

FINAL PENALTY NOTICE IN ACCORDANCE WITH SECTION 57C OF THE RAILWAYS ACT 1993

31 May 2019

1. This is a notice, given in accordance with section 57C(6) of the Railways Act 1993, (the Act), stating that the Office of Rail and Road (ORR) has imposed a penalty of £5 million on Govia Thameslink Railway Limited (GTR) for contravention of condition 4 of its Passenger Statement of National Regulatory Provisions (SNRP).
2. The contravention is in respect of GTR's provision of appropriate, accurate and timely information to passengers following the implementation of the 20 May 2018 timetable and during the subsequent disruption.
3. The acts and omissions which, in the opinion of ORR, constitute the contravention and justify the imposition of the penalty are more fully set out in paragraphs 18 to 19 of this notice. ORR's decision that GTR contravened Condition 4 of its SNRP was communicated to GTR by letter dated 14 March 2019 (the Contravention Decision), and paragraphs 18 to 19 below fully reflect the reasons contained in the Contravention Decision.
4. In accordance with the Act, the penalty should be paid in full to the Secretary of State¹ by 28 June 2019, unless GTR make an application within 21 days from the date of this Notice for ORR to specify different dates by which different portions of the penalty are to be paid.

Relevant Legal Provisions

5. Under Section 57A of the Act, ORR may levy a penalty of such amount as is reasonable, if it is satisfied that the licence holder is contravening or has, within the last two years, contravened a licence condition. The amount may not exceed 10 per cent of the licence holder's turnover, defined in accordance with the Railways Act 1993 (Determination of Turnover) Order 2005 (SI 2005 No 2185.)
6. Section 57B(3) of the Act provides that, in deciding whether to impose a penalty, and in determining its amount, ORR must have regard to its statement of policy

¹ GTR to contact the office of Nick Joyce, Director General, Resources and Strategy Group, Department of Transport, Great Minster House, 33 Horseferry Rd, Westminster, London SW1P 4DR. [REDACTED]
Telephone: 0300 330 3000 for details.

published at the time when the contravention occurred. ORR's statement of policy is contained in its Economic Enforcement Policy and Penalties Statement, published in November 2017 (the Penalties Statement)².

7. Under Section 57A(6) of the Act, ORR shall not impose a penalty if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1998. In this case, ORR does not consider that the Competition Act 1998 is applicable.

The Contravention

8. Condition 4 of GTR's SNRP sets out a purpose and general duty as follows³:

Purpose

1. The purpose is to secure the provision of appropriate, accurate and timely information to enable railway passengers and prospective passengers to plan and make their journeys with a reasonable degree of assurance, including when there is disruption.

General duty

2. The SNRP holder shall achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances, including the funding available.
9. To assist licence holders with compliance, ORR published guidance⁴ to support condition 4 by giving more information about what is expected and how it will be enforced. The guidance recognises that timetabling services and providing good information is a complex task and states:
'The licence obligations are not intended to undermine the primary objective of providing best available service for passengers. Making justified changes to the train plan to meet passengers' needs should not be conditional on providing perfect advance information about these. However, we would expect licence holders to use reasonable endeavours to get such information out as widely as possible and as quickly as possible. We will take circumstances into account during any assessment of compliance'
 10. ORR considers the provision of passenger information to be a fundamental objective of delivering effective service recovery following disruption and if information is available that could be used by passengers to better plan and make their journeys, this should be shared in a timely manner.
 11. This is reflected in the additional principles that ORR set out for train operators in February 2018. ORR wrote that train operators *'should be open about the impact*

² https://orr.gov.uk/data/assets/pdf_file/0004/18697/penalty-notice-2015-08-10.pdf.

³ Condition 4 is set out in full in Annex A

⁴ https://orr.gov.uk/data/assets/pdf_file/0015/4353/information-for-passengers-guidance-on-meeting-the-licence-condition.pdf

on all passengers of the challenges they face, and take responsibility for ensuring that their passengers can get the information they need to plan and make their journey as that information comes available'⁵.

ORR inquiry and the initiation of its investigation into GTR's provision of passenger information

12. In June 2018, ORR was asked by the Secretary of State to set up an independent Inquiry into the disruption that followed the introduction of the new timetable on 20 May 2018.
13. In September 2018, the findings of the Phase 1 Report of the timetable Inquiry found that information provided to passengers was inadequate which meant that passengers were unable to plan and make their journeys with any certainty.
14. Arising from these findings, on 3 October 2018 ORR launched a formal investigation into GTR - whose passengers were particularly impacted - to assess whether GTR is in contravention of, or contravened its obligation under condition 4 of its SNRP in relation to the provision of appropriate, accurate and timely information:
 - a. to passengers and prospective passengers **prior** to the implementation of 20 May 2018 timetable; and
 - b. to passengers during the subsequent disruption i.e. **following** the implementation of the 20 May 2018 timetable.
15. As part of the investigation, ORR considered a range of information, evidence, and direct communication with GTR. ORR analysed both source evidence provided to the timetable Inquiry and significant volumes of further information provided by GTR, including internal documents and staff communications. ORR also undertook a detailed analysis of the GTR passenger experience pertaining to the timetable change to better understand the nature and impacts of the primary information failures.
16. In assessing these issues, ORR considered whether GTR did, and is doing, everything reasonably practicable to comply with its obligations in condition 4.
17. Full details about the investigation may be found in ORR's Investigation Report⁶, which was published alongside the ORR's proposed penalty notice dated 14 March 2019 (the Proposed Penalties Notice).
18. A summary of the investigation findings was provided in the Proposed Penalty Notice and is reproduced below⁷:

⁵ This letter was issued as part of ORR's informed traveller / T-12 investigations February 2018
https://orr.gov.uk/data/assets/pdf_file/0020/27047/licence-condition-4-letter-to-toc-managing-directors-2018-02-23.pdf

