



NOTICE IN ACCORDANCE WITH SECTION 55(6) OF THE RAILWAYS ACT 1993, AS AMENDED, OF THE OFFICE OF RAIL REGULATION'S DECISION NOT TO MAKE A FINAL ORDER, OR MAKE OR CONFIRM A PROVISIONAL ORDER, IN RELATION TO NETWORK RAIL INFRASTRUCTURE LIMITED'S CONTRAVENTION OF CONDITION 7 OF ITS NETWORK LICENCE

2 MARCH 2006

1. This document constitutes a notice issued by the Office of Rail Regulation ("ORR"), published in accordance with section 55(6) of the Railways Act 1993, as amended ("the Act"), stating that:

- (a) ORR is satisfied that Network Rail Infrastructure Limited ("Network Rail") is contravening Condition 7 of its network licence by not taking, and not having taken, such steps as are necessary or expedient, to achieve the purpose in paragraph 1 of Condition 7 to the greatest extent reasonably practicable, in that it:
 - (i) has not, and is not, adopting best practice in the operation of the network in ensuring that the capability of the network is accurately described;
 - (ii) has not, and is not, securing the operation of the network in a timely, efficient and economical manner because it is not making available accurate information on capability; and
 - (iii) is not therefore satisfying the reasonable requirements of its customers and funders, which include having timely and accurate information; and
- (b) nevertheless ORR will not at present make an order under section 55 of the Act because:
 - (i) Network Rail has agreed to take all such steps as appear appropriate to ORR for the purpose of securing or facilitating compliance with Condition 7 - namely, the steps set out in the annex and any further steps needed to restore compliance - and is taking those steps; and
 - (ii) ORR does not consider it appropriate to make an order, because it is satisfied that an enforcement order would not, at this stage, deliver a better result than would be achieved by delivery of the proposed steps and would not provide greater impetus in Network Rail's delivery to secure more effective or timely compliance with Condition 7.

Background

2. Capability is an important issue. The importance of accurate information on capability is explained in paragraphs 4 to 9 below. In summary, Network Rail needs to understand the capability of its infrastructure to run its business and to plan the future operation, maintenance, renewal, and enhancement of the



network and inform decisions on future funding and outputs. In planning their businesses, train operators need to understand whether it is possible to use, or increase use of, a particular part of the network. The capability of the infrastructure is described in the sectional appendix for a particular part of the network (including such matters as gauge, line speed, and route availability). The sectional appendices are incorporated in the industry network code and are used in access contracts between Network Rail and freight train operators to describe the network covered by the contract. It is therefore important that these documents are accurate.

3. In response to an investigation by ORR, launched after freight customers of Network Rail had submitted a complaint to ORR in November 2004, Network Rail identified around 40 routes across the network where the published capability of the route does not match the actual capability. It has broken these down into three categories: routes where work is needed to bring the route up to published capability; routes where the sectional appendices should be changed, if necessary following the network change procedure in the Network Code; and routes where further investigation and consultation is required. In addition, Network Rail is carrying out further investigations to determine whether there are any other routes thus affected.

Condition 7

4. Condition 7 of its network licence requires Network Rail, by virtue of paragraph 2, to:

“take such steps as are necessary or expedient so as to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder [Network Rail] to finance its licensed activities.”

“The purpose” referred to in paragraph 2 of Condition 7 is defined in paragraph 1, and is:

“to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network, in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of:
 - (i) the quality and capability of the network; and
 - (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.”



5. ORR considers that making available accurate information about the capability of the network is an important part of this obligation. In ORR's view, based on representations received, it is a reasonable requirement of persons providing services relating to railways (especially Network Rail's passenger and freight train operating customers) and funders that Network Rail should maintain and provide to users in a timely way accurate and up-to-date information on the capability of the network.

6. It is important that Network Rail makes available to its customers and funders accurate information about the assets in the network so that they can plan the future of their businesses with a reasonable degree of assurance. For example, freight operating companies have rights within their access contracts to use the network, subject to the capability of the network set out within the sectional appendices. Accurate information on that capability is therefore important for the operators in seeking and agreeing new haulage contracts.

7. It is also important that Network Rail understands the nature of its network, including the capability of its assets, for its own needs and to comply with the obligations placed on the company in its network licence and in its access contracts. This information is essential to secure the operation and maintenance of the network, for planning maintenance and renewals of the network, as well as providing the basis for allocating capacity.

8. Moreover, it is important for ORR to have confidence, when approving or directing access applications, that Network Rail can deliver the rights required in any such application and that the infrastructure described is available to meet the applicant's reasonable requirements.

