-in’ of any track access charge increases are still permissible under the new Rail Regulations and has used these mechanisms; and (2) simplified the freight charging structure through the removal of some charges and the combining of others.

19. The first of these aspects is crucial as it can ensure that there are no immediate ‘price shocks’ as any increases in access charges can be mitigated against and introduced gradually over time. The second is important in increasing the simplicity of the access charge pricing of rail so that it can be more easily understood when compared to the road alternative which is very simple (consisting only of VED and licensing costs).

20. Notwithstanding this, there are aspects of the draft determination that are disappointing. These include the rate at which the substantial increases in track access charges for freight are being ‘phased-in’ and the decision to bring biomass into the category of commodities that can ‘afford to pay’ the new Freight Specific Charge. This is estimated by DB Cargo to result in an ‘overnight’ substantial increase (when taken into account with other access charge price rises) of around 57% from 2018/19 (end CP5) to 2019/20 (start CP6).

ORR approach to producing Network Rail’s determination and to regulating Network Rail in CP6

21. DB Cargo agrees with ORR’s expectation for Network Rail’s internal governance allowing the routes and System Operator to have a choice as to whether they wish to undertake services themselves, procure them from the central function or procure them from outside where appropriate. This approach, assuming a sufficiently robust governance process is in place, will enable productivity, reduction in unit costs and innovation to thrive.

22. Maximum encouragement should be given to the routes and System Operator to go to the open market to enforce efficiency and value from central functions. The role of ORR in their reporting should highlight good practice in a route, how

that compares across the other routes where applicable and monitor that Network Rail shares and embeds that change across its wider business so that the benefits are maximised quickly.

23. DB Cargo agrees with ORR's approach to enforcement policy and reputational tools so that the strongest incentives for Network Rail corporately and individually are reputational ones. DB Cargo welcomes the shift towards reputational incentives, focus on monitoring and reporting as financial penalties would ultimately have a negative effect on the customers of the railway and would further restrict Network Rail maintaining and renewing the network during CP6.

ORR review of Network Rail's network licence

24. For DB Cargo's representations on this aspect of the Periodic Review, please see its separate submission entitled "*2018 Periodic Review Draft Determination: Supplementary Document – Review of Network Rail's Network Licence*" sent to ORR on 30 August 2018.

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ORR review of Network Rail's scorecards and requirements

25. DB Cargo supports the introduction of Scorecards which gives transparency to customers and stakeholders at a route business level. However, DB Cargo considers that the Scorecards do not truly reflect the importance of rail freight users. The tier 1 geographical routes will only report individually on one single freight metric (i.e. Freight Delivery Metric – Route (FDM-R)) with all other freight metrics being solely contained in the FNPO route Scorecard even though actual delivery and achievement of those metrics is almost wholly reliant on the individual geographical routes. This could have the unintended consequence of there being a conflicting priority which may result in the geographical routes focusing solely on the Scorecard metrics of their own direct customers to the detriment of the freight metrics of the FNPO route. This needs addressing in the governance process and in the structure of the Scorecards to ensure that the FNPO route has the ability to demand robust and effective delivery plans from the geographical routes to meet its committed Scorecard measures.

26. It is crucial that all the geographical routes and the System Operator continue to engage with freight operators to ensure that strategic business plans are aligned with the agreed measures in the FNPO Scorecard.

27. DB Cargo agrees with ORR's requirement for Network Rail to maintain a baseline

for network capability. As a freight operator, route availability, gauge, line speed and other relevant network capability characteristics are critical to DB Cargo's business decisions when tendering for contracts and developing new business opportunities and so it relies heavily on the published information being accurate. As a freight customer of Network Rail, DB Cargo expects the strategic business plans to ensure the infrastructure is maintained to the published route availability.

ORR assessment of health and safety

28. DB Cargo agrees with ORR's decision enabling the reallocation of £22m for basic depot safety improvements from the 'operational' spend to the 'core' spend within the FNPO draft settlement. DB Cargo is ready to working closely with FNPO to identify and implement improvements to mitigate safety risks.

ORR review of Network Rail's proposed costs and income

29. DB Cargo appreciates that Network Rail is now a public sector organisation and subject to constraints on the company's ability to move money freely between different years within the control period and also between operating and capital expenditure. There are potential implications to these constraints, for example, the loss of committed outputs over the full length of the control period due to the inability to move funds across years if a project is delayed.

30. With this in mind, it is imperative ORR has sufficient oversight that Network Rail must have in place robust delivery plans to meet the committed outputs within CP6 so that users do not suffer from schemes being cancelled due to a failure to deliver in years 1 & 2. It is critical that Network Rail 'hit the ground running' at the start of CP6 and not as in previous control periods where the spending profile in the early years did not materialise as deployment plans had not been robustly developed.

The financial framework for CP6 and affordability

Charges and contractual incentives in CP6

Access Charges

31. DB Cargo is pleased that ORR has acknowledged that the mechanisms of 'capping' and 'phasing-in' of any increases in variable usage charges ("**VUCs**") continue to be permissible under the new Railway Regulations. However, DB Cargo is very concerned at the way ORR proposes to apply these mechanisms to achieve an

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outcome that all freight VUCs will be increased to reach their ‘uncapped’ level by the end of CP7.

32. As currently proposed in the draft determination, for the first two years of CP6, freight VUCs will be ‘capped’ so that they remain broadly comparable (after taking into account the removal of other variable charges such as the Capacity Charge and Coal Spillage Charge) to the last year of CP5. Over a period of 8 years from the third year of CP6 to the last year of CP7, freight VUCs will increase on a straight line so that by the end of CP7, they will be set at their ‘uncapped’ level.

33. DB Cargo (together with other freight operators) is deeply concerned about this proposal as it represents a steep real terms increase in VUCs of more than 30% over those 8 years which would have significant implications for the rail freight sector making it less competitive when compared to its main competitor, the road haulage industry. This will inevitably result in modal shift from rail to road.

34. DB Cargo considers that the reasons for ORR’s ‘capping’ and ‘phasing-in’ proposals are unclear. Although it is acknowledged that such proposals cannot be ‘open-ended’, it appears uncertain as to why ORR is minded to determine that full cost recovery should be reached by the end of CP7 instead of, for example, over a longer period of time.

35. DB Cargo believes that a trajectory towards full costs recovery over a longer timeframe would still be compliant with relevant legislation. DB Cargo urges ORR to reconsider its current proposal and instead introduce an alternative approach that would require freight VUCs to increase ‘year on year’ at CPI + 1% until full cost recovery is reached. The greater Network Rail’s cost efficiency improves going forward the sooner that full cost recovery will be achieved under this ‘shallower profile’ alternative approach.

36. Not only would this alternative approach be consistent with relevant legislation, DB Cargo also believes that it would enable ORR to better fulfil more of its other statutory duties. These would include, enabling freight operators to plan the future of their businesses with a reasonable degree of assurance by enabling them to mitigate the transitional impacts associated with sudden large increases in charges, better protect the interests of users of railway services, contribute to the achievement of sustainable development and better promote the network for the movement of goods.

37. This alternative proposal, DB Cargo submits, would also better meet both the Department of Transport’s (“**DfT**”) and Transport Scotland’s policies of

encouraging rail freight growth. In his Guidance to the ORR, the Secretary of State requests that the ORR has regard to the objectives of the Rail Freight Strategy (2016) by considering the affordability of freight charges, provide certainty about CP6 costs and take "*all appropriate steps to support the growth and development of the rail freight sector*". Furthermore, in articulating its view to the ORR earlier this year, the DfT said it would like to see "*capping charges in real terms, to the full extent consistent with the legal framework, at the current end of CP5 level in order to provide rail freight operators and investors with certainty about the level of this charge for the next control period*". It also states that *"we support the proposed approach in the FNPO plan to keep the overall level of charges the same (in real terms) as at the end of CP5.*"

38. Furthermore, DB Cargo believes that ORR's impact assessment is based on 'out of date' information which invalidates its estimate of modal shift from rail to road. The impact assessment refers to an MDS Transmodal study which estimated that a doubling of the VUC would see a 4.6% reduction in tonne-kilometres. However, the analysis quoted was undertaken back in 2012 when coal traffic (largely captive to rail) represented a much higher proportion of overall freight volumes and oil prices were higher. Given the decline in the traditional coal market, the analysis does not accurately reflect the current composition of freight traffic, most of which faces very strong competition from road transport. The 2012 MDS Transmodal study estimated that a 50% increase in VUC would see a reduction in 6.6% of intermodal traffic, and a 7.7% reduction in construction traffic, but only a 0.2% reduction in coal traffic. DB Cargo, therefore, urges ORR to reconsider its impact assessment so that it reflects the current freight traffic mix and not a historical position that is no longer valid.

39. The above views are consistent with those expressed by the Rail Delivery Group (on behalf of all freight operators) in its letter to ORR dated 3 August 2018.

40. Since the ORR's draft determination was issued, Network Rail has published its draft VUC price lists for CP6. From an analysis of those price lists it is clear that whilst the intention of ORR was to ensure all freight VUC charges remained broadly the same between end CP5 (2018/19) and start CP6 (2019/20) this is not always the case. For example, despite the increase in the majority of VUC rates to compensate for the removal of the Capacity Charge and Coal Spillage Charges, there are a significant number of vehicles that actually reduce, in some cases, by as much as 16% from the start of CP6 and thereafter remain the same throughout the Control Period (e.g. FKAA loaded in Domestic Intermodal reduces from £1.6142 to £1.3558 per kgtm). Given that all trains conveying any vehicle types currently pay the Capacity Charge, this would appear to imply that such revenue currently being recovered from trains conveying vehicles whose VUC rates are reducing in CP6

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would instead be recovered through increases in the VUC rates of all other vehicles. This would appear on the face of it to create an unfair cross-subsidy between commodity groupings.

41. If this is indeed the case, then DB Cargo would have thought that a fairer and more appropriate approach which would avoiding any possible cross-subsidy would see the revenue currently collected through the Capacity Charge being recovered through an 'across the board' increase in VUC rates in CP6 because that revenue in CP5 is being recovered from every single freight train irrespective of vehicle type. Similarly, the reduction in the Coal Spillage Charge revenue should be recovered from an increase in the VUC rates of the vehicle types that are currently subject to that charge (i.e. those relating to the ESI Coal commodity grouping).

42. In terms of the 'mark-up', DB Cargo supports the merger of the Freight Only Line Charge with the Freight Specific Charge so that there is only one single 'mark-up' levied in CP6 on those commodity groupings deemed by ORR to be able to 'afford to pay' more. However, it is disappointed that ORR has extended those commodity groupings to include biomass. Although ORR considers that the Freight Specific Charge for biomass in CP6 will be set at a conservative level of £1.3/thousand gross tonne miles (actually £1.4290 in Network Rail's draft price list) DB Cargo has estimated that this, combined with the increase in VUC rates, will increase the VUCs of its biomass services by around 57%, in effect 'overnight' (i.e. from 31 March 2019 (end CP5) to 1 April 2019 (start CP6). This significant increase should be fully taken account of in ORR's draft impact assessment.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents

Scotland

43. DB Cargo broadly supports the Scotland Route settlement. There is a clear recognition that Scotland Route understands its role in delivering for Rail Freight and the requirement for the alignment of targets with FNPO and System Operator to ensure Network Rail is able to deliver the promised outcomes expected from its funder and customers. It is noted that Scotland Route will be agreeing a route Scorecard with its customers setting out what it will deliver and recognises freight regulatory measures on the tier 1 scorecard to deliver positive outcomes for freight operators and customers.

44. However, DB Cargo would have liked the scorecard to have included a freight journey time improvement or a freight efficiency measure as well.

45. DB Cargo notes that a review has been commissioned on network capability in Scotland and in England & Wales. Findings from this work will be published in Autumn 2018, separately from the Final Determination and ORR expects Network Rail to implement any recommendations in CP6.

46. DB Cargo agrees with ORR's view on the availability of cross-border routes. That is that Network Rail follows industry processes through the Network Code to use its reasonable endeavours to keep at least one cross border route available at all times and that journey times are to be kept as short as possible.

47. DB Cargo agrees that the ongoing programme of work to manage vegetation needs to be accelerated and plans in place for effective management going forward to ensure clearance is maintained to the published gauging envelope on all lines.

48. DB Cargo supports the view of ORR that part of the GB Digital Railway programme team should be allocated to Scotland, as the rail network has to work as a GB system on a long-term basis.

49. DB Cargo agrees with Scotland Route that the delivery of Journey Time improvement (including freight) will be a joint responsibility of the Scotland Route and System Operator and it will produce 'back-to-back' metrics to ensure clarity over both delivery and accountability.

50. DB Cargo would like to see the Asset Data Quality requirements as specified in Scotland applied to England & Wales in the future. This also applies to network capability / capacity

51. Vegetation clearance on rural and scenic routes should be controlled and maintained so as to both facilitate views from the train and more importantly to prevent damage to trains (including those of charter operators), such as damage to paintwork and exterior finish) and goods being conveyed (particularly new cars). DB Cargo continues to suffer damage to its rolling stock from uncontrolled vegetation in Scotland, most recently on 18/08/18 between Alloa and Longannet.

52. There are a number of HLOS requirements that Network Rail has not fully developed and costed. DB Cargo requests these are finalised with input from the route freight customers, System Operator and FNPO route to enable the delivery of

the Scottish Gauge requirements, infrastructure enhancements to support freight growth and freight journey time improvements.

Freight & National Passenger Operator route

53. DB Cargo welcomes ORR's decisions on the FNPO draft settlement. However, there is a clear requirement to define the governance between FNPO and geographic routes. DB Cargo still has concerns that the geographic routes' incentives to accommodate freight is weak, and a single target set on the Freight Delivery Metric could drive behaviour towards accepting less freight, not more, to ensure that the routes' performance targets are met.

54. DB Cargo believes that there is a compelling case that FNPO requires being included in the proposed changes to Network Rail's network licence conditions (please see DB Cargo's representations on this aspect of the Periodic Review, set out in its separate submission entitled "*2018 Periodic Review Draft Determination: Supplementary Document – Review of Network Rail's Network Licence*" sent to ORR on 30 August 2018.

55. DB Cargo agrees with ORR that the FNPO needs to provide more details on the steps it will undertake to meet the requirements of the Transport Scotland HLOS and provide assurance of its delivery. This will ensure that the most appropriate part of Network Rail is held to account on delivery of each step and that there is full alignment across FNPO, Scotland Route and System Operator. This should be reflected with common measures on the Scorecards of each route and SO so that customers, funders and ORR can clearly see the progress on outcomes.

56. As indicated earlier in this response, DB Cargo supports the recommendations to transfer £22m from 'operations' spend to the 'core' spend.

57. DB Cargo acknowledges FNPO placing some of its staff physically within the geographical routes to strengthen links and engagement with route controls on a real time basis. However, there is a concern that these roles become too inwardly focused on processes between routes to the detriment of their primary purpose of delivering expected outcomes for its freight operators and customers. FNPO is a small team in comparison to the geographical routes and the System Operator so there is a need within the business plan to ensure its people retain identity and core principles of the FNPO route when remotely working within the geographical routes.

58. DB Cargo welcomes the FNPO commitment to introduce a supervisory board.

...

However, progress has been slow with its establishment and, as yet, there are no draft terms of reference or detail on structure currently available.. DB Cargo welcomes further discussion on how this supervisory board will hold the FNPO route to account and how it engages with other established route supervisory boards to ensure that freight interests are represented consistently and effectively across all Routes and System Operator businesses in Network Rail.

System Operator

59. DB Cargo considers that an effective and independent System Operator is vital for national operators such as freight given increasing devolution and plans for greater integration between passenger franchises and Network Rail.

60. DB Cargo supports Network Rail's plan to ensure the capability and capacity of the System Operator is a high priority for CP6 and also supports a well-resourced and sufficiently funded System Operator.

61. DB Cargo welcomes the increased funding in the draft determination for the System Operator, but in light of the recent timetable planning problems, considers it is worth reviewing whether there should also be more IT investment related to timetabling activities alongside further strengthening of additional skilled people.

62. DB Cargo agrees with ORR that the System Operator is best placed within Network Rail to lead the development of a plan for journey time improvements in Scotland, in collaboration with Scotland route, FNPO and industry to meet the requirements of the Scottish Ministers' HLOS.

63. DB Cargo strongly believes that the System Operator has a valuable role to play in reporting on routes' compliance with the various frameworks it owns. A failure of routes to adhere to these requirements will put strain on System Operator's ability to deliver a robust and efficient timetable for operators, specifiers and freight/passenger customers.

England & Wales routes

64. DB Cargo supports the draft determination for England and Wales. It notes the additional measures to provide a greater stretch on efficiency, in order to return to CP4 efficiency levels. Network Rail's efficiency is critical for DB Cargo as a national freight operator as it feeds directly into the level of VUCs.

65. DB Cargo is concerned that Network Rail routes have not provided convincing plans on how they intend to work more efficiently, including setting out any planned investment in technology. It is unclear how ORR will monitor to ensure that efficiency is not being achieved by default at the expense of outputs.

66. DB Cargo notes that ORR has not set outputs for Network Rail other than when required by an HLOS or in respect of a Scorecard. DB Cargo is concerned to ensure that this approach will give sufficient scrutiny of Network Rail and enable a holistic view of overall outcomes. DB Cargo would expect ORR keep this policy under review.

Investment in Research and Development (R&D)

67. DB Cargo welcomes ORR's support for the principles of R&D but is concerned that it has set an initial funding allocation of only £100m in CP6, which is significantly less that the level of funding sought by Network Rail in its strategic business plan. For an organisation that needs to deliver significant efficiency savings over CP6, a reduction in R&D funds could significantly affect outcomes by preventing major technology advances and new products to market and will have wider implications for the rail sector supply chain.

Please contact me if you would like clarification or amplification of any of the points in this response.

Yours sincerely,

R Clarke

Richard Clarke
Head of Transport Policy, Access & Regulation

DB

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30 August 2018

2018 PERIODIC REVIEW DRAFT DETERMINATION: SUPPLEMENTARY DOCUMENT-REVIEW OF NETWORK RAIL'S NETWORK LICENCE

This letter contains the responses of DB Cargo (UK) Limited ("**DB Cargo**") to the questions posed in the "*Review of Network Rail's network licence" iss*ued by the Office of Rail and Road ("**ORR**") in July 2018 ("**the consultation**").

Q1. We consider that aligning the network licence with the devolved structure of Network Rail and our regulatory approach for CP6 will provide additional clarity and consistency. Do you agree, or are there any compelling reasons why this is not the case?

DB Cargo supports the intention of ORR to maintain a single network licence for Network Rail as a whole and not require any legal separation of routes or the System Operator. Notwithstanding this view, however, DB Cargo recognises that ORR also needs to ensure that the single network licence is nevertheless aligned with the devolved structure of Network Rail to better reflect the day-to-day responsibilities of the routes and the System Operator. Consequently, DB Cargo also supports the proposed inclusion of new obligations which require Network Rail to maintain its business structure, with routes and a System Operator responsible for certain functions but ensuring that central governance arrangements remain in place to support that structure.

Q2. Do you consider that any further steps should be taken, within the scope of this review, to embed the Network Rail operating model and our regulatory approach for CP6?

As a national freight operator, DB Cargo is not aligned to any one of the geographical routes. Instead, its interests within Network Rail are intended to be managed by the Freight and National Passenger Operator 'virtual' route ("**the FNPO**"). Therefore, DB Cargo is concerned to ensure that the FNPO has sufficient power and influence to be able to promote and safeguard its interests within Network Rail as a whole and, in particular, the geographical routes who, given their closer direct relationship with passenger operators, may not otherwise view national operators, such as DB Cargo, as direct customers.

Whilst DB Cargo is, therefore, pleased that ORR intends to reflect the interests of freight and national passenger operators in the revised licence, it nevertheless remains concerned the FNPO will not have any specific obligations placed upon it. DB Cargo acknowledges that the FNPO does not have direct responsibilities for asset management of the core network, but it does have a regulated business plan, income stream and budget. The FNPO is also the sponsor for freight enhancements and has a role in developing Network Rail's freight property portfolio. DB Cargo considers it essential that these, as well as any other relevant obligations, are specifically reflected in the revised network licence.

Q3. Do you agree with our proposals for new licence conditions around the structure of Network Rail (with route devolution and a SO) and the requirements around governance? Do you have any specific views on the requirements we propose to put in place?

As indicated in its answer to question 1 above, DB Cargo agrees with the principle of ORR's proposals for new licence conditions to be introduced to reflect the revised structure of Network Rail in terms of route devolution and a System Operator. DB Cargo also supports the requirement for Network Rail to maintain robust governance arrangements to ensure that the routes and the System Operator are enabled to carry out their responsibilities and obligations under the licence.

Whilst DB Cargo considers it essential that the System Operator is able to undertake its role in a way that is sufficiently independent from the rest of Network Rail so that it remains impartial, it believes that the System Operator should also be obliged to operate as far as is possible in a consistent manner across the network. This would avoid national operators, such as DB Cargo, encountering different and/or inconsistent rules and regulations across the various geographical routes.

The proposed licence obligation to ensure that Network Rail assigns sufficient resources to the geographical routes and the System Operator is welcomed, particularly given the current issues Network Rail is encountering in being able to develop and publish on time the Working Timetable and the T-12 Informed Traveller Process information. The proposed requirement for the different parts of Network Rail to co-operate to meet all of the obligations in the licence is also welcomed.

Q4. We have not proposed specific requirements upon the FNPO as we do not propose that it will have specific network management responsibilities. However we will protect the interests of freight and national passenger organisations through requirements around how Network Rail structures its organisation. Do you have any views on this position?

As indicated in its answer to question 2 above, DB Cargo is concerned to ensure that the FNPO is reflected in the licence to confirm that it will have sufficient status and influence to ensure that the interests of national operators are promoted and safeguarded by the geographical routes and the System Operator. Without this, DB Cargo believes that national operators could be disadvantaged through their 'arms-length' indirect relationship with the parts of Network Rail (i.e. the geographical routes and the System Operator) that actually deliver the infrastructure and planning required to enable train services to

...

operate. For example, it is not clear under the licence proposals whether there is a requirement for the FNPO to be consulted by other parts of Network Rail over changes to asset management policies or disposals of land, even if those changes and disposals would have an impact on freight operators. If this is the case then this needs to be addressed to ensure FNPO can look after the interests of rail freight in this regard.

Q5. We have sought to align the existing network management and timetabling requirements within the licence with the responsibilities held within Network Rail by the routes and the SO. Do you have any views on how we have allocated these?

DB Cargo is content with the way in which the existing network management and timetabling requirements within the licence are proposed to align with the responsibilities held within Network Rail by the routes and the System Operator.

However, in the consultation it is noted that the development and production of the network timetable will be one of the key outputs of the System Operator. Consequently, it is proposed that the licence would require the System Operator to run an efficient and effective process, reflecting best practice, for establishing a timetable and changes to it and promptly resolving disputes.

DB Cargo submits that the way in which the timetable is developed, changed and the related disputes process are all requirements that are currently already expressly set out in the relevant parts of the Network Code (including the Access Dispute Resolution Rules). Although it is no doubt correct for such requirements to be also reflected in the network licence, if there is no reference to the Network Code in respect of those requirements, DB Cargo is concerned that unintended conflicts could arise. For example, a conflict could occur if Network Rail sought to unilaterally introduce another way of producing the network timetable that did not conform to the processes set out in the Network Code but in all other respects met the broad requirements of its network licence. Such potential conflicts could be avoided if the network licence also included an obligation for Network Rail to comply with the Network Code in relation to its licenced activities. This would similarly apply in respect of the provision of advanced information to passengers on timetable disruption (i.e. the 'T-12 Informed Traveller process').

Given that the Network Code is an agreed contractual document between Network Rail and relevant Beneficiaries that requires ORR's consent to amend, including such an obligation in the network licence should not in DB Cargo's view give rise to any concerns. Consequently, as the Network Code is such a crucial document it would give comfort to Beneficiaries that a breach of the Network Code could also lead in extremis to licence enforcement action by ORR.

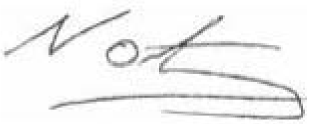
Q6. We have proposed some specific changes to the definition of stakeholder within the licence to ensure the definition captures all of Network Rail's stakeholders and supports the broad purposive intent of the stakeholder general duty. Do you have any views on this proposed definition?

On balance, DB Cargo prefers the existing definition of ‘stakeholder’ because although it is longer and more specific, it is more easily understood and lacks any ambiguity. The proposed definition, on the other hand, as summarised in the consultation, is broader but could give rise to ambiguity. For example, the proposed definition of ‘stakeholder’ is intended to cover any organisation, individual or community with which Network Rail has (now or in the future) a significant relationship and/or which can be impacted by the activities of Network Rail. This could give rise to debates over what level of relationship is considered a ‘significant’ one or whether a future relationship, significant or not, may even exist.

Q7. We have proposed a number of changes to the licence, including changes to reflect Network Rail’s reclassification as a public sector arm’s length government body, changes to requirements around safety standards and changes to the structure of the licence. Do you have any further comments on the changes which are set out above?

As indicated in its answer to question 4 above, DB Cargo considers that the FNPO should also be consulted over land disposals to ensure that the current and future interests of freight operators are promoted and safeguarded. Consequently, the new land disposal licence condition should explicitly ensure that the FNPO should also be required to give its approval to such disposals. In addition, Network Rail should also be obliged to consult relevant stakeholders over such disposals in advance of seeking ORR’s consent.

Yours sincerely,



Nigel Oatway
Access Manager

Department for Transport

Government Response to the Periodic Review 2018 Draft Determination

Moving Britain Ahead

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Contents

Introduction

Government is grateful for the opportunity to respond to the Periodic Review 2018 (PR18) Draft Determination. We have been closely involved with the PR18 process since its outset in the summer of 2016 and are pleased to note the excellent progress that has been made by the Office of Rail and Road (ORR), Network Rail (NR) and the wider rail industry since then in delivering PR18.

Our response does not seek to address every point raised in the Draft Determination and its supporting documents. Rather, we have focussed on issues of particular importance to the achievement of Ministerial objectives for Control Period 6 (CP6), to the protection of the passenger and taxpayer interest, or where specific input from Government is still required. We have not sought to provide detailed commentary on route documents, for instance, save in a small number of instances where we have identified specific financial issues. We have no desire to act as an impediment to the continued improvement of working relationships between NR's routes and its customers which we judge is critical (and current not yet sufficiently advanced across the whole network) and we see a proper route-owned planning process as a key enabler of those relationships. This reflects our strong focus on ensuring a more joined up approach between track and train.

This response sets out Government's views on the Draft Determination and the wider PR18 process. Much of the content of this response is narrative in nature. Where we wish to formally highlight points of particular relevance, we have done so through the use of roman numerals. For the avoidance of doubt, this document addresses only the Draft Determination for England and Wales, reflecting the devolution of responsibilities to the Scottish Government.

1. Periodic Review 18: the Context and the Challenge

From the outset, we have been clear that PR18 posed a particular challenge to Government, the ORR and the rail industry. The review has taken place against the backdrop of a number of complicating factors. In particular:

- Serious issues with the delivery of the May 2018 timetable have shone an important light on the need to improve system operation capability. Work is underway, chiefly through the ORR's own Timetabling Inquiry, to identify the causes of these issues and remedies to prevent a future repeat.
- Severe problems have emerged with the design and delivery of the Control Period 5 (CP5) settlement. Cost-overruns to the enhancements programme have forced replanning and reductions in the scope of planned works. Progress on efficiency has fallen far behind expectations, with NR's overall efficiency currently forecast to be worse at the end of CP5 than it was at the outset. Train performance levels have fallen far short of expectations, with decline on many parts of the network, notwithstanding continued, significant taxpayer investment.
- NR's reclassification to the public sector, which occurred approximately six months after the start of the period, has significantly changed the financial architecture of the company, with consequent implications for its financial and corporate governance.
- The independent reviews set up in light of failures in the enhancements programme have led to significant changes to responsibilities and the strategic direction of the industry. The Shaw Report[1] supported moves towards a more devolved and responsive NR. The Bowe Review[2] led to the establishment of new processes for enhancements, with a clearer client/provider role between Government and NR.

A key role of the PR18 process, which ORR identified from the very start of the process, has been the modernisation of the industry's regulatory architecture to learn the appropriate lessons from CP5 and set the industry on a more stable footing for the delivery of CP6. We have been pleased to see these themes maintained throughout the PR18 process, from the Initial Consultation, through the detailed working papers and the development of the Financial Framework and onwards into the Draft Determination.

Government has played its own role in modernising the industry's architecture and refocussing priorities on the end-user over the last couple of years. Through our High Level Output Specification[3] (HLOS) and Statutory Guidance to the ORR[4], published

[1] https://www.gov.uk/government/publications/shaw-report-final-report-and-recommendations
[2] https://www.gov.uk/government/publications/bowe-review-into-the-planning-of-network-rails-enhancements-programme-2014-to-2019
[3] https://www.gov.uk/government/publications/high-level-output-specification-2017
[4] http://orr.gov.uk/about-orr/who-we-work-with/government/department-for-transport/related-links/secretary-of-state-for-transport-guidance-to-orr

in July 2017, we identified the maintenance of safety and the improvement of performance as our top priorities for CP6, recognising the critical importance of these outputs to users of the railway. Our Statement of Funds Available[5] (SoFA), published in October 2017, committed Government to continued record investment, enabling around £47.9bn of spending on rail infrastructure across CP6, of which £34.7bn would be enabled by direct Government grant. The Secretary of State's Strategic Vision for Rail[6], published in November 2017, set out our longer term strategy to improve the railway for users and the economy, focussing on a more joined up approach between track and train.