⁶ Office of Rail and Road Rail [Investigation Report](#): Govia Thameslink Railway: Provision of passenger information – May 2018 timetable change

⁷ Paragraphs 22-35 of the Proposed Penalty Notice

“Investigation findings

22. *In relation to the provision of appropriate, accurate and timely information to passengers and prospective passengers **prior** to the implementation of 20 May 2018 timetable, ORR considers that GTR took reasonably practicable steps to provide appropriate, accurate and timely information to passengers.⁸ This part of the investigation is therefore not discussed any further in this notice.*
23. *In relation to its investigation into the provision of appropriate, accurate and timely information to passengers **following** the implementation of the 20 May 2018 timetable, ORR considers that GTR contravened condition 4 of its SNRP by not achieving the purpose in condition 4.1 to the greatest extent reasonably practicable having regard to all relevant circumstances, including the funding available.*
24. *ORR’s investigation is set out in full in its Investigation Report. Our findings from this part of the investigation are set out from paragraph 4.64 and are summarised below.*
25. *ORR considers that the exceptional circumstances that followed the introduction of the 20 May timetable meant that providing perfect advance information for all services was, from the outset, an impossible task. Evidence demonstrates that GTR’s overriding focus throughout the period that followed 20 May was on providing as much capacity as it could to meet customer demand.*
26. *ORR’s guidance to support compliance with condition 4 recognises that timetabling services and providing information to passengers are difficult, complex tasks. There is a balance to be struck between service delivery and the ability to provide appropriate, accurate and timely information for passengers during sustained periods of disruption. The licence condition is not intended to undermine the primary objective of providing the best available services for passengers.*
27. *ORR consider the immediate response to the timetable change on 20 May required a period of reactivity as both the scale and severity of the disruption emerged. However, ORR consider that better passenger information should be a core element of the service recovery process and as time progressed an increasingly improving picture should have emerged. Against this context, ORR considers that GTR failed to appropriately balance service recovery with the need for passenger information to an unacceptable extent and duration throughout the implementation of their service recovery plan.*
28. *In particular ORR has identified failings in the following areas:*
 - a. ***Aligning service recovery with passenger information obligations.***⁹ *ORR considers that too often there was a failure in operational decision-making to give adequate regard to the fact that running a train service (or rail replacement bus) is only helpful to passengers if they know when and where the service will arrive, where it is going and how long the journey will take. Further ORR considers that as information failures persisted over such a sustained period of time, without any timely or proportionate response to these*

⁸ ORR’s investigation into GTR’s delivery of passenger information prior to 20 May timetable is set out in full in our Investigation Report.

⁹ Details set out in paragraphs 4.68-4.69 of ORR’s Investigation Report

issues, there was a fundamental problem at both a strategic and functional level in aligning operation recovery with passenger information obligations.

- b. **Provision of ‘Alpha list’¹⁰ and other journey information¹¹.** ORR considers that GTR’s failure to clearly communicate known cancellations in a timely manner undermined the ability of prospective passengers to plan ahead and make informed journey decisions. The Alpha list information could have been published sooner than 25 June, which would have provided greater certainty to passengers about services which were not planned to run.
- c. **Day to day amendments¹².** ORR considers that operational decisions taken and implemented to support the recovery process were in many cases to the detriment of providing passengers with appropriate, accurate and timely information to an unacceptable extent and duration. Passengers were therefore left uncertain of what services would run each day as travelling on a particular train one day was no guarantee that it would run or be shown on station screens the next day. ORR considers that the cumulative effect of the factors described here manifested in the unacceptable passenger outcomes described in our Investigation Report and in the numerous examples of passenger information failures.
29. ORR wrote a case to answer letter¹³ to GTR on 29 January 2019 to state that we considered there was evidence that GTR did not do, and is not doing everything reasonably practicable to deliver its passenger information obligations following the 20 May timetable change.
30. GTR requested a meeting with ORR and provided a written response to our letter on 13 February 2019. GTR raised a number of inaccuracies with our Investigation Report and stated that it considered that it did do everything reasonably practicable to deliver its passenger information obligations in light of exceptional circumstances, which were a direct result of industry failings.
31. In response to the representations ORR made some revisions to its Investigation Report.
32. In accordance with ORR’s rules of procedure, the decision whether to find GTR in contravention of condition 4 and if so what regulatory action to take, was made by ORR’s Board. ORR’s Board took into account all relevant material including the Investigation Report and GTR’s representations and is satisfied that:
- (i) GTR’s operational decision making was not supported by passenger information that was sufficiently aligned to the steps that it was taking to recover the service;
 - (ii) GTR’s failure to clearly communicate known cancellations in a timely manner undermined the ability of prospective passengers to plan ahead and make informed journey decisions; and
 - (iii) Operational decisions taken and implemented to support the recovery process did not take account of the need to provide passengers with

¹⁰ GTR’s Alpha list was a list of specified train services that it was unable to run and which were removed from the timetable.

¹¹ Details set out in paragraphs 4.70–4.74 of ORR’s Investigation Report

¹² Details set out in paragraphs 4.75-4.79 of ORR’s Investigation Report

¹³ ORR’s case to answer letter has been published along with this notice

appropriate, accurate and timely information to an acceptable extent and within an acceptable time period.