9. In addition, accurate information about network capability is an important input to periodic reviews, satisfying the reasonable requirements of funders.

Network Rail representations

10. Network Rail stated in a letter on 21 December 2005 that it does not agree that it is in contravention of Condition 7. Network Rail's position is that:

- (a) it inherited the position from Railtrack, and ORR should therefore have regard to what is reasonably practicable for Network Rail in the light of its inheritance, in line with the statement by the then Rail Regulator, made on the acquisition of Railtrack by Network Rail¹ that he,
"would not expect to take action in relation to Network Rail's stewardship of the network merely because of the failures by its predecessor."; and
- (b) it is complying with the duty under Condition 7 and is taking, "such steps as are necessary or expedient so as to achieve the purpose to

¹ The proposed acquisition of Railtrack PLC by Network Rail Limited; a statement by the Rail Regulator and proposed licence modifications. ORR, June 2002. <http://www.rail-reg.gov.uk/upload/pdf/146.pdf>.



the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.” It takes the view that the duty implies only progress towards achieving the purpose.

11. ORR does not accept that Network Rail’s arguments establish that Network Rail is not contravening Condition 7, because:

- (a) although Network Rail may have inherited the problem from Railtrack, it has had three years to resolve these issues, and should have taken a more proactive approach. In his statement on the acquisition of Railtrack in June 2002, the then Regulator also said that he would “require Network Rail to take action as soon as practicable to address these issues and any other shortcomings which it inherits, in a timely and efficient and effective manner.” Network Rail over the past three years has failed to resolve this issue; and
- (b) the reference in paragraph 2 of Condition 7 to taking “steps” to achieve the purpose does not mean that Condition 7 merely requires progress towards achieving the purpose. It requires a minimum standard of compliance; taking “such steps as are necessary or expedient” so as to achieve the purpose entails doing (subject to reasonable practicability and all relevant circumstances) all that is required to achieve the purpose. It is, therefore, a proactive obligation to achieve best practice in a timely, efficient and economical manner to satisfy reasonable requirements. A recovery plan does not, however, negate the existence of a contravention. In this case, a best practice infrastructure operator would not be in the current position in relation to the publication of inaccurate information about network capability more than three years after taking over operation of the network. ORR considers that Network Rail should have been able to supply a plan for resolving the discrepancy within a reasonable period of time from its discovery of the problem or from it being drawn to its attention.

Findings on licence contravention

12. ORR is satisfied that Network Rail is in contravention of Condition 7 of its network licence because its published information about the capability of the network is inaccurate to an extent which shows that it has failed and is failing to take such steps as are necessary or expedient to achieve the purpose - specifically, as described in paragraph 4 above - to the greatest extent reasonably practicable.

Further submissions from Network Rail

13. Network Rail further submitted on 9 February 2006 that enforcement action would not add additional incentive on it to deliver its programme. It argued that the timescales it had set itself were already challenging and go beyond what was required to respond to customer reasonable requirements. It said that the programme had been developed through open consultation with ORR and the industry and no substantive objections of principle to the proposed



way forward had been received. It noted that it had committed to resolving the issues as soon as practically possible and that work was already well under way. Network Rail considered that enforcement action “would have no material impact on [its] commitment, ability or incentive to address and resolve this matter” and would do little to facilitate compliance in a more timely manner. Network Rail stated that it is concerned that enforcement action might create a disincentive to adopting a similar open approach in future which could impact on its relationship with its customers.

Section 55 of the Act

14. Section 55(1) of the Act obliges ORR, if it is satisfied that a licence holder is contravening, or is likely to contravene, any condition of its licence, to make a final order requisite to secure compliance. Section 55(2) of the Act provides that ORR shall instead make a provisional order if it appears to ORR that it would be requisite.

15. Section 55(3) provides that, in considering if it is requisite to make a provisional order, ORR shall have regard in particular to the extent to which any person is likely to sustain loss or damage in consequence of a contravention of the condition before a final order can be made. It does not appear to ORR that it would be requisite to make a provisional order in this case as it does not appear to ORR that any person is likely to sustain any specific loss or damage in consequence of the breach before a final order could be made and there are no other factors that would make it requisite to make a provisional order.

16. There are exceptions to the obligation to make a final order under section 55(1), as follows:

- (a) section 55(5) provides that ORR must not make an order if it is satisfied that the duties imposed on it by section 4 of the Act preclude making an order;
- (b) section 55(5A) provides that ORR must not make an order if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998; and
- (c) section 55(5B) requires that if ORR is satisfied that:
 - (i) the relevant operator has agreed to take, and is taking, all such steps as it appears to ORR to be appropriate for it to take for the purpose of securing or facilitating compliance with the condition; or
 - (ii) the contravention or apprehended contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure;

it must make an order only if it considers it appropriate to do so.