[5] https://www.gov.uk/government/publications/railways-statement-of-funds-available-2017
[6] https://www.gov.uk/government/publications/a-strategic-vision-for-rail

2. A Modernised Regulatory Regime

Against the backdrop of the very significant challenges outlined above, we recognise the great strides that ORR has made in modernising its regulatory regime during PR18, to ensure that it remains fit for purpose. In particular, we welcome:

- The focus that PR18 has placed on NR route devolution as a means of improving NR's efficiency and delivery and making the company more accountable to its customers, with complementary regulation of the System Operator to bring a new focus to its performance.
- The shift towards a bottom-up approach to assessing NR's Strategic Business Plans, ensuring that ORR's assessments on efficiency and deliverability are more evidence-based and informed by customer concerns than they have been for any previous Periodic Review.
- The emphasis on ensuring NR's routes continue to feel strong ownership of the Strategic Business Plans as they progress through the milestones of the regulatory review.
- The emphasis on providing appropriate stability to the supply chain to enable it to build its capability and deliver the CP6 work programme efficiently and effectively.
- The modernisation of the Financial Framework to reflect NR's public sector status, ensuring proper financial governance which balances public sector spending practices with NR's need for long term financial planning.
- The approach to Track Access Charges, which removes many charges whose incentive effects were negligible and ensures that new open access operations will move towards paying an appropriate share of their costs to facilitate their continued, sustainable development. Freight and charter operators will continued to be protected, helping to support their growth and the important role they play for rail users.
- The new framework for separating the development, design and delivery of new enhancements from the regulatory process, while ensuring important protections for routes through the introduction of change control processes for their settlements when new enhancements are committed.

We are grateful for the ORR's ambition, imagination and collaborative approach in making these changes. We consider that they will result in a significantly strengthened regulatory regime and placed the rail industry on a stronger footing to face the challenges of CP6.

3. Value for Rail Users and Taxpayers: Alignment with our HLOS and SoFA

The SoFA, which we published in October 2017, continued the Government's clear commitment to continuing record levels of investment to improve our railway. However, the reclassification of NR to the public sector necessitated a radically different approach to setting the HLOS and SoFA compared to previous Periodic Reviews. In particular, our approach to setting the HLOS and SoFA over the course of 2017 was influenced by the following factors:

- The lessons of CP5, where many enhancement schemes were committed without a thorough understanding of their costs and benefits, led us to adopt a different approach to the HLOS, with the focus shifted to the top-level outputs which matter most to users: safety and performance.
- NR's reclassification ensured that its borrowing would now score in national accounts. On this basis, we concluded that there was little purpose to the organisation continuing to fund its activities through borrowing across CP6 and determined that NR should therefore not take loans or issue bonds to fund the HLOS[7]. As we desired to preserve a broad continuity of Track Access Charge levels (recognising the pass-through financial implications that these have for Government in respect of franchised operators), we increased grant levels markedly as a result.
- The SoFA now has a rapid impact on national accounts once set, placing a constraint on the wider use of public funds. Accordingly, we needed to set the SoFA on the basis of much more detailed estimates of NR's revenue requirements than was previously the case and worked closely with both NR and ORR to this end. We were particularly grateful for the ORR's Advice to Ministers[8], which focussed on maintenance and renewals costs for CP6.
- Furthermore, on the basis of work carried out over the course of August and September 2017, our SoFA was set for the first time on a "post-efficient" basis, building in the latest efficiency assessments available from NR's business planning process at that time.

With all of NR's spending now recorded in the national accounts, we have been particularly interested in ensuring that the objectives set out in our HLOS and the funding envelope identified by our SoFA remain at the heart of the PR18 process.

The improvement of asset condition, asset sustainability and train performance was a key objective of our HLOS, recognising the critical importance of reliability to users of the railway. The Strategic Business Plans submitted by NR in February identified a

[7] In addition, Network Rail must refer to the 'Network Rail Framework Agreement' before entering into any financial transactions which may be classified as borrowing.

[8] http://orr.gov.uk/__data/assets/pdf_file/0017/25217/pr18-advice-to-dft-on-the-development-of-the-england-and-wales-hlos-and-sofa-for-cp6.pdf

small improvement in train performance levels across the span of CP6, but the situation on an operator-by-operator basis was mixed, with declines in performance forecast for some operators. We regard it as critical that the regulatory process results in CP6 performance targets which are both stretching and realistic. Accordingly, we would make the following points:

1 We strongly support ORR's challenge to NR's routes to do more work with their customers on CP6 performance trajectories. We do not wish to express a view on the precise targets we believe are appropriate, but we are clear that the critical issue is that an appropriate balance is struck between ambition and realism. Given the very considerable investment Government has committed to improving the condition of the network, we regard improvements to train performance as a critical output for CP6.

2 We are pleased that the proposed change control processes will allow performance targets to flex in response to newly committed enhancements.

3 We are prepared to discuss targets included in current franchises with train operators where this is a material issue. We are clear, however, that we do not intend to excuse operators from making every effort to work closely with NR to improve train performance.

In respect of NR's efficiency, we welcome the approach that the ORR has taken in the Draft Determination. NR's Strategic Business Plans contained levels of efficiency broadly consistent with those upon which our SoFA was set. It is right, however, that the ORR has robustly challenged NR to seek further efficiencies. A strong, independent regulatory challenge, built on the basis of bottom-up work by ORR and the independent reporters, is vital to ensuring that both users of the railway and taxpayers receive the best possible value for money. We would, therefore, like to make the following points in respect of efficiency:

4 We agree with the principle of the ORR challenging NR to go beyond the level of efficiencies identified in its Strategic Business Plans.

5 We do not, however, wish to set out a view on the specific efficiency target that should result from this challenge process, reflecting that this is properly a matter to be determined by ORR on the basis of the evidence available to it so that we secure a stretching yet realistic target.

6 We strongly encourage ORR to continue with its challenge to Routes to lead the development of efficiency targets, reflecting the vital importance of them feeling strong ownership of the eventual CP6 Business Plans.

7 We particularly support the shift towards a whole-asset, whole-life approach to assessing efficiency, recognising this as crucial to the long-term financial and operational sustainability of the railway.

8 We agree with the principle set out in the Draft Determination that, where additional efficiencies are identified, the funds released as a result should be predominantly allocated to the improvement of asset sustainability and train performance. These were the key objectives identified in our HLOS and we would wish to see better trajectories for these vital outputs than we identified in the Strategic Business Plans.

9 We would encourage the ORR to continue to engage with NR, its supply chain and Government on the establishment of CP6 spending profiles ahead of the Final Determination. These profiles will need to reflect the capability of the supply

chain, particularly in light of the wider Highways England and HS2 capital profiles, and the wider public fiscal position.

10 We support the ORR's decision to use CPI rather than RPI as the indexation factor for Track Access Charges. We would note, however, that this support is contingent upon the overall profile of charges being set in such a way that NR is held neutral on the total quantum of income from them across the period, so that the total level of grant required does not exceed the £34.7bn limit expressed in our SoFA.

We note that the ORR has identified further funds it believes could be released through the generation of additional property income and reductions in NR's proposed levels of research and development spending. We consider research and development activity to be vital to the future sustainability and improvement of the rail network and that the rail industry should expect to do this as part of its mainstream activity. Insofar as ring-fenced funding is needed, we accept that the Strategic Business Plan submission did not provide sufficient evidence to justify a request for more than £430m of public expenditure. We have further noted the ORR's view that NR should be required to carry out approximately £80m of additional safety-related works. Accordingly, we would like to make the following points:

11 We support the ORR's challenge to NR to generate more income from its property portfolio, but as with the issue of efficiency, we do not offer a view on the appropriate outcome of this challenge, recognising that this is a matter for the ORR to determine, to ensure stretching yet realistic targets.

12 Given the critical importance of research and development to the future of the rail network, we would ask that ORR consider how the industry can be better incentivised to mainstream this activity, and to increase the effectiveness of its spending. We would ask ORR to consider how it can provide incentives over time for industry to substantially increase the effectiveness of its research and development activity and to reduce its dependence upon ring-fenced funds provided by Government.

13 Nevertheless, we accept the reasons for ORR's proposed reduction in NR's research and development spending, but we would encourage the ORR to consider allowing NR a slightly larger allocation than the £100m proposed in the Draft Determination, provided the company is able to present a better evidenced and supported business case for this spending, which addresses the issues raised by the Draft Determination, particularly those at paragraph 7.85 of the overview document.

14 In particular, any approval of an increase in the allowance for research and development should be contingent on NR demonstrating how it will use funds in a collaborative manner, to drive innovation and efficiency across the industry while attracting match-funding wherever possible.

15 We would particularly welcome research and development activity focussed on the improvement of timetabling systems and technology, in light of recent issues with delivery of the timetable, as well as wider technology supporting advice on potential options for network and service change, and research in lowering whole-life asset costs. These activities have the potential to facilitate the delivery of our HLOS.

16 In light of the poor case made for investment in research and development at the time of the Strategic Business Plans, we would welcome discussions with industry on how the case for future public spending on research and development can be

made more effectively, including for expenditure later in CP6 should additional resource become available through effective management of NR's risk reserve.

17 We support the ORR's challenge to NR on safety, recognising that the continued safety of the railway was a key requirement of our HLOS, but we leave the determination of the works required to achieve this as a matter to be resolved between ORR and NR.

In respect of the allocation of NR's central costs between funders, addressed in paragraphs 8.20-8.21 of the Draft Determination, we would like to make the following points:

18 We engaged constructively with CEPA, who carried out work on this issue on behalf of ORR. We regard the CEPA work as highly credible and accept its conclusion that NR's proposed cost allocation was fair. Accordingly, we do not believe that cost allocations should be changed in the Final Determination.

19 Our SoFA was set on the basis of highly detailed information provided by NR on its CP6 revenue requirement. This included assumptions on cost allocation, which are consistent with those in the CEPA report. This situation is likely to continue in future Periodic Reviews. We would therefore suggest that should ORR wish to work with funders to revisit cost allocation formulae in detail, this should be done early in the next Periodic Review programme, well ahead of the publication of the SoFA for CP7.

The Draft Determination indicated that since the publication of the SoFA, NR has identified an additional £250-300m of income from the Crossrail Supplementary Access Charge (paragraph 10.7). We are clear that had this income been reported to us in advance of the publication of the SoFA, it is likely that the level of Government grant available would have been reduced by a corresponding amount. Accordingly, we would make the following point:

20 The Final Determination should recognise that Government may have a legitimate need to reallocate this funding from NR to other areas of transport spending. While we have not formalised this requirement at this time, it is highly likely that we will do so. Accordingly, NR should programme on the basis of this funding being used for "contingent renewals", which could be cancelled readily and with few consequences should Government need to reallocate this money to areas.

The Draft Determination places a requirement on NR to change its proposed allocation of risk funding. When NR introduced its proposed risk buffers in the Strategic Business Plans, this ran contrary to our previous assumptions, which did not account for the need for such a significant risk pot for a public sector entity. However, we have accepted the advice on NR, ORR and ORR's independent reporter that the level of risk provision is acceptable for an organisation with a portfolio of works of the size and complexity of NR's. We would therefore make the following points in respect of risk funding:

21 We agree with the ORR's proposal that the size of the NR central Group Portfolio Fund should be reduced, with approximately £850m of this funding being reallocated to routes. We further agree with ORR that routes should assign this proposed allocation to "contingent renewals". We believe this approach helps to cement the principles of route devolution. It enables the rapid deployment of funds held in route-level risk buffers as risks fail to materialise, maximising financial efficiency and the benefits to users of the railway.

22 We expect to see arrangements put in place around risk funding, whether held centrally or at route level, which ensure that funds are released for activity on a rolling basis, as and when risks fail to materialise. This will be critical to ensuring that funding is not lost to the railway as a result of the financial flexibilities framework that will be available to NR during CP6.

23 In the first instance, we would expect funding released from risk allocations to be used for the improvement of asset condition, asset sustainability and train performance. We would, however, be open to the prospect of some released funds being used for research and development activity, subject to satisfactory business cases.

Taken as a whole, we are very clear that the approach adopted by the ORR is optimally designed to ensure the delivery of our objectives within our available funding and would encourage the ORR to continue with this approach through to the Final Determination.

4. Ensuring Sustainable and Competitive Markets: Charges and Incentives

We strongly support the approach the ORR has taken to charges and incentives across the PR18 process. It strikes a good balance between simplifying the system, improving transparency, and reinforcing the right incentives on the industry. Ultimately this should deliver better outcomes for passengers and freight shippers.

We also appreciate the way that ORR, and NR, have taken on board the feedback of stakeholders and funders in shaping the approach to specific issues, including on the allocation of fixed costs across the network. We are clear that this iterative, consultative process has led to a better outcome.

We would wish to make the following specific points in respect of access charges:

24 With respect to infrastructure cost charges for franchises, we agree with ORR's proposals to cap Network Rail's downside risk for variability in timetabled train miles. This strikes the right balance between incentivising Network Rail to use capacity effectively, whilst still providing certainty over what the total impact could be and allowing NR to plan accordingly.

25 Regarding the proposal to levy infrastructure cost charges on freight services carrying ESI biomass, we note that ORR has undertaken further analysis of the economics of biomass generation. When making their final decision we expect that ORR continues to engage with stakeholders, both freight operators and their end-customers, including ports, and takes in to account any new relevant evidence.

26 As we have set out in a number of places, we are supportive of reforming fixed track access charges (through infrastructure cost charges) so that open access operators pay an appropriate amount towards the costs of the network. This is critical for creating the level-playing field on which open access can play a greater role in delivering benefits for passengers.

27 We support only applying this reform to new open access services[9]. Similarly, we support applying this reform to existing operators where they propose significant changes to their services. We also recognise that new services take time to build their customer base so agree with the principle of phasing in ICCs for open access over 5 years. We would however, like to see the profile altered slightly so that they pay at least a small proportion of charges in the second year – around 10%, to better address taxpayer impacts. It is important to have a clear statement that all operators should pay their way as early as possible.

28 Over the course of CP6 we expect the ORR to monitor this approach carefully so that new operators are not able to unduly benefit from taxpayer subsidy and that

[9] As defined at paragraph 3.51 of the supplementary document “Charges and Incentives: Infrastructure Cost Charges Consultation”. We consider that any change to the definition as set out in the consultation document would have significant adverse consequences for taxpayer interests.

they are delivering genuine benefits for passengers. We look forward to continued work with ORR on the development of the Public Service Obligation levy. We would also like to see further work on disaggregation of services to help with future tweaks of the system to further improve the incentives in this area.

29 On variable charges we are particularly pleased that the ORR agrees with government that it is important to protect the critical benefits that freight and charter operators deliver. By limiting the short term impact of increases in charges through the phasing in of the increases over two control periods this gives these operators vital time to adapt and plan, so that they can continue to grow and develop their businesses. We do, however, agree that these operators should move towards paying an appropriate share of their costs over time.

30 We would like to express our strong support for the proposed Performance Innovation Fund, which we believe will provide a useful and important laboratory to test the impacts of more radical proposals for charging reform without creating wider risks for users of the railway or taxpayers.

31 We support ORR's approach on Schedule 4 and 8. In addition, we appreciate the reasoning around the desire for a further recalibration of Schedule 8 benchmarks during Control Period 6. We would like to see a re-opener provision supported by a robust benchmark recalibration methodology. This includes taking into account the appropriate timing for a recalibration, as this may have an effect on the financial impact. ORR's offer of publishing guidance on this would be welcome.

32 Finally, whilst it is still some way off, we consider that a more comprehensive review of schedules 4 and 8 may be a fruitful area of focus for Periodic Review 2023. To facilitate this, and to better ensure that the current system works as effectively as possible, we would like to see the industry, working closely with the ORR, collect the necessary data and where appropriate trial alternative approaches.

In summary, we believe that the proposals on Track Access Charges and incentives set out in the Draft Determination should have positive impacts on the market for rail services and, as a consequence, on passengers and freight shippers. We would urge the ORR to preserve this broad approach through to the Final Determination.

5. Holding Network Rail to Account and Closer Working Between Track and Train

It is absolutely critical that, once the regulatory framework for CP6 has been set, NR is properly held to account for the delivery of its regulated outputs within the scope of funding available from Government, so that it delivers the benefits users and funders require. We are clear that the SoFA represented the totality of the funding that Government can make available to the railway across CP6 for the delivery of the outputs defined in the HLOS. A failure by NR to deliver could, therefore, result in regulated outputs not being achieved.

We have been pleased, throughout the PR18 process, to note the emphasis that ORR has placed on promoting more joined up working between track and train. We would offer some specific comments in this area, in respect of NR's accountability to its users:

33 We share the ORR's view that Route Supervisory Boards are not yet operating in a satisfactory manner. We expect to see continued pressure to clarify the role of these boards and enhance their effectiveness and transparency.

34 We are clear that we see improving the level of communication and consultation between NR and train operators as critically important. We strongly endorse the ORR's proposals in this area, though we wish to contribute further to aspects of the ORR's proposed approach to CP6 scorecards, most specifically how these fully reflect the role of Government as a major customer and as shareholder, before final decisions on this are made"

35 We wish to see a continued step-change in NR's customer engagement, building on the lessons learned during CP5 and the earlier stages of the PR18 process.

We were also reassured by the strong focus on improving monitoring of NR's activity and ensuring that the organisation's component parts are held responsible in a manner that properly embeds route devolution and the wider programme of transformation. In respect of the published proposals, we would like to make the following comments:

36 We agree with the ORR's proposals for strong regulation of the System Operator function, including the proposed increase in resources for that function. We welcome the SO's improvement plans, and now want to see them delivered effectively. We are clear that the SO's capability and responsiveness must improve if we are to see improvements in the service it provides its customers, including Government, and ultimately train performance across CP6. While we await the outcomes of the ORR's independent inquiry into recent timetabling problems, it is our firm view that improving the effectiveness of the System Operator will be an important factor in avoiding any future repeat of these

problems. We recognise that the structure and role of the System Operator may continue to need to evolve over the course of CP6, as the process of route devolution develops. We address this issue further in our response to ORR's consultation on the Network Licence.

37 We are concerned that the FNPO route is not sufficiently empowered to protect the interests of the freight industry, in particular how it ensures that the System Operator, geographic routes, and other parts of NR deliver for freight. We therefore agree with ORR's recommendations to the FNPO route on how it is incentivised to deliver against its strategic business plan, and we want to see Network Rail implement these recommendations.

38 We remain concerned about the balance of responsibility between NR's routes, the System Operator and Infrastructure Projects. We would be grateful if the ORR could give further and continued focus on how this relationship works, as it is important that these relationships do not impede the development of closer relationships between routes and their customers. DfT is working jointly with NR on a programme of work to improve the delivery of enhancements and renewals which is looking at how the clarity of roles and accountabilities with NR addresses these issues. The ORR's involvement in this work will be welcome to ensure it provides the appropriate regulatory monitoring of national functions to avoid any duplication of work and to address the concerns set out in the draft determination.

39 We are clear that any future arrangements between routes and Infrastructure Projects must accommodate the possibility that routes should be able to procure projects from providers other than Infrastructure Projects, enabling contestability and competition in the market for rail projects, strengthening accountability and improving value for money. The ongoing work to improve the delivery of infrastructure projects and NR's response to the Hansford Review in the form of their "open for business" programme will be imperative to embed this behaviour within NR ahead of CP6.

In respect of the ongoing monitoring of NR's performance against its CP6 targets, we have been encouraged by the approach the ORR has taken to improving the effectiveness and accessibility of its monitoring regime. In particular:

40 We strongly support the move towards separate monitoring of the performance of each of NR's routes and the major central functions. We regard this as essential to realise the benefits of route devolution. ORR must make the most of this approach, with clear and accessible comparisons, clearly presented in documents such as the Network Monitor, to enable clear and effective benchmarking, strong accountability and the sharing of good practice between Routes.

41 We welcome the move towards more use of leading indicators of performance in the ORR's monitoring of NR. While this cannot entirely supplant the use of trailing indicators, we think it has the potential to drive significant cultural and behavioural improvements.

42 We support the proposed changes to the monitoring of efficiency and financial performance.

43 We also support the proposed changes to the escalation of concerns and the progression towards enforcement action. We approve of the proposals to make use of more targeted enforcement action on individual routes or functions and the intention to use more reputational incentives, such as public hearings. These are critical to underline clear route accountability.

44 We welcome the commitment to the new Rail Ombudsman that is included in the Freight and National Passenger Operator route plan. We encourage the ORR to ensure that NR has allocated sufficient resources to ensure that NR plays an effective role in the scheme.

In light of the ORR's most recent Network Rail Monitor[10], here are a number of concerns which we would like to become the subject of specific ORR focus over the remainder of the PR18 process.

45 We regard NR's readiness for CP6 as a matter of critical importance. The opening months of CP5, as ORR has recognised[11], were marked by stasis and lack of progress, with profound implications for the rest of the period. Avoiding a repeat of this for CP6 is essential. We would encourage the ORR to continue and, if necessary, intensify its monitoring of NR's CP6 readiness.

46 We note that NR remains badly adrift of its CP5 efficiency targets, with the situation forecast to worsen during 2018-19. While we recognise that the original CP5 targets may, with hindsight, have been undeliverable, we are clear that a continuation of the present situation in CP6 would be intolerable. We would ask the ORR to take every available action to drive a sustainable recovery in efficiency. We would also ask that ORR be mindful of the impacts of 2018-19 efficiency on the CP5 out-turn position and hence on the position at the start of CP6, to ensure that CP6 targets strike the appropriate balance between challenge and realism from the outset.

47 We further note that train performance continues to be far below expectations. Some of this may be down to specific events such as the recent timetable problems, but we would ask ORR to drive a continued focus on improving performance and to be mindful of the course of events over 2018-19 on the CP6 start-position.

Over the last few years, we have been grateful for the ORR's co-operation on the implementation of the findings of the Bowe Review, which have seen significant changes to the governance of enhancement projects. For CP6, new enhancements will not be committed as part of the regulatory process, but rather will be developed through the new Rail Network Enhancements Pipeline[12] (RNEP).

ORR has taken clear steps to modernise the regulatory regime for CP6 to reflect these changes to the planning and delivery of enhancements. We would like to make the following specific points in this area:

48 We are pleased that the new arrangements for the monitoring of NR's delivery of enhancement projects are properly reflected in the Draft Determination.

49 We very much welcome the separate document that ORR issued on the roles and responsibilities of different parties in respect of enhancements[13]. This document reflects very well the productive discussions between ORR, DfT and NR and provide a clearer basis for accountability, with ORR playing a particularly important role in monitoring NR's overall enhancements delivery capability.

50 We support the issue of an Enhancements Delivery Plan by NR, which should not include regulated outputs. Instead, the publication of Entry into Service milestones for enhancements which have successfully progressed to the delivery stage

[10] http://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/monitoring-performance/network-rail-monitor
[11] http://orr.gov.uk/rail/consultations/pr18-consultations/consultation-on-improving-network-rails-renewals-efficiency
[12] https://www.gov.uk/government/publications/rail-network-enhancements-pipeline
[13] http://orr.gov.uk/rail/consultations/open-consultations/invitation-to-comment-on-roles-and-responsibilities-for-enhancements-in-cp6

would be appropriate and would support the recently published RNEP. It will be critical in reporting on this issue that it is clear where a milestone has been missed and a new one set to ensure clear accountability.

51 We strongly support the ORR's proposed change control processes, which will allow updates to route plans and regulated outputs as necessary when new enhancements are committed.

We strongly support ORR's proposals to update the Network Licence to differentiate between the responsibilities of routes and central functions. We will provide a separate response to the Licence Review consultation. We welcome the ongoing dialogue between Government and the ORR on the alignment between the ORR's review of the Network Licence and the DfT review of the Framework Agreement, which sets out the corporate relationship between NR and Government. Between these two reviews, we believe there exists substantial potential to improve NR's accountability.

Conclusion

Throughout the PR18 process, we have been highly impressed by the degree of ambition, engagement, flexibility and imagination that the ORR has demonstrated in reforming the regulatory regime. We particularly welcome the strong reflection of Ministerial objectives and priorities throughout the document, focussed on how we can achieve a better railway for its users and funders in CP6. We support the Draft Determination and, subject to the comments provided above, would wish to see its principles carried through into the Final Determination.

[Letter from DfT specifically on the network licence consultation]

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Dear John,

We welcome the ORR's publication in June of the policy consultation on reforms to the Network Licence ("the Licence"), followed by the subsequent July consultation on the draft Licence itself. This letter represents the Government's response to both consultations.

We strongly support the ORR's intention to reform the Licence, given the important role it plays in establishing the framework in which Network Rail (NR) operates. We are particularly encouraged by the progress that the consultation documents represent towards embedding the important reforms heralded by the NR transformation agenda and wider Periodic Review 2018 (PR18) process into the Licence, particularly the clear focus in supporting culture change with NR. Between the wider issues addressed in the ORR's Draft Determination and our own work to reform the Framework Agreement that defines the relationship between NR and Government, there is a real opportunity to ensure that NR is placed on a properly sustainable and more accountable footing from the start of Control Period 6 (CP6), supported by a culture even more supportive of effective delivery. It is critical that this opportunity is fully seized.

We are also particularly pleased by the extent to which your consultations address the Government's policy priorities for CP6. In particular, we think it is vital that there is continued emphasis on:

- continuing to drive and embed meaningful route devolution within NR;
- ensuring a accountable system operator function with clear responsibilities, with the capability and culture to deliver effectively;
- driving further progress on the good start that has been made to promote closer working between NR and its customers, bringing closer together track and train; and
- ensuring that the regulatory framework supports continued transformation of NR across CP6, including steps to increase the contestability of certain functions. [1]

While we believe that the documents presented for consultation represent very positive steps forward, we nevertheless wish to raise several more specific issues which we consider are important to ensure the opportunities of this reform are fully seized.

[1] Consistent with the themes of the Secretary of State's guidance to the ORR (July 2017). We ask that the ORR continues to have regard to that Guidance (most particularly paragraphs 9 and 11) as it continues and concludes its work to reform the Licence.

Driving devolution, transformation and effective System Operation

The ORR has set support for NR devolution as a key objective for the review of the Licence. We are pleased by the steps taken to embed devolution and enhance accountability through requiring NR to designate routes and being clear that the Routes have primary responsibility for the operation, maintenance, renewal, improvement and development of the railway within the route, as well as the clear identification of the role and accountability of Route Managing Directors.

We also strongly agree on the importance of allocating specific responsibilities between NR's routes and System Operator in a more granular manner, supported by effective change control. This is key to driving accountability from, and stronger reputational incentives on, NR's management teams. We are therefore highly supportive of the ORR's overall approach, including the emphasis it places on continued effective co-operation between the routes and the central functions. However, we would note that there may be a legitimate need in some circumstances to preserve a degree of future flexibility on the assignment of responsibilities, to allow for emerging trends or innovations within the transformation programme. However, to prevent blurring of accountability, the reasons for such flexibility in the assignment of roles must be clearly and strongly justified.

We therefore see real value in your drive to clarify the respective roles of the routes and System Operator. It is particularly critical that, as the ORR proposes, the Licence properly supports the development of more effective relationships between the routes and central functions. We would be keen to see the Licence helping to embed a shift in the internal dynamics within NR, such that the routes become informed and empowered customers of the System Operator and Central functions, further supporting accountability and contestability.

We believe this is particularly relevant in respect of capacity allocation and the sale of access rights. We have noted some tensions between the System Operator function and routes over the assessment of network capacity and the ability of the network to accommodate additional train paths. We are clear that the System Operator must retain responsibility and accountability for ensuring the effective operation of the railway at a network level and for ensuring that all parties wishing for access to the network are treated fairly. We would, however, be pleased if routes were to take a more active role in the capacity allocation process, recognising their detailed knowledge of their local assets.

More generally with respect to the System Operator we consider that clear accountabilities are absolutely critical to create strong incentives to continually improve the capability of the System Operator, including in the critical areas of capacity allocation, performance analysis and the critical issue of timetabling. We therefore welcome the proposed allocation of SO primary responsibilities, including the establishment of the national timetable and the provision of timetabling information to passengers. With respect to timetabling specifically, we consider it is critical that the ORR ensures that the process of Licence reform ensures that the key lessons arising out of the ORR's timetabling inquiry (including the interim report in September) can be reflected in reforms to the Licence. It may also be necessary to preserve flexibility to adapt to the final report due by December. Doing so is absolutely vital to ensure all steps are being taken to prevent a repeat of the recent significant timetabling challenges, helping to prevent future unacceptable timetable related disruption to rail users.