33. *ORR is therefore satisfied that, taking account of all evidence, including our findings and GTR's representations, there is evidence that GTR contravened Condition 4 of its SNRP in that it failed to deliver to the greatest extent reasonably practicable, having regard to all relevant circumstances, its obligation to provide appropriate, accurate and timely information to passengers to enable them to plan and make their journeys with a reasonable degree of assurance.*
34. *ORR is not satisfied that there is sufficient evidence that this contravention is a current breach because GTR has taken some steps to ensure that the same situation would not happen again, in particular:*
 - a. *The steps GTR took to provide appropriate, accurate and timely passenger information during the implementation of the interim timetable on 15 July 2018, the phasing of additional services through September 2018 and the further timetable change in December 2018;*
 - b. *The information from Transport Focus regarding a Customer Awareness Report based on research carried out through October and November 2018 showing that 88% of passengers overall and 92% of commuters were aware of the planned February blockade on the Brighton Mainline;*
 - c. *The utilisation of a dedicated project website by Network Rail and GTR to communicate to passengers about The Brighton Mainline Improvement Project;*
 - d. *GTR advise it has service recovery frameworks (SRF) to respond to disruptive events across GTR's routes, which are supported by customer plans;*
 - e. *Since May 2018, GTR advise it has rolled out new smart phones to its entire front line staff pre-loaded with industry information applications to enable staff to have improved access to passenger information. Further, as it became apparent during the May Timetable disruption that GTR's messaging system "Tyrell" was not able to keep up the level of changes being inputted into the system, GTR has since converted to a cloud based scaleable environment to allow the system to respond to user demand more effectively; and*
 - f. *Improvement in performance and reduction in compensation claims following the introduction of the July 2018 timetable.*
35. *The penalty that ORR proposes to impose on GTR therefore relates to a past breach of condition 4 as specified above."*

19. The Proposed Penalty Notice then went on to consider whether, in ORR's provisional view, a penalty was justified and if so (again, in ORR's provisional view) what the level of such penalty should be. That part of the Proposed Penalty Notice is reproduced below¹⁴:

¹⁴ Paragraphs 36-63 of the Proposed Penalty Notice

“Factors that justify the imposition of a penalty

36. *ORR’s penalties statement states that, in deciding whether to impose a penalty, we will take full account of the particular facts and circumstances of the contravention, including any representations and objections made to us. ORR will also act in accordance with our Section 4 duties under the Act, and take into account the six penalty principles set out in the Macrory report¹⁵ and the related five principles of good regulation (proportionality, targeting, consistency, transparency and accountability).*
37. *ORR’s primary objective in setting a penalty is to change the future behaviour of a licence holder and to incentivise it and others to comply with their obligations both specifically and in general.*
38. *ORR considers that a penalty is appropriate in relation to GTR’s failure to provide appropriate, accurate and timely information to passengers because:*
 - a. *a penalty would incentivise GTR to ensure that the provision of information to passengers is managed more effectively in the future; and*
 - b. *a penalty could also act as a future deterrent to other licence holders.*
39. *In deciding whether or not a penalty is appropriate, ORR also considered the following factors to be relevant:*
 - a. *The reputational damage GTR have already suffered and additional costs incurred due to their wider failings in relation to the 20 May timetable change;*
 - b. *GTR have taken some steps to compensate passengers through delay compensation schemes and have paid a passenger benefits fund to the Department for Transport. However, these sums were paid in response to its wider failings in relation to the 20 May timetable change and do not address the harm caused by its additional failings to provide adequate information to passengers;*
 - c. *GTR have learnt some lessons from the 20 May timetable change and made some changes prior to the December timetable change. However, there is a lack of evidence that GTR undertook a significant lessons learnt exercise relating to passenger information and have focused instead on the wider industry failings;*
 - d. *GTR have not acknowledged responsibility for its failure to provide adequate information to passengers.*

Factors that justify the amount of the penalty

¹⁵ See the Macrory report - ‘Regulatory Justice: Making Sanctions Effective’ and the related five principles of good regulation- The six penalty principles are: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from non-compliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; (iv) be proportionate to the nature of the offence and the harm caused; (v) aim to restore the harm caused by regulatory non-compliance, where appropriate; and (vi) aim to deter future non-compliance.

40. *In line with our penalties statement ORR has considered factors falling into two categories:*
- a. *Proportionality; and*
 - b. *Mitigating and aggravating factors.*

Proportionality

41. *The penalty should be proportionate to the seriousness of the contravention, and this is our starting point in calculating the amount. In considering the seriousness, in line with paragraph 129 of ORR's economic enforcement policy and penalties statement, ORR has looked at:*
- a. *the actual and potential harm caused to third parties including passengers and other railway users and to the public interest purpose of the obligation (including the effectiveness of the regulatory regime);*
 - b. *the culpability of the licence holder, including whether it has acted negligently, recklessly, knowingly or intentionally; and*
 - c. *the extent to which the licence holder has co-operated with ORR during the investigation.*
42. *ORR sets out in its penalties statement, five levels of seriousness ranging from a technical or de minimis contravention to a very serious contravention, with corresponding financial ranges. Our policy states that these levels of seriousness are based on previous actions taken by us and judgements of seriousness and recognises that when we consider the particular facts and circumstances of each individual case, we may consider it appropriate to deviate from the scales.*

Actual and potential harm:

43. *To assist in determining the starting point for the penalty, ORR have assessed the level of harm/potential harm, particularly the harm caused to passengers of GTR's Thameslink and Great Northern services caused by the failure to provide appropriate, accurate and timely information.*
44. *In relation to passenger information, it is difficult to quantify the actual and potential harm caused, although we have some evidence relating to key industry data, GTR social media engagement and passenger research carried out at the time of the issues.*
45. *In this particular case, issues with the provision of information, while serious, do not appear to be 'systemic' nature and affected passengers relying on GTR services primarily during an 8-week disruption period.*
46. *ORR further recognises that ineffective passenger information was not the only cause of harm as passengers were already suffering disruption to services because of the timetabling problems. In effect, even if passenger information had been 'perfect' passengers would still have suffered harm due to the wider disruption to services. ORR considers that GTR's passenger information failings exacerbated the level of harm felt by passengers during this period as inaccurate or late changes to timetables further undermined their ability to plan and make journeys.*

