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Dear Gerry

Consultation on a revised contractual regime at stations

Network Rail is pleased to support ORR's view that the contractual arrangements at stations

- must support and encourage the drive for more efficient ways of working
- must not act as a barrier to third party investment and
- must provide clarity regarding the process for dealing with objections and resolving financial compensation issues

We strongly agree with these aims, and believe that the proposal ORR originally consulted on achieved these, and welcome many of the principles in your emerging conclusions.

One area we would wish to emphasise in making this response is that we do have some serious concerns regarding your proposal to extend the list of permissible objections. The proposed station change process specifically distinguished between compensatable and non-compensatable matters, with all financial issues being dealt with through a separate Co-Operation Agreement, with its own dispute process. This was to ensure that truly financial issues did not hold up the actual station change. The inclusion of additional objections now clouds this issue and reintroduces uncertainty and the potential for delay. This has the potential to undermine the benefits from the other areas of proposed improvement. The Stations Code contained further wording [19.1.3(d)] which recognised that, where financial compensation is adequate, the consultee cannot hold up the work so as to import either additional cost or potential loss of benefit to the proposed change. We believe that the revised wording would retain what has been one of the main barriers to third

party investment and should not be incorporated in to the new SACs in the currently proposed format. We would be happy to meet to discuss this further.

I attach Network Rail's full response and confirm we are happy for this to be published on your website.

Yours sincerely

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Gabrielle Ormandy
Regulatory Reform Manager

	Para	Question	Answer
	4.5	Do you agree that we should introduce the concept of “Exempt Activity” and adopt the definition as developed for the proposed Stations Code?	Yes, the concept of Exempt Activity should be retained. This is not a new idea, as the concept of repair and maintenance being outside the Station Change procedure is already built into the SACs by the inclusion of Condition C1.1, which contains a carve out (inter alia) for the performance of obligations under Conditions D1 or D2.1, and for actions under Part G. The concept of Exempt Activity in the original consultation replicated that approach, by allowing a party to perform the routine work required to comply with its maintenance, repair, environmental and other obligations contained in the SACs. We note the suggestion in this consultation to reflect the definition in the Stations Code. It is true that most works of a routine nature will last no more than 28 days anyway. However, we do have some reservations over the proposed new definition, as follows: • the requirement for the works to be expected to last for not more than 28 consecutive days could be a perverse incentive to plan them so that there is a break after a period of time before resuming again, in order to bring them within this category. Perhaps there is a need to provide that the relevant works cannot form part of a larger programme at the same station resumed within a year of the works completion date; • the requirement for the work not to diminish materially the number of passengers or trains able to use the station on any day is onerous, and could for example rule out short term platform works. By way of clarification, we wish to emphasise that the 28 day period should relate to the physical act of carrying out the work (e.g. the installation of a boiler), rather than the duration for which the works (e.g. the new boiler) will be present at the station. We are sure this is what was intended, but it may be worthwhile putting it beyond doubt.

2	4.21	Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?	Yes, for the reasons set out in the ORR's emerging conclusions. As Network Rail has stated previously, this figure of £5,000 strikes a fair balance between the need to reduce administration costs, and the concern not to set too high an amount which would leave a consultee with unforeseen costs to its business. We note the ORR proposes to keep this figure under review, so that it can be increased or reduced depending on how the mechanism works in practice, once it is embedded. Some increase is to be expected in due course in any event. Network Rail is convinced that having a threshold will reduce unnecessary bureaucracy in the rail industry and therefore drive down costs associated with rail station enhancements.
3	4.22	Do you have any views on the alternative proposals dealing with the circumstance when a single change proposal has a material impact on one station party, but not on another?	The suggestion is that if there is more than one consultee, and the Financial Impact Test is satisfied in respect of one and not another, then the classification of the proposal as a Material Change Proposal should apply to all. This is agreed. If the change is a Material Change for all consultees (even those who do not trigger the £5,000 limit) then a consultee not meeting the Financial Impact Test would not have the right to object or receive compensation (unless or until it did). This is also agreed.
4	4.23	Do you agree that we should introduce a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Material Change Proposal? Under this arrangement, a consultee must incur costs of £5,000 or more in its own right before compensation becomes payable. Once the threshold has been met, all compensation becomes payable for the affected consultee. Parties whose costs do not meet the £5,000 threshold will receive no compensation. We consider that this would make financial compensation arrangements consistent with other parts of the Station Change regime.	Network Rail agrees that compensation should only be paid once the threshold of loss has reached £5,000. We believe the ORR's statement "once the threshold has been met, all compensation becomes payable for the affected consultee" means that if the loss is £5,010 then the consultee is entitled to be paid the full amount of £5,010, rather than just £10. On that basis, this is agreed. Please can ORR confirm this is what is intended by its statement?