We recognise the potential benefits in introducing a regulatory requirement for the SO to handle customers' information sensitively (2.11), not least because it could help to allay concerns of people providing information. However there are risks this creates an overly bureaucratic and prescriptive set of processes within NR. It may be more useful for the licence to set a higher level requirement, for instance requiring a clear data handling protocol to be put in place that ensures people providing data to the SO agree to the uses NR may make it and makes appropriate provisions to protect commercially sensitive data.

Finally, we strongly agree on the importance of the Licence being clear that information requests can be provided to the Routes and the SO directly, as well as instructions to independent reporters being capable of being focused on the Routes and the SO. This is important to underline the accountability of local management teams.

Bringing together track and train

We were pleased to see the emphasis placed, in the July consultation in particular, on sharpening the focus within the Licence on NR carrying out meaningful engagement with its customers, supporting cultural change in NR, which is a key aspect of achieving transformation and closer working between track and train. We consider this essential to ensure a more joined up railway that works better for its customers. We would strongly urge you to continue to use the Licence as a tool to drive progress in this area, particularly through supporting further culture change in NR to enhance its responsiveness to its customers.

We have been encouraged to note a general improvement in the quality of NR's stakeholder engagement over the course of the PR18 process, as the ORR clearly indicates in the Draft Determination. However, despite the positive signs we have witnessed, we consider that considerable further improvement is still required if we are to realise the ambition set out in our Strategic Vision for Rail to improve the network for end-users through closer working between track and train.

In this light, we are highly supportive of the principles that you have set out alongside the Draft Determination for high quality stakeholder engagement, in that it must be:[2]

- effective,
- inclusive,
- transparent, and
- well governed.[3]

While we can see that these are broadly reflected in Licence condition 1.7, we consider that it would be even more effective if these principles are explicitly and directly set out in the Licence, with the accompanying definitions from the Draft Determination included. We consider that such an approach, whilst being non-prescriptive gives a clear indication of the types of behaviours that NR is expected to demonstrate in its engagement with customers. However, we consider that such a view is much too narrow – setting these principles clearly into the Licence are an important aspect of supporting the cultural change in NR which is a key aspect of transformation and in better joining up track and train in the interests of customers.

Reflecting reclassification of NR

We also support the recognition in the consultation of the importance of ensuring that the Licence reflects the reality of NR as a public body and Secretary of State as the sole

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[2] http://orr.gov.uk/__data/assets/pdf_file/0018/27801/pr18-draft-determination-stakeholder-engagement.pdf - table 2.1

[3] http://orr.gov.uk/__data/assets/pdf_file/0010/27757/pr18-draft-determination-overview-june-2018.pdf - para 3.16

shareholder in the company. We therefore support the removal of the Financial Indebtedness provision as with respect to new funding requirements NR is now wholly funded by the State and not through debt market issuance, meaning that financial indebtedness limits would no longer be relevant; also obviating NR's need to maintain investment grade issuer credit rating. Similarly, sole Secretary of State shareholder status and public ownership mean that Change of Control provisions are no longer relevant, all of which will simplify such aspects of the Licence.[4]

Protection for Freight Operators and Customers

The Government's Rail Freight Strategy recognises the crucial role that rail freight plays in the UK economy and we consider the continuance of a healthy rail freight market to be of vital importance. We, as we articulate in our separate response to the Draft Determination, continue to support the strong steps that the ORR are taking through PR18 to support the freight sector. However, we are concerned that the present text within the draft Licence (paragraphs 2.6-2.7) may not provide sufficient protection for the interests of freight users during a period when NR will be undergoing a process of significant and necessary transformation.

We accept that this is an area where a degree of flexibility may need to be preserved within the Licence to allow practice to evolve over the course of CP6. For instance, we recognise there may be legitimate debate as to whether it is better for the FNPO route or geographic routes to be held directly accountable for freight interests. But we would like to see the existing wording of this section strengthened to reflect the critical importance of ensuring fair treatment of freight operators and their customers, to help enable the rail freight industry to grow.

We want to see the FNPO route having the right governance in place through the Licence to ensure that freight is not disadvantaged and receives equal treatment, enabling Network Rail to make fair trade-offs. As it stands, the proposed Licence does not include a clear obligation for the SO and geographic routes to work with the FNPO route, limiting the authority the FNPO has to ensure that other parts of Network Rail's business deliver for rail freight. As such, the Licence needs to oblige all parts of Network Rail to deliver for rail freight, including an obligation to cooperate with the FNPO route (or any other part of its business that is established to act as the focal point for the freight industry).

Network Rail also has an important relationship with freight customers, such as ports and the construction industry, which is not acknowledged in the proposed Licence. Network Rail takes in to account the interests of freight customers who rely on Network Rail to support their businesses, and this needs to be reflected in the Licence.

The rail freight industry, both operators and their customers, need to have certainty to plan their businesses. This is especially important at a time when the freight industry is restructuring to focus on new markets following the decline of coal. At a time where Network Rail is also transforming, the rail freight sector needs to have confidence that all parts of Network Rail's business are obliged to deliver for rail freight, and that the industry has clear recourse through the Licence where things go wrong. This would send a clear signal to the rail freight industry that their interests are embedded across all parts of Network Rail's business.

[4] We similarly support the other steps to simplify and clarify the Licence highlighted in the July consultation.

In Conclusion

We regard the reforms to the draft Licence as highly positive, subject to our comments above, and encourage the ORR to continue to take an ambitious approach to reforming the Licence to enhance accountability. I am pleased that constructive discussions are underway between ORR officials and our own NR Shareholder Team on certain aspects of the Licence, particularly those relating to Management Incentives, which are important to enhance accountability. It is encouraging that you have identified the need to ensure that Network Rail's scorecard, framework agreement and Licence align to support effective measurement of performance and management of reward. We look forward to continued engagement with you on this process as ORR takes full advantage of the opportunity afforded by Licence reform.

Yours Sincerely,

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28th August 2018

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Periodic Review 18 Draft Determination

Supplementary Document – Charges and incentives: Infrastructure cost charges consultation

We are responding to the decision to allow Network Rail to levy infrastructure cost charges (ICC) on trains carrying biomass in CP6. Although the rail access charges are paid by the Freight Operating Companies, who transport the biomass from the ports to Drax, these are passed through to Drax so have a direct impact on our business. As you know, we strongly disagree with the decision to levy ICC on biomass but appreciate the willingness and openness of the ORR team to engage in discussion on the issue and commission additional consultancy studies to examine the impact in detail.

The reasons why the ICC should not be applied to biomass are:

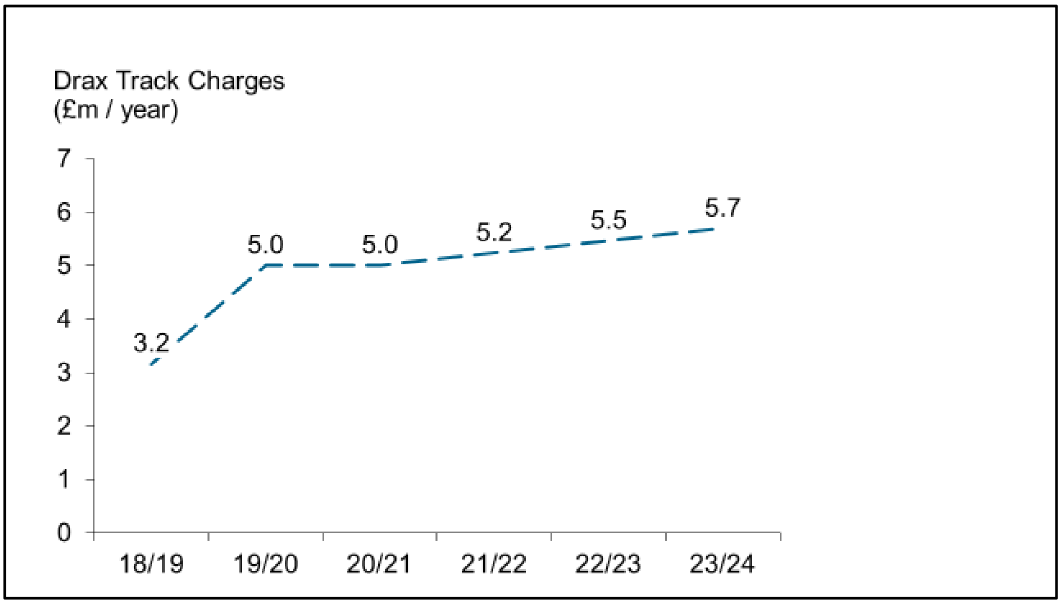
- The cost of generating electricity from the units will increase, which means that our biomass units will be less competitive when compared with fossil fuel plants such as gas- and coal-fired power stations. This increases the probability that the renewable power produced by our biomass units will be displaced by power stations emitting higher levels of CO_2. If our biomass units are the marginal price setting plant on the electricity system, this may increase the cost of power to UK businesses and residential consumers.
- Biomass units currently provide the UK system with the only source of renewable power that is flexible and dispatchable, additionally supplying essential system services to National Grid to ensure a stable system. We receive renewable support until March 2027 but have embarked on a project to reduce the cost of biomass by at least 40% to ensure that we can continue to provide such power and services without subsidy. Cost increases, such as those being proposed, make an already challenging project that much more difficult. This may ultimately make biomass generation uncompetitive and, in our opinion, push up long-term electricity prices in the UK as less effective sources of electricity are needed to balance the system.
- Drax and the port owners through which we import our biomass have made significant infrastructure investments (over £500m) and have committed to using the railway as a cost-effective and low carbon way to deliver biomass to the power station. Levying this charge will be a poor signal that could dissuade other industries from making similar commitments in this and other sectors.

We note that the decision has been made that the ICC will be levied on biomass in CP6 subject to final ratification by ORR later this year. Acknowledging this position we would suggest that it may be time for a more fulsome review of the whole charging structure for freight on the railway.

It is not equitable that biomass will pay most of the freight sector's contribution to Network Rail's fixed cost in CP6 (see table below). This is an opportunity for the ORR to consider the type of fundamental reform that Ofgem are considering in their Targeted Charging Review to develop a system that incentivises the most efficient use of the system whilst sharing the existing infrastructure costs and new investment equitably amongst the users. This would recognise the fundamental changes that have occurred to the use and users of the network since the original methodology was put in place.

Commodity	**Average Annual ICC in CP6 (£m)**	**Proportion of Total**
ESI Coal	0	0%
Iron Ore	0.3	10%
Spent Nuclear Fuel	0.6	20%
Biomass	2.0	70%
Total	**2.9**	

Looking at the specific impact on Drax, the Chart below illustrates the effect using the draft price list published by Network Rail. As shown, we estimate there will be a significant increase (~£2m) in the charges from the end of CP5 to the first year of CP6.



A phased introduction of the ICC would ameliorate some of the impact on Drax. For example, if the ICC is phased in the same manner as the Freight Specific Charge was in CP5 this would provide a more gradual adjustment to the higher charges, as shown in the Chart below.

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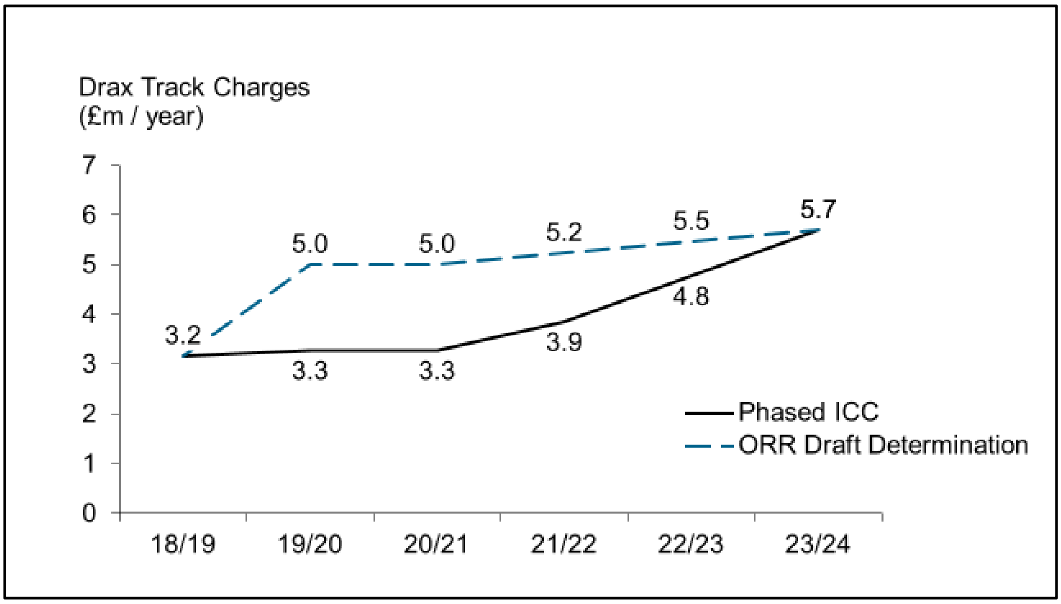

There are good reasons why the introduction of the ICC should follow the precedent that was set when the FSC was phased-in during CP5 including:

1. In our response to the CP6 consultation, we highlighted that levying the ICC could reduce the amount of biomass transportation on the railway and subsequent generation of renewable electricity. This was confirmed in the detailed analysis by MDST for the ORR and the consultants highlighted that Drax could seek to mitigate the impact by reorganising its supply chain routing. However, this is not a simple task as there are contractual requirements with the port operators and biomass suppliers that constrain the timescale for making such adjustments.
2. The levying of ICC on biomass is estimated to add around £1.7m per year to Drax's cost base even after mitigation through changes to the supply chain routing. This will directly impact the company's costs and may reduce renewable generation from the power station for the reasons set out earlier, potentially driving up carbon emissions and/or power prices.
3. Our contracted biomass portfolio declines over time, as existing contracts expire. A phased approach to the introduction of revised charging should enable us to work with our suppliers and other stakeholders, particularly in the UK at our ports and across the railway industry - an industry that has already suffered considerably following the significant decline in coal volumes moved – to absorb these costs in a way that mitigates the impact as effectively as possible.
4. Although the final determination for CP5 highlighted that levying the charge on biomass would be re-visited for CP6, it was reasonable for us to assume there would be a phased increase. The reasons for phasing of the FSC in CP5 appear equally applicable to the levying on biomass in CP6. It would also be consistent with the wider duties of the ORR in enabling persons providing railway services to plan the future of their business with a reasonable degree of assurance.

Our disappointment that the ICC will be levied on biomass was made worse when it was confirmed that the proposed charges have increased since the Draft Determination, which means that:

- Variable Usage Charge increases by 21% (after taking account of the removal of the Capacity Charge) compared to an 11% increase for freight users as a whole.

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- The average ICC over CP6 will be £1.429/kgtm not £1.3/kgtm shown in the Draft Determination.

Once again, we thank you for your willingness to engage in discussions during this Periodic Review and hopefully you will consider favourably our request for a phased introduction of the ICC on biomass to allow time for us to mitigate its impact.

Yours faithfully,

Andy Koss

Chief Executive Officer

Drax Power Limited

ECMA

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29.8.18

Dear Sir/Madam

Periodic review 2018: draft determination

The Consortium of East Coast Main Line Authorities (ECMA) works to secure investment, improve the passenger experience, improve capacity and reliability and shorten journey times on the East Coast Main Line. Its membership encompasses Local Authorities, Combined Authorities and Scottish Regional Transport Partnerships along the full length of the line from Hertfordshire to the Highlands. The East Coast Main Line is of national strategic importance, connecting economies that contribute over £300bn to the UK economy, connecting businesses and communities up and down the Country. The line serves over 20 million people a year with important commuter and regional traffic and freight services, as well as long-distance intercity services connecting cities along the spine of the Country from the Highlands to London.

ECMA welcomes ORR's focus on increased spending on maintenance and renewals, recognising the importance attached to the reliable running of the railway and long-term sustainability of infrastructure. Performance on the East Coast Main Line remains an issue, and infrastructure failure remains a key source of delays and cancellations.

Network Rail in its draft Strategic Business Plan for CP6 stated that 'performance improvements desired by our East Coast Main Line (ECML) customers and stakeholders would require a significant programme of renewals beyond baseline funding'. It set out a compelling case for additional renewals expenditure on the ECML in the '*East Coast Supplementary Plan'* to drive up the reliability of the increasingly tired infrastructure on this route. The Supplementary Plan indicates that there is strong value for money case to support additional renewals investment.

ECMA members note that the West Coast Main Line was substantially renewed in the 2000s, and the Great Western Main Line is currently subject to a programme of substantial renewals and enhancement. By contrast, the East Coast Main Line has not seen substantial investment in renewals for over 30 years, which is increasingly reflected in the reliability of the infrastructure. In addition, we believe that investment in the East Coast Main Line is essential to make it "HS2 ready" including supporting an Eastern option for a High Speed Rail connection to Scotland.

ECMA therefore strongly supports the case set out in the East Coast Supplementary Plan and sees this as a priority for the allocation of the £1billion Sustainability Fund being proposed by ORR in its draft determination. We invite the ORR to ensure that the mechanisms put in place in the final determination reflect this important priority. However, this is a disappointing minimum investment even if approved and we believe the ORR should urgently examine the case for strategic investment in the ECML beyond repair and maintenance.

Yours faithfully

Ian Coe

Ian Coe
Principal Transport Planner
North East Combined Authority
on behalf of Consortium of East Coast Main Line Authorities

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John Larkinson

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31st August 2018

Dear John,

Response to ORR's Consultations: (a) Periodic Review 2018: Draft Determination and (b) Roles & Responsibilities for Enhancements in CP6

Thank you for the opportunity to respond to the consultations on the Periodic Review (PR18) Draft Determination and the roles and responsibilities for enhancements in Control Period 6 (CP6). This response is made by FirstGroup on behalf of our Rail Division and its train operating companies: Great Western Railway; TransPennine Express; Hull Trains; East Coast Trains Ltd; and South Western Railway (which is a joint venture between FirstGroup and MTR).

Our response focuses initially on the Draft Determination and related documents and considers specific areas primarily relating to our role as a train operator (for example performance and the structure of charges). There are, however, some areas (for example, performance funds and research and development) which whilst they relate to the allocation of funding for Network Rail, they do impact on our businesses and therefore we have comments which we believe should be taken into account. Our comments on the enhancements consultation follow on from those on the Draft Determination and highlight the role Network Rail has in aiding and facilitating third party investment in the Network and that it must recognise that in doing so it will always have to bear some level of risk.

A number of the themes that we raise should be recognisable to the ORR as they are consistent with those that we have made throughout the PR18 process, both through the regular Rail Delivery Group (RDG) meetings and also in our responses to various reports and consultations published by the ORR. Of particular note is our letter of 9th March 2018 in relation to engagement by Network Rail in its development of the Strategic Business Plans and the role of the System Operator. This is relevant to both the performance and stakeholder engagement areas that we comment on below. Engagement with Network Rail in relation to the development of plans for CP6 has remained mixed and we are expecting a marked improvement once CP6 commences.

As alluded to above, FirstGroup is a core member of the working groups established by the Rail Delivery Group (RDG) in relation to the PR18 process. We are fully supportive of the draft response to this consultation developed by RDG and our comments are closely aligned with the position taken by RDG.

Turning to the specific areas in the Draft Determination and related documents that we wish to respond to:

Structure of Charges

We welcome the work that ORR has undertaken on the structure of charges during this Periodic Review. In responding to the initial consultation on ORR's options for charging in 2017, First expressed concern in a number of areas relating to the movement away from the prevailing approach which included fixed charges for franchised operators and a Capacity Charge (with the related Volume Incentive) which all operators paid. It was not clear how the ORR intended the changes to work holistically. We are now content with the ORR's proposals as set out in this Draft Determination that will now mean Network Rail's actual fixed costs are reflected in track access charges through the Infrastructure Cost Charge (ICC) and that, therefore, for franchised operators the Fixed Track Access Charge (which is what the ICC will represent for these operators) is no longer an arbitrary amount. By basing the ICC on the volume of trains there is also an assurance that Network Rail will be able to recover the costs associated with increased volumes, therefore encouraging growth. However, there remain some questions to be addressed with the approach proposed which have the potential to adversely impact the finances of train operating businesses, and these are set out below.

As you will be aware First has written separately to ORR raising a number of issues in relation to the proposed Infrastructure Cost Charge (ICC), how it is applied and the related treatment of Open Access Operators (OAO). The matters raised in that letter, dated 14th August 2018, are relevant in the context of this response and as such First requests that the ORR considers that letter as part of First's response to this consultation. To confirm, these are: the inconsistency in application of the definition of new and existing OAOs; the lack of a definition of "inter-urban" services; the market can bear test for the ICC for new OAOs and its relationship with the same test for variable charges, which do not appear to have been assessed together; and the revised access policy in relation to incurring the ICC (which also relates to the definition of "new" OAO).

The application of the ICC as set out in the Draft Determination could have a material impact on both franchised and open access businesses. Whilst our letter of 14th August focuses on the implications for East Coast Trains Ltd, not least the inconsistency of approach as regards this business compared to others, the ORR should note that the shift in policy in relation to access to the Network could materially impact franchised operators. The ORR is proposing that in exchange for paying the new ICC OAOs will have this contribution offset against the Not Primarily Abstractive (NPA) test. This would mean increased flows of revenue from franchises businesses to OAOs. It is not clear why the ICC, which is a contribution to Network Rail's fixed costs (much as the Capacity Charge is today) would mean that a new operator could abstract additional revenues from a franchised business. More clarity on this area is needed.

One of the areas raised in our previous letter is the relationship between the new ICC and the increases in Variable Usage Charge (VUC) for CP6. Both of these charges have been subject to a "market can bear" test, but it appears, certainly in the case of OAOs, that these have been undertaken in isolation meaning that the cumulative effect of the implementation of the new ICC and the increase in the VUC have not been properly assessed. We are keen to understand how the ORR intends to address this.

The suite of documents published by ORR in relation to the Draft Determination also sets out how the proposed ICC will work for franchised operators, particularly in the context of changes in traffic levels. We note that the ORR is proposing to cap the downside risk to Network Rail of reductions in traffic levels over the Control Period through limiting the cumulative effect to 5%. Whilst we support this approach in terms of ensuring that Network Rail is adequately funded for its fixed costs through the term and is not exposed should there be a significant reduction in timetabled services, there needs to be an assurance that Network Rail is not in a position to receive a windfall through significant changes in service patterns between or within a TOC. In particular, remapping of franchises is one area where Network Rail could unduly benefit. Finally, further clarity on the exact mechanism by which annual adjustments to payments are calculated and reconciled is required.

We note that the ORR has not been able to conclude how arrangements in relation to network grants paid by funders to Network Rail will work. There is a risk that changes in the level of grant could mean that the new ICC could be materially affected as the ORR is required to ensure that Network Rail remains adequately funded. The solution to this seems to be that any change in the level of assumed network grant as at the time of Final Determination should be for DfT and Transport Scotland to address directly with Network Rail, rather than impacting on the level of charges that operators have to bear. Whilst, it may be argued that franchised operators could be held harmless by funders, although this is not certain given the methodology in place to address financial change, this would not be the case for OAO and freight operators. Therefore we would expect that the ORR should put in place a mechanism to ensure that the level of charges for non-franchised operators does not change from the point of the publication of the Final Determination.

Finally, we are pleased that the ORR has not made alterations to the structure of Schedules 4 and 8, retaining their role and incentivising Network Rail to perform. These regimes provide a liquidated damages regime for train operators associated with business disruption caused by third parties. We are looking forward to the results of the recalibration exercise for Schedule 8 particularly given the issues with agreeing performance trajectories for CP6. Network Rail needs appropriate incentives to deliver good performance and so the benchmarks need to be set accordingly. Appropriate incentives need to remain in place through the Schedule 4 Notification Discount Factors for Network Rail to provide details of possession requests and timetable alterations consistent with their licence obligations, such that we can inform our customers in a timely manner.

Train Performance

The development of performance trajectories for CP6 continues to be a source of frustration for First and its TOCs. As we set out in our letter of 9th March 2018 engagement in this area has been inconsistent and limited, and is in marked contrast to the collaborative approach that was witnessed during the development of the trajectories for CP5.

Whilst First was supportive of a change in approach for how Network Rail was measured for performance delivery in CP6, to being focused on what was within its control (i.e. delay minutes due to Network Rail, expressed as the CRM-P measure for CP6) we did not expect that Network Rail would in effect no longer be incentivised to manage overall train service performance. Network Rail is accountable for the delivery of the operational railway, including the management of all incidents on the Network. However, it is apparent that Network Rail has seen the change in regulated performance measurement as an opportunity to focus only on its performance. This has been reflected in the performance trajectory discussions that our operators have been able to hold, with limited engagement on TOC-on-TOC management and very often refusal by Network Rail to accept improvements in PPM trajectories driven by TOC only initiatives. There is also a lack of clarity as to how the CRM-P trajectories have been calculated.

We are also concerned that Network Rail and the ORR have not adopted the revised performance metrics that were specifically designed by the industry, led by the National Task Force, for CP6. These measures were designed to capture the actual experience of all passengers by monitoring on-time performance, through lateness, at each station rather than just at destination, as well as reliability and time to fifteen minutes. Whilst these new measures have been reflected in new franchise agreements ahead of CP6, they are only being adopted on scorecards in relation to specific operator requests and therefore Network Rail will only be monitored, and therefore regulated, by the ORR on CRM-P. Furthermore, this monitoring will also consider a floor of performance below which Network Rail should not fall, this is not an effective approach to ensuring that passengers experience good performance. It is true to say that operators can still refer Network Rail to the ORR where it believes that Network Rail is not delivering, but this is not the same as a regular reporting requirement and an effective incentive to deliver.

Franchised operators have also struggled to ensure that Network Rail is reflecting the expectations of passengers, and indeed the terms of franchise agreements, in determining performance trajectories for CP6. In some circumstances we are likely to enter CP6 with trajectories not aligned with franchise agreement requirements. Specific examples are as follows:

- GWR – Network Rail has proposed a CP6 exit of the equivalent of 89.2% PPM.GWR has identified a number of TOC related schemes that, subject to funding, would improve this number to 90.6%. Network Rail has not agreed to alter the trajectory. Discussions are continuing but we are concerned that there will be no movement. An outturn facility governed by the ORR would permit such actions if implemented to adjust the trajectory target during the course of CP6
- SWR – we have already reached a position with South Western Railway where Wessex Route and our TOC have "agreed to disagree", as the Network Rail trajectory does not meet what we consider to be realistically achievable
- Hull Trains – performance trajectory has not been agreed and continues to be under discussion. In particular, there are discrepancies as to how Network Rail has allocated benefits of initiatives across operators on the Route

Finally, we are fully supportive of the establishment of a performance innovation fund. A similar fund was provided for in CP4 and its absence from CP5 has been materially felt by operators and Network Rail. We understand that the ORR is keen to receive input on the size of this fund, which is currently proposed at £10m in CP6. We would advocate that in fact this should be set at no less than £10m per annum, in order to drive real improvements. We would be supportive of RDG and NTF undertaking a role to develop the governance arrangements for this fund and to also be involved in its administration.

<u>Investment in Research & Development</u>

Whilst we are supportive that the ORR has recognised the value of Research & Development (R&D), we are concerned that the amount allocated to this vital area has been capped at £100m for the Control Period. We support the RDG's analysis of the impact of capping spend in this area, in particular that it could lead to a reduction in overall industry investment in this vital area, with the resultant effect that the industry will not be able to deliver the benefits of the long-term Railway Technical Strategy Capability Delivery Plan.

It is not unusual for organisations of the size and capability of Network Rail to spend up to 5% of turnover on R&D. Limiting the funding to an average of £20m per annum also has the potential to reduce the ambition that may otherwise be associated with R&D. This is simply because the outcome of R&D activity is not always successful and with a small fund available there could be a reluctance to invest in innovative and alternative ideas that could in fact deliver real benefit. First recognises that there is a finite amount of funding available to Network Rail in CP6 and is not in a position to identify where funds could be redistributed to create additional investment in this vital area. However, we would contend that the central risk fund is one area that could be used to release additional funding, particularly as the ORR itself has identified this as a potential source.

System Operator

As we have set out in previous correspondence to the ORR, notably our letter of 9th March 2018 we were supportive of the Strategic Business Plan for the System Operator and as such are pleased that the ORR has agreed to provide funding in line with the plan put forward by Network Rail. However, we would advocate that there is more to do in this area, and we are keen to see a step change in the way in which Network Rail manages the allocation of capacity and the development of the timetable both in terms of its capability and the quality of the resource deployed in this area. In particular, the way in which the System Operator's central planning team works and interfaces with the train operators which are dispersed across the Network is an area that needs to be strengthened. We look forward to working with Network Rail's System Operator to implementing the plans for CP6 and to address these specific areas.

Stakeholder Engagement & Regulatory Enforcement

First welcomes that the ORR has not been overly prescriptive about how Network Rail and its devolved organisation engages with its customers during CP6 and is governed. Ahead of CP6 Network Rail is beginning to implement governance arrangements, but it remains vital that Network Rail recognises the role that all operators play in the industry and as such that they should be fully represented. We have previously identified this issue in our letter of 9th March and separately in discussions with Network Rail.

