

16 October 2012

Dear Colleague,

## **Formalisation of the Rail Delivery Group – Conclusions and Statutory Consultation**

We recently consulted you on proposals to formalise the Rail Delivery Group (RDG) through the introduction of a new condition into the licences of Network Rail and passenger and freight operators.<sup>1</sup> This new condition will require licence holders to:

- become Licensed Members of RDG and comply with the obligations of membership as set out in the RDG articles of association (the RDG Articles<sup>2</sup>); and
- where an operator's owning group meets the turnover threshold criterion set out in the RDG Articles, ensure that the owning group becomes a full Member of RDG's leadership body.

The consultation set out proposals developed by RDG regarding its structure, membership and governance arrangements and the role it intends to play as the cross-industry leadership body charged with driving efficiency and value for money in accordance with the McNulty recommendations.<sup>3</sup>

Following consideration of responses to the consultation (which are outlined in Annex A) ORR remains of the view that a formalised RDG will have an important role to play in leading the rail industry in taking responsibility for developing policies and strategies for delivering better value for money and greater efficiency. A key element in delivering this role will be RDG's ability to engage with parties across the whole industry, taking and building on their ideas and expertise to help drive improvements. RDG will address this by seeking the direct input of those industry bodies best able to advise on a particular issue and by enhancing its communications with the wider industry in line with a public statement it will publish shortly on its website.

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<sup>1</sup> Our consultation document, which was issued on 18 July 2012, can be found on our website at <http://www.rail-reg.gov.uk/upload/pdf/rdg-consultation-july-2012.pdf>.

<sup>2</sup> Available on the RDG website at <http://www.raildeliverygroup.org/files/2012/10/RailDeliveryGroupArticlesofAssociation.pdf>.

<sup>3</sup> Sir Roy McNulty's report entitled 'Realising the potential of GB Rail' is available at: <http://www.dft.gov.uk/publications/realising-the-potential-of-gb-rail/>.



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On this basis ORR has concluded that it should support the formalisation of RDG as proposed and this letter is therefore issuing a statutory licence modification notice to Network Rail and those passenger and freight train operators that operate over the mainline network. This notice has been amended slightly from the version consulted on, but the changes incorporated are not material. This notice can be found at Annex D and it is requested that the licence holders affected give their consent to the proposed modification by 13 November 2012. Changes to licences will then be implemented by the end of November.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Michael Beswick', is positioned below the closing text.

**Michael Beswick**



## **Key issues arising from the RDG consultation**

We received 43 responses to the consultation: a list of those who responded can be found at Annex B, and copies of their responses can be found on our website.<sup>4</sup> In summary, Network Rail, passenger and freight operators were content with the proposals and satisfied that we should propose the introduction of the new licence condition.

Other stakeholders, however, expressed a number of reservations relating primarily to the structure and membership of the leadership group, communication and transparency of RDG and the rights of those who would fall into the licensed and associate membership groups. More details about these concerns and how they will be addressed by RDG are set out in the following paragraphs.

### **The RDG Articles**

A number of stakeholders expressed concern that the RDG articles of association (the RDG Articles) had not been made available prior to the closure of the consultation and therefore did not feel able to comment fully on the proposed arrangements.

The RDG Articles have now been finalised and published on the group's website. ORR has reviewed the RDG Articles and accepts that they establish appropriate governance arrangements for RDG.

As well as requiring a licence holder to become a Licensed Member of RDG the new condition will require the licence holder to comply with its obligations under the RDG Articles, and where relevant, to ensure that a member of the licence holder's owning group becomes a full Member of RDG's leadership group and also complies with the RDG Articles. The RDG Articles are therefore of central importance to the scope and suitability of the licence condition, and ORR is keen to ensure that they are not operated or amended without its consent in a way that: materially changes RDG's purpose; materially undermines RDG's ability to achieve its purpose; alters the membership criterion of RDG or any other rules in a way that limits appropriate industry participation; or jeopardises the credibility, functioning or success of RDG.

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<sup>4</sup> Available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10968>.