47. *The impact of the passenger information issues predominantly affected GTR's Thameslink and Great Northern service routes and GTR stated in its letter of 13 February 2019 to ORR that:*
- a) *at the time of the May 2018 timetable implementation, it carried on average 1.06m passengers per weekday including in excess of 474,000 passengers per weekday on its Thameslink and Great Northern services and there were 982 front line staff on the Thameslink and Great Northern services;*
 - b) *Southern and Gatwick Express services did not suffer to the same extent from the late validation of the timetable issues and the operational and passenger information systems were therefore fully uploaded and correct for the implementation of the May 2018 timetable. As a result, passengers travelling on those services, which at the time made up over 63% of the GTR operation, were not as significantly affected as the passenger information was held and displayed correctly within the industry information systems.*
48. *ORR also considered the following impacts felt by passengers from the overall disruption: financial; stress and inconvenience; employment; social; personal safety; trust in the railway (and changing travel behaviour); and the impact of the disruption on disabled passengers¹⁶. It is not possible to assess the extent to which these impacts can be directly attributed to the failure to provide adequate information, however it is clear that inadequate information will have exacerbated the impacts of the service issues.*

Culpability:

49. *ORR's policy is to consider culpability including whether GTR acted negligently, recklessly, knowingly or intentionally.*
50. *ORR consider that GTR has some culpability in relation to the provision of passenger information post 20 May timetable until its interim timetable was introduced on 15 July.*
51. *We do not think that GTR benefited financially from the breach and we have no evidence that it cut corners to save money. In fact, ORR are aware GTR increased its staffing to manage the problems and the cost to GTR could be significant both reputationally, as well as financially.*
52. *Overall, ORR considers that GTR's behaviour was not knowing or intentional but was instead towards the negligent end of the spectrum. Its focus on capacity of services during disruption was, we consider, made with the best intentions, but we take the view that much of its positive work to stabilise service levels and manage these issues post 20 May 2018 did not flow effectively through to adequate passenger information outcomes.*
53. *However, as time progressed and the extent of the information failures impacting passengers was repeatedly communicated to senior management, we have no evidence to demonstrate a timely or proportionate level of reaction or enhanced response to recognise and then improve the situation. In this respect, we consider that there was initially negligence but then latterly a level of knowing*

¹⁶ These impacts are set out in more detail in chapter 2 of ORR's Investigation Report.

acceptance of the problem until the interim timetable was introduced on 15 July (Phase 3 of the Service Recovery Plan).

Co-operation with ORR during the investigation:

54. ORR considers that GTR's co-operation with the investigation is what we would expect and therefore it does not alter our perception of the level of seriousness.

Level of seriousness:

55. ORR considered that the relevant levels of seriousness drawn from ORR's penalties statement were:

- a. *Less serious – this level would be appropriate in circumstances where a relatively small amount of harm was caused or was caused only to a small geographical area.*
- b. *Moderately serious – this level is more appropriate in circumstances where there were more serious implications and more serious actual or potential harm to third parties.*
- c. *Serious – this level is appropriate where there is evidence of systemic failings that results in serious harm or potential harm to third parties.*

56. ORR does not consider that the contravention should be regarded as less serious because of the wide areas covered by the Thameslink and Great Northern routes, the large number of passengers affected over an 8 week period and the fact that, whilst the provision of information was not the only cause of harm, it exacerbated it to a significant degree. ORR also does not consider the contravention should be regarded as serious since ORR does not consider the failings to be systemic in nature.

57. Having considered the factors above, ORR has decided that this contravention therefore falls into the moderately serious level in our penalties statement, which suggests a starting point in the range up to £10m.

58. Taking all potentially relevant factors into account, we have decided that the significant actual (and potential) harm caused to passengers from the failure to provide adequate information, taken together with GTR's culpability, puts the starting point in the middle of this range. ORR has therefore decided that the starting point should be £5m.

Mitigating and aggravating factors

59. ORR's penalties statement also states that we will adjust the starting penalty up or down to take account of relevant mitigating and aggravating factors, according to the particular facts and circumstances of each case.

60. ORR's penalties statement sets out a number of mitigating and aggravating factors which it may consider. From this list, ORR has identified the following mitigating factors that apply to GTR:

- a. *Steps taken to minimise the risk of the breach recurring:- GTR has taken some steps to improve communications and passenger information for future timetable introductions and more generally (see paragraph 34);*

- b. Repeated or continuing infringement of this or other obligations:- no formal licence action has previously been taken against GTR to date; and*
 - c. Co-operation with ORR's investigation:- we consider that GTR has co-operated with our investigation and have been generally open and forthcoming with their responses.*
61. ORR has also identified the following aggravating factors that apply to GTR:
- a. Steps taken to rectify the breach, including whether these were initiated proactively by the licence holder or in response to ORR's actions & the extent of involvement of directors of senior management in the action or inaction which caused the breach or their lack of appropriate involvement in action to remedy the breach:- during the 8 weeks of disruption, the scale of information failures became more apparent to senior management. However, despite this awareness we have not seen sufficient evidence that GTR took subsequent steps to address the level of inadequate information to passengers;*
62. ORR has noted that to date we have also not received any separate offers of reparations for consideration under our economic enforcement policy.
63. ORR considers that the mitigating and aggravating factors balance each other out and therefore proposes that the penalty should be set at £5m.”

Representations

20. In accordance with s.57C(1)(e) ORR specified in the Proposed Penalty Notice the period within which representations or objections with respect to the proposed penalty should be made, namely by 5 April 2019.
21. ORR received two responses during the specified period, neither of which were withdrawn.

Transport Focus¹⁷

22. Transport Focus responded to the Proposed Penalty Notice via letter dated 1 April 2019. It welcomed ORR's decision that GTR failed to provide appropriate, accurate and timely information to passengers after the 20 May 2018 timetable change.
23. However, Transport Focus considers that whilst the proposed £5m penalty sends a message to GTR and the industry, it will not directly benefit those passengers who suffered. They consider that it would be better to reinvest the money in order to benefit the affected passengers and therefore they had contacted GTR urging them to consider making an offer of reparations with a focus on improving passenger information and making journey planning easier. Transport Focus encouraged ORR to consider any such offer of reparations, should one be made by GTR.