It is important that the ORR recognises its role in monitoring Network Rail's delivery. We recognise that operators play a part in ensuring that Network Rail is meeting its obligations to us as its customers, but operators do not by their very nature possess the skill set to monitor all of Network Rail's deliverables, this remains the responsibility of the ORR.

We also remain unconvinced that using reputation as a method of ensuring Network Rail Routes deliver will be effective on its own. Whilst to an extent individual Route performance can be compared through consistent scorecards, this will not be the case for other parts of Network Rail such as the System Operator and ultimately Network Rail remains one business. One Route may be delivering its CRM-P but still be providing poor performance to one of more of the operators that use its infrastructure, it is not clear that this will be reflected in the scorecards that the ORR is monitoring.

As outlined above, Network Rail has already focused its efforts on performance for CP6 on those aspects that it is solely responsible for (as opposed to whole system performance for which it remains accountable) and will not monitor itself on metrics that the travelling public recognise. As operators our customers will continue to consider performance delivery by the company with which they travel so it is in fact our reputation that is the important factor rather than whether or not one Route is performing better than another.

Train operating geography does not match that of Routes, and there are very few operators that only have one Route to interact with. Whilst it is the case each operator has a lead Route, there is already evidence that operators who traverse multiple routes struggle with engagement on non-lead Routes. This is of particular concern in the North of England where the nature of the railway means that many services run across two Routes, but there is not a consistent approach from Network Rail between the Routes. This is an area where we would like more clarity from ORR as to how it will ensure a devolved Network Rail acts fairly and appropriately. Best practice requires to be disseminated to each Route.

It is for these reasons that financial penalties must remain as the ultimate incentive to deliver. We would advocate that any penalties that are levied on Network Rail during CP6 are recycled into funds to improve delivery in those areas that are failing. Operators would need to be involved in determining how these funds should be spent to ensure that effective resolutions are delivered. This needs to managed well to ensure failure is not an incentive to achieve redirection of funds.

Budget Flexibility

We recognise that Network Rail's status as a public sector organisation means that there are constraints on the ability for it to move money between operating and capital expenditure and between different years. However, the move from a five year funding settlement to one that is comprised of 12-month amounts risks efficiency in expenditure. We are pleased that this has been acknowledged to a degree and that as such some flexibility has been agreed in this area. However, this flexibility relies on Network Rail being required to spend more on OM&R through reducing its risk contingency. We are not clear how this will be achieved given that the contingency is designed to address unforeseen external occurrences during the Control Period. The proposed approach therefore does not remove the risk that delivery and passenger improvements could well be affected as a result of these restrictions.

A good example of this is the situation affecting GWR proposals to operate additional services between Reading and Gatwick (a long-standing franchise requirement and stakeholder and customer aspiration). Network Rail has identified potential funding to resolve level-crossing restrictions on the route. However, this money must be spent before the end of the financial year and there appears to be no mechanism to enable delivery to continue into 2019/20. There is a very real risk that the scheme will therefore not be implemented, given the concern over timing, with the resultant effect that the additional services cannot be accommodated.

We would therefore welcome the ORR's consideration of how these situations can be avoided during CP6. We would be happy to work with ORR and DfT, as necessary, to identify solutions.

As outlined above, we would also like to take this opportunity to provide some comments on the consultation on the approach to enhancements during CP6. We note that the document focuses only on the delivery of committed schemes funded by government, and does not address the broader. We are content with the proposals in the document as they are structured in line with the work that has been undertaken on enhancement delivery by Network Rail, DfT and ORR during 2018. We also support the role of the ORR in managing change control, effective independent oversight that takes into account the views of stakeholders is of vital importance. We also look forward to details of an appropriate Enhancements Delivery Plan for CP6. This is important as it provides operators and stakeholders clarity on the status of schemes, we would also advocate that this plan recognises the planned outcomes that these schemes will facilitate and how they align to franchise outcomes and commitments.

We would welcome further clarity on the role that the ORR will play in relation to the delivery of third party schemes, whether these are delivered by Network Rail or another party. Network Rail has implemented its Open for Business initiative which is aimed at attracting third party funding into the Network by making Network Rail more accessible. Whilst this is welcome there is still much for Network Rail to accomplish in this area, particularly as the Hansford Report that led to this initiative did not take into account the work by train operators in this area who have helped to deliver external investment often in spite of Network Rail. We remain concerned of the Network Rai's extremely risk-averse nature in relation to third party schemes. Promoters of schemes often only have a fixed budget that is unlikely to take account of extra costs that Network Rail has tended to insist are required. This must be addressed in CP6 if the industry is to truly harness the potential funding that exists outside of central government and we believe that ORR has a central role to play in resolving these issues.

Finally, the role of the ORR in ensuring Network Rail acts efficiently in terms of OM&R activity should not mean that Network Rail is prevented from delivering incremental benefits when implementing a maintenance or renewals scheme. It is often the case that for a small incremental expenditure a much improved outcome can be delivered, that if developed separately would not otherwise have a business case or be too expensive. We are pleased to note that at least two Routes are actively engaged with our TOCs in this area.

Once again, thank you for the opportunity to respond to these consultations. Should the ORR wish to discuss any aspect of this response in more detail please do not hesitate to contact me. We will provide a copy of this response to RDG and Network Rail.

Yours sincerely

Russell Evans
Policy & Planning Director, First Rail

First

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14th August 2018

Dear John,

PR18 Draft Determination – Open Access

I refer to the PR18 Draft Determination (**DD**) published last month and write further to recent communications between First Rail Holdings (**FRH**) and ORR. Our analysis of the DD is continuing and this letter is separate from our formal response to the DD, which we will provide in due course.

We thought that it would be useful to set out some of the major points in respect of open access operations for discussion at this stage so that they can be explored, and hopefully progressed, constructively during the consultation period.

We have concerns about the likely adverse operational and economic impacts of the structural charging approach provisionally proposed and also the apparent imbalance and lack of equality of treatment in the proposed introduction of different categories of open access operator (each an **OAO** and collectively **OAOs**).

The DD has created significant uncertainty about a number of issues. As we have flagged in recent communications, particularly our letter to ORR of 18 June 2018, FRH is well-progressed in the procurement of rolling stock for East Coast Trains Limited (**ECTL**).

However, before any final approval on rolling stock purchase, the final shape of the determination (and the resulting impact on the economics of the service) will obviously need to be understood. We appreciate that full clarity about many of the issues will not be provided before the Final Determination (**FD**) is published in October 2018.

In the meantime, we would welcome the opportunity to engage actively with the consultation to ensure that it best supports public policy but is also rationally consistent with past actions.

Proposed changes to the structure of access charges

The proposed changes to the charges regime outlined in the DD are likely to have adverse impact on services and choice for customers.

Previously, of course, operators have paid to access the network by variable and fixed cost mechanisms. The consultation suggests ORR intends to make a variety of structural changes (including the removal of the capacity charge (**CapC**)) and recalibrations (including a significant increase in the VUC) to meet Network Rail (**NR**) requirements and delivery capability.

We understand that ORR intends to introduce a new charge, the infrastructure costs charge (**ICC**), to recover the fixed costs of running the network from OAOs.

The proposed charge is set at £4/train mile, which is a considerably higher level of charge than was contemplated in ORR's initial work. We have significant concerns that the financial modelling underlying the calibration of the ICC was based on CP5 charges, when the forecast average increase in the VUC for CP6 relative to the final year of CP5 is 36% (driven in significant part by the failure of NR to make efficiency savings). It appears that ORR has used its market can bear analysis to reach its position that OAOs can afford in isolation (i) the VUC increase; and (ii) the ICC at the proposed charge rate. Worryingly, it does not appear that ORR has considered the affordability for OAOs of the VUC increase and the ICC at the proposed charge rate in combination.

This increase combined with the introduction of the ICC has the potential to be a fundamental flaw in the CP6 access charge regime, particularly with respect to OAOs, who may be driven from, or prevented from entering the market on an equal footing. Our analysis of the financial modelling underlying the DD is continuing.

Designation of OAOs as "existing" or "new"

We note that the intention is that OAOs will be designated as either existing OAOs or new OAOs. The 2018 Periodic Review Draft Determination Supplementary Document – Charges and Incentives: Infrastructure Cost Charges Consultation (June 2018) (**ICC Consultation**) states:

> "*We define existing OAOs as operators of services who had access agreements approved before we set out our intention to review the charges levied on OAOs as part of PR18. We formally set out this intention in our letter responding to the Competition and Market Authority Report on on-rail competition published on 26 November 2015 and our consultation network charges published on 10 December 2015. For the avoidance of doubt, the open access application we approved from First Group to run services between London and Edinburgh, falls after these dates and consequently the services will be treated as new services for charging purposes.*"

Annex A to the 2018 Periodic Review Draft Determination Supplementary Document - Overview of Charges and Incentives Decisions (**Charges Overview**) indicates that ICCs are to be charged for some new OAOs in CP6 but not for any existing OAOs.

While specific reference is made to the designation of ECTL's services as a new OAO, no reference is made to the open access services to be operated by Great North Western Railway Company Limited, approved in June 2018. In light of the definition set out in the ICC Consultation and the fact that the application for this service was submitted after 10 December 2015, can you please confirm that it would be designated as new OAOs if the distinction is pursued.

Additionally, we should be grateful for your confirmation that Hull Trains Limited, which has, of course, been operating since 2000, will be designated an existing OAO.

We will also be seeking further consideration of ECTL's proposed designation as a new OAO. ORR's proposed definition would turn on the date an application is approved. It would obviously introduce inequality of treatment, and would not be rational to use the date of approval rather than the date the application was submitted.

ECTL's application was submitted on 17 March 2015 with its business plan following on 31 March 2015. Significantly, this submission predated the publication of the Competition and Market Authority's report on on-rail competition, which ORR intends to serve as the watershed moment between new and existing OAOs. Further, ECTL's business case and viability was designed around and considered and assessed by ORR on the CP5 charge basis. Given the restricted access to the network under ECTL's original submission, it was reasonable for us to factor into that business case a presumption that the overall level of charges would remain reasonably constant (which would not be the case under the proposed charges regime).

There was no opportunity after submission to amend the business case to take into account any intended changes. The potential issues arising are exacerbated by potential flaws in the financial modelling underlying the ICC, which may lead to excessive access charges.

The application was not approved until 12 May 2016 but you will appreciate that the reason for the 14-month period between application and approval was not an applicant issue but related to the specific regulatory process adopted to review the East Coast applications.

Segmentation of new OAOs as "inter-urban" or "other" services

Paragraph 3.30 of the ICC Consultation states that all new OAOs will be segmented into new OAOs operating inter-urban services and new OAOs operating other services. In CP6, ORR intends that ICCs will only be charged of those new OAOs operating inter-urban services. However, it is unclear how the market will be segmented into inter-urban and other. Further and more specifically, it is unclear into which segment ECTL's services would fall.

Paragraph 3.12 of the ICC Consultation describes services as being "*suburban, inter-urban, regional, rural etc.*", suggesting that the "other" segment comprises new OAOs operating suburban, regional and rural services. ECTL's Edinburgh to London service has the geographic characteristics of a regional service as it specifically serves passengers to travel between London, the North East of England (stopping in Newcastle upon Tyne and Morpeth only) and Scotland (stopping in Edinburgh only). The only other calls are made by two services with stops in Stevenage (limited to pick up and set down), specifically designed to enable travel to Scotland.

It is also clear that ORR's proposed segmentation of the market is, at least, partially informed by OAOs' ability to bear ICCs. In principle the ability to bear charges can be factored in but this, of course, must only be done on transparent, efficient and non-discriminatory principles[1] which optimise competitiveness. We are concerned about the methodologies used in assessing the ability of OAOs to bear the new charges. For present purposes, it suffices to say that the removal of the CapC is likely to be insufficient to enable ECTL to bear the new ICCs in combination with the proposed increase in VUCs for CP6.

In light of ECTL's services having the geographic characteristics of a regional service and the likely limits on ECTL's ability to bear the ICCs, we presume that ECTL, if it is designated as a new OAO irrespective of the aforementioned reasons why it should be designated an existing OAO, will be classified as a new OAO operating other services.

Access rights

We understand ORR's intention to be that the payment of higher charges in the form of ICCs will be reciprocated with more generous access rights than had previously been made available to OAOs. ECTL currently has restricted access to the network and there is no reference in the DD to ECTL being permitted greater access to the network.

Should ECTL be designated an existing OAO, which, as we have already made clear, we consider it should be, we understand that it may still become subject to ICCs if it applied for

[1] Directive 2012/34/eu Art 32(1) and Schedule 3 para 2(1) of RIAM as amended

and was granted different access rights. Annex A to the Charges Overview indicates that this would be the case where the change in access rights was "significant". Presently, it is unclear what would constitute a significant change to access rights and we would welcome clarification.

On the other hand, if ECTL continues to be designated as a new OAO, we consider its current position represents the worst of both worlds. In effect, it would be required to bear the additional burden of ICCs without the usual benefits, namely additional access to the network. The ICC will fundamentally change ECTL's business case. To counterbalance that change, ECTL may require additional access (such as being permitted to stop at other locations). Such extra access would be in line with the principle design of open access, a principle which we understand underlies the introduction of ICCs, namely to increase in-market competition. As it stands, it appears that ECTL would only be able to obtain additional access to the network if it submitted a new application. However, we would welcome discussion about the introduction of a more streamlined process for OAOs who did not have the opportunity to take advantage of the more generous availability of access rights.

The not primarily abstractive ("NPA") test

We note that ORR intends to revisit the NPA test currently used when approving access rights to OAOs. We infer from the DD that ORR's current intentions are that OAOs will be subject to the NPA test to a lesser degree. However, it is unclear to us why payment of the ICC would offset potential revenue abstraction. We note that ORR intends to consult on any changes and await the publication of that consultation. We would welcome the opportunity to engage with such a consultation to ensure that it supports ORR's policy of opening up the market and increasing competition without unfairly prejudicing track access applications which were assessed before the changes.

Next steps

In light of the date on which ECTL's application for access to the network was submitted, we consider ECTL has been incorrectly been designated as a new OAO. The imposition of ICCs will fundamentally alter ECTL's business case and significantly threaten the economic viability of the services. Should ECTL continue to be designated as a new OAO required to pay ICCs, it may only be possible to counterbalance the increased costs by obtaining additional access to the network.

In addition, there are a number of issues where we consider that further clarification on the DD is needed to understand the position. We would appreciate engagement with the ORR team on this to avoid any impact on our ability to contribute fully to the consultation.

We look forward to further engagement ahead of the publication of the FD. We consider that the best way to progress things would be a meeting in the latter half of August (taking account of anticipated absences amongst our staff). We should be grateful if you would propose dates when the ORR team would be available for such a meeting.

Yours sincerely

Russell Evans

Policy & Planning Director, First Rail

Cc:

Joanna Whittington and Chris Helmsley (by email)

Freight on Rail response to the Office of Rail and Road (ORR) draft determination

Freight on Rail thanks the ORR for the opportunity to comment on its draft determination.

Freight on Rail, a partnership of the rail freight industry, the transport trade unions and Campaign for Better Transport, works to promote the economic, social and environmental benefits of rail freight to local, devolved and central Government.

1. **Why we believe ORR should not increase freight track access charges in CP6 in real terms**

   The level of increase of variable usage charges for freight in CP6 and CP7 is significant and risks loss of traffic to road, and negatively affecting investment decisions made by customers and freight operators and other parts of the supply chain.

   The draft determination proposal covers the 10 years from 2019 to 2029, covering CP6+7, would work out at a 43% increase over the ten year period for certain commodities such as construction traffic, which cannot be absorbed by operators without detrimental impact on the market.

2. ORR has stated that the average increase for CP6 is around 11% plus inflation for the period but based on the draft price lists, the actual increase for different commodities and wagon types varies significantly with some bulk sectors including construction well in excess of the average figures so the average figure is misleading; some customers will be facing increases of circa 24% by the final year of CP5 and circa 48% by the end of CP6.

3. The RDG is proposing CPI+1% for CP6 and CP7, which we believe is more equitable.

4. We would like to highlight that the ORR does not appear to have fully assessed the impact of price increases on existing rail traffic, instead relying on work undertaken for PR13. Changes in the rail freight market, and other exogenous factors, since 2013 are likely to make the degree of change greater, as around 1/3 of the market at that time was coal and relatively inelastic to price changes. The rail freight operators have commissioned MDS Transmodal to refresh this work for PR18, the results of which are expected shortly. The work undertaken by CEPA for ORR in the context of the 'ability to pay' test confirms that intermodal and construction traffic remain highly elastic and at risk of reverse modal shift with price increases, but this data does not appear to have been taken into account in the assessment of the variable charge.

5. Network Rail has failed to meet its CP5 efficiency targets by a huge margin and this is directly impacting on the charges that are proposed to be paid by the freight sector.

6. We suggest that the increase could be phased in over a longer term period to reduce the impact on customers and reduce modal shift to road, and to allow opportunity for Network Rail to achieve efficiencies. A capped annual increase of 1% above inflation would support future rail freight growth and certainty to support investment decisions

7. Our submission concentrates on the rationale for stable charges for CP6 in line with the DfT letter and the financial provision in the SOFA which allows for the cap; there will be a further and separate round of charges reviews for CP7.
   The *Statement of Funds Available, (SOFA), made financial provision for this capping for CP6. Network Rail anticipated that the freight charges would be capped so if the current level of charges proposed by ORR are retained, there will be additional income for NR.*

8. **Cross Departmental Government Policy supports rail freight**
   This approach goes against Government policy which is to increase rail freight to reduce the adverse environmental and safety impacts of road freight and improve productivity, as recognised in the following Government policies.

   Shifting freight from road to rail can result in significant CHG emission savings as well as economic and safety co-benefits DfT Freight Carbon Review February 2017. P43 Key messages

   DfT Rail Freight Strategy of September 2016. Paragraph 135 P42 - *A significant increase in track access charges could result in some freight moving from rail to road, resulting in the associated economic and environmental benefits to the UK being lost.*

   Increasing freight access charges would result in reverse modal shift which would not only increase road congestion, road collisions, road infrastructure damage and pollution but also be counter to cross department government policy to shift more freight to rail. As most recently articulated in the latest Defra Clean Air Strategy of June 2018 ref and the DfT Ports Connectivity Study of April 2018. The DfT Rail Freight Strategy of September 2016 also makes a strong case for increasing rail freight volumes, not decreasing rail freight as this proposal would do.

9. Relevant sections from DfT Rail Freight Strategy

   DFT Rail Freight Strategy of September 2016 said in relation to the ORR review of Track Access Charges, the following extracts P10 Paragraphs 26/27, P42 paragraph 135 in italics-

   26 At the same time, we recognise the positive benefits of rail freight for the UK- Including its environmental and air quality benefits relative to road freight and its impact on reducing road congestion. These benefits are not currently recognised in the track access charging regime.

   27 We will continue to support ORR's work to develop appropriate track access charges for freight from CP6, including by understanding the overall impacts on the rail freight industry of any changes. Alongside this we are considering whether further support may be needed from Government in future in recognition of the benefits to the UK economy and society of modal shift to rail which incurs far lower congestion and pollution costs and helps to improve road safety. Any new support would be subject to the identification of future funding and would need to be designed in a way that would avoid distorting the market.

P42 Paragraph 135 - *At the same time, we recognise the positive benefits of rail freight for the UK- including its environmental and air quality benefits relative to road freight and its impact on reducing road congestion. These benefits are not currently recognised in the track access charging regime.*

A significant increase in track access charges could result in some freight moving from rail to road, resulting in the associated economic and environmental benefits to the UK being lost.
paragraph 136 -As set out in the Secretary of State For Transport's guidance to ORR in July 2012, in setting track access charges we would expect ORR to note the government's rail freight policy, including the importance of sustaining efficient and commercially predictable network-wide freight operations. The guidance to ORR also notes that the Secretary of State wishes to be advised by ORR of, and to discuss with ORR, any changes to the charges which ORR proposes to pursue which would adversely affect the competitiveness of rail freight compared to other modes.

Actions P43 paragraph 139 -DfT will continue to support ORR's work to develop appropriate track access charges for freight from CP6, including the overall impacts on the rail freight industry of any changes. In particular, DfT is keen to support ORR's work to ensure that decisions about track access charges levied on rail freight reflects the cumulative impacts of different charges on the rail freight industry and are joined up with Government decisions on wider support and funding to freight.

Paragraph 140 – DfT will continue to co-ordinate the work of the Freight Investability and Sustainability Group (FISG) to develop thinking on the potential for wider changes to funding alongside more cost-reflective track access charges for rail freight, including whether further support may be needed from Government in future to retain the economic and environmental benefits of rail freight. Any new support would be subject to future funding being identified and would need to be designed in a way that would avoid distorting the market.

Furthermore, the Committee on Climate Change report of June 2018 stated that more freight needs to be transferred to rail if the Climate Change targets are to be met. It highlighted that transport, the only sector for which emissions increased, needs to reduce carbon dioxide emissions.

10. The ORR draft determination is not aligned with the DfT recent instructions
Extract from DfT letter from Phil West to John Larkinson of ORR 8th March 2018

We would therefore support capping charges in real terms, to the full extent consistent with the legal framework, at the current end of CP5 level (i.e. uncapped end CP5 rates) in order to provide rail freight operators and investors with certainty about the level of this charge for the next control period. As funder and shareholder, we are satisfied that this is consistent with the assumptions we made in the Statement of Funds Available. DfT gave provision in the SOFA for a cap on charges, which means that funding could stay at CP5 levels for CP6 in real terms. Ie CPI but not the 3.6%.

We welcome the fact that there will be no increase in the new charges in the first two years starting April 2019; however we believe that this level of charging should be retained to provide stability for the rest of the CP6 period for the following reasons;-

The ORR's draft decision to increase freight access charges by 3.6% above CPI each year starting in April 2021 will have a detrimental impact on rail freight volumes which would result in increased emissions from freight, increased collisions and reduced productivity – all counter to government policy.

Such a sharp increase risks undoing much of the positive work that the industry has been doing since the decline of coal in 2015.

The competitive pressures between the modes mean that it is unlikely that such increases could be passed onto customers and the precarious financial position of freight operators means that they cannot absorb such increases.

The Government, including the ORR, needs to take a holistic view of surface access charging otherwise there will be unforeseen consequence. Reverse modal shift would be very damaging in economic, environmental and safety terms. These external and congestion costs will still have to be borne by the Government and the taxpayer if rail freight flows are forced back onto the roads; the costs will not disappear.

The latest analysis by KPMG, showed that In 2016, rail freight generated economic benefits for UK Plc of £1.73bn, which included productivity benefits of £1.17bn for Britain's businesses and externality benefits of £0.56bn, through lower road congestion and environmental gains.

As acknowledged by Government, there is not a level playing field between HGVs and rail freight. See section 14 for details

DfT Rail freight Strategy September 2016
P43 paragraph 139 -DfT will continue to support ORR's work to develop appropriate track access charges for freight from CP6, including the overall impacts on the rail freight industry of any changes. In particular, DfT is keen to support ORR's work to ensure that decisions about track access charges levied on rail freight reflects the cumulative impacts of different charges on the rail freight industry and are joined up with Government decisions on wider support and funding to freight.

11. The context for providing stable freight access charges is as follows:-
Rail freight access charges have increased is 22 per cent while fuel duty has been frozen since 2011.

While we understand that the legislation requires operators to pay the costs directly incurred, the ORR has options to apply the cap differently to minimise the impact of the charges increase in CP6.

CP6 will be a crucial control period for the rail freight sectors as it continues to recover from the destabilising impact of the decline of coal. Applying a cap to see the Variable Usage Charge remain flat in real terms in CP6 would support the industry at this pivotal time. Such a cap would be entirely consistent with the funding in the SOFA and in-line with the assumptions Network Rail made in their

February Strategic Business Plans. We urge the ORR to reconsider this.

Instead the glide path proposed by ORR will see Variable Usage Charge increase significantly from Year 3 of CP6. This is much too steep given the competitive pressure and financial position of the sector. A more sustainable position would have been for the Variable Usage Charge to remain flat in real terms in CP6.

Although charges would eventually need to recover the costs directly incurred the competitive position in future control periods may be influenced by wider policy decision, for instance road charging, that may make the glide path proposed by ORR more credible. This will not be the case in CP6 though.

12. We urge the ORR to rethink the phasing in of the Variable Usage Charge cap in CP6 to avoid the real risk of modal shift from rail to road and all the negative externalities that will occur as a result.

Prior to the ORR's final decision we would expect an assessment to be made over how the increase in Variable Usage Charge collected by Network Rail is offset by the reduction in externality and productivity benefits caused by the reduction in rail freight volumes. Given the intense competition in the largest rail freight markets – i.e. intermodal and construction, it is highly likely that the reduction in benefits to UK plc will exceed the increase in Variable Usage Charge collected by Network Rail.

As the sharp increase in variable charges that are proposed in CP6 are the result of Network Rail's worsening efficiency trends, it is essential that Network Rail puts in place measures to turnaround their efficiency to avoid the rail freight industry bearing the impact of their missed efficiency targets in future.

13 Environmental policy threat to rail freight from two Government announcements

a) The halting of further rail electrification by the DfT is a threat to rail freight. Electrification is the tried and proven low emissions rail freight option, which increases capacity and reduces maintenance costs. The Department is now focussing on bi-mode and stating that diesel only locomotives are banned from 2040. This is much harder on freight than passenger services, where there is more electric traction whereas rail freight, which is privatised, uses less than 10% of electric traction now.

b)However, the DfT is not treating rail and HGVs equally – there is a rail freight diesel-only ban from 2040 while diesel HGVs are not banned and all they have agreed to is a 15% voluntary, non-binding carbon dioxide O2 reduction by 2025 and further analysis of alternative fuels such as gas, as part of *the Road to Zero* policy.

14. Rail freight and HGVs costs and charging are not aligned

The ORR now has responsibility for roads as well as rail so it should treat the two modes fairly which is not happening at the moment.

Rail freight has to compete with HGVs on price despite the fact that HGVs only internalise around 32% of the costs they impose on society. The latest MTRU research, commissioned by Campaign for Better Transport shows that heavy goods vehicles (HGVs) receive a £6 billion subsidy each year in terms of the congestion and road infrastructure damage, increased road crashes, air and CO2 emissions. HGVs are almost seven times more likely than cars to be involved in fatal accidents on local roads.

The latest MTRU report of January 2018 and the Department for Transport (DfT) table below shows that two thirds of marginal costs of the large HGVs are not being met by the haulage operators. In 2016, 9 billion vehicle miles were run by articulated HGVs alone (this figure does not include rigid HGVs (source: TRA3105)) implying a marginal cost shortfall of about £6 billion. In 2014 the figure was £6.5 billion. These numbers vary a little from year to year according to traffic and the severity of impacts such as pollution or casualties. However, they remain substantial and completely unmet. The issue of all the congestion, road damage, collision and pollution costs is discussed fully in this Freight on Rail report, Read the **original** research here.

DfT marginal external cost tables

For articulated HGVs DfT produce Mode Shift Benefit (MSB) tables, most recently updated in 2015 with estimates for 2020 values at 2015 prices. These calculate the marginal costs so that investment in alternatives which reduce articulated vehicle miles can be tested for value for money. These showed a rise in costs from the original 2009 estimates, in particular those for road infrastructure and for carbon. The tables below show the comparative values.

i. These include a range of effects including for the MSB report: up and downstream processes; soil and Water Pollution; nature and Landscape; driver frustration / stress; fear of accidents; community severance (including restrictions on cycling and walking); visual intrusion

These conclusions are in line with two other separate reports. MDS Transmodal study in 2007 found a very similar amount of underpayment: £6billion. Transport & Environment research issued in April 2016 found that HGVs were only paying 30% of their external costs.
It is therefore crucial that the government recognises HGV costs in its discussions about rail freight costs because rail freight has to compete directly with road.

DfT marginal external cost tables

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Pence per articulated HGV mile

Table 1 Mode Shift Benefits 2015 and 2009

Pence per articulated HGV mile

	Motorways (by level of congestion)		Roads			
	High	**Low**	**A**	**Other**	**Weighted Average 2015**	**Weighted Average 2009 report**
Congestion	99	24	72	78	**57**	***52.4***
Accidents	0.5	0.5	5.6	5.5	**2.7**	***2.8***
Noise	9	7	8	14	**8**	***7.0***
Pollution	0	0	0.1	0.2	**0.1**	***2.5***
Greenhouse Gases	6	6	7	9	**7**	***3.8***
Infrastructure	7	7	24	171	**18**	***9.0***
Other (roads)1	6	6	6	6	**6**	***6.4***
Gross Total	127.5	50.5	122.7	283.7	**98.8**	***83.9***

1 *These include a range of effects including for the MSB report: up and downstream processes; soil and Water Pollution; nature and Landscape; driver frustration / stress; fear of accidents; community severance (including restrictions on cycling and walking); visual intrusion*

Taxation	-31	-31	-32	-40	**-32**	***-34.1***
Marginal cost gap	96.5	19.5	90.7	243.7	**66.8**	***49.8***
Road Tax as % Gross marginal cost	24%	61%	26%	14%	**32%**	**41%**

These conclusions are in line with two other separate reports. MDS Transmodal study in 2007 found a very similar amount of underpayment: £6billion. Transport & Environment research issued in April 2016 found that HGVs were only paying 30% of their external costs.
It is therefore crucial that the government recognises HGV costs in its discussions about rail freight costs because rail freight has to compete directly with road. see Freight on Rail report,

16. **Government needs to reform HGV charging**

The revision of the existing time based road user levy (RUL) by the DfT and the Treasury is an opportunity to start making HGVs pay more of the external and congestion costs they impose on the economy and society.