5	4.24	We would be interested in your views on how to deal with the situation where a series of Change proposals are made at separate stations, which individually do not meet the Financial Impact Test threshold but when taken together do and could have a material impact on a consultee.	We agree that where a series of related change proposals are made at separate stations, which individually do not satisfy the Financial Impact Test, but when taken as a whole do, then this should be treated as a Material Change Proposal. This is included in the original consultation drafting of the definition of Financial Impact Test which includes, in limb (b), the words: "where similar works or activities are carried out at more than one station including the Station, at all of the stations".
6	5.8	Do you have any comments on the proposed revised list of valid objections?	The existing Station Change process is seen by industry studies as a barrier to investment, due in part to a consultee's right to veto a proposal, whether or not with the objective of achieving monetary benefit. This in turn has had the effect of discouraging station enhancement schemes. We believe the introduction of limited grounds of objection, backed by a robust mechanism for the calculation and payment of compensation, and speedy reference to an effective dispute resolution mechanism, will provide a balance between competing interests, and encourage station enhancement, benefitting passengers and the industry generally. We therefore support the ORR's view that the objective of segregating financial issues by dealing with them under a separate Co-operation Agreement should be paramount, and financial issues should not be allowed to infiltrate and undermine valid grounds of objection. Anything properly capable of being financially compensated for should not be permitted as a ground of objection. Indeed, if the level of disruption being caused to a consultee is substantial, there will be an impact on the business case for the proposed works, because there will be a resulting increase in the compensation that must be paid. As part of the original consultation the drafting of Condition C4.7 aimed to set out the limited circumstances where compensation would be insufficient. At present the drafting states that it would be a valid ground of objection if the Material Change Proposal, if implemented, would put the Material Change Consultee in breach of a Legal Requirement or of its Franchise

			Agreement, Station Operator's Licence or Network Licence. The proposal in paragraph 5.7 of the ORR's Emerging Conclusions is that the list of objections set out in paragraphs 19.1.3(c)(i), 19.1.3(c)(ii) and 19.1.3(c)(iii), and 19.1.3(f), of the proposed Stations Code should be added to the original proposed grounds of objection. Network Rail has serious concerns about the suggestion that the legitimate grounds for objection be widened to include some of the grounds in the Stations Code in order to protect essential operations. Referring to considerations such as: • " **material adverse effect**" on the operation of the Station or its use by passengers, or on any operator's ability to perform its obligations, and • **material disruption** of other specified works at the Station reintroduces the existing weaknesses in the system which resulted in projects being delayed when financial compensation would have been sufficient and effectively meant that consultees could hold the proposer to ransom. The point of a station change process is to allow disruption that is unusual or material to allow enhancements and development to take place whilst compensating the operator for the same. Therefore, it is perverse to incorporate into the mechanism an objection ground that the disruption is material. It is almost inevitable that many Material Change Proposals will have some material adverse effect on the station, whether temporary or permanent, and in our view, the reintroduction of a test of material prejudice as a ground of objection threatens one of the fundamental objectives of the ORR's consultation, namely to allow stations to be more easily improved and upgraded. Importantly, the wording in paragraph 19.1.3(d) of the Stations Code has not been replicated in the ORR's suggested drafting. That wording states that

			"the amount or other terms of the Relevant Indemnity or Relevant Undertaking offered by the Proposer are in some other respect insufficient or inappropriate for reasons specified by the Objector". The Stations Code therefore recognised the importance of the need to be clear that where financial compensation is adequate then the consultee cannot object. In the original consultation, there has been an appropriate definition provided in the drafting of C4.7 of the situations where compensation is insufficient : anything that would place at risk compliance with law, Station/ Network Licence or the Franchise Agreement . We consider that deals with issues around or concerns around safety or service delivery. That list of valid objections is designed to give the parties to a Station Change certainty about what issues will qualify as an objection. Thereafter, any disagreement is likely to be about the level of compensation payment. and can be dealt with under the Co-operation Agreement. The rationale for having a Co-operation Agreement is that it **does** provide the mechanism for adequate compensation to be properly calculated and paid in a timely manner and in Network Rail's view this ought to be sufficient. Although we are reluctant to reintroduce the element of subjectiveness which your wording imports, we are willing to agree a compromise, that there is added, at the end of the additional objections set out in paragraph 5.7 of the ORR's Emerging Conclusions, the wording (qualifying both paragraphs (a) and (b)) "and in respect of which the Material Consultee is able to provide substantive and proper evidence that the amount of compensation payable under the Co-operation Agreement would be insufficient or inadequate for reasons specified by the Material Consultee." This would mirror the wording of paragraph 19.1.3(d) of the Stations Code, by giving objectors the right to show that financial compensation would not be appropriate (in cases where, for example, its reputation would be irreversibly damaged), whilst at the same time preventing vexatious objections where financial compensation **would** be sufficient.