¹⁷ Transport Focus' letter is provided at Annex B to this Notice

ORR response

24. ORR's states in its Penalties Statement that it encourages licence holders to offer reparations to be considered as part of its enforcement process, if a licence holder has acknowledged its failings. ORR would expect any offer of reparations to be submitted along with a detailed plan so that it is clear what is being offered, or what has already been done. ORR would then determine if the reparation is genuinely additional, appropriately targeted and proportionate, deliverable and provides value for money.
25. However, ORR has not received any offer of reparations from GTR. Further, as recorded elsewhere in this Notice, GTR has not acknowledged its failings. Transport Focus' submissions are therefore inapplicable.

GTR¹⁸

26. GTR responded to the Proposed Penalty Notice via letter dated 5 April 2019 and made a number of substantive representations, in relation to both the Contravention Decision and the proposed penalty.

Summary of GTR's representations

27. In summary GTR consider that ORR has:
- a. failed to take all relevant circumstances into account when formulating the remit of its investigation; and
 - b. failed to give other relevant circumstances due and proper weight in arriving at its findings.
28. GTR submit that if all relevant circumstances are considered ORR should not have found it to be in contravention of condition 4 following the implementation of the 20 May 2018 timetable.
29. In relation to the proposed penalty, GTR also submit that without prejudice to its representations on the Contravention Decision:
- a. no penalty should be imposed upon them in respect of any contravention found by ORR; alternatively
 - b. the proposed penalty is in any event disproportionate and not reasonable in light of the factors highlighted in its representations.

Contravention Decision:

30. GTR submit that ORR wrongly failed to take account the reasons for the disruption that occurred following 20 May 2018. It also submits that, both at the time when ORR commenced its investigation and in its "case to answer" letter dated 29 January 2019, ORR failed to mention that it would disregard the circumstances that led to the disruption and GTR's decision not to implement an emergency timetable, both of which are in GTR's view material and highly relevant

¹⁸ GTR's letter of representations and supporting material is provided at Annex C to this Notice

considerations. Accordingly, GTR submits, ORR has failed to take into account all relevant circumstances and has therefore failed to apply condition 4 correctly.

31. GTR points to “*significant failings*” by Network Rail in terms of its timetable offer to GTR, leading to very late finalization of the new timetable, with a knock-on impact on GTR, resulting in the delays and cancellation of services experienced in the period following the timetable change, the volume of which only became apparent at a very late stage in the process. Such delay had a damaging effect on GTR’s ability to finalise its resourcing plans and on the time available to GTR to match the skills and route knowledge of its crew with the requirements of the timetable and associated operating plans.
32. GTR submit that its ability to provide accurate and timely information to passengers cannot be considered in isolation from what ORR refers to as GTR’s decision not to implement an emergency timetable. GTR emphasises that emergency timetables are only suitable for very short-term disruption, and the 8-week period of disruption could not have been adequately addressed by an emergency timetable.
33. GTR contends that its best option was to stabilise services whilst planning to introduce a more robust and sustainable timetable on 15 July 2019, which passengers could rely on. GTR submit that it was not possible to introduce the interim timetable any sooner, had it done so then it would have resulted in a severely limited service that would not be acceptable for a commuter operator. GTR submit that ORR should have taken into account its inability to implement an emergency timetable.
34. In relation to ORR’s specific findings of failings, GTR submits as follows:
 - a. As to the finding that operational decision-making was not supported by passenger information that was sufficiently aligned to service recovery, GTR submits that ORR has failed to give due and proper consideration to the particular characteristics of its franchise. GTR’s status as a commuter operator means that its priority was necessarily to enable as many passengers as possible to undertake their journeys. The value provided by every additional train it was able to run was not significantly diminished by an inability to provide passengers with the level of advance information that it would provide in ordinary circumstances. GTR do not accept that there was a lack of alignment between its service recovery and passenger information operations. GTR’s operational and information teams are both located in the Three Bridges Rail Operating Centre, and information was being updated manually as the operational decisions were being made.
 - b. As to the finding that GTR failed to clearly communicate known cancellations in a timely manner, undermining the ability of prospective passengers to plan ahead and make informed journey decisions, GTR reiterate that it would not have been appropriate to publish the ‘Alpha list’ in its operational form as it did not contain details of the intermediate stops. The information in the Alpha lists was made available via journey planners

from 11 June 2018. GTR further submit that they took the best approach, which was to produce accurate revised timetables for passengers and to disseminate the information once it was stable.

- c. As to the finding that operational decisions taken and implemented to support the recovery process did not take account of the need to provide passengers with appropriate, accurate and timely information to an acceptable extent and within an appropriate time period, GTR submit that the exceptional circumstances of the disruption were such that GTR was receiving information on an hour-by-hour basis, which restricted its ability to provide greater advance notice of 'Beta list' cancellations to passengers, hence its advice to passengers to keep checking journey planners and speak to station staff prior to their planned journey.

ORR response:

35. ORR has carefully considered GTR's representations, but for the following reasons does not consider that they call into question the soundness of the Contravention Decision.
36. First, both the terms of reference for the investigation and ORR's case to answer letter clearly explain that the scope of ORR's investigation was to investigate GTR's provision of information prior to the implementation of the 20 May 2018 timetable and during the subsequent disruption.
37. Contrary to GTR's submissions, ORR did take account of the exceptional circumstances that GTR faced following the implementation of the 20 May 2018 timetable. As can be seen from paragraphs 25 to 27 of the Proposed Penalty Notice, ORR explicitly acknowledged the exceptional circumstances facing GTR at the time, which meant that providing perfect advance information was from the outset an impossible task and that there would inevitably be a period of reactivity on GTR's part as both the scale and severity of the disruption emerged. However, ORR maintains the view that as time progressed the provision of information should have improved.
38. ORR reiterates that it does not criticise GTR for its decision not to implement an emergency timetable. As stated at paragraph 4.6 of the Investigation Report, *"Condition 4 of the Passenger Train Licence and the Statement of National Regulatory Provision (SNRP) is not intended to undermine the primary objective of providing the best available service for passengers. For that reason we have not sought to question GTR's decision in this area."* ORR have also not criticised GTR, or questioned its reasons, for implementing its interim timetable on 15 July. The relevant inquiry, however, is whether, having made those decisions, GTR's provision of information over the 8-week period between 20 May and 15 July 2018 complied with condition 4. ORR's conclusion was that it did not.
39. To the extent that GTR contends that its duty under condition 4 is modified on account of its operating predominantly commuter services to and from London, ORR disagrees. First, not all passengers are commuters, and of those who are