Given the level of industry commitment to RDG, ORR considers it unlikely that any of these scenarios will arise. However, in order to safeguard this, ORR's approval is required for amendments to the RDG Articles including changes to the turnover threshold criterion. We would usually expect to approve such amendments but where the reason for any proposals is unclear we will request a brief written explanation from RDG before deciding whether to give consent, and in the light of that may seek the views of other affected parties.

The RDG Articles also allow directors on the leadership group to prescribe administrative rules regarding membership arrangements. ORR expects any such rules to be genuinely administrative in nature and not substantive alterations.

The RDG Articles contain a right of appeal to ORR in cases where decisions over leadership group membership arrangements and decisions to terminate licensed memberships are challenged. The process that ORR proposes to use when asked to determine appeals can be found at Annex C.

#### ORR's enforcement role

Also in terms of ORR's involvement with RDG, specific questions were raised about its enforcement role and how we would monitor compliance with the RDG Articles and the circumstances in which we might take action. The licence condition requires licence holders and leadership group Members to comply with their obligations under the RDG Articles. As stated in the consultation document our main concern would be where non-compliance would have a regulatory or public interest impact. For example, we might consider action if companies fail to nominate leadership Members or if breaches of the RDG Articles arise that have a regulatory or public interest impact. ORR expects to be kept informed on such matters either by the RDG leadership group, or by other interested parties.

#### Industry representation on RDG

A number of comments raised concerns about the composition of the RDG leadership group. It was suggested it would not represent the whole industry and that proposals and decisions will be commercially driven with no protection for passengers and taxpayers.

The McNulty report recognised that the way to deliver change and improve industry efficiency was through a small and efficient leadership group comprised of senior executives from Network Rail and the train operators. The report considered that Government, rather than getting involved in the detailed running of the industry, should focus on establishing what it should deliver (in terms of setting out policy, high level objectives and outputs required). The industry itself should then determine how these



objectives should be met. This vision has been reflected in the structure of the leadership group, which is designed to involve the key players from Network Rail and train operators, as the companies with direct accountability for delivery to users and funders.

In terms of commerciality, the industry bodies that form the leadership group, coming as they will from Network Rail and the train and freight operator owning groups, will already be constrained by the contractual arrangements they have with Governments and other funders through their franchise agreements and, in other respects, by the regulatory functions of ORR. RDG has no powers to impose changes on railway stakeholders or to the industry's contractual framework. RDG has set out in its Articles that its role is to help deliver a safe, efficient, high quality rail service for users and taxpayers. ORR is therefore content that there are sufficient safeguards in place to ensure that the interests of operators, funders, suppliers, employees and others not directly represented on the board will be protected. RDG also already meets regularly with the Department for Transport to discuss policy and funding issues, and is willing to meet with other funders if they so wish.

In terms of wider representation, specific comments were received about the lack of inclusion on the leadership group for bodies representing such groups as suppliers, passengers, and the industry workforce. The leadership group is likely to be more effective as a relatively small body (comprising those who have the biggest influence to drive change across the industry) to make decisions about strategy and approach for delivering a safe, efficient, high quality rail service for users and taxpayers, which it can advocate to the wider industry.

The views and input of other railway bodies are obviously important to achieving this, which is why their involvement as Associate Members will provide an opportunity for wider industry participation. RDG will shortly publish on its website a communication statement setting out how it intends to interact with the various industry parties. The group recognises the importance to its success of building cross industry support for its policies and strategies through:

- discussions with, and utilising the ideas and expertise of, wider industry participants; and
- being fully transparent (subject to appropriate confidentiality) about its activities, proposals and decisions.

RDG Members will actively seek the views and involvement of those bodies to whom the specific matter being considered is directly relevant. This in turn should address other concerns expressed over the views and interests of Licensed and Associate Members being adequately represented and taken account of.



RDG will also welcome discussions and communication from licensed and associate members on any issue. The communication statement indicates that Members of the leadership group will be nominated to lead engagement with particular bodies and groups. These details will be made available and any contact should be made either through the relevant Members or the RDG secretariat.