			The Station Change mechanism was intended to protect the business operation of the consultees. Other requirements such as planning (as appropriate) environmental law closure and safety exist concurrently in any event under the Railways Act 1993 (as amended by the Railways act 2005), The Railways and Other Guided Transport Systems (Safety) Regulations 2006 (ROGS), Planning Acts etc ..
7	6.12	Do you have any suggestions on the terms of the "participation deed" that third party developers should be required to sign?	We do not believe that introducing a "participation deed" in similar form to that proposed for use with the Station Code, achieves any more than what we have already suggested. Our proposed drafting of Condition C4.1.7 requires Material Change Proposers, who are also Specific or Strategic Contributors, to submit with their Proposal not only an offer to enter into a Co-operation Agreement, but also an unconditional undertaking to comply with and be liable under the provisions if Part C, as if that party were a Relevant Operator. We therefore believe we have already dealt with making the arrangements binding on third parties by providing for them to give such an offer and undertaking as a condition precedent to making a valid Material Change Proposal. Requiring a participation deed adds a further layer of detail to an already complex structure, which we believe is simply not necessary, given that the position is already adequately covered.
8	7.18	Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.	We believe there should still be a distinction between public and private investors. Private bodies do not have the same statutory functions or obligations as public entities, and will therefore have different objectives and warrant different treatment. A Strategic Contributor could also be a Specific Contributor, but not the other way round. We need to make sure that the drafting does not imply that the terms are mutually exclusive.

9	7.19	If public and private investors are to be treated in the same way: (a) should we have one qualifying financial threshold and duration of interest and at what level should those be set?; or (b) should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?	As stated above, in response to 7.18, we do not believe that private and public investors should be treated in the same way. However, if they are, then we propose that there should be one qualifying financial threshold, which should be set at £50,000, to be invested in station facilities (and not, for example, in shop fittings).
10	7.20	If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all stations on that particular network?	It is suggested that the Strategic Contributor should be entitled to have an interest in a spread of stations. This could be reflective of their span of influence in a particular geographic region. Certainty as to the identity of those stations will be required, and we suggest that the Proposal for Change should list the relevant stations at the outset.
11	7.21	Are there other ways that a third party's "interest" in a station could be determined e.g. the length of interest to be determined by the life of the asset(s) that their investment has funded?	Network Rail is not convinced that a Specific Contributor should be entitled to be consulted for a period beyond the implementation of its own Station Change. Going beyond that could result in a plethora of consultees at any one individual station. However Network Rail agrees with the proposition that a Strategic Contributor should enjoy rights for a period of five years from the date of investment. Any other test (for example, the life of the asset) would be far too complicated to put into practice.

12	8.10	We asked in our earlier consultation whether respondents agreed that: (a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and (b) an otherwise agreed Station Change should be allowed to proceed while the financial compensation issues are resolved? We have set out above why we consider this approach is to be preferred, but if you do not agree, (a) please explain your reasons why; and (b) please provide your suggestions for dealing with this situation.	(a) Agreed; (b) Agreed.
13	8.34	Should loss of revenue (in addition to loss of profit) be capable of being included as part of any compensation claim?	Including both loss of revenue and loss of profit will result in double counting The principle should be that benefits etc should be netted off as the compensation should hold the relevant consultee financially neutral It is therefore appropriate to talk in terms of loss of profit, since the focus should be on the sum required to compensate a party for the difference between the cost and income. The cost of providing the service may have gone down, at the same as the income from it is reduced, so there may be less of an impact on profit, as on revenue. It may be simplest to include additional drafting to clarify that the calculation of compensation should be "net" of savings, and perhaps to include guidance as proposed by our letter of 26 November 2011. For example, the extension of a car park at a station could involve the SFO in additional maintenance costs, but offset against this should be additional car park and fare box revenue.