commuters not all of them commute to and from London. Secondly, it should be noted that GTR run timetabled services rather than high-frequency, high-capacity services such as the London Underground. As such, GTR's passengers are entitled to proper information as to the status of such services for the purposes of both planning and making journeys, in the same way as passengers on routes served by other train operators.

40. ORR next addresses GTR's criticisms of ORR's specific findings of failings in relation to the provision of information.
41. ORR maintains the view that GTR's operational decision-making was not supported by passenger information that was sufficiently aligned to service recovery. As the final investigation report explained at paragraph 4.18, *"too often there was a failure in operational decision-making to give adequate regard to the fact that running a train service (or rail replacement bus) is only helpful to passengers if they know when and where the service will arrive, where it is going and how long the journey will take. Moreover, the persistence of these information failures over such a sustained period of time, coupled with the lack of evidence as to the company developing any timely or proportionate response to these issues, lead us to conclude there had been a fundamental problem at both a strategic and functional level in aligning operational recovery with passenger information obligations"*. It is irrelevant that, as GTR states, the operations and information teams are located in the same physical space.
42. ORR also maintains its conclusions in respect of the 'Alpha list'. ORR disagrees with GTR's view that it would have been inappropriate to publish that list in its operational form because it did not contain details of the intermediate stops. ORR notes in this regard that it is standard industry practice to publish information about disrupted services by referring solely to their time, origin and destination.¹⁹
43. Further, whilst it is true that journey planners were updated as of 11 June 2018, GTR did not make clear to passengers until 25 June 2018 which services had been cancelled altogether until further notice and which were just one off cancellations. As noted at paragraph 4.22 of the Investigation Report, whilst the timetables for weekday services were uploaded to journey planners on the Sunday evening, the times for more than a week ahead still showed the full Monday-to-Friday timetable as expected to be introduced in May 2018.
44. Finally, ORR maintains the view that the day-to-day amendments made by GTR led to unacceptable passenger outcomes, as found at paragraphs 4.75 to 4.79 of the Investigation Report. GTR persevered with a process of making overnight and

¹⁹ See e.g. Southern's website on 9 April 2019:

Planned engineering work for Today

Amended 23:16 London Victoria to Worthing service on Monday 8, Tuesday 9 and Thursday 11 April

Amended evening trains in the London Victoria / Clapham Junction area from Monday 8 to Thursday 11 April

Amended 22:46 London Victoria to Hastings service from Monday 8 to Wednesday 10 April

very late notice changes until the introduction of an interim timetable on 15 July, despite the impact that this had on the provision of passenger information for a prolonged period²⁰. ORR does not accept that GTR has provided sufficient reason to justify the extremely late provision of information over a sustained period of time, including in some cases after a service was due to have departed, and more generally the numerous instances of information inadequacies experienced by passengers.

45. In conclusion, therefore, ORR does not consider it appropriate to alter or withdraw its decision that GTR contravened condition 4 of its SNRP.

Decision to impose a penalty:

46. In response to the Proposed Penalty Notice, GTR first makes submissions on whether ORR should impose any penalty at all.

47. GTR submits that ORR acted inconsistently with the Penalties Statement by failing to *“take full account of the particular facts and circumstances of the contravention”*. GTR submit that, when placed in the proper context of the exceptional circumstances of the 20 May 2018 timetable change, any contravention should not be met with a penalty.

48. GTR states that ORR has not found any current breach of Condition 4 and has acknowledged steps taken by GTR to guard against the same situation reoccurring. GTR submit that it is accordingly neither necessary nor appropriate to impose a penalty based on seeking to change or incentivise its future behaviour, and it is unjustifiable to impose a penalty as a deterrent to other operators.

49. In relation to the factors justifying the imposition of a penalty as set out at paragraph 39 of the Proposed Penalty Notice, GTR make the following representations:

- a. It has paid out over £17.7m under its additional passenger compensation scheme, over £2.5m under the delay repay scheme over and above the normal run rate, and almost £30k in enhanced compensation for the period 20 May to 14 July;
- b. The delivery of accurate and timely information to passengers was, and continues to be, one of its key priorities. The various steps taken to improve its passenger information as set out in paragraph 34 of the Proposed Penalty Notice demonstrate that it has undertaken significant lessons learnt exercises; and
- c. It is not correct to say that it has not acknowledged responsibility for the provision of inadequate information to passengers. GTR acknowledges responsibility for its passenger information not reaching the standards it would ordinarily meet, and has apologised for the unacceptable levels of disruption suffered by passengers, both publically and in submissions to ORR.

