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## **BREACH OF CONDITION 1 OF NETWORK RAIL'S NETWORK LICENCE WITH REGARD TO NETWORK RAIL'S OPERATIONAL PERFORMANCE**

### **1) Investigation and Considerations**

This letter sets out the decisions made by the Office of Rail Regulation (ORR)'s Board following our licence enforcement investigation into Network Rail (NR)'s performance delivery in 2014-15<sup>1</sup>.

ORR wrote to NR in April 2015 to confirm it intended to investigate NR's performance delivery in 2014-15, the first year of CP5<sup>2</sup>. The investigation looked into whether NR did, or is doing, everything reasonably practicable to meet its licence obligations in relation to:

- a. not meeting its regulated performance target in Scotland<sup>3</sup> for the first year of CP5 and whether this is an on-going issue for subsequent years;
- b. missing its performance strategy targets<sup>4</sup> to Southern for the first year of CP5 and whether this is an on-going issue for subsequent years;

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<sup>1</sup> These decisions were taken by ORR's Board on 20 July 2015. Subsequent to this meeting Network Rail provided further representations to ORR. The ORR Board considered these representations and decided that they did not constitute new material information that would justify revisiting the decisions made on 20 July 2015.

<sup>2</sup> ORR's Periodic Review 2013 (PR13) Final Determination set out the regulated outputs which Network Rail (NR) is required to deliver in control period 5 (CP5). NR is required to deliver these obligations under its Network Licence. In England and Wales, ORR also agreed (after the Final Determination was published) to take an input-based approach for years 1 and 2 of CP5 in relation to its performance targets; this includes intervening when delivery of performance strategy targets (Public Performance Measures (PPM) and Cancellations and Significant Lateness (CaSL)) are outside the agreed thresholds. Scotland performance targets remain output-based for all of CP5.

<sup>3</sup> Performance in Scotland (PPM annual 92% and CP5 exit of 92.5%) is defined as ScotRail

<sup>4</sup> ORR will intervene in certain circumstances, for example if an operator's PPM (MAA) appears likely to fall more than 2 percentage points below its agreed PPM output or CaSL MAA appears likely to increase more than 0.2 percentage points above target.

- c. not delivering its performance strategy targets to Govia Thameslink Railway (GTR) for the first year of CP5 and whether this is an ongoing issue for subsequent years; and,
- d. whether it is ensuring that the end of CP5 regulatory targets are met, including an assessment of whether there are any systemic weaknesses relating to NR's operational planning, management and delivery of performance, such as timetabling.

In reaching its decisions, ORR's Board had regard to its duties under section 4 of the Railways Act 1993 and to its published economic enforcement policy and penalties statement. It also applied our competition primacy duty which obliges ORR to consider whether it would be more appropriate to proceed with action under the Competition Act 1998. In this regard, we are satisfied that NR's failure to deliver its performance targets could not amount to an infringement of the Competition Act 1998 for Scotland, Southern or GTR in 2014-15.

ORR has considered evidence gathered during its investigation, including NR's quarterly progress reports against its performance plans, performance data and correspondence and meetings between our organisations. ORR has also taken into account the views of NR's customers and passenger satisfaction data.

As part of the investigations ORR identified factors which were outside NR's control and meant that it was not reasonably practicable to deliver the performance targets in full in 2014-15 for these operators. As a consequence, ORR determined a number of adjustments should to be taken into account in its assessment:

- **Traincrew issues:** Southern and GTR have both seen a significant increase in delays from traincrew issues.
- **Glasgow Commonwealth Games:** For ScotRail, ORR has taken into account the performance impact of the Glasgow Commonwealth Games, which we estimate to be 0.6 percentage points (pp) on the end of year PPM (MAA). Both NR and ScotRail acted pragmatically during the Glasgow Commonwealth Games period to ensure the successful movement of passengers rather than prioritising performance.
- **Externals:** We also consider that NR was not wholly responsible for the delay minutes and subsequent PPM loss caused by fatalities and trespass events, and that it has worked constructively to reduce these incidents and mitigate their impact in Scotland, Southern and GTR in 2014-15.