14	8.35	Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payment(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by instalments).	We agree that no party can insist on compensation being payable by way of fixed sum payments. If the proposer wants to suggest that compensation is paid as a fixed sum, whether by a single upfront payment or by instalments, it may do so, but the consultee should be entirely free to decide whether to accept that suggestion.
15	8.36	1.1 If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree: (a) that the request should be made within a defined period, and not at any time during the project? and (b) if you do agree, what should the time limit be?	(a) Agreed; (b) We propose three months.
16	8.37	As currently drafted, the Co-operation Agreement envisages reimbursement of costs to the end of an operator's franchise. As highlighted in paragraph 8.21 above this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?	We propose that the reimbursement of costs to the end of an operator's then current franchise should apply to franchise operators. For non-franchise operators, e.g. open access operators, we suggest this should be to the end of their then current access agreement. For LOROL, it should be to the end of their concession. For LUL (calling at a number of stations), again this should be to the end of their relevant access agreements. A Specific or Strategic Contributor should not receive any compensation at all.
17	8.38	Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms? Do you agree with our preference to remove the proposer's entitlement to seek any information it requires?	Yes, these provisions relating to Savings Suggestions should be retained, and taken to dispute resolution if the parties cannot reach agreement on their terms. We agree with the proposal to remove the proposer's entitlement to seek any information it requires, where that proposer is a developer (i.e. a Specific Contributor).

18	8.39	We are keen to hear your views, and the reasons for your views, on: (a) whether a developer's liability should be uncapped; (b) whether the introduction of a liability cap would be appropriate; and (c) the level at which any liability cap should be set.	Our views are as follows: (a) a developer's liability should be uncapped; (b) no, the introduction of a liability cap would not be appropriate; (c) not applicable. The industry should not import costs of private developers, as that would represent public funding. The business model of the consultee does not take account of capped compensation in these circumstances.
19	8.40	Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of an improvement resulting from a Station Change, in the same way that Network Change is drafted?	This is not for Network Rail to say; it is a matter for the franchise agreements (although bearing in mind that benefits obtained should be netted off against compensation payable under the Co-operation Agreement). It may be open to train operators to recoup losses from say car parking charges or toilet facilities.
20	8.41	In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?	In these circumstances, where the enhancements delivered to the station will generate additional revenue to the operator, it should be netted off against the compensation payable under the Co-operation Agreement, otherwise there is a "windfall gain" to the operator.
21	8.42	We propose that the payback of overpaid compensation should be free of interest as long as it is paid back within a defined period of time, otherwise interest becomes payable, backdated to the date of the payment request: (a) Do you agree with this approach? (b) Is 28 days an appropriate period for payback? (c) If you do not agree either with the approach or with the payback period, please provide your alternative suggestions.	In relation to the payback of overpaid compensation free of interest: (a) we agree that no interest should be payable as long as it is paid back within a defined period of time; (b) we agree that 28 days is an appropriate period; (c) not applicable.

22	8.53	Paragraph 8 of Annex 1 to the revised SACs sets out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).	We believe it would be a mistake to extend the obligation to provide alternative accommodation to Station Facilities, or something wider, and take the view that it is sufficient to provide alternative Core Facilities only. The reason is that it **is** very often the case that a Station Change alters the Station Facilities, namely the platforms, forecourts, car parks, waiting rooms, toilets etc at the station. To impose an obligation to replicate those facilities as part of any Station Change is in danger of actually negating the mechanism of Station Change itself as it requires a like for like replacement of what station facilities exist already. That surely would be illogical. and would stifle the reforms advocated by McNulty. If a TOC had genuine grounds for concern that a proposal would interfere with its franchise commitments, it could challenge the proposal on that basis (see Condition C4.7.2 of the proposed revised SACs). Additionally the discontinuance of the operation or use of a part of a station used by passengers is subject to the Closure controls imposed by the Railways Act 2005 and those are designed to protect those station facilities necessary for the operation or use of station for or in connection with the provision of railway passenger services. On the other hand Core Facilities are those areas and facilities actually required to perform an operator's franchise obligations, and it is accepted that those will need to be replaced in some shape or form (although not necessarily of the same size or in the same location) if the proposal makes them unusable, whether temporarily or permanently. In our view the position proposed in the revised SACs is more generous than under the current SACs, as a proposer must **provide** alternative Core Facilities, whereas under the current SACs it must only **propose** alternative Station Facilities. We consider that the benefit of the obligation to **provide** alternative facilities, outweighs any reduction in the scope of the facilities to which it refers, whilst recognising that Core Facilities are those facilities which are crucial for an operator's business.