²⁰ See paragraph 4.76 of the Investigation Report

50. GTR further submit that the imposition of a penalty would be inconsistent with the penalty principles set out in the Macrory Report.²¹ GTR submit that as ORR have not found them to be in current breach, it is not appropriate to impose a penalty partially or wholly on the basis of seeking to change its future behaviour and/or deter future non-compliance. GTR also point to the fact that they have already suffered reputational damage and additional costs as a result of the 20 May 2018 timetable change.
51. GTR contends that ORR have not appropriately factored in the financial repercussions already felt by GTR. In particular, GTR draws attention to the £15m passenger benefits fund that GTR has made available pursuant to agreement reached in November 2018 with the Department for Transport (the Passenger Benefits Fund). GTR submits that ORR is wrong to consider that the Passenger Benefits Fund does not address the harm caused by its failings to provide adequate information to passengers. GTR submit that its agreement with the DfT did address the failure to provide adequate information to passengers.
52. GTR also submit that a decision to impose a financial penalty is not compliant with the five principles of good regulation:
- a. **Proportionality:** ORR's finding that there is no current breach, and the significant costs and investment incurred by GTR, demonstrate that it is not necessary or proportionate to effectively re-penalise it;
 - b. **Accountability/transparency:** in light of GTR's submissions regarding ORR's remit of its investigation, imposing a penalty would not serve the interests of accountability or transparency;
 - c. **Consistency:** ORR has not been completely consistent in its approach to its investigation into Northern's compliance with Condition 4 compared to its investigation into GTR. Further, no penalty has been imposed on Network Rail despite it being in breach of conditions 1.23 and 2.7 of its licence, on the basis that it would not be appropriate as it would not further incentivise compliance; and
 - d. **Targeting:** in failing to properly consider the wider May 2018 context, ORR has necessarily been unable to accurately quantify the level of harm suffered by passengers that is attributable to any passenger failings by GTR; therefore any penalty is insufficiently targeted at the specific issue of passenger information.

ORR response:

53. ORR has carefully considered the points advanced by GTR but remains of the view that the imposition of a penalty is justified and proportionate, in accordance with the Macrory principles.
54. As noted at paragraph 121 of the Penalties Statement, ORR's primary objective in setting a penalty is to change the future behaviour of an offender and to deter non-

²¹ *Regulatory Justice: Making Sanctions Effective* (November 2006).

compliance with its obligations (both specifically and in general); ORR also aims to incentivise others subject to similar obligations to comply with them.

55. The fact that GTR is not currently in breach of condition 4 does not make a penalty inappropriate in this case. ORR considers that imposing a penalty would provide a transparent signal to the industry in respect of GTR's (and other TOCs') role and responsibilities in relation to passenger information, and would serve to deter both GTR and others subject to similar SNRP conditions from breaching them in future. Moreover, whilst there is no finding that GTR is currently in breach of condition 4, the fact remains that GTR has not accepted responsibility for the information failures experienced by passengers (indeed, it has consistently denied contravening the condition).
56. Further, as already explained above, the circumstances facing GTR at the time do not excuse its failings; nor do they not justify the non-imposition of a penalty.
57. ORR is confident that there has been no inconsistency of treatment between GTR and Northern: there were clear differences in the respective TOCs' provision of information to passengers during the disruption, as detailed in the respective decision letters and investigation reports.²² Further, ORR considers that drawing parallels with Network Rail in this context is inappropriate. The circumstances of the two companies are not the same, and ORR notes that Network Rail's licence breaches resulted in ORR making an enforcement order requiring Network Rail to undertake a number of actions, including reporting to ORR, which were designed to ensure that such breaches would be remedied. The same does not apply to GTR.
58. With regard to the GTR's reliance on the compensation it has paid and the Passenger Benefit Fund, ORR considers that neither amounts to an "*offer of reparations*", per paragraph 122 of the Penalties Statement. The compensation payments relate to the (persistent) delays suffered by passengers, rather than the additional impact felt by them as a result of the information failings identified by ORR.²³ As for the Passenger Benefits Fund, ORR notes that it has not been provided with a copy of the agreement between GTR and DfT pursuant to which the fund was set up or any clear explanation of its purpose and scope. A letter from DfT in December 2018 stated that the Passenger Benefits Fund was a means of holding GTR to account for their role in the unacceptable performance following the 20 May 2018 timetable change. ORR notes that DfT has responsibility for holding TOCs to account in their performance of their franchise obligations, and that GTR's wider failings in relation to the timetable change will have fallen within the purview of its franchise agreement. Unsurprisingly, the DfT's letter did

²² The decision letter and investigation report in respect of Northern are available at <https://orr.gov.uk/rail/investigations-and-current-issues/investigation-into-gtr-and-northern-trains-provision-of-information-to-passengers-during-and-after-the-may-2018-timetable-disruption>.

²³ In its letter to ORR dated 24 July 2018 in relation to the Inquiry, GTR provided a screenshot confirming that "*if there are persistent delays on a route, season ticket holders are also sometimes entitled to enhanced compensation.*"

not suggest that the Passenger Benefits Fund covered failings related to GTR's SNRP, which are ORR's responsibility to investigate.

59. On 20 February 2019, DfT further provided the following additional explanation:

“On the level of the fund I suspect all we could say is that we took all the facts and circumstances into account including the level of the previous payment made by GTR in relation to the 2016 problems on Southern, the desire to create a fund which could provide meaningful benefits for passengers and the financial position of the TOC: pointing out that with the fund set at this level GTR will make no profit at all this year in recognition of their role in the disruption.”

60. This further explanation does not alter ORR's analysis at paragraph 58 above.

61. ORR further notes that the Passenger Benefits Fund relates to GTR's performance delivery to Thameslink, Great Northern and Southern, and that all these routes will receive benefits under the fund, whereas ORR's breach findings relate to the first two routes only. Again, this is consistent with the DfT's own remit in respect of TOCs' franchise obligations.

62. ORR have become aware of a new website that has been set up in recent weeks in relation to the Passenger Benefits Fund²⁴ which sets out how the funding will be allocated to the stations affected and how passengers can propose local or wider passenger benefit schemes. Under “*wider passenger benefit schemes*”, the site suggests some examples of possible schemes that would lead to passenger information improvements.

63. ORR recognises that the operation of the fund could result in some improvement to the provision of passenger information at specific stations (e.g. an additional CIS screen,) but only if a significant proportion of passengers support such an improvement. Further, it is not sufficiently clear whether the fund will go towards making passenger information improvements for it to have any, or any significant, weight in the penalty assessment. Finally, it is in any event highly doubtful whether any such forward-looking information improvements as may be brought about by the fund would constitute “*reparations*” to those who were affected by the breach of condition 4.