RDG, in its own consultation response, has also committed to holding an annual forum and producing an annual report, which ORR considers is an essential tool for keeping all stakeholders updated on its achievements and plans for the coming year, and thus encouraging further dialogue from and involvement of interested parties from across the whole industry.

### Franchise bidders

Another representation related to the treatment of franchise bidders, and whether a bidder not represented as a member of RDG in any way would be at a disadvantage in terms of understanding proposed industry developments when compared with those bidders who were a member of RDG. ORR and RDG understand these concerns.

ORR's view is that parties involved with RDG at leadership, licensed and associate level will need to be able to have a material effect on improving industry efficiency. Prospective bidders who have no other railway involvement will be less able to provide this.

In the event that a new bidder is identified as the preferred bidder for a franchise RDG has agreed that they would then be able to become an Associate Member. When they take up operation of their franchise they would become a Licensed Member, and turnover threshold allowing, qualify as a Member of the leadership group. In the meantime, and to ensure that such bodies are treated fairly in the franchising process, the RDG secretariat would be happy to meet with any bidder to discuss emerging policies and strategies being considered by RDG.

### Membership qualification criterion

Some parties responded to the consultation expressing concern about the applicability and fairness of the qualifying turnover threshold and membership arrangements. One owning group in particular felt that their apportioned industry turnover, which exceeded the threshold of £250m despite them having no controlling interest in any franchise, should entitle them to sit on the RDG board. As mentioned above the aim of the leadership group is to enable decision makers to drive industry change. It is therefore sensible for majority shareholders (i.e. those who are able to influence and direct their respective train operators) to act as board Members. Minority shareholders do not have the same level of



influence and control, but clearly should be kept informed of developments by, and be able to feed back their views to, their majority shareholder board representative. They will also be able to participate on RDG as Associate Members.

It was suggested that turnover from non-GB railway activity should be allowed to contribute to the membership threshold criterion. Whilst this may provide RDG with a wider experience pool to inform its decision making work, such an approach could distort the structure of the leadership group away from its GB railway focus and have a detrimental impact on the clarity and simplicity of the criterion. In any case such wider experience can be called upon to inform the RDG specialist working groups as required.

The consultation document proposed that membership would be determined based on projected turnover, raising the question of what would happen if that projection was not met in reality. In such a case, where the lower level of turnover is expected to continue, the RDG Articles include provision to terminate the membership of those that did not meet the criterion.

#### Other issues

A number of other individual issues were raised by those that responded. ORR considers that as these relate specifically to the working of RDG they would best be addressed by the Members themselves, and suggests that the RDG secretariat be contacted if concerns still remain.

#### ORR's conclusions

In view of the responses received and having considered:

- the principles for industry reform arising from the McNulty report;
- the structure proposed to establish and formalise RDG; and
- RDG's undertaking to involve the wider industry in the development of proposals to improve the efficiency of the industry,

ORR is content to support the formalisation of RDG through the incorporation of a new RDG membership condition into the licences of Network Rail and passenger and freight train operators that operate over the mainline network. We do not propose applying the new licence condition to non-passenger train (for example, as used by yellow plant operators), depot, station or other network licences.



We are therefore issuing the statutory licence modification notice that can be found at Annex D in accordance with our duties under section 12(2) of the Railways Act 1993 and regulation 13(2) of the Railway (Licensing of Railway Undertakings) Regulations 2005. We need the consent of the licence holders listed in Schedule 1 to Annex D in order to make the modifications. We would be grateful if those licence holders could send their written consent by 13 November 2012 to:

Gordon Herbert  
Licensing and Network Regulation Team  
Office of Rail Regulation  
One Kemble Street  
London  
WC2B 4AN  
[Gordon.Herbert@orr.gsi.gov.uk](mailto:Gordon.Herbert@orr.gsi.gov.uk)

If licence holders are unwilling to give their consent they should send their representations or objections by the same date. If we cannot agree the appropriate changes to licences we have the option of referring the issue to the Competition Commission, who can impose changes in the public interest.