23	9.8	Do you agree that re-instatement of the original position should be considered on a case by case basis?	Yes, we agree.
24	9.9	Do you agree: (a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for costs/losses that they might incur if the development is not implemented in accordance with the terms of the original Station Change proposal; and (b) that affected parties should be able to object to the terms of the relevant undertaking?	(a) We do not consider that it is necessary to introduce a new concept of a Relevant Undertaking, but suggest that provisions for the proposer to undertake to compensate for costs or losses incurred if the development is not implemented in accordance with the terms of the original Station Change Proposal (though, for the avoidance of doubt, not extending to loss of "hope" value) should be incorporated in the Co-operation Agreement. (b) not applicable, since we do not agree it is necessary to have a relevant undertaking.
25	9.10	Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?	Network Rail believes this would be a self-correcting mechanism and that strictly speaking there is no need to state that an incomplete scheme should be subject to a new Station Change Proposal. However, we can see no harm in making this express, if that is the industry's and ORR's preference.
26	10.8	Do you think that that the protections contained in Part G: (a) should be incorporated into the proposed new "Notifiable Change" process?; or (b) should remain in Part G of the revised SACs, separate from the Station Change provisions?	We believe that the proposal to include easement and wayleave provisions within the Notifiable Change process should be retained, but are willing to agree that the Financial Impact Test should apply to the grant of easements and wayleaves, so that if a consultee's costs in relation to a proposed grant exceed £5,000, the proposal would become a Material Change. The definitions of Notifiable Change Proposal and Material Change Proposal would need to be adjusted to reflect this. As a Notifiable Change Proposal (assuming the Financial Impact Test is not satisfied), there would be a right for consultees to make representations and a duty on the proposer to consider them (see Conditions C3.6 to C3.8 inclusive of the proposed new SACs), so the concept of consultation which appears in Condition G6 of the current SACs has already been preserved in the proposed new drafting.

27	11.15	We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment (to a Station Access Agreement) might be obtained 'in principle', to allow registration and implementation to proceed before formal section 22 approval of an amendment to an access agreement is given. We invite comments on this suggestion.	We are wholeheartedly in favour of this approach.

28	14.5	We wish to hear from respondents on what (regulatory) impact – positive or negative - you believe that the proposed changes will have on you.	The impact of the proposals are greatly dependent on whether or not it is accepted that: 1. financial compensation should stand apart from objections to the Station Change; and 2. the grounds for objection that can prevent a Station Change from proceeding are limited to matters affecting the objector's operating licence or franchise agreement, or would be a breach of a legal requirement (since such items reflect the basic delivery and safety requirements of the operators). The McNulty recommendations require improvement to the legal and contractual framework so that decisions can be made faster and change implemented more easily. All parties therefore need to be able to progress change proposals with reasonable speed and certainty. If these fundamental points are accepted, then we anticipate that the new mechanism will provide the necessary flexibility to deliver real improvement in the way in which the industry parties cooperate with each other to enhance stations and improve the management of the station portfolio. If, on the other hand, the industry does not embrace this opportunity for reform, and continues to resist the two basic principles outlined above, there is a serious danger that the mechanism for change will become deadlocked, and the chance to make real improvements to the station asset portfolio will be lost. Network Rail welcomes the fact that there will be some increase in the number of stakeholders as a result of these proposals, but that all parties will be incentivised to act in a reasonable and responsible manner. We also welcome the fact that this new procedure should standardise and simplify the administrative process and encourage appropriate recording of station changes.

29	14.5	While we have raised specific questions, summarised in chapter 13, we equally welcome respondents' views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process.	The proposed SACs reform introduces a process where disputes and disagreements about financial compensation should be resolved through a separate, but parallel process that can be progressed into dispute resolution. The new Station Change suggested should require parties to opt to resolve disagreements about financial compensation through the dispute process rather than ransom so that station projects can proceed resulting in enhanced stations around the network, We suggest that a working group is set up to ensure that the dispute resolution process we are proposing works in as efficient and speedy a manner as possible. This process, which underpins the Station Change process as a whole and gives weight to the principles set out in the Co-operation Agreement, should be seen to be fair and workable, and we would hope that the ORR would be fully supportive of any such initiative. Network Rail has sought to assist and cooperate with ATOC and the ORR to provide a workable mechanism for the industry. Other than the suggestion made above, it is not thought possible to go any further in streamlining the process at this stage.