## **2) NR's delivery of performance in Scotland in 2014-15**

ORR's analysis of the December 2014 timetable highlighted several avoidable operational planning errors and a number of tight timings. While better (and earlier) modelling, prior to the introduction of the new electric services, would have helped maintain performance levels, our investigation concluded that Timetable Planning Rules (TPR) issues were significant in NR failing to achieve its 2014-15 PPM target.

These 2014-15 incidences of timetabling errors were different to those previously investigated (and where no breach was found) in 2013-14. These 2014-15 issues whilst minor individually had a cumulative impact on performance delivery. Performance has improved since NR addressed the issues initially through briefing to signallers and subsequently in the May 2015 timetable change. In the first periods of 2015-16 Scotland has achieved PPM in excess of 94% (and close to 94% in P3.)

The Board took into consideration NR's response of 10 July to Alan Price's letter of 2 July 2015 setting out ORR's investigation findings. In this regard it accepts that the company is planning to undertake a review of TPRs although it is slightly more limited in scope than we had suggested. It also accepts NR's view that changes to 'point to point' timings on the Whifflet to Rutherglen line have brought it into line with the rest of the Route and agree there is some evidence that it is now undertaking quality assurance of its timetables. NR confirmed that a number of TPRs still need to be reviewed and that 150 defects have been or will be removed from the timetable. Incorrect TPRs can lead to the timetable being unachievable. The volume of defects is unacceptably high and could also generate delay through conflicts or unachievable timings.

Overall, taking account of all of the evidence and representations provided, ORR's Board was satisfied that in 2014-15, NR breached Condition 1 of its network licence because it did not do everything reasonably practicable to achieve its regulated PPM MAA output in Scotland. It missed its targets primarily as a result of the impact of the errors that occurred in the May and December 2014 timetable changes.

Timetabling is a core operational activity for NR and is fundamental to the successful delivery of efficient services on the network. We expect NR to make sure it takes all necessary steps to learn lessons and to ensure these issues do not occur again. It must also be aware of the need to manage the timetable changes effectively to facilitate the Glasgow Queen Street blockade.

### **3) NR's delivery of Southern and GTR performance in 2014-15**

ORR's investigation identified errors in performance modelling for a new timetable being implemented in December 2014-15 as part of the Thameslink programme works at London Bridge. This had a significant and detrimental impact on Southern and GTR's operational performance in early 2015.

The Board considered the response provided on 10 July. NR acknowledged and accepted its responsibility for the shortfall in performance in 2014-15 and the unacceptable impact on operational issues at London Bridge and consequential impact on passengers. The Board also noted steps NR was taking to work with its customers to improve operational implementation of timetable changes, to examine how it can improve its performance modelling capability and its commitment to implementing the recommendations in its South East review and Internal Audit review.

Having reviewed all the evidence and representations, ORR's Board is satisfied that NR did not do everything reasonably practicable to achieve its performance

strategy targets in 2014-15, and therefore has breached condition 1 of its network licence in relation to the three following targets:-

- Southern – PPM – Public Performance Measures
- Southern – CaSL – Cancellations and Significant Lateness
- GTR – CaSL – Cancellations and Significant Lateness

Our findings highlight a need for more robust quality assurance processes in NR's timetable modelling and a better understanding of the impact of timetabling on operating services in practice. It is essential that infrastructure improvements are carried out effectively. NR needs to plan and manage its operations and engage with its customers in a manner consistent with what would be expected of a best practice operator. We expect NR to make sure it takes all necessary steps to learn lessons and ensure these issues do not occur again. ORR will also continue to monitor closely NR's progress with improving its modelling capability and its implementation of its review recommendations.

### **3.1) Wider observations**

There was a high incidence of newly installed assets failing or their performance being sub-optimal and NR has acknowledged that there have been 184 failures of these assets between 30 December and 15 April 2015. NR has also acknowledged the consequential impact on services. We acknowledge a recent improvement means that NR considers the reliability of new assets 'is now at least comparable to the rest of the network'. We therefore propose to continue to monitor these asset issues through our existing regulatory processes.