We supports the Government's aim in its recent call for evidence to reduce road congestion and pollution by incentivising more efficient HGV use of the road network with an effective lorry road charging system.

Currently, the industry is competitive but not efficient. The existing time based system has neither led to efficiencies, nor reduction in emissions and collisions in the UK. Empty running is now at 30 per cent for the second year running, the highest level for years and load utilisation has not improved either. DfT figures show that only 36 per cent of trucks were full in terms of volume for 2017. Thus to improve economic efficiencies there should be a direct relationship between the taxes per km travelled and the marginal costs which a distance based charging system can provide. It is the calculation of these marginal costs which is crucial during the HGV levy revision.

By contrast, distance-based tolling HGVs has improved efficiency and resulted in better efficiency and lower empty running in Germany, Switzerland and Austria. Germany reduced its empty running figures, which had been at a similar level as the UK, by a third to around 18 per cent when the distance based charging was introduced. The introduction of the charge per km for trucks had reduced the percentage of empty vehicles in Austria from 21,1 per cent in 1999 to 15,7 per cent in 2004. At the same time the average load grew 0,6 Ton to 14,7T. 2

Furthermore the evidence shows that tolls can be beneficial to society without placing an unbearable financial burden on freight transport. For example, the German Government has been using revenue from tolls to provide discounts for hauliers to purchase less polluting trucks.

The overwhelming conclusion from the various independent research reports cited in our submission is that distance based HGV charging systems can reduce lorry miles and therefore reduce congestion, pollution and crashes.

Furthermore a distance charging system would make it fairer for rail freight to compete if HGVs were paying a large proportion of the costs they impose on the economy and society. See our consultation response http://www.freightonrail.org.uk/ConsultationsDepartmentForTransportCallForEvidence.htm

15. HGVs Infrastructure track costs

HGVs only pay 11 per cent of their road infrastructure costs. A 44 tonne standard 16.5 metre HGV is 136,000 times more damaging than a ford focus. 4^{th} power law.

Campaign for Better Transport has criticised a report, commissioned by the FTA, which falsely claimed heavy good vehicles (HGVs) cover the costs of the damage they cause to roads, pavements and street furniture.

This is also in sharp contrast to the way that the ORR measures and charges rail freight for its track costs compared with HGVs.

Heavy Goods Vehicles: Do they pay their way? - impacts on road surfaces, produced by RepGraph for FTA (Freight Trade Association), found HGVs pay three times more than their estimated damage costs to infrastructure. But Campaign for Better Transport says the report is flawed, based on out-of-date figures and incorrect assumptions, and in fact HGVs only cover one tenth (11 per cent) of their road damage costs.

Four fundamental flaws in the RepGraph report:

- Using fuel duty from HGVs to offset HGV infrastructure costs when fuel duty income is not used in this way and there are no Government plans to do so
- Halving HGV infrastructure per mile costs by using the Government 2009 value of nine pence per mile instead of the latest figure from 2015 of 18 pence per mile

2 VCÖ-Factsheet 2013-16 - Lkw-Maut in Österreich ausweiten (2016)

- Omitting any external costs other than infrastructure, such as congestion, collisions, carbon and air pollution
- Not distinguishing between different types and weights of HGVs. The largest and heaviest HGVs cause a great deal more damage to foundations and structures of roads than cars - the standard six-axle 44 tonne 16.5 metre truck is 136,000 times more damaging to road surfaces than a Ford Focus - therefore some of the heaviest road repair costs are almost exclusively attributable to the heaviest vehicles.

  RepGraph Heavy Goods Vehicles: Do they pay their way? - impacts on road surfaces, is available from the FTA website.

  So, rather than paying three times their costs as claimed in the RepGraph report, with the corrected damage figure of £3 billion, HGVs are in fact only paying 11 per cent (£340 million) through Vehicle excise duty (VED) and the Road User Levy. This is calculated by adding £50 million from foreign vehicles paying the Road User Levy to the VED total for 2016.

  The RepGraph report conflates two different and recognised costing methods. The first is the marginal external cost, which includes additional congestion and road maintenance as costs, but assumes the road network has been built and does not include an allowance for this. This approach seeks to match the marginal cost per mile of the external impacts of HGVs to the perceived cost per mile of using a particular HGV. Obviously, the impacts of a 44 tonne articulated vehicle are much greater than a 7.5 tonne rigid HGV. The second is the fully allocated cost model, which similarly identifies costs according to HGV characteristics, but includes the capital cost of the road network. This can be either as a notional depreciation and/or cost of capital, or on the basis of the typical annual spend on road construction. In the fully allocated cost model case, congestion is often left out of the cost side since it is borne by road users as a group. However, it should be noted that strictly speaking a significant amount of the congestion costs are borne by cars and are not part of the road freight user group.

16. Rail freight reduces road safety costs

The relative safety costs of road and rail must be taken into account; the DfT values the prevention of each road fatality at £2 million[i].

Government figures show HGVs are almost seven times more likely than cars to be involved in fatal crashes on minor roads[ii].

Driver's fear of collisions involving HGVs also needs to be taken into account.

[iii]. A recent questionnaire, from Brake, the national road safety charity, showed that 79 per cent of car drivers want to see less freight on the roads on safety grounds; Furthermore, 79 per cent of drivers want the Government to fund the necessary rail network upgrades to transfer the freight to rail.

Philippa Edmunds Freight on Rail Manager

[i] RAS60001 2016
[ii] *Source: Traffic statistics table TRA0104, Accident statistics Table RAS 30017, both DfT*
[iii] RAS60001 2016

FTA PR18 Draft Determination Response

Summary of FTA View

- Rail freight is vital to the well-being of the British economy. A typical freight train can remove 50 lorries from Britain's roads with obvious impacts on safety and congestion. Environmentally, rail has benefits over road.
- It is clear that the current proposals would, over time, substantially increase the cost of UK rail freight. If these cost increases are introduced without any measures to alleviate their effects, FTA believes it would result in at least a failure to increase the role of rail in the supply chain, affecting industry's ability to meet its carbon targets, and at the worst to actually reduce use of rail freight.
- Given the legal constraints under which the terms of the charging regime have to be set, it may be the solution comes from separate Government policy initiatives. If increased charges are to be pursued, FTA would urge that cross-Departmental discussions are held urgently to safeguard the place of rail freight within the UK supply chain. Otherwise key Government priorities such as carbon reduction, road safety improvement and congestion management will all be threatened.

Background

The Freight Transport Association (FTA) is one of Britain's largest trade associations, and uniquely provides a voice for the entirety of the UK's logistics sector. Its role, on behalf of over 17,000 members, is to enhance the safety, efficiency and sustainability of freight movement across the supply chain, regardless of transport mode. FTA members operate over 200,000 goods vehicles - almost half the UK fleet - and some one million liveried vans. In addition, they consign over 90 per cent of the freight moved by rail and over 70 per cent of sea and air freight.

FTA response

Introduction – the role of rail freight in the UK supply chain

Rail freight is vital to the well-being of the British economy. It has an essential place in securing continuing UK competitiveness and business wealth creation through its part in an integrated supply chain. Rail freight has a particularly large potential for the near future as containerised imports increasingly become the dominant means of importing goods to the UK. Container movement is increasingly becoming the dominant part of rail's work as part of the UK supply chain, however, it is far more price sensitive then the movement of traditional bulk commodities, due to road's ability to do the same work.

Too often, any political discussion on rail is automatically taken to mean passenger rail. In fact, around 30 per cent per cent of the traffic carried on the British rail network is freight, rather than passenger[1]. Whilst the political imperative behind a focus on passenger traffic is understandable, it is vital to consider freight as an equally important part of the rail network's offering to the British economy.

As well as potential economic benefits for the UK, rail is especially important for managing and reducing the three main social impacts of freight movements – emissions, safety and road congestion. A typical freight train can remove 50 lorries from Britain's roads with obvious benefits for safety and congestion.

Environmentally, rail has advantages over road even when run on diesel – with lower greenhouse gas (GHG) emissions per tonne moved and local air quality impacts largely removed from local populations (due to far fewer people walking/living in very close proximity to train lines). The environmental efficiency of rail will continue to be a benefit over road even as an increasing number of road vehicles become electric – due to the far greater energy efficiency of movements by rail compared to road.

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[1] Defined by tonne kilometres. *Source: ORR*

Future charging regime and effects on UK logistics

Rail freight must not be looked at just as a part of the rail industry. It is an integral part of the British logistics, and any changes to rail freight must be considered in terms of the impacts they would have on the UK supply chain, and thus on the UK as a whole.

It is clear that the current proposals would, over the time of the control period, substantially increase the costs of UK rail freight. As noted above, a vital and growing role for rail in the UK is unitised traffic – ie containers - which is vulnerable to competition from road haulage which is also well suited to it (as compared to bulk or aggregate traffic which is often more suitable for rail).

The UK logistics industry has many challenging performance targets, whether set by Government or wider society. One of the clearest and most demanding is the recently agreed target of a 15% reduction in total HGV GHG emissions by 2025. FTA believes this can only be achieved with a notable increase in the use of rail freight. The key opportunities for this are in domestic intermodal and international container traffic sectors.
However, increasing the cost base of rail freight could instead have the effect of reducing use from its current levels. Previous analysis by MDST for Control Period 5 has already identified that domestic intermodal, international container traffic and also aggregates are highly price sensitive and would switch to road if costs increase.

Road freight also bears cost burdens from Government, most notably fuel duty, but is an innovative industry that will continue to seek marginal cost efficiencies. Rail's cost base must reduce likewise if it is to win market share from road – however, the proposed increases in costs are far more than marginal and easily outweigh any increased efficiency operators could achieve. In addition the longer asset life of rail locomotives means the turnover and adoption of low-emission and lower-carbon technology is necessarily slower than in the road sector.

Feedback from our logistics customer members (major supermarkets, retailers and manufacturers) is that they are willing and able to use rail if it is cost competitive with road, because of the social benefits. Rail does, however, need to match the price of road as otherwise the company is adding cost into its supply chain that could reduce their competitiveness against their own rivals.

Therefore if cost increases of the kind put forward here are introduced without any measures to alleviate their effects, FTA believes it would result in at least a failure to increase the role of rail in the supply chain, affecting industry's ability to meet its carbon targets, and at the worst to actually reduce use of rail freight – resulting in increases in use of road freight with consequential relative increases in congestion and emissions and adverse safety impacts.

We have set out some thoughts on this, but clearly the Freight Operating Companies themselves will be the best source of information on how to re-shape the proposals.

Given the legal constraints under which the terms of the charging regime have to be set, it may be the solution comes from separate government policy initiatives. These could include increased infrastructure spending on freight priorities to delivered reduced costs and improvements in service to outweigh the negatives impacts of track access charge increases. Further beyond Network Rail or ORR's remit, other examples of policy measures could include the revival and expansion of grant programmes, reductions in Red Diesel tax charges for intermodal rail freight or adjustments to other corporate tax regimes.

Clearly these are matters outside the Periodic Review process, and are matters for Department for Transport or HM Treasury to decide. But if increased charges are to be pursued, FTA would urge that cross-Departmental discussions are held urgently to safeguard the place of rail freight within the UK supply chain. Otherwise key Government priorities such as carbon reduction, road safety improvement and congestion management will all be threatened.

There are real world consequences of ORR decisions in this process that must be addressed in the round before determinations are made and a process set in place that will jeopardise the success of rail freight the UK.

Specific comments on the costs and charges proposed in PR18

Costs

- We support the recognition of the importance of maintenance and renewals including the increased grant provided by government and the separation of processes for approving and monitoring the deliverables of enhancements, which will allow better focus on the efficient delivery of maintenance and renewals.
- The lack of cost control and declining efficiency at Network Rail during CP5 has been of great concern to the rail freight industry. If higher infrastructure costs are passed on to operators this will negatively impact competitiveness of rail and the efficiency of the supply chain. We therefore support the work ORR has done to highlight this deterioration and its approach to challenging the cost base proposed by Network Rail for CP6. We assess that it possible for Network Rail to achieve further efficiencies beyond those in the draft determination and that these further efficiencies will be critical for the survival of rail freight.

Charges

- ORR has statutory duties to: promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable; and protect the interests of persons providing services for the carriage of passengers or goods by railway in their use of any railway facilities which are for the time being vested in a private sector operator, in respect of the prices charged for such use and the quality of the service provided. With these duties in mind, FTA is very concerned about what charges freight can bear given that the sector is loss making. We ask for full disclosure to our operator members on the assessment that rail freight has the capacity to increase its own efficiency to absorb these additional charges.

Potential grant requirement

- Our analysis of estimated charges is that without capping, the total charge (variable and fixed) paid by freight operators would increase from £53 million currently to £75.4 million by the end of CP6. With the full capping, total charges would increase to £61.2 million by end of CP6. Assuming similar efficiencies are continued in CP7, then total costs at the end of CP7 would be £105.4 million under the proposed phase-out of capping and £70 million if capping remained in place.
- In 2016/17 DfT MSRS rail freight grants were £18m, so under the capped model grants would need to increase by a further £10 million to compensate, and under an uncapped model they would need to roughly double.

Conclusions

If ORR decides it is not economically practicable to promote the use of the railway for the carriage of goods any further by reducing the changes payable by freight operators over CP6 and CP7 then growth in rail freight will be constrained. If charges increase, the use of the railways for freight will decline.

The Secretary of State and Scottish Ministers will need to consider their willingness to support the industry in the context of the wider freight operations. Each freight train removes around 50 lorries from the road, and the governments will need to consider if it is desirable for Britain's road network to carry freight which transfers from rail given the environmental and congestion costs of this.

FTA will write to the Transport Secretary and Scottish Ministers to raise with them the adverse impacts to the UK of the policy proposals ORR is putting forward.

ORR Periodic review 2018: draft determination

Response from Freightliner

August 2018

This is the response of Freightliner Group, which is part of Genesee and Wyoming's UK/Europe Region companies, to the ORR's periodic review 2018 draft determination

Executive Summary

Overall, Freightliner is supportive of the contents of the draft determination, and the associated decisions, however there are some areas where we have continued concerns, which we raise in this consultation response:

- The level of increase of variable usage charges for freight in CP6 and CP7 is significant and risks loss of traffic to road, and negatively affecting investment decisions made by customers and freight operators and other parts of the supply chain.

- The average increase quoted in the draft determination is misleading as some customers will be facing increases of circa 24% by the final year of CP5 and circa 48% by the end of CP6

- Network Rail has failed to meet its CP5 efficiency targets by a huge margin and this is directly impacting on the charges that are proposed to be paid by the freight sector.

- We suggest that the increase could be phased in over a longer term period to reduce the impact on customers and reduce modal shift to road, and to allow opportunity for Network Rail to achieve efficiencies. A capped annual increase of 1% above inflation would support future rail freight growth and certainty to support investment decisions

- The ORR's impact assessment is flawed and we are concerned that the decisions made in the draft determination with regard to freight access charges have been made on the basis of the assumptions in this assessment. Concerns include out of date assessment of the impact on the modal shift to road of the proposed increase in charges, as well as incorrect assumptions around the incentives to purchase track friendly bogies. The impact assessment also considers rail freight as an isolated market rather than part of the logistics sector. It is incorrect to state that air pollution and noise pollution increases when rail freight grows, this ignores the fact that Heavy Goods Vehicles (HGVs) will be removed from the roads in this scenario.

- Freightliner remains concerns about the authority of the Freight and National Passenger Operator Route (FNPO) in delivering through the geographic Routes, the System Operator and other parts of Network Rail on behalf of the freight sector. In this respect we welcome ORR's conclusions to request further plans from Network Rail to demonstrate the governance structure for freight.

- There appears to be no incentives for the physical Routes to support rail freight growth. Freight operators have to constantly develop new business to maintain existing levels of movements as customer requirements constantly changed. We are concerned that development of new business will become increasingly difficult if Network Rail Routes have no interest in supporting new business.

1.0 Efficiency

The draft determination notes that Network Rail has "performed poorly over recent years in terms of delivering efficiently against its plans or ORR's determination" and is now "substantially less efficient than at the end of CP4" in many important areas. This is a significant concern for all freight operators given the impact that inefficiency places on track access charges. Rail freight's future viability and its ability to compete with other modes is highly reliant on Network Rail's ability meet its efficiency targets. This represents a significant risk for freight operators who are fully exposed to changes in regulated costs.

Network Rail's poor performance against its efficiency plans in CP5, augmented by its reclassification led to a significant re-planning of its enhancement programme mid-control period. This is clearly a situation that the industry wants to avoid in CP6 and therefore it is important that Network Rail is set a challenging but realistic efficiency target.

Network Rail enters CP6 as a very different business from its entry into CP5. Many initiatives have been put in place to target efficiency gains and the development of a devolved Route-based structure provides an opportunity to isolate costs and cost-drivers and benchmark and create competitive tension, which drives efficiency, between Routes.

The benefits that we expected to be realised from the new Route structure do not seem to be have materialised in the Route Strategic Business Plans; these generally take a pessimistic view of future efficiency, highlighting the many headwinds that Network Rail could face in CP6. As noted in the draft determination very few 'tailwinds' are identified and there is limited discussion of possible mitigations to overcome the headwinds, which we would have expected Network Rail to identify.

This gives rise to the impression that Network Rail's proposed efficiency targets are not sufficiently challenging. Indeed ORR's review of Network Rail's proposed costs noted that the baseline period for the business plans was itself in a period of "unusually poor performance on efficiency". Network Rail's poor performance in CP5 will inevitably lead to its conservatism in future efficiency targets.

Despite Network Rail's recent struggles, it remains important that Network Rail is sufficiently challenged on its efficiency levels and set a stretching, but realistic target. This target needs to consider all of the initiatives that Network Rail has put in place and the positive impact on efficiency that its new structure is designed to have. Furthermore where Network Rail can identify looming 'headwinds' Network Rail should be challenged to respond accordingly.

Whilst we aware that the ORR has proposed to increase Network Rail's efficiency target slightly in CP6, considering the decrease in efficiency in CP5 in our view the revised target is still very cautious. It is absolutely crucial that Network Rail puts in place measures to turnaround its efficiency in order to create more confidence in the deliverability of the rail industry and to avoid the rail freight industry bearing the impact of future missed efficiency targets, as it will do in CP6.

2.0 Variable Usage Charges (VUC)

The draft determination confirms that the deterioration in Network Rail's efficiency means that the cost of repairing the wear-and-tear that train operators cause to the network has increased significantly and without mitigation VUC would increase materially in CP6. This has been a concern for freight operators for a number of years as we are fully exposed to changes in costs. The overall level of charges, particularly the affordability of the short-run variable charges, directly impacts on the competitiveness of the rail freight sector, which is why the industry, through the Freight Investability and Sustainability Group, has been actively exploring options to provide certainty over the affordability of future charges over a number of years.

The importance of a stable and affordable charging regime was an important theme in both the Department for Transport and Transport Scotland rail freight strategies. Both identified the importance of having charges, and a charging structure, that supports existing rail freight, and encourages growth. This is in the context of the significant environmental and economic benefits delivered by rail freight, which were estimated to be worth over £1.7bn to the UK economy in 2016[1] and the risk that an increase in charges would be likely to cause the economic benefits to disappear at a faster rate than the additional costs recovered from higher charges.

2.1 Department for Transport and Transport Scotland letters to ORR

In recognition of the importance that the level of charges has on the viability of moving freight by rail and the profound impact that the decline of coal had on the sector both the Department for Transport (DfT) and Transport Scotland outlined their positions to ORR in relation to Network Rail's recovery of the variable usage charges in CP6.

The DfT outlined its support to cap VUC in real terms in CP6 and confirmed there was provision in the Statement of Funds Available to do so.

"We would therefore support capping charges in real terms, to the full extent consistent with the legal framework, at the current end of CP5 level (i.e. uncapped end CP5 rates) in order to provide rail freight operators and investors with certainty about the level of this charge for the next control period. As funder and shareholder, we are satisfied that this is consistent with the assumptions we made in the Statement of Funds Available."

Similarly Transport Scotland outlined its "*serious concerns about the effect of any increase in VUCs, particularly in relation to freight traffic and charter operators as we look to grow both the rail freight and rail tourism market*s". Furthermore "*it is essential that the charges and incentive framework should provide a stable platform to enable and encourage this growth in the rail freight sector*".

There is a clear support from these letters for VUC to be capped in real-terms in CP6. Both governments noted that such caps would need to be time limited. Therefore DfT suggested "*revisiting this issue as part of a future periodic review, once further information is available about Network Rail's cost and efficiency in CP6*".

Given the strong government support for real-terms capping and the provision of funding to enable Network Rail to do so, Freightliner was disappointed that the ORR has instead proposed to introduce significant real-terms increases in VUC rates in CP6. Freightliner urges the ORR to reconsider this ahead of the final determination.

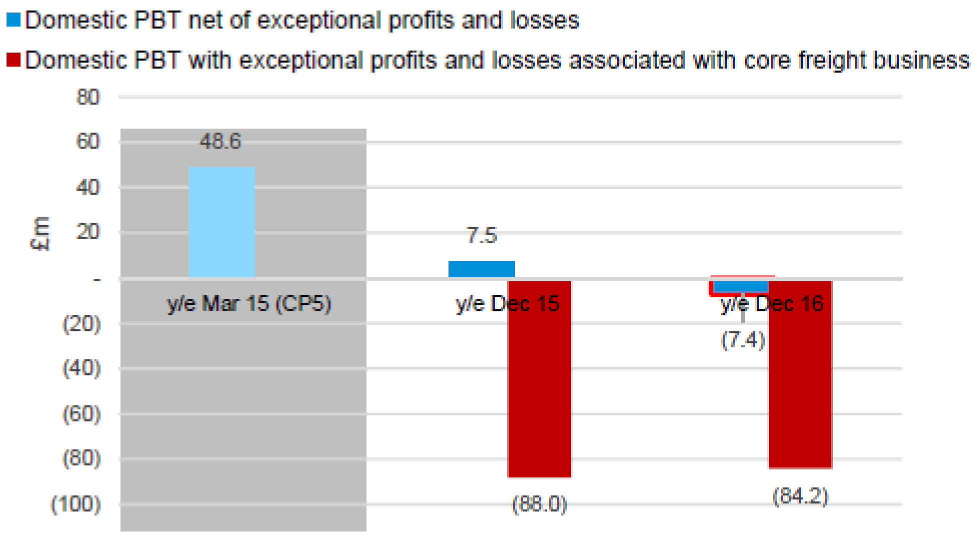
2.2 Affordability of phasing-in cap

The rail freight industry remains at a financial cross-roads following the sudden decline of rail's traditional bulk commodities and we fear that the proposal to phase-in the cap will place the recovery of the sector in jeopardy.

KPMG analysis of the financial position of the freight operators shows that they collectively lost £88m in 2015 and £84.2m in 2016 (see Chart 1).

[1] https://www.raildeliverygroup.com/files/Publications/2018-06_rail_freight_working_for_britain.pdf

Chart 1: Profit before tax (PBT) from ongoing domestic operations



The financial position of the sector was clearly recognised in the ORR's draft impact assessment on capping/ phasing-in the VUC in CP6, which acknowledged "the ability of freight operators to absorb a significant increase in the VUC is likely to be limited". The proposal to phase in the real-terms increase in VUC would seem to be at odds with the backdrop and the known financial position of the sector.

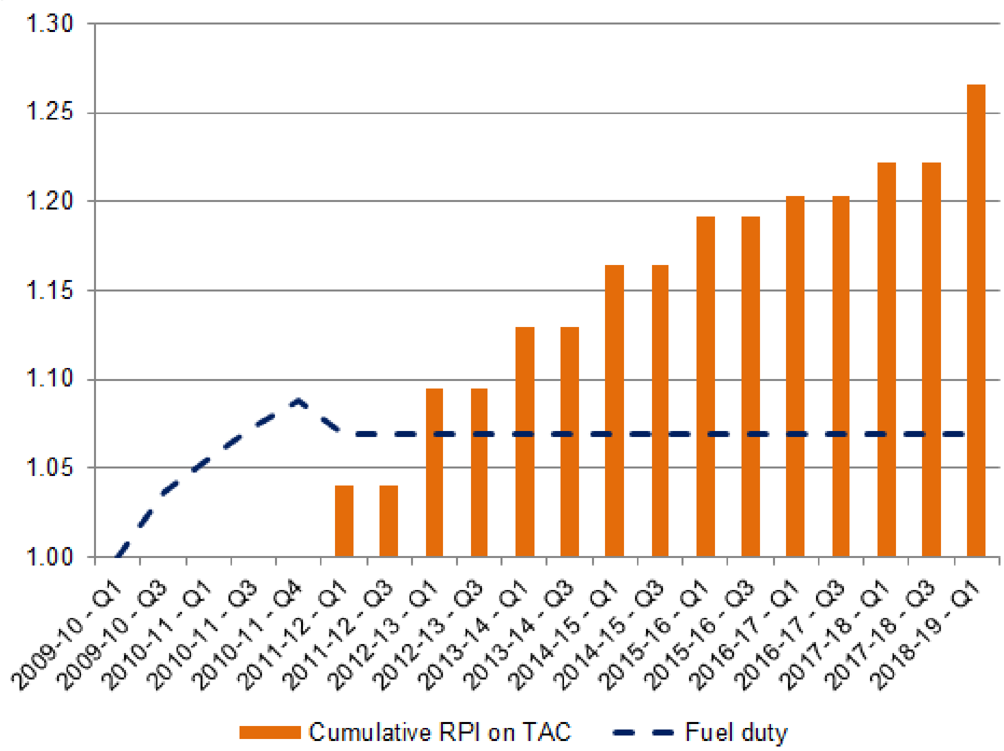
2.3 Glide-path

- Freightliner understands that the ORR proposal to phase-in the VUC increase is driven by the desire to provide a credible glide-path to full direct cost recovery. Freightliner urges ORR to reassess the slope of this glide-path and the time horizon to achieve full direct cost recovery. We understand that there is no legal requirement with regard to the specific length of the trajectory. Annual increases of CPI plus 1% would support future rail freight growth and certainty to support investment decisions. Other options including 15 year trajectory may offer a less damaging glide-path to cost recovery whist remaining entirely credible, particularly noting the lost impetus in Network Rail efficiency improvements.

The current glide-path proposed is much too steep for the industry to be able to absorb without reducing rail freight volumes and modal shift to road. We urge ORR to consider the glide-path in the context of wider policy decisions and against the background of the current financial health of the sector.

An assessment of the glide-path against the wider policy decisions will help to ensure a more achievable and credible transition. The steep phasing-in of VUC proposed should be looked at in the context of the freeze in fuel duty that road hauliers have been benefitting from since 2011. Chart 2 shows that while fuel duty has been frozen in real terms since 2011, track access charges paid to Network Rail have increased by over 27% RPI over the same period (in addition some commodities have seen further considerable increases over CP5).

Chart 2: RPI on track access charges versus change in fuel duty



In the short-term there is no expectation that the current policy to freeze fuel duty will change but there is discussion intensifying that distance based charging could change the way that road usage is charged. The conversion to electric power for road users will in future necessitate an alternative form of taxation to compensate for the reduction in fuel duty collected and it is increasingly being recognised that a distance based road charging scheme could provide a credible alternative. Such a scheme would allow for more sophisticated pricing signals that could support modal shift to rail.

Freightliner would expect that the credibility of the glide-path to phase-in the VUC would be considered in this wider context. Such an assessment would likely point to real-terms capping of VUC in CP6 or a much shallower glide-path, given that we are still a number of years away from changes to the wider policy framework.

The current financial health of the sector should also provide a steer for the slope of the glide-path. The ORR's draft impact assessment on capping/ phasing-in the VUC in CP6 recognises the financial challenges facing the sector. This was key to the rationale behind the DfT and Transport Scotland supporting the real-terms CP6 capping of VUC. The freight operators are in the midst of restructuring their businesses and CP6 will be a pivotal control period for the sector. In this context the industry would very much benefit from a stable and affordable level of VUC in CP6 to ensure that freight operators can emerge from the crisis following the decline of coal volumes.

Consideration of the glide-path in the context of wider policy decisions and the financial health of the sector points to the need for a much shallower glide-path for the phasing-in of VUC. Freightliner considers that the most suitable approach would be CPI plus 1% in CP6. We note that provision was made within the Statement of Funds Available for flat real charges, so that funding should be available for this option. A decision to phase-in from CP7 could then be taken against the likely different policy background and a different financial climate for the freight operators and hopefully improved Network Rail cost efficiency.

Should the ORR feel that this would not be credible, there are other ways of phasing-in the increase in VUC that would be shallower and would do less harm to the sector. An increase of 1% + inflation would provide a shallower way of phasing-in the increase in VUC until full cost recovery is achieved.

