

## PROVISIONAL ORDER - REASONS

1. This document sets out the reasons why, on 28 February 2008, ORR made a provisional order in respect of a likely contravention by Network Rail Infrastructure Ltd (“Network Rail”) of Condition 7 of its network licence.
2. This document covers the:
  - (a) background;
  - (b) nature of the likely contravention of condition 7;
  - (c) reasons for taking enforcement action;
  - (d) reasons for making a provisional order; and
  - (e) content of the order.

### **A. Background**

3. The West Coast Route Modernisation (“WCRM”) programme was developed to deliver a strategy by the former Strategic Rail Authority in 2003, and funding and output requirements on Network Rail were established by the Rail Regulator in the 2003 access charges review. A key output of the WCRM is the provision of infrastructure capability to deliver significant timetable improvements currently scheduled for December 2008 (“the Output”). Delivery of the Output is a reasonable requirement under Condition 7 of Network Rail’s network licence which means that Network Rail must take such steps as are necessary or expedient to achieve it to the greatest extent reasonably practicable having regard to all relevant circumstances.
4. ORR has monitored delivery of the WCRM programme for some time, largely through the independent reporter. It has been clear over recent months that the programme to deliver the Output has become very tight with little or no contingency.
5. On 6 December 2007, Network Rail announced that it wished to extend the blockade planned for Christmas at Rugby, a milestone in the WCRM work, by an extra day, to finish on 31 December rather than 30 December 2007. On 17 December 2007 Virgin Trains asked ORR to issue a provisional order in effect preventing Network Rail from taking this additional day. ORR decided on 19 December 2007 against issuing a provisional order, on the grounds that it would not be in the best overall interests of rail users. However, ORR began an urgent investigation into the background, and into whether there had been a breach of Network Rail’s network licence.
6. In the event the Rugby possession overran until 4 January 2008, causing substantial disruption to rail users.

7. ORR announced on 2 January 2008 that it was extending its investigation and that the two strands of its investigation were to be:

“A To investigate the circumstances surrounding the late notice planned extension of the Rugby possession, and the major possessions overruns at Rugby and Liverpool Street over Christmas/New Year 2007-08. To investigate any relationship between these events and delivery of planned works elsewhere on the network over this period (for example at Stevenage and Shields Junction). To establish the impact of these events on train operators and their customers (passenger and freight), and the extent to which Network Rail contributed to mitigating these impacts.

B. To investigate the robustness of Network Rail’s plans for the remaining work to enhance the West Coast Main Line to meet its obligations under ACR2003 and to enable the planned December 2008 service upgrade.”

8. By way of a report dated 28 February 2008, ORR has set out its findings in relation to its investigation (“the Findings Report”). In this document ORR sets out the key reasons for making the provisional order but ORR is also relying on the facts and findings in the Findings Report to underpin the key reasons. In its assessment in the Findings Report, advised by the independent reporter, Halcrow, ORR has concluded that delays that occurred in earlier parts of the WCRM programme meant that the pressure on the remaining schedule has become increasingly severe. This has increased the risk that planning assumptions will be overambitious, and the risk of delivery problems has grown. ORR considers that Network Rail has a number of outstanding issues to resolve: it must complete the design for Rugby, for which it is currently behind schedule, it must go through industry processes to take key possessions for the work, and it is likely to require additional possessions to ensure there is sufficient contingency to deliver the December 2008 timetable.
9. Network Rail has acknowledged that the current programme is no longer robust – a view supported by Halcrow. Network Rail has told us that it is undertaking a full review of deliverability. However, as things stand at present, there is a real possibility that the company will not deliver the Output currently scheduled for December 2008.

## **B. Likely contravention of Condition 7**

10. It therefore appears to ORR that Network Rail is likely to contravene Condition 7 of its network licence, in that Network Rail is likely to fail to deliver the Output. ORR considers that this is evidenced by the fact that at the moment Network Rail does not have an adequate plan to deliver the Output.

11. Network Rail needs to ensure that its plan to deliver the Output for which it is funded is adequate, takes due account of the impact on its customers and funders, and takes full account of the risks associated with achieving delivery. From our ongoing monitoring, the information reviewed in our investigation and discussions with key parties, we are not satisfied that it currently has such a plan in place.
12. Network Rail has itself acknowledged in meetings with ORR on 13 February 2008 and 26 February 2008 that it does not currently have an adequate plan to deliver the Output.
13. At the meeting on 13 February 2008, Simon Kirby, Director, Infrastructure and Investment at Network Rail said that:
  - (a) Network Rail had been reviewing the WCRM programme but that review was not yet complete and there were options/choices to be considered further;
  - (b) in respect of general programme deliverability, there were four possible options but continuing with the current plan had a low probability of delivery. The May possession in Rugby was crucial as it had to be held to meet the current December 2008 deadline. However, it was possible Network Rail might fail to deliver all the works planned for May. Also, other pinch points in the plan are Nuneaton in August and Rugby stage "J" in November, but the only contingency in relation to that possession was the Christmas 2008 period; Rugby and Nuneaton were too finely balanced and if that May were lost then the whole programme schedule would fall.