## Annex B

### **List of responders to the Rail Delivery Group consultation**

Angel Trains Limited  
Arriva Trains Wales Limited  
Associated Society of Locomotive Engineers and Firemen  
Chiltern Railways  
Civil Engineering Contractors Association  
Colas Rail Limited  
Community Safety Partnerships Limited  
DB Regio Tyne and Wear Limited  
DB Schenker Rail (UK) Limited  
Department for Transport  
Direct Rail Services Limited  
Eversholt Rail (UK) Limited  
First Group plc  
Freight Transport Association  
Freightliner Group Limited  
GB Railfreight Limited  
Go-Ahead Group plc  
Hitachi Rail Europe Limited  
Keolis (UK) Limited  
London Overground Rail Operations Limited  
Mike Lunan  
National Express Group plc  
National Union of Rail, Maritime & Transport Workers  
Network Rail Infrastructure Limited  
Passenger Transport Executive Group  
Porterbrook Leasing Company Limited



Rail Delivery Group  
Rail Freight Group  
Rail Safety and Standards Board  
Railfuture  
Railway Engineers Forum  
Railway Industry Association  
Trades Union Congress  
Transport for London  
Transport Salaried Staffs' Association  
Transport Scotland  
Transworth Rail  
TravelWatch NorthWest  
Unite the Union  
Welsh Government  
Which?  
XC Trains Limited  
Young Railway Professionals

## **Proposed RDG appeal process**

### **Appeals to the Office of Rail Regulation over RDG membership disputes**

1. Any dispute arising under RDG Articles 28.8, 31.1 or 32.5 may be referred on appeal by the affected party to the Office of Rail Regulation (ORR) for determination.
2. Any appeal brought under paragraph 1 must be served by written notice (an Appeal Notice) on ORR and RDG:
  - (a) within 5 working days of receipt of a decision by RDG to which the objection is made; or
  - (b) where the period referred to in paragraph 2(a) includes Christmas Day, within 10 working days of such receipt.
3. ORR may extend the timeframe referred to in paragraph 2 if it considers it appropriate to do so.
4. An Appeal Notice must:
  - (a) identify the RDG decision that the affected party wishes to challenge;
  - (b) detail why the affected party considers that the RDG decision is wrong; and
  - (c) provide any evidence on which the affected party wishes to rely in support of the appeal.
5. On receipt of an Appeal Notice ORR may give RDG the opportunity to respond and provide evidence.
6. In determining any appeal ORR may exercise one or more of the following powers:
  - (a) it may direct that a challenged decision of RDG shall stand; or
  - (b) it may substitute an alternative decision in place of a challenged RDG decision.
7. Where an appeal is brought pursuant to RDG Articles 28.8, 31.1 or 32.5 the parties to the appeal shall comply with the final determination of ORR.
8. ORR shall not be liable in damages or otherwise for any act or omission to act on its part (including negligence) in relation to the conduct of any reference to appeal.



## Annex D

### **Notice under section 12(2) of the Railways Act 1993 (the Act) and regulation 13(2) of the Railway (Licensing of Railway Undertakings) Regulations 2005 (the Regulations)**

1. This notice concerns the licences granted under section 8 of the Act and Statements of National Regulatory Provisions (SNRPs) granted under regulation 10 of the Regulations, to the operators listed at Schedule 1 to this notice.
2. The Office of Rail Regulation (ORR) hereby gives notice, pursuant to section 12(2) of the Act and regulation 13(2) of the Regulations, of its proposal to modify the licences and SNRPs of those operators out in Schedule 1 by the inclusion of a new licence condition as set out in Schedule 2 to this notice.
3. The reason for this proposed modification is to support the formalisation of the Rail Delivery Group (RDG) as the leadership body of the industry by requiring the licence holders listed in Schedule 1 to be Licensed Members of the RDG and to comply with its articles of association.
4. Formalisation of the RDG in this way will ensure that all licence holders in Schedule 1 will have the opportunity to contribute to the development of policies and strategies for the benefit of the whole industry and be a key factor in delivering a more sustainable and cost efficient railway in the future. Whilst this may result in an unquantifiable increase in the workload of licence holders we consider that this will ultimately be for their benefit, both in helping to develop understanding the implications of proposals for their business/sector, and the impact of delivering RDG's purpose of improving value for money. There will clearly be some cost implications for licence holders in participating in RDG activities and, where appropriate, contributing to the RDG levy. These costs should however be relatively small. It is not therefore anticipated that the proposed new licence condition will place any additional risk or significant burden, either administrative or financial, on the licence holders affected.
5. Any representations or objections to the proposed modification should be made in writing before 5pm 13 November 2012. Please send any comments on this proposal to:



**Gordon Herbert**  
**Licensing and Network Regulation Team**  
**Office of Rail Regulation**  
**One Kemble Street**  
**London**  
**WC2B 4AN**  
[Gordon.Herbert@orr.gsi.gov.uk](mailto:Gordon.Herbert@orr.gsi.gov.uk)

6. Copies of this notice will be published on the ORR website ([www.rail-reg.gov.uk](http://www.rail-reg.gov.uk)).

A handwritten signature in blue ink, appearing to read 'Michael Beswick', written in a cursive style.

**MICHAEL BESWICK**  
**Date: 16 October 2012**



## Schedule 1

The licences granted under section 8 of the Act, and SNRPs granted under regulation 10 of the Regulations, subject to this notice, with reference numbers, are:

Abellio Greater Anglia Ltd

- [GB passenger SNRP](#) UK 02 2012 0001

Arriva Trains Wales Ltd

- [GB passenger SNRP](#) UK 02 2005 0011
- [GB freight SNRP](#) UK 02 2005 0013

c2c rail ltd

- [GB passenger SNRP](#) UK 02 2005 0015

The Chiltern Railway Company Ltd

- [GB Passenger SNRP](#) UK 02 2005 0019
- [GB freight SNRP](#) UK 02 2005 0021

Colas Rail Ltd

- [GB freight SNRP](#) UK 02 2012 0002

DB Regio Tyne and Wear Ltd

- [Passenger train licence](#) UK 03 2010 0001

DB Schenker Rail (UK) Ltd

- [GB freight SNRP](#) UK 02 2005 0029

Devon and Cornwall Railways Ltd

- [GB freight SNRP](#) UK 02 2010 0001



Direct Rail Services Ltd

- [GB freight SNRP](#) UK 02 2005 0026
- [GB passenger SNRP](#) UK 02 2005 0024

East Coast Main Line Company Ltd

- [GB passenger SNRP](#) UK 02 2006 0006

East Midlands Trains Ltd

- [GB passenger SNRP](#) UK 02 2007 0009

English Welsh & Scottish Railway International Ltd

- [GB freight SNRP](#) UK 02 2005 0031
- [GB freight SNRP \(international services\)](#) UK 02 2005 0033