2.4 Average capped increase versus actual increases

Table 9.1 of the draft determination suggests that the capped increase from the close of CP5 to the final year of CP6 is 11% misleading. Having now received the draft price lists from Network Rail it is clear that the maximum increase that could apply to any one customer is far in excess of 11%. For example the variable charges for a loaded BLA(A) steel carrier increase by 30.6% in year 5 of CP6, compared to year 5 of CP5 (both at 17/18 price levels), once an adjustment is made for the abolition of the Capacity Charge, this increase equates to about 23.6%. On average net of the removal of the Capacity Charge we estimate that the increase for the construction and steel sectors is around 17% in year 5 of CP6, compared to year 5 of CP5 (both at 17/18 price levels).

Table 9.1 lays out the uncapped increase from close to CP5 to CP6 as 29%. This is again misleading as the difference between different wagon types is considerable. The uncapped price for a loaded BLA(A) steel carrier is 68.4% higher than year 5 of CP5 (both at 17/18 price levels), once an adjustment is made for the abolition of the Capacity Charge, this increase equates to an increase of about 61.4%. On average net of the removal of the Capacity Charge we estimate that the increase for the construction and steel sectors is around 42% in year 5 of CP7, compared to year 5 of CP5 (both at 17/18 price levels).

2.5 Price increases deterring investment

In the commodity sectors that are proposed to be particularly hit by large price increases the sector's customers will be facing daunting price increases. Neither the steel, construction or oil sectors have been assessed as sectors that can bear a mark-up and these price increases will impact on future growth and potentially existing business. When customers come to a decision point, at the end of an existing contract, when wagon leases expire or assets become life expired it is highly likely that they will reconsider their options versus road. As rail access charges are becoming more expensive, whilst fuel duty continues to be frozen at actual levels (and therefore in effect reducing each year), there is a real likelihood that road will be chosen over rail.

Likewise these price increases will impact on the confidence of rail freight operators in the future growth of the market and this will impact on future investment decisions. Rail freight operators are owned by multi-national companies and businesses in the UK have to compete for capital with businesses in other countries in the same ownership. The proposed increases in track access charges will introduce considerable risk to such investment decisions.

3.0 ORR's draft impact assessment on capping/ phasing-in the VUC in CP6

Freightliner welcomes the publication of the ORR's draft impact assessment on capping/ phasing-in the VUC in CP6 and the different options that have been considered to phase-in the cap. We are concerned though that some areas of the impact assessment are fundamentally flawed and a reassessment could give rise to different options being selected.

3.1 Respond to pricing signals

One of the principle arguments made in the ORR's draft impact assessment is around the ability of operators to respond to incentives to invest in track friendly rolling stock. The impact assessment argues that the phasing-in trajectory will drive CP6 investments in rolling stock as a means for operators to mitigate against some of the increase in VUC. For instance one of the impacts of 'flat-real' VUC in CP6 is "lower investment in track friendly vehicles".

This assumption is flawed and seemingly ignores the fact that investments in rolling stock are investments in 30 year plus assets and are therefore taken over a long-term time horizon and not in response to near-time pricing signals over one periodic review. Such arguments ignore operators' investment cycles and assume that there actually exists more track-friendly rolling stock on the market.

Freightliner has already made investments in track-friendly rolling stock over recent years. 77% of the wagons we have invested in over the last 12 years have track-friendly bogies. The remaining 23% of wagons include the 22.5T axle load wagons for which there were no track-friendly bogie options available on the market. Therefore the ability to escape, or to mitigate against the increase in VUC is negligible, and that's notwithstanding that any response to pricing signals would need to align to the 30-year investment cycle given the high acquisition costs that are involved.

Furthermore the lead-time for the delivery of new wagons is currently 2-3 years following order. That means that even if a decision were taken to purchase wagons on the near-term pricing signals within a periodic review process, those wagons would not start to operate on the network until towards the end of the control period. By this point the next periodic review process will already be well underway and therefore there may be different pricing signals.

The impact assessment places too much weight on the ability of operators to respond to near-term pricing signals and therefore the assessment significantly overstates the incentive properties.

3.2 Holistic consideration of external impacts

Freightliner is surprised at the negative external impacts that have been noted in relation to flat-real VUC cap. The impact assessment argues that flat-real VUC could lead to more services being run "resulting in increased noise and air pollution". The externality benefits of rail freight are well known. KPMG recently calculated that the UK gained £0.5bn of externality benefits rail freight in 2016[2], using government green book assumptions Therefore the suggestion in the impact assessment that growth could be viewed as a negative is flawed given that modal shift from road to rail delivers externality benefits for the UK economy. It appears that the impact assessment views the traffic in isolation and does not consider that were the traffic not move by rail it would likely move by road and that would generate negative externalities and lead to a reduction in economic benefits.

3.3 Impact on volumes

The impact assessment describes the effect on volumes of increases in VUC rates. It uses information from MDS Transmodal produced as part of PR13 to inform its analysis. Freightliner is surprised that these elasticities have not been updated for PR18 following the significant structural changes in the rail freight sector between PR13 and PR18.

The commodities moved, competitive pressures and underlying economics of the freight sector (across all modes) are different now than they were in PR13. The decline of ESI coal volumes is a loss of a commodity sector that was more or less captive to rail. Intermodal and construction volumes, which are now two-thirds of rail freight, are intensely competitive sectors with road and feeder shipping. This means that the overall % assumptions stated in the impact assessment are flawed.

Many of the assumptions that were developed as part of MDS Transmodal's PR13 modelling also need updating to reflect current status, especially as the base for this modelling was the year up to October 2011. For instance MDS applied the assumption that in the "7.5 years from the base year

[2] https://www.raildeliverygroup.com/files/Publications/2018-06_rail_freight_working_for_britain.pdf

to 2018/19, fuel prices are assumed to have a real-terms increase of 8%"[3]. Chart 3 below shows this assumption at odds with actual events. The pence per litre of ULSD, adjusted to remove the inflationary affect, shows a significant fall over that timeframe. This is clearly a factor that favours road over rail.

Chart 3: ULSD adjusted for CHAW

Many of the other assumptions that were made as part of the original modelling work also need revisiting:

- No significant changes in track access charges in real terms for 2016/17. However significant changes are due towards the end of CP5, for Variable Usage Charges (VUC), Freight Only Line Charges and Freight Specific Charges for certain commodities.
- Labour (drivers' wages for road and rail) increased by 7% from the base year to 2016/17. This was against an assumption that HGV driver wages are would increase by 15% over that timeframe[4].
- HGV fuel costs decreased by 24% from the base year to 2016/17. This was against an assumption that fuel prices would increase in real terms by 8%.

It is clear that the competitive environment, economics of the markets and the underlying structural make-up of the sector have changed and therefore the impact assessments need to be refreshed accordingly. Freightliner considers that many of the rail freight sectors are highly price elastic and more price sensitive than PR13 modelling suggests. Therefore we believe that as the draft determination relies on outdated elasticity figures, it underplays the impact that increases in charges will have on rail freight volumes.

In order to ensure that the impact assessment accurately models the price and volume effects of any increase in charges, Freightliner would expect the price elasticities to be reassessed. The

[3] http://orr.gov.uk/__data/assets/pdf_file/0003/1794/mdst-freight-tac-changes-feb2012.pdf
[4] http://orr.gov.uk/__data/assets/pdf_file/0003/1794/mdst-freight-tac-changes-feb2012.pdf

freight operators have engaged MDS Transmodal to re-assess the impact on volumes that the proposed increase in charges will have on rail freight volumes. Freightliner would urge the ORR to consider this evidence before making a final decision on the phasing-in the VUC in CP6. We expect this study to be complete by 14th September 2018.

4.0 Additional income

The impact assessment confirms that Network Rail's February SBP baselines were produced on the assumption of flat-real VUC for freight operators. Therefore any phasing-in of VUC would represent additional income that Network Rail had now assumed in their SBPs, although clearly the amount of additional income would be dependent on the effect on volumes that any price increases have. Therefore the impact assessment confirms that the impact of any flat-real VUC "can be viewed principally as foregoing additional income and projects that were not included in the February SBP baselines".

Throughout the periodic review process Network Rail has reiterated that it is not funded to change any parts of the contractual relationship where such a change would require any additional funding. For instance Network Rail has indicated that it cannot move to cost reflective Schedule 4 rates or cancellation rates due to lack of provision within the SOFA. Should the final determination confirm a real-terms price increase for freight operators in CP6, the argument about not being funded will not necessarily apply. Therefore we would ask ORR to seek a mechanism for ring-fencing any additional funding to enable the industry to have a more informed debate about the best value for such funding.

The below table shows the difference between the assumed Variable Charge funding assumptions for CP6 in the FNPO SBP, and the updated assumptions post the publication of the draft price lists by Network Rail. The assumed difference in Variable income over CP6 is £24.8 million.

	£m 2017/18 prices					
	CP6					
	2019/20	2020/21	2021/22	2022/23	2023/24	total CP6
NR CP6 forecast income from freight Variable Usage Charges following publication of price list 31/1/18	£50.50	£51.80	£56.90	£62.90	£71.30	£293.40
NR SBP forecast income from freight Variable Usage Charges	£48.50	£49.90	£52.80	£56.20	£61.20	£268.60
Difference between SBP and post price list forecast	£2.00	£1.90	£4.10	£6.70	£10.10	£24.80

5.0 EU legislation

Since the last periodic review Implementing Regulation EU 2015/909 has entered into law providing detailed and prescriptive rules that infrastructure managers must follow in the calculation of costs directly incurred. This legislation is designed to provide greater transparency to railway undertakings over the calculation of the charges and ensure consistency of approach across different Member States. Freightliner provided input to the European Commission to help shape this legislation and we welcomed its adoption in 2015.

Freightliner notes that the legislation appears to have had a positive impact on the calculation of VUC for railway undertakings, with a "9% reduction in the average level of the uncapped VUC".

Given that this legislation has potentially significant ramifications on how VUC is calculated, we had expected that ORR to have completed a detailed review of Network Rail's compliance against this legislation, as part of the periodic review process.

In Freightliner's response to Network Rail's consultation on variable charges and station charges in Control Period 6 (CP6) we questioned how VUC cost estimates comply with the 2012 EU Directive (2012/34/EU) and the Implementing Regulation (EU 2015/909). We note that Network Rail has responded to these concerns in an appendix to the response to the consultation. Top-level VUC cost categories are provided along the percentage of those costs that are considered direct. This is welcome but we note that only one detailed example is provided – the track renewal cost category.

We note that the process to assign percentages of each cost category that vary with traffic would appear to require subjective judgement and therefore it is not straightforward to ascertain with a high degree of precision in all cases. In that context it would be helpful for Network Rail to provide a transparent breakdown of assumed direct costs within each of the cost categories and for ORR to review this categorisation to ensure compliance against the Implementing Regulation EU 2015/909.

We welcome the ORR's commitment to complete this review "during CP6, to facilitate decision-making ahead of PR23", but we would welcome at least a preliminary assessment as part of PR18 given the impact that it could have on levels of VUC. We do not consider the decision to apply a cap in CP6 supersedes the need to ensure Network Rail is compliant with the new implementing regulations.

FDM

Freightliner notes that ORR has now confirmed that an FDM level set at "94.0% is an appropriate baseline against which to hold the FNPO to account". As we detailed in our response to the SBP we consider an FDM target of 94.0% lacks ambition, given that this is a level that Network Rail has outperformed for large parts of CP5. We do understand that FDM has dipped over recent periods, but this has been driven by a set of exceptional factors, including the timetabling issues, the heat and an incident at Routs level-crossing on the Felixstowe branch that impacted freight traffic for nearly a week. We would expect this to be a short-term blip, with a return to the previous levels of performance that saw, for instance, average annual FDM of 94.3% in 2016/17.

It still remains unclear to Freightliner why the FDM target was revised down between the September 2017 draft SBP and the February version, although we appreciate the ORR feedback on this matter in the draft determination. The commentary in the Freight & National Passenger Operator draft settlement document states that "*FNPO could not provide clear evidence that the change to 94.0% had been agreed, it did provide sufficient evidence that it had informed Freightliner of this change, and so arguably provided an opportunity for comment on the change*". Freightliner has never been asked to agree to the change in the FDM performance trajectory and we have never formally been given the opportunity to comment on the level of FDM. The change from 94.5% to 94% FDM was mentioned at a Schedule 8 Freight Working Group, but the actual level of FDM has been considered out of the scope of the Working Group to discuss.

Going forward it would be helpful to establish a clear change control process, particularly if Network Rail is seeking views and trying to reach agreement with the freight operators. We are not aware that Network Rail has ever actively sought our agreement over the level of FDM.

Schedule 4

Freightliner considers that there has been a missed opportunity to consider changes to the freight Schedule 4 regime as part of the PR18 process. Within the Freight and Charter Schedule 8 Working Group, the ORR set out its expectations that Schedule 4 rates should reflect the cost of a possession to a freight operator. The freight operators provided evidence to confirm that the current rates are not designed to be cost reflective and the freight operators identified options to update the rates accordingly.

As Network Rail highlighted that there is no funding available to support higher Schedule 4 rates in CP6 and only proposals that did not require extra funds could be progressed, the default position was to uplift the current rates by inflation. This is a disappointing outcome particularly given that cost reflective rates could unlock additional efficiency for Network Rail, noting that currently freight operators lose money every time they agree a possession.

There is a dichotomy between the expectation from ORR that the rates should be set at a cost reflective level and the reality that they are not cost reflective and nor are they designed to be. The current rates were born out of the level of previous compensation paid by Network Rail for Restriction of Use under Part G before being reduced by 31% in 2012 because more freight trains were impacted by Restriction of Use than had been anticipated.

Freightliner has strongly supported the ORR's expectation that Schedule 4 rates should be cost reflective, but it should be recognised that this represents a policy change from previous periodic reviews and indeed this periodic review. Noting that the issues with the Schedule 4 regime are likely to persist into CP6, Freightliner would welcome improvements to the freight Schedule 4 regime being prioritised for PR23.

FNPO strategic plan and scorecards

We remain concerned that the FNPO route is not sufficiently empowered to protect the interests of the freight industry, in particular how it ensures that the geographic routes, System Operator, and other parts of NR deliver for freight.

Freightliner therefore strongly supports the ORR's proposed steps to improve the governance and reporting framework, specifically:

- How the FNPO Route interfaces with the geographic routes, the SO and other parts of Network Rail and the level of authority that the FNPO Route holds.
- Clarity on the role of the FNPO Supervisory Board and how it provides assurances to its customers about its delivery. Freightliner has recently started engagement with the FNPO Route on the structure of the Supervisory Board, although we are still unclear how the requirements of freight customers are taken into consideration by the geographic route supervisory boards. We have never seen an agenda or minutes from a Route Supervisory Board so they remain an enigma to us.
- We welcome the annual review of activities to provide commentary on how the FNPO Route is delivering for its customers and priorities for the future year.
- Freightliner welcomes the engagement that we have had with the FNPO Route on the development of our scorecard. Though it should be noted that while the scorecard reflects many of our priorities it only tracks those indicators that can be easily measured and therefore it cannot measure parts of Network Rail's delivery that are important to our business. For example the scorecard measures the process to achieve longer trains but it does not actually measure how many longer trains were made possible to operate.

We remain concerned about the lack of incentive in the geographic Route scorecards to accommodate freight growth. By relying on FDM alone of the Route scorecards, there is a likelihood that performance will be disproportionately incentivised. Freightliner is already seeing evidence of this. We recently had an application for access rights for new freight traffic, transporting aviation fuel to Heathrow airport, rejected on the basis of Route concerns over performance. Despite fully validated, compliant paths being identified, the Western Route did not support the application at the Sale of Access Rights (SOAR) panel, citing unspecific performance concerns. Were Network Rail Routes better incentivised to accommodate new rail freight traffic it is conceivable that the Western Route's decision may have been different. Freightliner remains of the view that the geographic Route scorecards could be better balanced to ensure freight growth is adequately incentivised.

Funding for Research and Development

We understand that the ORR has diverted funds from Network Rail's research and development (R&D) budget to instead fund track renewals to a more sustainable level.

Whilst we understand the reason for this decision we are concerned by the very low funding that remains for R&D as a percentage of Network Rail's overall spending.

In order to achieve future efficiencies it is essential to invest now in R&D and we are concerned that Network Rail will struggle to break out of their current inefficient cycle.

We also understand from the cross-industry Technical Leadership Group (TLG) that Network Rail have agreed to fund 9 out of 12 of the Rail Technical Strategy Capability Delivery Plan activities but the one freight activity has been dropped from the plan. The reduced funding in this area risks the delivery of the outputs of the industry agreed plan as well as the opportunity for matching funding from other sources.

We understand that Network Rail did not articulate their plan for R&D in their SBP submission, but rather than divert this funding we suggest that Network Rail are asked to resubmit their plans in this area so that they can be properly considered on their merits before a final decision is made.

Response from Freightliner Group

Implementing PR18: consultation on changes to Network Rail licence

August 2018

This is the response of Freightliner Group, which is part of Genesee and Wyoming's UK/Europe Region companies, the matters included in the "*Consultation on Changes to the Network Rail licence*" issued by the Office of Rail and Road ("**ORR**") in July 2018 ("**the consultation**").

Overview

Freightliner supports the continuation of a single network licence for Network Rail and we note the new responsibilities for the physical Routes and the System Operator (SO). In particular we support a separate System Operator with a specific role and responsibilities and the requirement to make independent decisions, and to be sufficiently resourced to undertake its duties. The proposed requirement for the different parts of Network Rail to co-operate to meet all of the obligations in the licence is also welcomed.

We welcome the improvements in the licence with regard to the interests of freight organisations, including an obligation upon Network Rail requiring it to put in place specific institutional arrangements to ensure that the interests of freight is represented. However we are concerned that with the new devolved structure that this may be insufficient to protect the interest of the freight industry going forward or encourage Network Rail to be "open for business" for freight customers.

Freight and National Passenger Operator Route (FNPO

The proposals made propose to treat the FNPO Route differently in the licence; it does not oblige Network Rail to have a FNPO route, leaving its existence vulnerable in future. Our strong preference would be that the licence should oblige Network Rail to have a specific department to look after the relationships with and the interests of the freight industry. As an absolute minimum we would like to see more explicit obligations on the [physical] Routes to take into account the interests and reasonable requirements of freight operators and their customers.

As it stands there would be nothing to prevent Network Rail closing down the FNPO Route during CP6. This would mean that the FNPO Strategic Business Plan (SBP) would fall away and we would be left with the single obligation in the [physical] Routes on the Freight Delivery Metric. We have separately raised our concerns with regard to the [physical] Routes SBPs not including any measure to support freight growth.

We are not convinced that the licence provision as drafted supports giving FNPO sufficient power and influence to be able to promote and safeguard its interests throughout Network Rail. In particular, safeguards are need to ensure that the [physical] Routes, as their structure act in the interests of the freight sector, especially because it seems likely they will be increasingly more aligned with passenger operators in future.

The FNPO Route has a regulated business plan, income stream and budgets. It is the commercial lead for freight operator contracts, is the sponsor for freight enhancements and has a role in developing Network Rail's property portfolio as well as the commercial relationship with freight operators. These activities are placed in the FNPO route to ensure they are given sufficient focus, particularly as the geographic routes move to becoming even more aligned with passenger businesses. Freightliner would like to the network licence to reflect these obligations.

The omission of FNPO from the licence also affects the interpretation of other conditions. In certain areas for example, under Asset Management, the route businesses and SO must be consulted to changes in asset management policies – but this as drafted means that the FNPO route do not need to be consulted. On land disposal, FNPO would not be required to consent to the disposal of land under the new proposed clause (even if that land might have freight utility). The clauses which enable ORR to require confirmation of accuracy of information would not, as written, apply to the FNPO route. This is clearly not the intention, but by omitting FNPO as a route business, it creates these impacts, and means that ORR could not use the licence as a way of enforcing freight outcomes. In this respect the licence should clarify that the description of route businesses should where applicable include any route covering freight and national operators.

System Operator

In the consultation it is noted that the development and production of the network timetable will be one of the key outputs of the System Operator. Consequently, it is proposed that the licence would require the System Operator to run an efficient and effective process, reflecting best practice, for establishing a timetable and changes to it and promptly resolving disputes.

We note that the process for establishing a timetable are laid out in the Network Code, which forms part of all operators' track access agreements. We suggest that there is link between the licence condition and the Network Code in this respect, so that there is no ambiguity of the obligation to act in accordance with the Network Code. Indeed as the Network Code is such a crucial document it would give comfort to Beneficiaries that a breach of the Network Code could also lead in extremis to licence enforcement action by ORR.

June 2018 ORR - Draft Determination – Summary of Conclusions for Scotland

This is the response of the Friends of the Far North Line (FoFNL) to this document. We are not qualified to analyse the content in detail but wish to comment on some of the matters which arise therein.

We are pleased to note that Network Rail's higher expenditure plans for CP6 include mention of increased weather resilience. It is a source of frustration that extreme temperatures and high winds, all experienced in recent times on the Far North Line can so adversely affect the running of trains which traditionally have had the edge over road transport when bad weather strikes. The plans for extensive clearance of intruding vegetation are particularly welcomed.

FoFNL notes the reference to a higher spend on "core electrification" which reflects Transport Scotland's extremely welcome continuing policy of electrifying 100 track kms per year - in marked contrast to the ill-advised retrenchment in electrification by the current SoS, and his commitment to the unsatisfactory bi-mode trains seen in England & Wales. The shortcomings of these trains will be highlighted when they take over running of the *Highland Chieftain* and struggle to keep to time over Drumochter and Slochd on the HML. The cost overruns which occurred on the GWR, due to the lack of recent electrification design and implementation experience have not been replicated in Scotland.

It was good to see the comment that NR had "engaged well with stakeholders". We are looking forward to being kept abreast of the progress of CP6 plans once they are 'in the pipeline' as promised by NR at the Transport Scotland Rail Infrastructure Strategy Workshop in Glasgow in April.

We are particularly pleased to see a requirement for freight growth of 7.5% by the end of CP6. Currently the only freight being carried on the FNL is pipes for Subsea 7. There is an issue with the length and number of passing loops on this line, and the Highland Main Line, which needs to be addressed. There is however some ambiguity around the question of how much of this 7.5% requirement is new business. Different descriptions appear in the Annex at 3.1:
"Network Rail is required to ensure that 7.5% of that growth [*of 7.5%*] is new business" and later, "at least 7.5% of the final net freight tonnage must be product new to rail during CP6".

There are various references throughout the document to differences between the way NR relates to the UK Government and the Scottish Government. Whilst we are aware that the present SoS does not wish to remove the anomaly that the Scottish rail infrastructure provider is accountable to the DfT rather than the Scottish Government, we feel that this will need to be revisited. We think it is unnecessarily difficult in terms of the management of large projects for the provider to be accountable to the funder through an intermediary. Scottish timetabling was caught up in the *débâcle* in May 2018 and has had some improvements deferred because of it. This would not have been the case if NR Scotland Route had been set up as an autonomous entity.

Ian Budd, Convener, Friends of the Far North Line 01-08-2018

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GB Railfreight Ltd response to the Office of Rail and Road (ORR) draft determination

GB Railfreight thank the Office of Rail and Road (ORR) for the opportunity to respond to the draft determination. Rather than answer using the pro-forma, GB Railfreight will extract the salient points of note from the consultation and comment accordingly.

1. Charging

1.1 GB Railfreight is highly concerned with the application of the uplift in Variable Usage Charges applicable from Year 3 of CP6. In fact, this approach really does not differ whatsoever from the methodology put in place in CP5 and is disappointing given the sheer extent of consultation and industry liaison that has taken place. It appears no real innovative thought has been given to this. On review of the proposal we can see no clear incentive to grow rail freight but rather this proposal will hinder the ability for Freight Operators to maximise existing traffic as well as attract new users to the network.

1.2 In total, GB Railfreight determine that more than a 30% increase will be applied in real terms across all Variable Usage Charges with impact being felt both in April 2019, and then again in April 2021 and henceforth for the remaining three years. We can only see negative consequences for Freight Operating Companies and the End Users of rail freight by attempting to terminate capping of charges by the end of the Control Period. Stability and an overall uniformity of charging increases must be in place to offer certainty to all users of the network, we see no reason why freight should be any different. It should be noted that as part of the FNPO Strategic Plan it was made clear that Network Rail supported stable charging – so both parties agreed on that point. We would expect the team to support the fact that the charging approach proposed does not offer stability.

1.3 GB Railfreight agree with the proposal put forward by RDG that the increase would be more acceptable at an annual uplift level of CPI +1%. We could envisage a scenario where this methodology is rolled over into future Control Periods.

1.4 As always, this proposed hike in charges will simply result in the Freight Operating Companies, whom regularly demonstrate clear sustainability benefits and a £1.73bn benefit to the UK economy (based on KPMG analysis from 2016), becoming less competitive with the road hauliers and thus long-term traffic will be lost to alternative modes of transport. This is particularly prevalent in the Deep-Sea intermodal market and in fact is occurring at this very moment. The profitability of this market has eroded for rail freight and the forecast growth is simply not achievable given the proposed charges. The use of an historic MDS Transmodal report from 2015 really should not assist in determining the composition of the rail freight market, nor its forecast or perceived profitability. A refreshed version of this report is imminent, which importantly factors in the decline of the coal market, and GB Railfreight would be keen to see this used to revise assumptions made by ORR.

1.5 GB Railfreight have observed from both industry liaison and associated formal documentation from DfT that in fact there is provision in the SOFA (Statement of Funds Available) for a cap on charges that is assumed in line with inflation. We cannot understand the step to apply CPI + circa 3.5% over the final three years of CP6. What is more alarming is that other variable costs that Freight Operating Companies are constrained to paying are not increasing at the same rate, e.g. diesel fuel, so this increase feels disproportionate.

1.6 Having reviewed the draft Pricelists issued by Network Rail, and in conjunction with this consultation, GB Railfreight can see no incentive for further investment in Track Friendly/Low Noise Rolling Stock. There is simply no real significant savings on offer by purchasing more expensive equipment other than to have assets with a longer lifespan. We would expect that all network users should want to see the most track friendly equipment far outnumber the older, more damaging equipment but there must be a saving that makes this investment worthwhile. New equipment is far more expensive to purchase and often takes a significant investment by a freight operator with an expectation there would be downstream benefits, e.g. reduced variable usage charges. This is not the case and it does appear to have been somewhat disregarded during the PR18 review.

1.7 In addition, many of the most damaging wagons on the network, which are owned/operated by Network Rail, do not even pay toward network wear-and-tear as do not they pay track access. Therefore, Network Rail are held immune to the economic drivers that other users face. This does not motivate Network Rail to invest in new, track-friendly rolling stock. All this infrastructure damage appears to be washed into the Variable Usage Charge rates for services operated on behalf of freight End Users. GB Railfreight do not believe that any effort has truly been made to understand these costs.

1.8 Lastly, it has been made very clear by GB Railfreight, and some of the other key End Users of rail freight, that the levy of additional charges feels counter-productive to growth market growth. The biomass industry has delivered significant investment in terminals and new rolling stock to provide new to rail freight services, underpinned by significant long-term contracts with hauliers. This investment has been well into the £100m's, notwithstanding the investment in new staff and training. By imposing a Freight Specific Charge on biomass, twinned with the upcoming hike in Track Access Charges, it will only serve to ensure that the commodity will be 'priced-off' the network far sooner. GB Railfreight remain unconvinced that meaningful work has been carried out to truly understand whether the commodity can bear the increased cost.

2. Train Performance

2.1 GB Railfreight have been fairly content with the outcome of the challenging discussions that have taken place over the past months within the various performance working group meetings. It has been clear that there has been a lack of agreement between the Freight Operators and Network Rail but the guidance from ORR has been welcome and has helped to inform debates on Schedule 8 recalibration, as well as performance trajectories and proposals for FDM in CP6.

2.2 We consider the 94% FDM target to be a challenge in the industry, particularly given the current FDM scores and imminent large-scale construction projects that will demand significant freight haulage and investment, e.g. HS2. However, FNPO should be striving to deliver a clear road-map to get to 95% FDM. Some of the new to rail traffic that we will see come to fruition in CP6 will be short term. The key to making rail freight sustainable and attractive for investors will be to deliver quality high-speed freight services where right time arrivals and departures, increased average velocity and fast turnaround times at terminals are all part of the norm. The industry cannot say it is at that point yet.

3. Network Capability and Asset Sustainability

3.1 It is unclear to GB Railfreight how poorly Network Rail has performed in delivering its maintenance and renewals in CP5, though we do know this is well short of what industry expectations are. Notwithstanding this, if Network Rail are funded and entrusted with ensuring that the network is maintained and renewed to expectations of all users then ORR should allow Network Rail to get on with the job at hand, which will inevitably require a level of flexibility and choice. Decisions should be made by those directly involved in the work on a daily basis who should be well placed to make informed and innovative decisions on how to deliver value for money for end users in a safe and efficient manner.

3.2 What has been unacceptable during CP5 is the way Network Rail has allowed the capability of the network in some locations to significantly reduce. GB Railfreight has seen some communication on, for example, the Scottish gauging strategy which is supposed to be in place within the next few months. Sadly, on some routes in Scotland we expect the gauge of the network to continue to be determined by Freight and Charter services effectively 'gauging' the route, resulting in significant damages to rolling stock. Such damage (paint, windows, aerials) is often very difficult to recover from Network Rail due to the bureaucratic nature of their claims panel process and the very little 'real-world' rail freight experience in attendance at these panels.