At the meeting on 26 February 2008, ORR was advised that Network Rail had done considerable further work to develop the options going forward but had not at this stage come to a view on the preferred option or developed a plan to deliver it.

### **C. Reasons for enforcement action**

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, by final order to make such provision as is requisite for the purpose of securing compliance with that condition or requirement. Section 55(2) of the Act provides that ORR shall instead make a provisional order if it appears to ORR that:
  - (a) a relevant operator is contravening or is likely to contravene, any relevant condition or requirement; and
  - (b) it is requisite that a provisional order be made.

15. There are exceptions to the obligation to make an 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 proceedings 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 purposes of securing of 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.

16. 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. The only duty that might preclude ORR from taking such action is ORR's duty to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions. However, in this case ORR considers that the action it is proposing is proportionate to the likely contravention in question.

17. Moreover ORR considers that the following of its section 4 duties are relevant to the approach it is adopting:

- a. to protect the interests of users of railway services;
- b. to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
- c. to promote efficiency and economy on the part of persons providing railway services for passengers and freight;
- d. to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance; and
- e. to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railways services.

This is because ORR considers that in the absence of the plan required by the order the providers of railway services would continue to be unable to plan their businesses with any reasonable degree of assurance. Moreover, the interests of users of railway services would not be protected, because of continued uncertainty about when possessions might be required and/or the deliverability of the programme. Therefore ORR considers that not only do the duties in section 4 not preclude the taking of this enforcement action, but that they strongly support it doing so.

18. ORR is satisfied that the exception in section 55(5A) does not apply as it is not satisfied that it is appropriate to proceed under the Competition Act 1998. This is because there is a specific provision in Network Rail's network licence that is likely to be contravened.
19. In relation to section 55(5B) of the Act whilst 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 the purpose of securing compliance with Condition 7, ORR nevertheless considers it appropriate for a provisional order to be made.
20. ORR is satisfied that Network Rail has agreed to take, and is taking, all such steps as it appears to ORR for the time to be appropriate because Network Rail acknowledges that its current plan is no longer sustainable, is urgently reviewing this and is assessing how best to proceed in delivering the Output. ORR understands that in doing this Network Rail has a dedicated team assessing the feasibility of different options for the revised plan and it has already had discussions with train and freight operators and the Department for Transport to discuss the impact of such options.
21. Despite this, ORR considers that it is appropriate to make a provisional order. This is because, in the light of the importance and scale of the WCRM programme, of the significant risk attached to Network Rail's ability to deliver the Output. Further, ORR considers that it is important that Network Rail has a firm deadline to which it must deliver its revised plan for delivery of the Output so that its review and revision process of its current plan is carried out in a timely and transparent way which will provide some certainty of progress to the rail industry and users.

#### **D. Reasons for a provisional order**

22. In essence the difference between a provisional order and a final order is that a provisional order has immediate effect, albeit subject to confirmation, whereas a final order is subject to a consultation period of at least 21 days. In considering whether it is requisite that a provisional order be made, ORR is required by section 55(3) of the Act to have regard, in particular, to the extent to which any person is likely to sustain loss or damage in consequence of anything which, in contravention of the licence condition, is likely to be done or omitted to be done, before a final order may be made.

23. ORR considers that third parties, in the form of Network Rail's customers and funders, passengers, and freight customers are likely to sustain loss or damage by any delay in issuing an order. This is because, notwithstanding Network Rail's decision to review its current plans and develop a revised plan, ORR considers that industry and passengers require the certainty that would result from Network Rail being required to produce a plan for the WCRM by the end of March 2008. Without this certainty, ORR considers that there could be continued uncertainty and disruption. This is especially so in light of the importance and scale of the WCRM. ORR considers that it is essential that any inadequacies in the plan are addressed as soon as possible.

#### **E. Content of the order**

24. For the delivery of the Output, it is clear to ORR that Network Rail needs firm timescales imposed by ORR to re-examine its current programme in defined timescales, in discussion with key stakeholders and must then make a commitment endorsed by its board to deliver it.
25. The provisional order requires Network Rail to produce a plan to ORR by 31 March 2008 with clear milestones in it showing how Network Rail will deliver the Output.

#### **Conclusion**

26. For all the reasons set out above, ORR is making the provisional order attached.

**Bill Emery**  
**Chief Executive of the Office of Rail Regulation**

**28 February 2008**