Europorte Channel SAS

- [GB freight SNRP](#) UK 02 2011 0001

Eurostar International Ltd

- [GB passenger SNRP](#) UK 02 2005 0027

First Capital Connect Ltd

- [GB passenger SNRP](#) UK 02 2006 0004

First Greater Western Ltd

- [GB passenger SNRP](#) UK 02 2006 0002

First Scotrail Ltd

- [GB passenger SNRP](#) UK 02 2005 0035
- [GB freight SNRP](#) UK 02 2005 0037



First/Keolis Transpennine Ltd

- [GB passenger SNRP](#) UK 02 2005 0039
- [GB freight SNRP](#) UK 02 2005 0041

Freightliner Heavy Haul Ltd

- [GB freight SNRP](#) UK 02 2005 0043

Freightliner Ltd

- [GB freight SNRP](#) UK 02 2005 0045

GB Railfreight Ltd

- [GB passenger SNRP](#) UK 02 2009 0001
- [GB freight SNRP](#) UK 02 2005 0049

Golding's Rail Ltd

- [GB passenger SNRP](#) UK 02 2006 0008

Grand Central Railway Company Ltd

- [GB passenger SNRP](#) UK 02 2007 0003

Hay's Rail Ltd

- [GB passenger SNRP](#) UK 02 2006 0009

Heathrow Express Operating Co Ltd

- [Passenger train licence](#) UK 03 1997 0001

Hull Trains Company Ltd

- [GB passenger SNRP](#) UK 02 2005 0055





London and Birmingham Railway Ltd

- [GB passenger SNRP](#) UK 02 2007 0011

London and South Eastern Railway Ltd

- [GB passenger SNRP](#) UK 02 2006 0003

London Overground Rail Operations Ltd

- [GB passenger licence](#) UK 02 2007 0012

London Underground Ltd

- [Passenger train licence](#) UK 03 2004 0008

Merseyrail Electrics 2002 Ltd

- [Passenger train licence](#) UK 03 2003 0011

Network Rail Infrastructure Ltd

- [Network licence](#) UK 03 1994 0005

North Yorkshire Moors Railway Enterprises plc

- [Passenger train licence](#) UK 03 2007 0002

Northern Rail Ltd

- [GB passenger SNRP](#) UK 02 2005 0067
- [GB freight SNRP](#) UK 02 2005 0069

OQS Rail Ltd

- [GB passenger SNRP](#) UK 02 2006 0010

Orchard Rail Ltd



- [GB passenger SNRP](#) UK 02 2006 0011

Pre Metro Operations Ltd

- [Passenger train licence](#) UK 03 2003 0004

Rail Express Systems Ltd

- [GB passenger SNRP](#) UK 02 2005 0071
- [GB freight SNRP](#) UK 02 2005 0073

Rail for London Limited

- [GB passenger SNRP](#) UK 02 2007 0008

SOLR1 Ltd

- [GB passenger SNRP](#) UK 02 2007 0006

SOLR2 Ltd

- [GB passenger SNRP](#) UK 02 2007 0007

Southern Railway Limited

- [GB passenger SNRP](#) UK 02 2009 0002

Stagecoach South Western Trains Ltd

- [GB passenger SNRP](#) UK 02 2007 0001

Strutton Rail Ltd

- [GB passenger SNRP](#) UK 02 2006 0012

Tyne & Wear Passenger Transport Executive

- [Passenger train licence](#) UK 03 2002 0002



West Coast Main Line Company Limited

- [GB passenger SNRP](#) UK 02 2006 0007

West Coast Railway Company Ltd

- [GB passenger SNRP](#) UK 02 2005 0079
- [GB freight SNRP](#) UK 02 2005 0081

West Coast Trains Ltd

- [GB passenger SNRP](#) UK 02 2005 0083
- [GB freight SNRP](#) UK 02 2005 0085

Westminster Rail Ltd

- [GB passenger SNRP](#) UK 02 2006 0013

XC Trains Limited

- [GB passenger SNRP](#) UK 02 2007 0010



## Schedule 2

The proposed modifications are:

1. For the network licence subject to this notice as listed in Schedule 1:

Insert the following new licence condition:

***Condition 25: Rail Delivery Group***

1. *The licence holder shall:*

*(a) become and thereafter remain a Member of RDG; and*

*(b) comply with its obligations under the RDG Articles.*

2. *In this condition:*

*“Member” has the meaning ascribed to it in the RDG Articles;*

*“RDG” means the Rail Delivery Group (a company limited by guarantee and registered in England and Wales under number 08176197); and*

*“RDG Articles” means the articles of association of RDG.*



2. For each passenger and freight licence and SNRP subject to this notice as listed in Schedule 1:

Insert the following new licence condition:

**Condition 28: Rail Delivery Group**

1. *The licence holder shall:*
  - (a) *become and thereafter remain a Licensed Member of RDG;*
  - (b) *comply with its obligations under the RDG Articles; and*
  - (c) *procure that any member of its Group that is entitled under the RDG Articles to become a Member of RDG:*
    - (i) *becomes and thereafter remains a Member of RDG; and*
    - (ii) *complies with its obligations under the RDG Articles.*
2. *In this condition:*

*“Group” has the meaning ascribed to it in the RDG Articles;*

*“Licensed Member” has the meaning ascribed to it in the RDG Articles;*

*“Member” has the meaning ascribed to it in the RDG Articles;*

*“RDG” means the Rail Delivery Group (a company limited by guarantee and registered in England and Wales under number 08176197); and*

*“RDG Articles” means the articles of association of RDG.*