3.3 GB Railfreight have been disappointed to see the degradation in Route Availability (RA) in many areas of the country. This is particularly prevalent in network sidings and access to network yards. Network Rail were funded to maintain the 'Network'. It has been clear that the full network has not in fact been maintained throughout CP5 and therefore we remain concerned that the settlement will not be adequate to improve this situation. It is often more expensive to re-introduce the necessary RA or gauge than it is to ensure that these maintained as part of a long-term maintenance strategy.

4. Freight and National Passenger Operator Team

4.1 GB Railfreight is pleased to see that ORR have suggested that £28m is a reasonable funding requirement for the FNPO team. We will be assessing throughout CP6 whether this proves to be value-for-money for rail freight. At present, and as has been reflected in the FNPO Scorecard, we currently see very little benefit in this team in delivering for the rail freight industry, in particular their lack of meaningful involvement in rail freight growth across various sectors and new to rail services. We believe that the Strategic Business Plan for FNPO is challenging but in delivering this the FNPO will be demonstrating their role in rail freight and thus enhanced support from GB Railfreight. Ownership of the funding and strong leadership of the FNPO is absolutely necessary to deliver positive results.

4.2 We will be certain to ensure that GB Railfreight are represented at industry liaison meetings to ensure that the £22m safety improvement fund is spent in the right areas where there can be a clear demonstration of sustainable safety benefits, not just short term, quick-win, safety improvement projects.

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5. Additional Funding

5.1 GB Railfreight is pleased to see that a significant fund has been made available for Research and Development (R&D) – although we understand more was originally requested - but would forewarn that this funding must be used as intended. More specifically, we would be keen to see the regular output of where this money has been spent and what has been delivered. Our concern is that this fund is not governed appropriately. We would like to see clear involvement with industry partners akin to the Freight Technology Group (FTG) that held Network Rail to task and was governed by Freight Operating Companies.

5.2 Dependent on how broad the scope of the R&D is, and the intended benefits that are determined, this funding could very well be quickly consumed. With adequate governance of the fund and industry participation GB Railfreight could see some level of value for money being delivered for the benefit of the network.

5.3 Precisely the same can be said of the performance innovation fund (£10m), which in relation to rail freight, has previously seen some excellent industry outputs to deliver an enhanced level of performance improvement. However, this has now somewhat stagnated and a further push is necessary in CP6 which GB Railfreight welcome and if appropriately managed, will offer to be part of.

6. System Operator (SO)

6.1 GB Railfreight is highly suspicious of the commitments made by SO in their Strategic Business Plan. This is a function that needs to be well resourced, skilled and suitably funded to ensure that the component parts of SO can deliver for its End Users. At present, the timescales to which this team delivers is simply unacceptable and way outside the parameters determined in the Network Code. The ongoing Timetabling crisis only goes to show the lack of strategic ability in the department on one side, but on the other it simply demonstrates just how constrained the SO can be if key rolling stock and asset investments are not delivered on time.

Please do not hesitate to contact me if you require any further information.

Yours Sincerely,

Carl Kent
Head of Strategy and Innovation
GB Railfreight

a public transport co-operative
run by passengers and employees

Office of Rail and Road
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29th August 2018

Dear Sir/Madam,

Response to the Infrastructure Cost Charges consulation

While the consultation covers both Open Access and Franchised operators, we are confining our responses to Open Access issues only. That is because we can only speak to the area of operations in which we have built up expertise.

It is desirable that open access operators should be limited only by their vision and imagination and not by the capacity of the network; logically that means that when they are using increasingly congested routes to meet suppressed demand, there should be sufficient revenue for Network Rail to be able to invest in increasing capacity to meet that demand. This has to mean a higher access charge than has been paid in many cases.

We are greatly reassured to see that ORR is alert to the risk that this could become a barrier to entry for services that would be of utility to passengers. This protection is essential – in fact, it is hard to see how taxpayer interests can be secured, or market distortions avoided, without it. Our concern is that barriers to entry and 'marginality' are not merely assessed over the life of any open access contract, but also in the early stages of an operation, and at the point of application. This is where most difficulties are faced, especially by new and innovative operators.

Proposed transitional arrangements for new entrants

This delayed charging regime, phased in over several years, provides a helpful structure for planning and is reasonable in terms of the build-up of traffic over a route. We have no objection to an arrangement that begins a transition from the date of a new operation commencing.

However, the timing of the transition is not related to the time that has been available for traffic to build up on a new route if that operator has ever traded before (ie if the company structure itself is new). This creates potential problems; if a small OAO wished to scale up its activities, it would have no opportunity to benefit from the transitional discounting but would have to pay the full charge on an immature service, even if that accounted for the bulk of its train operation.

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Proposed definition for new entrant open access operators

It is not safe to assume that because an operator is not new, it must have profit margins sufficient to cover charges in full from day one of operation. We believe that an operator should be considered 'new' if either the company itself has not previously conducted train operations; or if the scale of the company's operations (for example, annual mileage) have increased by 100% or more.

Proposal to levy ICCs on OAOs as a rate per train mile.

This is reasonable, as it is easy to calculate and bears directly on the cost of infrastructure maintenance.

Proposal to set the ICC for interurban OAOs in CP6 at £4/train mile.

The sum of £4 is reasonable, and the methodology used to derive it appears sound. However, this proposal rests heavily on the term 'interurban' which we understand is not yet defined. The acceptability of this charge is entirely reliant on the charge adoped, as it could easily render community services unviable.

Urban, as it is used by DEFRA, is unhelpful – it refers to any settlement of greater than 10,000 population. This is not a usage that will help to identify the most profitable rail services. However, the 'urban' category is subdivided into 'town/city' and 'conurbation' and this distinction is useful. Broadly speaking, the major and minor conurbations of the UK are focused settlements with more than 600,000 population, and account for over a third of the UK population. These are the locations that offer high profitability.

A further way in which 'interurban' services can be defined is speed – and this is helpful for linking to the cost of infrastructure, which is exponentially related to the speed of operation. We would suggest that any service with an average speed below 75mph is not an 'interurban' service, but rather a stopping or commuter service in which convenience rather than speed is the goal.

There is also a risk of the definition creating peverse incentives, such as:

- 'budget airline' style use of suburban stops as a substitute for main rail interchanges – for example, a service to Bristol that stops at Bedminster but not Temple Meads.

- inclusion of stops of little passenger utility as an appendix to a high speed intercity service, purely in order to avoid being classed as an interurban service

We would argue that the definition, being for the purpose of an infrastructure charge, should relate to actual impact on infrastructure and should not be subject to 'tipping points' and 'cliff edges'. That means that it should apply on high speed track between major urban centres and not elsewhere.

In short, our proposed definition of interurban would be 'any route or part of a route which links two conurbations with an average speed of 75mph or more'.

Subject to a defintion of this sort being applied, we are happy to support the new charging regime.

Yours faithfully,

Alex Lawrie

Operations Director, GO-OP Co-operative Limited

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CC Lynn Armstrong

30th August 2018

Dear John,

Grand Central CP6 Performance Trajectories: Review of position after discussion with Network Rail

As part of the draft Determination Consultation process, ORR have asked Operators to provide an update of the position reached with discussions to agree the CP6 Performance Trajectories with Network Rail. This letter summaries the position for Grand Central.

Grand Central has put significant effort into engaging with Network Rail throughout the process of the development of the Route Strategic Business Plans and has made extensive ad detailed comments on the drafts it has been provided with. This input has addressed both the content of the Business Plans and also the Scorecard Trajectories, including the Performance Trajectories.

At present, Grand Central has been unable to reach agree with Network Rail with regard to the Performance Trajectories, predominantly because:

- The “top down” process followed by Network Rail to build the Performance Trajectories from a base of a projected CP6 PPM Trajectory is flawed
- It is not clear that all the funded activities included in the Business Plans have been reflected in the development of the Performance Trajectories
- Network Rail have been unable to provide appropriate analysis to evidence how the underpinning PPM CP5 to CP6 “bridge” has been derived.

Grand Central will continue to engage with Network Rail to progress this matter but it is clear that the current CP6 Performance Trajectories are not an appropriate basis for regulation, ongoing operational management or for the setting of Schedule 8 Benchmarks.

As part of the Periodic Review process, ORR will be determining the Performance Trajectory that it will be requiring Network Rail to deliver against in Control Period 6. It is understood that the Regulatory Performance Trajectory for passenger operations will be expressed in terms of a Common Route Performance Measure (CRM-P) although a range of other Operational Performance metrics may also be included in Route Scorecards. This will be reflective of the funding that Network Rail will be provided with in the final Determination.

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Part of Arriva – a DB company

As part of the process to develop the Route Strategic Business Plans, Network Rail has been working with train operators to develop Performance Trajectories. It remains the aspiration of all parties that these Performance Trajectories should be agreed between the Routes and their customers. However, it has proved extremely difficult for this hoped for agreement to be reached.

Notwithstanding the difficulties experienced reaching agreement on the Scorecard Performance Trajectories, it is worth noting that all Operators (including Grand Central) have well developed Performance Improvement Strategies in place which have been developed and agreed jointing with the relevant Network Rail Routes. As has been noted by Grand Central throughout the process to develop the Route Strategic Business Plans, these joint Performance Strategies are not well reflected in the Operations and Performance improvement sections of the Route Strategic Business Plans.

Therefore, in order to inform its decision making ORR has asked train operators to provide evidence as to the reasons why agreement on the Operational Performance Trajectories as not as yet been possible. This letter provides the key issues identified by Grand Central.

- **Derivation of CRM-P trajectory**. Network Rail have chosen to derive the CRM-P trajectory by working backwards through a series of correlation models based on regression analysis starting from a PPM Trajectory. Grand Central believes that this approach is flawed:
    - While CRM-P is a Network Rail focused metric, PMM is an “all industry” performance outcome measure influenced by many factors including:
        - Network Rail performance as infrastructure manager
        - Network Rail performance as traffic manager
        - Network Rail performance as System Operator
        - Train operator performance
        - External factors
    - Network Rail’s approach to producing a proposed PPM trajectory is based on a “bridge” analysis between CP5 end point and CP6 end point – this does not provide a phasing across the Control Period.

Arriva believes that Network Rail should have derived the CRM-P trajectory “bottom up” based on the benefits delivered by the estimated impact of each initiative or influencing factor reflected in the Route Strategic Business Plan. This is how Operator Franchise Performance Trajectories are derived and how Joint Performance Strategies are developed.

- **Development of proposed PPM “bridges”.** There does not seem to be an evidence based approach to producing the “steps” in the bridges for each Operator in the Route Strategic Business Plans. The impacts of influencing factors seem to be significantly different for different Operators with very similar operational characteristics.

	Improved OLE	Reduced TSRs	Timetable change/traffic growth	DPI/service recovery	Thameslink	Improved Track	Reduced Impact externals	Improved NTA	Better Timetable from GPS
LNER	0.22	0.05	0.0	0.25	-0.32	0.15	0.25	0.14	0.18
Hull Trains	0.22	0.25	-0.18	0.25	-0.21	0.50	0.20	0.26	1.0
Grand Central	0.02	0.0	-0.24	0.05	-0.30	0.05	0.04	0.02	0

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- Network Rail have been unable to provide details as to the rational for the selection of these influencing factors.
- Network Rail has also been unable to provide details of an appropriate underpinning analysis that has produced the projected impacts associated with each influencing factor.
- With regard to the of Traffic Growth and Thameslink influencing factors, the projected impacts do not align with the Performance Assessments undertaken as part of the process for the sale of the relevant Access Rights.
- In addition, Network Rail has unable to provide details as to how these impacts have been phased over the Control Period to produce the Scorecard Performance Trajectories.

As a result, the Scorecard Performance Trajectories are inconsistent and disconnected from the nature of the operations they apply to.

	18/19	19/20	20/21	21/22	22/23	23/24	24/25
CRM-P	1.32	1.34	1.33	1.3	1.28	1.27	
LNER PPM	83.8	82.5	83.2	84.4	85.4	85.6	85.6
Grand Central PPM	85.4	83.5	85	85	85	85	85
Hull Trains PPM	82.3	84.5	85	85	85	85	85
LNER NRDM	209800	223300	216500	204100	193200	191600	191600
Grand Central NRDM	29000	30700	29400	29400	29400	29400	29400
Hull Trains NRDM	18300	17300	17100	17100	17100	17100	17100

Grand Central has proposed a more consistent assessment of the impacts of these influencing factors as below:

	Improved OLE	Reduced TSRs	Timetable change/traffic growth	DPI/service recovery	Thameslink	Improved Track	Reduced Impact externals	Improved NTA	Better Timetable from GPS
Grand Central	0.22	0.25	-0.18	0.25	-0.21	0.5	0.25	0.26	1.0

Grand Central has been raising these points with Network Rail throughout the process that has produced the Route Strategic Business Plans but has not had any meaningful response throughout that process.

- **Performance Trajectories have not been updated to reflect additional expenditure to deliver improved asset sustainability.** The Draft Determination provides additional funds for Routes to deliver improved asset sustainability. As yet, the Performance Trajectories have not been updated to reflect the performance benefits of this improved asset condition.
- **PPM "Bridge" does not include benefits from significant renewal and enhancement schemes on the ECML.** It is not clear whether the benefits associated with significant investments in late CP5 or in CP6 have been included:
  - General asset condition improvement other than for track
  - Traffic Management
  - South ECML "resilience"
  - Kings Cross remodelling.

Yours sincerely

Richard McClean
Managing Director

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PR18 draft determination consultation: pro forma

This pro forma is available to those that wish to use it to respond to our draft determination consultation, structured around the main areas of the draft determination. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed below (where you wish to comment), to aid our review of responses.

Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Ian Yeowart
Job title*	Chief Executive Officer
Organisation	Grand Union Trains
Email*	

*This information will not be published on our website. Please see Appendix B of our overview document for details on how we will treat information provided to us as part of this consultation.

Our approach to producing Network Rail's determination and to regulating Network Rail in CP6 For further information, please see chapters 2 and 3 of our overview document.
Nothing to comment

Our review of Network Rail's network licence Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.
Nothing to comment

Our review of Network Rail's stakeholder engagement
For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.
Nothing to comment

Our review of Network Rail's scorecards and requirements
For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.
Nothing to comment

Our assessment of health and safety
For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.
Nothing to comment

Our review of Network Rail's proposed costs and income
For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.
Nothing to comment

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

Nothing to comment

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

The Grand Union response will focus solely on the proposed imposition of fixed costs (wrapped up as Infrastructure Cost Charges (ICC)) onto new open access passenger operators. The thinking behind this proposal is totally at odds with the decision of the Court in the ORR's favour in 2006 - and importantly nothing has changed in the 'upstream market' (the market for access) to justify the ORR now seeking to ignore its significant Court victory of 2006. It is as difficult now, if not more difficult, for open access operators to receive approval from the ORR.

The ORR's view at Court was that "the market conditions under which franchised operators and open access operators seek access [to Network Rail's infrastructure] are significantly different"

Fair competition in the provision of railway services will not be possible if those operators who wish to provide such services are in an unequal position when seeking access to the necessary infrastructure, and the charging regime makes no attempt to address that inequality.

If the ORR now seeks to ignore that decision and levy fixed costs on new aspirant open access operators without levying those same costs on others then it will be discriminatory, particularly as franchises are indemnified against changes, and current open access operators are long established. The rationale of why only new open access operators would be charged in this way has not been established. The ORR seeks to suggest that it is intended to encourage more competition, but it gives no information on how this will be achieved, and there is no suggestion that the current barriers to access will be removed, far from it, this proposal seeks to lay a tripwire behind those barriers.

Far from encouraging competition, the new charge is likely to make new open access services unviable given that ORR is not proposing to change materially the restrictions on access to the network that open access operators face (save to propose the inclusion of the charge in the generated revenue element of the NPA test). ORR acknowledges that if it decides to introduce the new charge it will have to revisit its access policy but only expects very limited changes. It is not clear whether ORR's current thinking of including the charge as generated revenue is the limited change being referred to. There is no clarity on what further changes there might be or when they would be implemented. It the ORR includes the new charge in its final determination it must also revise its access policy in relation to open access at the same time to ensure that there is a more level playing field with franchise services in terms of access to the upstream market. Otherwise ORR's access policy will be discriminatory and contrary to the arguments

ORR made to the Court in 2006 (which were accepted in the ruling). It will also prove to be illegal if, as we believe, the new charge will price open access services out of the market.

In 2006, the ORR won a significant Court case that defined clearly the position of open access operators in relation to franchised operators. In the determination, it was clear that “the variable track access charge is currently the best available measure of the cost that is directly incurred”. Nothing in the consultations that have taken place for PR18 give any weight to the imposition of a further [ICC] charge for new open access operators, other than a desire to penalise them, and likely drive them from the market. The fact that ‘the industry’ had little to say on these matters is clearly due to the industry’s unhealthy close relationship with the Department for Transport and its reluctance to say anything that might upset it.

In the UK, franchised passenger train operators have a contract – a franchise - with the Department for Transport under which they commit to provide specified levels of passenger services over the life of that contract. Franchises are complex long-term contracts, and contain several state protections for the franchisee.

Unlike franchisees, open access operators have no contract with the state. They receive no subsidy, and pay no premiums. They are stand-alone businesses which are entirely reliant on the success of the services they offer to the public. Once established they can then find these long ignored markets become a target for franchisees and the Department for Transport, who have little trouble in seeing access proposals approved by the ORR, even when it can inflict over £7m worth of damage to an open access operator (ORR’s figures in approving VTEC’s Middlesbrough services – significantly more than Grand Central’s profit margin). The ‘smokescreen’ of the ORR carrying out the ‘Not Primarily Abstractive’ test on such applications must not hide the fact that it is impossible for an incumbent franchisee to ever fail this test as the ORR is well aware.

Both franchisees and open access operators need access to the national railway network owned and operated by Network Rail, the UK infrastructure manager. The statutory procedure by which they obtain that access is the same. ORR is responsible for the supervision of the consumption of capacity of the railway, and that includes ensuring that capacity is allocated to users – franchisees, open access operators, freight operators and others – on fair and affordable terms.

Crucially, the law on access charging provides that the infrastructure manager’s charges for equivalent use of the infrastructure “must be comparable and comparable services in the same market segment must be subject to the same charges”.

The Court decided that there is a critical distinction to be made between the market – the market segment, in fact – in which franchisees and open access operators obtain access to the infrastructure, and the market segment in which they compete for passengers on the same parts of the network.

The circumstances in which franchisees and open access operators get access to the network – the upstream market – are very different, even though the differences in the market for passengers – the downstream market – are much less pronounced. <u>And it is the upstream market which matters most for the purpose of determining the legality of network access charging policy.</u>

In the upstream market, franchisees have very considerable advantages over open access operators:

- as franchisees, they take over (or keep) established businesses; whilst ORR does not have an overriding statutory duty to approve access rights which give effect to the franchise commitments which have been made, there is a clear bias in that direction in sections 4 and

18(6A) of the Railways Act 1993 which allows the ORR to take into account the impact on public funds if a franchisee does not get the access he needs.

- franchisees have significant protections against variations in access charges, through state indemnities in their franchises which make them indifferent to regulatory decisions to alter charges
- some franchisees can have additional protections under which the state shares downside risk if revenues are lower than projected (and takes a share of the upside if they are higher)
- franchisees also have valuable force majeure protections in case of the unexpected

Open access operators have none of these protections, moreover, open access operators are at a disadvantage because ORR's policy on new competitive services requires them to pass tougher tests than franchisees when applying for access rights; essentially it requires them to show that their new services will not primarily abstract revenue from established (almost inevitably franchised) operators. Nothing has changed, apart from capacity getting scarcer, making it even more difficult for new entrants.

The Court had regard to the purpose of Directive 2001/14/EC. It said:

"The focus of the Directive is clearly on the need to ensure that all railway undertakings have "equal and non-discriminatory access" to [the "upstream" market for] rail infrastructure. If the ORR's charging scheme does not reflect differences between the ability of undertakings that perform services of an equivalent nature in a similar part of the "downstream" market to obtain access to the "upstream" market it will not achieve the objectives of the Directive."

Referring to the Directive's statement that charging and capacity allocation schemes should allow for fair competition in the provision of railway services, the Court added:

"Fair competition in the provision of railway services will not be possible if those operators who wish to provide such services are in an unequal position when seeking access to the necessary infrastructure and the charging regime makes no attempt to address that inequality."

The Court decided that the market conditions under which franchised and open access operators are able to obtain access to the infrastructure are, in practice, "very different indeed". It described them as "chalk and cheese".

They therefore occupy different segments of the market. This has not been addressed in ORR's analysis and therefore has not resulted in ORR making any substantive proposed change to access policy to address the inequality.

Since none of the franchise protections against the imposition, or subsequent alteration, of a charge are available to open access operators it would be contrary to non-discriminatory principles, on which mark-ups may be levied. It would be discriminatory because the ORR would be treating two very unlike cases as though they were alike."

The Court stated, "Imposing the fixed [ICC] charge on open access operators, while holding other parts of the [complex railway economic architecture] constant, would not result in a non-discriminatory charging regime for access to the railway infrastructure, but in a regime which was manifestly unfair to open access operators."

The Court added, significantly:

"The underlying thrust of the Directive … is that would-be operators who are able to pay for the costs that will be directly incurred as a result of their operations should be encouraged to use the railway infrastructure …, not discouraged from using it."

Thus, the charging regime must be measured against the overall objective of the Directive, and that is not to allow incumbents with significant advantages to exclude competitors who are willing and able to use the network and provide competitive pressures. It must always be remembered that the principles of the European Union are pro - not anticompetitive. Open access operators seeking access to networks have a strong support in the fundamentals of European law and policy.

The Court added:

"The charging regime simply treats [franchisees and open access operators] differently because … they are different …"

It is worth noting that the Court decision in 2006 centred very much around the significant disadvantages open access operators have against franchises, and yet, somewhere along the way the ORR talks about 'a level playing field' as if it is somehow the open access operators who enjoy advantages – how can that be when nothing has changed to improve access to the 'upstream market' for open access operators? This has been a perpetual theme from the Department for Transport, and seems to have come about following a rushed report from the CMA regarding on-rail competition where a level playing field was first mentioned. The CMA view of open access is one where significant operations are 'split' to provide competition, which is not the way open access was identified by the Court, nor indeed how the small number of open access services operate today.

The very fact that the Department for Transport is (according to the ORR) supportive of this discriminatory [ICC] charge should have been enough to raise alarm bells at the ORR. Consistently the Department for Transport has opposed every new service proposal and yet we are supposed to believe that it now supports a new charge which (according to the ORR) will lead to more competition?

The fact is, like ourselves they obviously see this as a way of virtually closing down the avenue by which smaller operators might access the market, irrespective of its discriminatory nature.

The Court case is very important because it was the first in the UK – and one of the first in Europe – to consider the access charging regime under Directive 2001/14/EC, what is meant by marginal pricing and how the state makes up the infrastructure manager's remaining revenue requirements. Significantly, it rules on what amounts to impermissible discrimination in such cases.

The judgment analyses the very different circumstances of franchised and open access operators and rules on how those differences not only justify, but require, a different charging framework. The legal basis on which the ORR now seeks to challenge the judgement, which was very much in its favour, has not been explained in any of the consultation documents and needs to be challenged.

In its 'Summary of conclusions for England and Wales' at 40(b) the ORR state: **Charges that recover fixed costs of the network will be reformed to support competition over time**. New open access passenger operators will face higher charges for 'inter-urban' services where demand is sufficiently strong to allow these costs to be met. This can support them having greater access to these parts of the network. These additional charges will be reflected in our assessment of the likely benefits generated by open access applications and will inform our decisions on whether to grant access to the network. Existing open access operators will be protected from these charges over CP6 for their existing business.

It is worth dissecting this paragraph:

Charges that recover fixed costs of the network will be reformed to support competition over time.

As has been detailed previously it would be discriminatory and contrary to Directive 2001/14/EC to levy fixed costs against open access operators when the market for access to the network is so different. If the ORR's charging scheme does not reflect differences between the ability of undertakings that perform services of an equivalent nature in a similar part of the 'downstream' market to obtain access to the 'upstream' market it will not achieve the objectives of the Directive.

There is also no guidance as to how long into the future 'over time' refers to, it is just another soundbite comment with no substance to support it.

New open access passenger operators will face higher charges for 'inter-urban' services where demand is sufficiently strong to allow these costs to be met.

Irrespective of the discriminatory nature of this proposal, there is still no definition of what the ORR means by 'inter-urban' service. Would Grand Central's services be regarded as 'inter-urban' if applied for today? On the North East route Grand Central provides services to a much larger population than is found on the direct ECML between York and Newcastle, and yet none of the places served, Sunderland (larger than Newcastle), Hartlepool and Eaglescliffe (Teesside) had had direct trains to London for many years. These are places ignored by both British Rail, franchises (until the open access operator has established the market) and the Department for Transport, and therefore by definition should be PSO services. Without Grand Central's work in 2004/5 they would still be off the 'inter-city' map, and the economic benefit they have would not have materialised.

'Demand' has no bearing on a businesses ability to be profitable, there are many businesses where demand is strong (not just rail) but profits are poor or non-existent. The lack of real commercial understanding within the ORR is a major concern, and is often also evidenced by the tortuously slow decision making process.

This can support them having greater access to these parts of the network.

Note that it 'can' not it 'will' support greater access. No explanation of how this will be possible is given.

These additional charges will be reflected in our assessment of the likely benefits generated by open access applications and will inform our decisions on whether to grant access to the network.

Apparently the ICC will be 'added' to the figures used to determine whether an application is 'not primarily abstractive' (NPA), and yet the ORR currently ignore revenues for franchises from open access operations in current determinations. For instance Grand Central pays significantly to Northern for station access and maintenance, revenue Northern would not have without the service. Based on its low passenger yields, it is quite probable that Northern is a net beneficiary and yet continues (as others do) to enjoy a degree of 'negative double counting' by the ORR on the NPA test.

Even if such charges were legal, when are they levied? The ORR suggests that £4 per train mile is 'conservative'. How have they come up with this arbitrary figure? When will it be introduced (bearing in mind the ORR agrees that 'ramp up' takes 4 years)? For Alliance's Blackpool service the train mileage is around 1 million, so this charge (if Blackpool is determined to be 'inter-urban') would be £4 million. This was significantly more than forecast profits, and a look at the developing years of Grand Central and Hull

Trains shows that none of these services would have survived with such a punitive and illegal charge.

Existing open access operators will be protected from these charges over CP6 for their existing business.

Why? When I was developing Grand Central in its early approvals it was made clear that changes at periodic review was something we needed to prepare for (accepting that any change must not drive an operator out of the market). The reason is clear, a £4 per train mile charge would likely drive them out of business, and yet the ORR is prepared to apply this discriminatory charge to new entrants, at a time when these businesses would be most vulnerable.

The whole process behind this proposed charge is flawed and designed for one thing only, to drive any new open access competition from the market.

It is, unfortunately, not unprecedented for the ORR to make errors in the area of charging where open access operations are concerned. The capacity charge decision at CP5 saw a near 7 fold increase in charges, which would have resulted in the probability of the open access operators then having to leave the market. Eventually the charge was 'capped' for these operators, which would have been unnecessary had the consultation actually taken account of the significant concerns raised at the time. For CP6 the capacity charge has now been scrapped altogether.

The circumstances are slightly different this time, as the charge may well be illegal, and is only focused on new entrants, thereby giving a significant advantage to incumbent operators, both franchise and open access.

All the focus from this review and consultation for CP6 on this charge has been designed to frustrate new entrants and advantage incumbents. The ORR has given no guide as to how it expects new entrants to plan their businesses with any degree of certainty, not least by its inability to even define the supposed 'downstream' inter-urban markets that open access may or may not be bidding into. It is focusing charging based on the 'downstream market', when it was clarified in Court that charging is focused on the 'upstream market', the market for access.

The ORR has failed to show what improvements – if any – are proposed to ease access into the 'upstream market' for new open access entrants, and has designed a charge that is likely to face legal challenge as it clearly benefits incumbent operators.

Such an anti-competitive position from a regulatory body that is supposed to promote competition shows a lack of understand not only of the many directives promoting competition, but also how the market works. It is a protectionist charge.

One of the main planks of any regulator is consistency, and the ORR is showing itself to be only consistent in its inconsistency, a worrying position for possible new entrants, but more so for the millions of passengers who have to endure monopoly supply on routes, or in some cases no supply at all.

As was mentioned previously: Fair competition in the provision of railway services will not be possible if those operators who wish to provide such services are in an unequal position when seeking access to the necessary infrastructure, <u>and the charging regime makes no attempt to address that inequality</u>.

Any charging regime must be measured against the overall objective of Directive 2001/14/EC, and that is not to allow incumbents with significant advantages to exclude competitors who are willing and able to use the network and provide competitive pressures.