## **4) Consideration of potential systemic issues**

The Board also considered whether there were any systemic issues affecting NR's performance in 2014-15.

The issues identified affecting Scotland, Southern and GTR can be generalised as timetable and / or performance modelling related errors, but these specific incidents are unrelated and resulted from a range of different errors.

Our Board was also content that, at this time, there is no case regarding NR's performance planning and supports our continued close monitoring of these issues through our existing regulatory processes. In particular, it welcomed NR's proposal to discuss a process for providing further assurance that the weaknesses identified with its performance planning process are being addressed.

## **5) Consideration of penalties**

Having identified the breaches for Scotland, Southern and GTR, the Board considered whether a penalty was appropriate in each of the cases. ORR's policy is clear that our primary objective in setting a penalty is to change the future

behaviour of an organisation in breach of its licence, and to incentivise it and others to comply with their obligations both specifically and in general.

The Board took account of all the evidence, our economic enforcement policy and, penalties statement and its section 4 duties. It determined the following:

### **5.1) Scotland PPM**

In the case of NR's delivery to ScotRail in 2014-15 our Board determined that the imposition of a penalty would not be appropriate. In particular, the Board considered that whilst the breach had some residual impact on services and passengers, the activities NR is undertaking to ensure the timetable issues are addressed mean that these issues were effectively mitigated operationally in 2014-2015 and performance has recently recovered. In these circumstances, the Board did not think that a penalty was necessary to change NR's future behaviour or as an incentive.

### **5.2) Southern PPM & CaSL and GTR CaSL**

The Board determined that a penalty is appropriate in the case of NR's performance for Southern and GTR. This was because of the significant impact to performance and passengers during the year as a consequence of the breaches, especially around the issues associated with timetabling at London Bridge. The Board considered that a penalty would incentivise the NR Board to reduce errors and manage the operational impact of major projects more effectively.

Although Southern services were affected to a greater extent than GTR, the factors that caused NR's non-delivery of the three separate performance targets in 2014-15 are very closely linked. In particular, a major contributory factor for both operators was timetable issues associated with the Thameslink programme at London Bridge. Due to these commonalities our Board determined it was appropriate to consider the three breaches together for the purposes of determining an overall or combined penalty.

Having considered the number passengers affected and the level of harm caused, culpability and mitigating and aggravating factors, the Board proposes to impose an overall penalty sum of £2 million.

The Board acknowledges that the imposition of penalties on railway businesses can be contentious. The ORR Board decided on the imposition of a penalty in order to send a clear message to the NR Board of the importance of focussing on passengers when planning their work because:

- of the late consultation with operators that resulted in insufficient time to mitigate the severe impact on passengers;
- this is not the first time NR has been warned in these areas; and,
- it is important to send a message to the affected passengers that this level of disruption is not acceptable and that NR will be held to account for its performance.

The level of the penalty proposed at £2m was considered appropriate and proportionate in the context of a moderately serious breach because of its reputational and incentivising effect, and its very limited impact on NR's ability to finance its licensed activities.

## 6) Section 57C Notice

In accordance with Section 57C of the Railways Act 1993, enclosed with this letter is ORR's formal notice that it proposes to impose a penalty sum. This notice sets out in more detail the factors informing the level of proposed penalty. A consultation period of at least 21 days is required for this notice. A deadline of **Tuesday 1 September 2015** is set out in the notice. Any representations, including offers of reparations, received by this deadline will then be considered by our Board before it confirms the final sum in September.

A more detailed assessment of the evidence ORR has used to reach these decisions has already been provided to NR and will also be published with this letter on ORR's website.

I am copying this letter to Patrick McLoughlin, Claire Perry and officials at the DfT, Derek Mackay and officials at Transport Scotland, Sir Peter Hendy, Phil Hufton and Paul Plummer at Network Rail.

Yours sincerely,



**Richard Price**