17. ORR does not consider that the exception in section 55(5) applies. ORR is satisfied that its section 4 duties do not preclude it making an order. In particular, resolving the discrepancy between actual and published capability is



consistent with promoting the use of the railway for the carriage of passengers and goods, enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance, and promoting efficiency and economy on the part of persons providing railway services.

18. ORR is satisfied that the exception in section 55(5A) does not apply. In this case, ORR has received complaints about a breach of a specific licence obligation and is not satisfied that it is most appropriate to proceed under the Competition Act 1998.

19. ORR does, however, consider that the exception in section 55(5B) applies.

- (a) ORR is satisfied that Network Rail has now agreed to take, and is taking, all such steps as it appears to ORR to be appropriate for it to take for the purpose of securing or facilitating compliance with the condition. Network Rail has proposed a timed programme of recovery which should address and resolve the issues in consultation with its customers. ORR has indicated its support for the programme and believes that, if delivered within the timescale specified, the programme should resolve the issues that gave rise to the breach of Condition 7.
- (b) specifically, Network Rail has agreed to restore compliance with Condition 7 by means of the measures set out in the recovery plan it submitted to ORR on 20 and 30 January 2006 and in accordance with the programme set out in the annex to the notice. Within its programme, Network Rail initially must complete its review of the relationship between actual and published capability. It must then determine whether to pursue network change and amend the published details of capability, if it believes the actual capability to be correct, or to upgrade the capability of the infrastructure to meet the published level, or establish that capability only needs to be maintained or enhanced if there is increased use of the route. ORR is satisfied that Network Rail is already taking steps to deliver the programme; it has already identified the initial scope of the problem and has established categories for action which will result in either investment or changes to the published capability through the network change process or a proposed new short-term network change process.
- (c) ORR does not consider it appropriate to make an enforcement order. ORR does not consider that the making of an order would achieve a better result than would be achieved by delivery of the programme or would provide any additional impetus in its delivery.

Decision

20. ORR is satisfied that:

- (a) for the purpose of section 55(1) of the Act, Network Rail is in contravention of Condition 7 of its network licence;



- (b) for the purpose of section 55(2) of the Act, it is not requisite that a provisional order be made;
- (c) for the purpose of section 55(5) of the Act, ORR's duties under section 4 of the Act do not preclude it from making an order; and
- (d) for the purpose of section 55(5A) of the Act, action under the Competition Act 1998 would not be the most appropriate way of proceeding to address this issue.

21. For the purpose of section 55(5B) of the Act:

- (a) ORR is satisfied that Network Rail has agreed to take, and is taking, all such steps as it appears to ORR to be appropriate for it to take for the purpose of securing or facilitating compliance with Condition 7;
- (b) ORR, having considered its duties under section 4 of the Act and the representations made by various parties, does not consider it appropriate at this stage to make an order for the purpose of securing compliance with Condition 7.

22. Under section 55(6) of the Act, ORR hereby gives notice to Network Rail that it does not intend to make a final order, or make or confirm a provisional order, in respect of Network Rail's contravention of Condition 7 of its network licence.

A handwritten signature in blue ink, appearing to read 'Bill Emery', with a small mark to the right.

Bill Emery
Chief Executive of the Office of Rail Regulation

Annex: Infrastructure Capability Programme

Key Milestones

1 Verification of published capability²

Confirmation to ORR of the scope of the verification programme for the identification of potential discrepancies, in terms of capability component and geography **17 March 2006**

Confirmation to ORR of intermediate milestones for the verification programme and the programme end-date for completing the task of identifying discrepancies **17 March 2006**

Complete verification of published gauge information (within sectional appendices) and send report to ORR **30 September 2006**

Complete route availability verification for priority routes (approximately 25% of total number) and send report to ORR **31 December 2006**

Back-stop date for completing the task of identifying discrepancies **30 September 2007**

2 Short-term network change

Commence formal consultation **1 May 2006**
(Proposal for Change to the Network Code)
subject to favourable informal consultation responses

3 Resolving published capability discrepancies identified as at 30 September 2005

Category 1 routes - plans to be included in 2006 Business Plan **31 March 2006**

Category 2 routes, sectional appendix change
subject to appeal process, where network change required **27 July 2006**

Category 2 routes, short-term network change
subject to appeal process **4 March 2007**

(Note: category 3 routes transfer to category 1 or category 2)

² “published capability” means: track & route mileage, linespeed capability, gauge capability, route availability, electrified track (ac/dc).