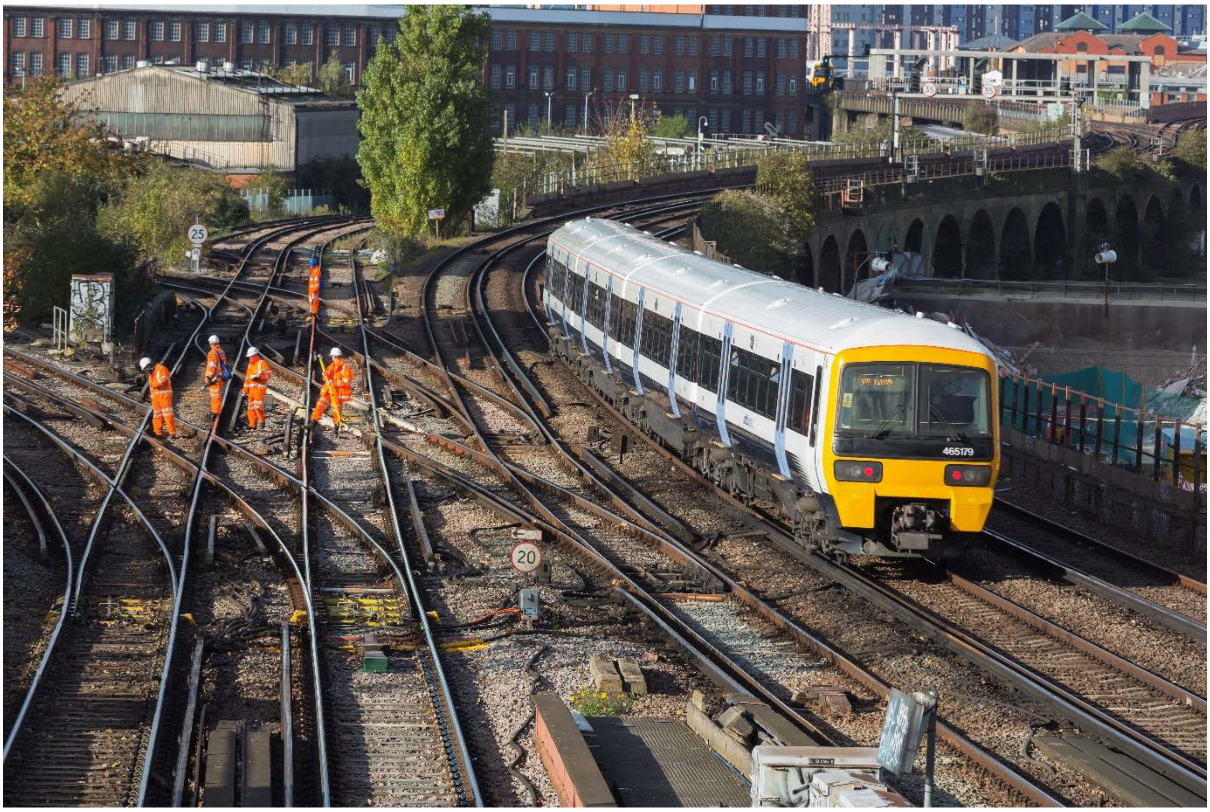
Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.
Scotland **Freight & National Passenger Operator route** **System Operator** **England & Wales routes**

Any other points that you would like to make

Thank you for taking the time to respond.

2018 Periodic Review Draft Determination

IOSH response to the Office of Rail and Road Consultation



Submission

31.08.18

Introduction

The Institution of Occupational Safety and Health (IOSH), the Chartered body for health and safety professionals, registered charity and international NGO, welcomes this opportunity to comment on the *2018 Periodic Review Draft Determination* consultation by the Office of Rail and Road.

The content for our submission has been provided by members from the IOSH Railway Group committee. This Group is made up of over 1500 professionals with a common interest of rail as a specialist area. The Group offers a range of networking and professional development opportunities.

In brief, the aims of the IOSH Railway Group include:

- supporting members globally in developing and sharing professional competences relating to rail industry matters
- providing technical support to IOSH
- working closely with IOSH Branches, Groups and Forums, industry regulators, representative bodies and relevant professional bodies

Specifically, its activities include:

- holding and supporting networking and industry events
- reviewing and commenting on key issues
- promoting best practice

In preparing our response we have examined the overview document, (overview of approach and decisions), as well as: the supplementary documents on health and safety, (HSS) and scorecard requirements. We have also looked at, 'Enhancements in Control Period 6 – roles and responsibilities' as this is relevant to making reasonably practicable judgements about investment decisions. Although we have looked at all parts of each document we have concentrated on the occupational safety and health, (OSH) implications of the draft determination captured mainly in the health and safety supplement.

In the response that follows, we provide a summary IOSH position, detailed comments and further information about IOSH.

Summary IOSH position

Whilst there are many positive messages in the Strategic Business Plans it is of concern that they indicate some significant questions about the capability of Network Rail directors and senior managers to develop and sustain a positive health and safety culture where all risks are managed consistently and effectively across the country. It is IOSH's view that this is something which should be targeted directly now to ensure that NR is ready and fit to lead effectively on health and safety in time for Control Period 6.

Detailed comments

In replying we have considered the draft determination in the context of the responses IOSH has made to earlier consultations, available upon request including:

- Draft guidance on Network Rail's strategic business plans (Dec ’16)
- Consultation on the financial framework for PR18 (Apr ’17)
- Consultation on the overall framework for regulating Network Rail (PR18) (Sep ’17)
- Network Rail Strategic Business Plan (Feb ’18)

We have also aimed to see the determination in the context of the current assessment of Network Rail’s health and safety performance as set out in the, ‘Annual Health and Safety Report of Performance on Britain’s Railways 2017-18’

IOSH welcomes the approach taken to the assessment of the Network Rail’s (NR) Strategic Business Plans (SBPs), which has taken on board our previous advice about:

- a more joined up approach by safety and economic regulators;
- clarifying that affordability is not part of the test of reasonable practicability; and
- the need to ensure that the overall approach for CP6 has a clear focus on system safety for the whole network.

We are pleased to find that the ORR has confirmed the findings of our own limited analysis of the SBPs that there is variability in NR’s routes understanding of health and safety hazards and risks and appropriate priorities.

We are also pleased that the draft determination asks NR to make targeted adjustments to its plans to reflect the decisions that funding should be put into improving asset condition and ensuring that minimum safety requirements are met.

Whilst we welcome the quality of the analysis, some of the draft determination reports findings trouble us. It is of concern that:

- there is variability around the routes and the centre about what reasonably practicable means and what appears to be an absence of a robust process or mechanism for making those decisions, particularly as respects investment decisions for renewals/enhancements etc. In this regard we note that the Enhancements in Control Period 6 document does not clarify how safety considerations will be incorporated into the decision making. The determination identifies NR as the duty holder with responsibility for making reasonably practicable decisions. In the case of enhancements, other bodies, with duties under the Health and Safety at Work etc. Act 1974 are making decisions which may affect NRs decisions. It is not clear how decisions on enhancements will take account of health and safety. (see advice in previous IOSH responses, available upon request, on the ORR draft guidance on NR SBPs and the financial framework).

- there is not yet apparently a clear process or mechanism by which the System Operator and Route Services can give effect to their, "good understanding of and commitment to accepting the opportunities to lead and improve network-wide risk control" as part of ensuring system safety for the whole network[1]. In this context we would comment that whilst it is essential that NR achieve legal compliance under health and safety legislation over CP6, this would not be a full demonstration of the aim of CP6 to achieve a safer railway. In our view, more thought should be given to defining what criteria should be used to judge the delivery of a safer railway, which needs to extend beyond an absence of accidents, e.g. a measured reduction in overall system safety risk.

- the analysis of Maintenance and Renewals, (paragraphs 1.15 to 1.36 of the HSS document refers), indicates variability and 'immaturity' in a number of systems and approaches for managing assets. We interpret this as evidence that NR do not yet have adequate control systems in place to manage the risks from the major hazards of the business, such as train derailments/collisions. Whilst we can agree that it is for NR to make reasonably practicable decisions about risk management, we see it as the role of the regulator to satisfy itself that NR has an adequate health and safety management system with all the necessary components to ensure appropriate risk control for the full range of hazards and risks. In our view this is a matter of serious and evident concern which needs immediate regulatory attention. It is not something which can be left to 'mature' over the CP6.

- although the scorecards include health and safety elements, we would welcome greater clarity on how health and safety performance will be monitored in CP6. The approach to health and safety still appears under-developed compared to the revised economic approach. For example, how will ORR monitor:

    - for potential negative impacts on health and safety of the new 'reputational rivalry' approach to monitoring?
    - that the 'challenging' targets for reductions in lost time injury frequency rates (LTIFR) do not lead to under-reporting?
    - that due emphasis is given to safety critical issues in scheduling the backlog of deferrals and enhancements etc?

[1] ORR 2018 periodic review draft determination Supplementary document – Health & safety, http://orr.gov.uk/__data/assets/pdf_file/0006/27726/pr18-draft-determination-health-and-safety-june-2018.pdf, p.7

    - that appropriate emphasis is given to securing safety by design in all new projects?

- although the assurance provided by the Safety Technical and Engineering Directorate (STE) has been positive the impression is that this process is compensating for the weaknesses in the understanding and skills of line management and their advisers in making reliable, robust decisions about the control of risk. This raises questions about the competence of managers in effective health and safety management for major hazards and the abilities of management to initiate and sustain health and safety improvements without the intervention of STE assurance and/or the regulator. For us this also reflects adversely on director and senior managers' capability to create a positive health and safety culture where health and safety is appropriately prioritised, competence in health and safety management is achieved, and an ethos of continual improvement is sustained.

About IOSH

Founded in 1945, the Institution of Occupational Safety and Health (IOSH) is the largest body for health and safety professionals in the world, with around 47,000 members in over 130 countries, including over 13,000 Chartered Safety and Health Practitioners. Incorporated by Royal Charter, IOSH is a registered charity, and an ILO international NGO. The IOSH vision is

"A safe and healthy world of work"

The Institution steers the profession, providing impartial, authoritative, free guidance. Regularly consulted by Government and other bodies, IOSH is the founding member to UK, European and International professional body networks. IOSH has an active research and development fund and programme, helping develop the evidence-base for health and safety policy and practice. Summary and full reports are freely accessible from our website. IOSH publishes an international peer-reviewed journal of academic papers twice a year titled Policy and practice in health and safety. We have also developed a unique UK resource providing free access to a health and safety research database, as well other free on-line tools and guides, including resources for business start-ups; an occupational health toolkit; and a risk management tool for small firms.

IOSH has 41 Branches worldwide, including the Caribbean, Hong Kong, Isle of Man, Oman, Qatar, the Republic of Ireland, Singapore and UAE, 18 special interest groups covering aviation and aerospace; broadcasting and telecommunications; construction; consultancy; education; environment and waste management; financial services; fire risk management; food and drink industries; hazardous industries; health and social care; offshore; public services; railway; retail and distribution; rural industries; sports grounds and events; and theatre.

IOSH members work at both strategic and operational levels across all employment sectors. IOSH accredited trainers deliver health and safety awareness training to all levels of the workforce from shop floor to managers and directors, through a professional training network of over 2,000 organisations. We issue around 180,000 certificates per year.

For more about IOSH, our members and our work please visit our website at www.iosh.com. Our new five-year strategy can be viewed at www.ioshwork2022.com.

Please direct enquiries about this response to:

Richard Jones, Head of Policy and Public Affairs
The Grange, Highfield Drive
Wigston
Leicestershire
LE18 1NN

PR18 draft determination consultation: pro forma

This pro forma is available to those that wish to use it to respond to our draft determination consultation, structured around the main areas of the draft determination. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed below (where you wish to comment), to aid our review of responses.

Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Jonathan Tyler
Job title*	Principal
Organisation	Passenger Transport Networks, York
Email*	

*This information will not be published on our website. Please see Appendix B of our overview document for details on how we will treat information provided to us as part of this consultation.

Our approach to producing Network Rail's determination and to regulating Network Rail in CP6

For further information, please see chapters 2 and 3 of our overview document.

I welcome the statement of the System Operator's responsibility [¶2.5, third point] and the commitment to a 'better used network' [¶3.2].

I also welcome the fresh emphasis on stakeholder engagement but am uneasy about the reference to enabling stakeholders to influence priorities [¶3.16, first point]. That could cause problems unless it is accompanied by strong processes and governance arrangements to secure the interests of the system, its participants and the public interest as a whole.

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

The review of NR's licence is sensible, but the references to the capacity-allocation and timetabling process should be broad enough to embrace research on alternative approaches: it is possible that improved understanding of the capacity of the network referred to in the Introduction [Figure 1.1, objective (iii)] may suggest radically different ways of improving operational efficiency [objective (ii)].

Our review of Network Rail's stakeholder engagement

For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.

The reference to the SO being 'actively involved in the franchising process' [¶4.8] is a welcome recognition of the bizarre fact that NR has not been properly involved in recent franchising and that future practice must change.

In Table 4.1 I note the admission that SO could have been clearer about NOT meeting stakeholder needs. Those are not absolute, and NR must have the confidence to reject requests where they are not in the overall interests of the railway (in a context where every local authority and innumerable campaign groups often have exaggerated perceptions of the extent to which the railway can solve their problems).

Our review of Network Rail's scorecards and requirements

For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.

I welcome the statement of the SO's responsibility for planning and coordination [¶5.92] and have been making the case elsewhere for this to be separated out from NR, combined with all but the broad policy-making functions of DfT and established as a Strategic Rail Authority (without the defects of the original SRA].

The proposals [¶5.94/95] for a thorough overall of the planning and timetabling process, including its supporting technology, are plainly of great importance, and I look forward to hearing more. However, as mentioned above, I have profound reservations about whether a system based on the sale of access rights is capable of delivering the most efficient use of capacity as measured by public-interest criteria. I would therefore like to see research into alternative concepts, with particular reference to fully-coordinated networks delivered by concessionaires, as best exemplified in Switzerland (where, *inter alia*, timetable planning is closely linked with enhancement programmes).

I welcome the requirement that the SO should lead development of a plan for journey-time improvements [¶5.99]. However this should go much further than is implied: (a) by being far more ambitious than the very modest ScotRail targets [footnote 32]; (b) by exploring a range of possible improvements with their commensurate costs and benefits; (c) by assessing what could be achieved through complete 'clean-sheet' rewriting of timetables; and (d) by including the issue of connections – far too many journeys involving a change of train are presently lengthened by poor interchange times that result from carelessness or lack of interest by planners.

Our assessment of health and safety

For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.

No comments.

Our review of Network Rail's proposed costs and income

For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.

The tension between NR and the TOCs over access is concerning [¶7.49-50]: the idea that the latter's aim of maximising income from discretionary travel should hinder NR's reasonable requirements for access is unacceptable.

I am pleased to read the endorsement of SO's increased budget [¶7.77-78].

The financial framework for CP6 and affordability

For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.

No comment.

Charges and contractual incentives in CP6

For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.

Whilst recognising the objectives of the mechanism of charges and incentives [¶9.1] I would put the case [see above] for research into the possibility that a centrally-planned optimisation of capacity (with implications for the enhancement programme) might yield greater overall benefit to the community than the present approach. This implies a possible challenge to the concept that competition [¶9.4] is the sole means of achieving efficient outcomes.

If the review of charges shows that those for Open Access Operators should be higher than they are at present then they should be levied on existing OAOs (maybe with a phased introduction). If this is not done OAOs are being subsidised, which is illegitimate [¶9.43].

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.
Scotland **Freight & National Passenger Operator route** **System Operator** **England & Wales routes** No comments.

Any other points that you would like to make
I have put the case to the Inquiry into the timetabling catastrophe that a root cause may be the rather rigid procedure based on applications for access rights and Network Rail's limited scope for coordinating the separate plans of the TOCs. If the Inquiry identifies the case for a more integrated approach to designing timetables I trust that this will be written into the CP6 determination.

Thank you for taking the time to respond.

PR18 draft determination consultation: pro forma

This pro forma is available to those that wish to use it to respond to our draft determination consultation, structured around the main areas of the draft determination. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed below (where you wish to comment), to aid our review of responses.

Please send your response to pr18@orr.gsi.gov.uk by **31 August 2018**.

Full name	Stephen Gasche
Job title*	Principal Transport Planner - Rail
Organisation	Kent County Council
Email*	

*This information will not be published on our website. Please see Appendix B of our overview document for details on how we will treat information provided to us as part of this consultation.

Our approach to producing Network Rail's determination and to regulating Network Rail in CP6

For further information, please see chapters 2 and 3 of our overview document.

Kent County Council supports the overall policy of the ORR in its approach to producing the Periodic Review of Network Rail for 2018 (PR18). In particular, the Council supports the four principles of reinforcing the relationship between Network Rail and its customers; supporting further devolution to routes and the System Operator; reflecting the reasons why Government provided a significant increase in funding for the railway; and learning lessons from CP5.

Our review of Network Rail's network licence

Further information, see paragraphs 3.59-3.63 of our overview document and our supporting document on our review of the Network Rail's network licence. This also contains a set of questions that we would welcome your views on.

One of the key drivers of the ORR review of Network Rail's network licence is that the rail infrastructure provider operates and maintains a network for which passengers and freight customers, together with taxpayers, ultimately pay. This principle should always be at the forefront of the determination of policy for Network Rail.

Our review of Network Rail's stakeholder engagement For further information, please see chapter 4 of our overview document and our related supplementary document on stakeholder engagement.
The ORR review rightly recognises the high level of stakeholder engagement offered by the South East route in the determination of their operations, maintenance and renewal (OMR) programme for CP6. Kent County Council engaged fully in this process and welcomed the wide opportunities to influence the overall OMR programme for the Kent Route.

Our review of Network Rail's scorecards and requirements For further information, please see chapter 5 of our overview document and our related supplementary document on scorecards and requirements.
This is a technical internal scoring system used by Network Rail, and as such the Council has no comment on this section of the ORR review.

Our assessment of health and safety For further information, please see chapter 6 of our overview document and our related supplementary document on health and safety.
Kent County Council agrees with Network Rail that the highest priority is given to health and safety on the railway, a priority recognised in the ORR review's executive summary "…that there is evidence of growing maturity in [Network Rail's] management of health and safety". *[PR18, Executive Summary, para. 26]*

Our review of Network Rail's proposed costs and income For further information, please see chapter 7 of our overview document and our related supplementary documents on our review of Network Rail's proposed costs and its other single till income.
The ORR's advice that Network Rail's costs could be reduced in CP6 by £959m, permitting additional expenditure of c£1bn, may be over optimistic. While there is undoubtedly scope for efficiency savings, a lower figure might be more achievable. *[PR18, Executive Summary, Table 1: Summary of ORR adjustments to Network Rail's SBP; note error in table 1: additional expenditure and total for column should read "circa 1,000" and not "circa £1,000", as column is already headed "£m"]*

The financial framework for CP6 and affordability For further information, please see chapter 8 of our overview document and our related supplementary document on the financial framework.
See response to proposed costs and income above.

Charges and contractual incentives in CP6 For further information, please see chapter of 9 of our overview document. We have also published related supplementary documents on: our overall charges and incentives decisions, our proposals on the variable usage charge for CP6 and our proposals on infrastructure cost charges.
No comment on this section.

Comments on our supporting annex to the Scotland summary, the draft settlements for the Freight & National Passenger Operator route and the System Operator (SO), or England & Wales route documents For further information, please see the Scotland summary, FNPO draft settlement document, and SO draft settlement document. Our other route review documents are here.
Scotland **Freight & National Passenger Operator route** **System Operator** **England & Wales routes** No comment on this section, as Kent County Council has already fully engaged in the consultation process which produced the South East Route: Kent Area Route Study (May 2018).

Any other points that you would like to make
None.

Thank you for taking the time to respond.

LNER response to ORR's consultation on the Draft Determination

31/08/2018

Introduction

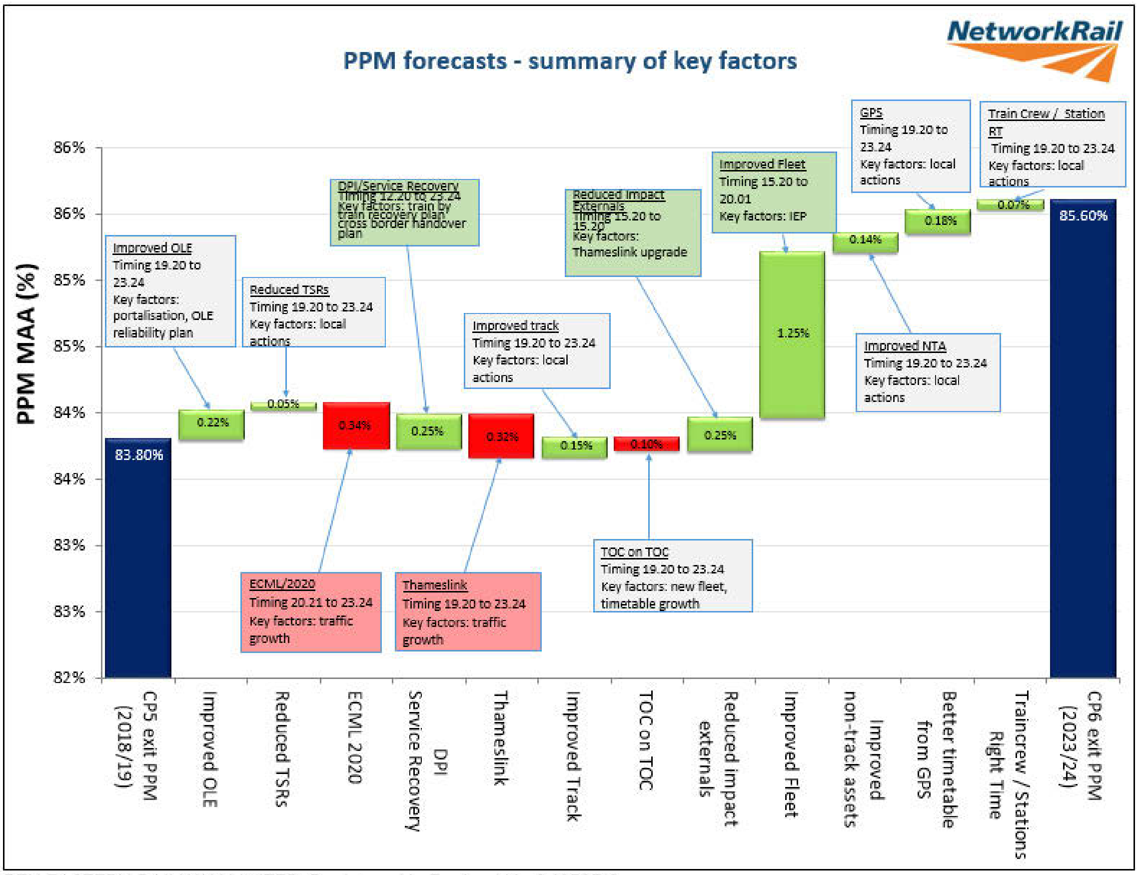
1. This document outlines the key points in response to the ORR's consultation on its Draft Determination for the 2018 Periodic Review. London North Eastern Railway Limited (LNER) supports the RDG responses to the consultations on enhancements in CP6 and changes to the network licence and makes no further comments on these.

2. ORR's consultation consists of numerous documents and a very wide range of topics related to the forthcoming control period. This response focuses on what LNER considers to be the most significant issues.

3. LNER is content for this response to be published on the ORR website.

Train Performance

4. We have been working with Network Rail colleagues to agree the PPM trajectory for CP6. Unfortunately, we have been unable to agree a performance trajectory. The performance trajectory Network Rail are prepared to agree to, is set out below:



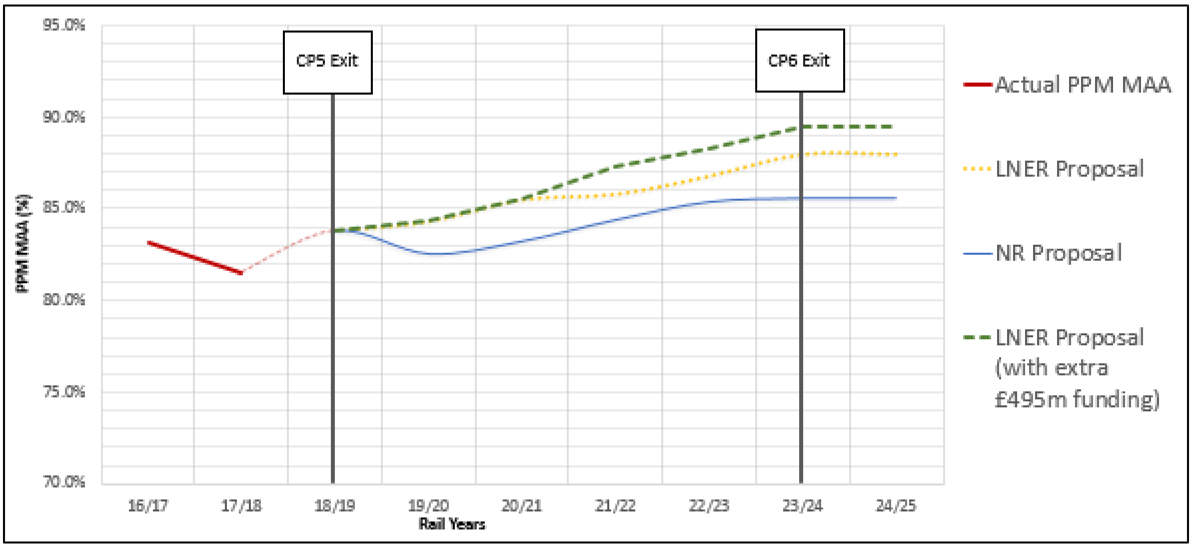
LNER

5. We believe this performance trajectory is wholly inadequate, lacks ambition, and if accepted by ORR, would chrystallise and reward a decade of under-performance. Network Rail were funded in CP5 to achieve 88% PPM MAA. This target was actually achieved (and exceeded) in the first year of CP5 (2014/15) but not maintained. Network Rail's proposal to achieve 85.6% PPM MAA by the end of CP6, with the vast majority of improvement delivered by train operators, is simply not good enough. Our customers contribute significantly to UK Rail, with £2.2 billion returned to the Department for Transport over the past 10 years. Our customers pay a significant premium to travel on this route and in return, expect and demand a premium level of service and performance.

6. Our analysis supports our view that a PPM MAA of 88% is achievable by the end of CP6 based on current, funded initiatives. The key differences in view are summarised in the table below:

Initiative	NR Proposal (PPM MAA)	LNER Proposal (PPM MAA)	Difference	Rationale
Improved OLE	+ 0.22%	+ 0.50	+ 0.28%	0.22% improvements represents just one fewer major OLE event per year. This underplays the great work already undertaken and planned and ignores the capability of the Azuma fleets to move away from the affected area when OLE is isolated.
TOC on TOC	- 0.10%	+0.30%	+ 0.40%	With TPE and GTR each delivering new fleets for early CP6, a 0.3% improvement is an extremely conservative view on what should be delivered.
Improved (LNER) fleet	+ 1.25%	+ 3.05%	+ 1.80%	In 2017/18 Fleet caused 1.8% more trains to fail PPM than target. Once fleet replacement is complete, we expect this 1.8% drop to be erased and therefore a 1.8% uplift could be expected.
Total			**+ 2.48%**	**88% PPM MAA is achieved.**

7. In addition to the above deliverable improvements in performance, Network Rail's LNE Route Strategic Plan included a Supplementary Plan (Package 1) which would deliver an additional +1.5 % (ppts) PPM MAA by Year 3 of CP6 for an additional £495m of investment. LNER fully supports this proposed package of investment. We believe this would deliver 89.5% PPM MAA, within touching distance of the 90% target we believe our customers require. These CP6 PPM trajectory scenarios have been illustrated in the graph below, with LNER's strong preference for the LNER proposal with the additional £495m investment:



8. We note that current performance is totally unacceptable to our passengers which is driven by the May 2018 timetable change, external events and poor fleet performance. We are working hard with Network Rail and the industry to improve performance and have a detailed 12 point performance recovery plan to achieve this. We are confident we will recover from the current dip in performance by early 2019/20 and therefore a trajectory based on a CP5 exit of 83.8% remains appropriate.

Access Charges

9. We believe that the £4/train mile that ORR is proposing for the new infrastructure cost charge to be levied on new Open Access services in CP6 is actually affordable now and is consistent with the current level of FTAC that LNER pays. (LNER will pay approximately £4.10 per train mile in 2018/19).

10. We do not believe that ORR's proposed change to the structure of FTAC for CP6, where the money Network Rail would receive would change depending on how many trains it accommodates in the timetable, would expose Network Rail to an unreasonable amount of financial risk.

System Operator (SO)

11. Ensuring the capability and capacity of the SO is a high priority for CP6 and LNER is strongly supportive of a well-resourced and funded SO. We welcome the increased funding in the draft SO settlement but, in light of the recent timetable planning problems, consider it is worth reviewing whether there should be further IT investment related to timetabling activities.

12. LNER believes that devolution of some SO functions to the routes is required. In particular, LNER is strongly supportive of the dispersal and re-location of capacity planning from Milton Keynes to the routes, to address the accountability and knowledge retention issues.