Penalty amount

64. GTR further submit that, in any event, a penalty amount of £5 million is excessive and not reasonable in the circumstances.

65. It disagrees with the proposed starting point of £5 million for the following reasons:

- a. ORR has attributed too much of the harm suffered by passengers to the matters identified by it as GTR's passenger information failings and therefore the level of penalty imposed is disproportionate to the level of harm directly attributable to issues with passenger information;

²⁴ <https://www.passengerbenefitfund.co.uk/>

- b. the alleged contravention is a past breach, it was not a systemic breach, and the effects were largely limited to an 8 week period;
 - c. ORR has acknowledged that the contravention did not extend to the majority of GTR's passengers on its Southern and Gatwick Express services;
 - d. ORR has failed to take into account GTR's status as a commuter operator, which makes a focus on capacity absolutely essential and therefore the contravention cannot be characterised as being towards the negligent end of the spectrum. GTR further denies that at any point was there a level of knowing acceptance of the problem; and
 - e. ORR raises no issues with GTR's cooperation with the investigation.
66. GTR agrees with the mitigating factors set out in paragraph 60 of the Proposed Penalty Notice; however, it considers that greater weight should be given to these factors. It considers that the following additional factors are also relevant:
- a. the primary mitigating factor is the wider context of the 20 May 2018 timetable change and therefore GTR's contravention cannot be accurately addressed without a consideration of the context in which it was operating; and
 - b. the remedial measures GTR took (resulting in a finding of no current contravention) and the interim timetable it implemented demonstrate that it proactively took steps to rectify any failings and minimise the chances of the failings re-occurring.
67. GTR disagrees with the aggravating factor set out in paragraph 61 of the Proposed Penalty Notice, submitting that its senior managers were involved in the development and implementation of responses to issues through gold command control calls five times a day, daily "exec calls" chaired by GTR's Chief Operating Officer, and "war room meetings" every 48 hours. GTR submits that its service recovery plan had at its heart a recognition of the importance of passenger information, and reflected the fact that GTR would not have reliable information to give to passengers until a certain level of service stability had been achieved.
68. GTR therefore submit that the relevant mitigating factors significantly outweigh any aggravating factors, and the level of penalty should be reduced to reflect this.

ORR response

69. ORR has carefully considered GTR's representations on the amount of the proposed penalty, but remains of the view that a penalty of £5 million is appropriate in this case, for the following reasons:
70. First, the Penalties Statement points out at paragraph 129 that in setting a penalty the starting point will normally be the seriousness of the breach. In considering seriousness, ORR will look at the actual and potential harm caused to third parties, the culpability of the offender and the extent of its cooperation with ORR during the investigation. Those factors were all addressed in the Proposed Penalty Notice. At paragraph 130 of the Penalties Statement, ORR distinguishes five levels of

seriousness. ORR notes that GTR has not expressly disputed ORR's provisional decision, by reference to the Penalties Statement, that the contravention is a "*moderately serious*" breach, justifying a penalty of up to £10 million; nor does it argue that another level is more appropriate.

71. ORR maintains its view that the breach here falls into the "*moderately serious*" bracket:
 - a. This is not a case where third parties suffered only a relatively small amount of harm: to the contrary, GTR's information failings, on two important routes, compounded the adverse impact already felt by passengers as a result of the May 2018 disruption, as explained in the Proposed Penalty Notice and in chapter 2 of the Investigation Report. The fact that the contravention did not extend to Southern and Gatwick Express services does not make the breach "*less serious*", in ORR's view.
 - b. ORR maintains the view that GTR's behaviour was towards the negligent end of the spectrum. GTR's emphasis on its status as a commuter operator is misplaced: as explained above, the fact that GTR carries many commuters does not dilute its duty to provide appropriate information to passengers. ORR maintains the points it made at paragraphs 52 and 53 of the Proposed Penalty Notice.
72. ORR therefore maintains that it is justified in choosing a starting point in the middle of the range indicated in the Penalties Statement, namely £5 million.
73. As for mitigating factors, ORR acknowledges the context of the 20 May 2018 timetable change, but does not consider that this represents an additional mitigating factor. As set out in this Notice, ORR's investigation required focus on the circumstances in which GTR found itself and how it then provided information to passengers, and not the underlying cause of the timetable failure. Even taking the circumstances into account, the scale and extent of the information failure was substantial.
74. The calculation of the proposed penalty acknowledged both the improvement in performance following the introduction of the interim timetable and the steps GTR had taken to improve communications and passenger information in future (see paragraphs 34 and 60 of the Proposed Penalty Notice). However, set against that is the aggravating factor that ORR identified, namely that senior staff were aware of the scale and extent of information failures that were occurring (a point that is merely reinforced by GTR's representations), yet any steps that were taken to improve information provision to passengers were ineffective and remained largely ineffective for the 8-week period that followed the 20 May 2018 timetable change.
75. The question of what adjustment, if any, should be made to the starting point is a matter of judgement, as paragraph 136 of the Penalties Statement notes. ORR's judgement is that the mitigating and aggravating factors balance each other out, such that no adjustment to the starting point is warranted in this case. For that reason, the appropriate penalty is £5 million.

Conclusion

76. ORR has carefully considered the representations received from Transport Focus and GTR. Having regard to its duties in Section 4 of the Act and the guidance contained in the Penalties Statement, and for the reasons set out above, ORR has decided that it should impose a penalty of £5 million in respect of GTR's contravention of condition 4 as described in this Notice.



John Larkinson
Chief Executive
Office of Rail and Road

Condition 4: Information for Passengers

Purpose

1. The purpose is to secure the provision of appropriate, accurate and timely information to enable railway passengers and prospective passengers to plan and make their journeys with a reasonable degree of assurance, including when there is disruption.

General duty

2. The SNRP holder shall achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances, including the funding available.

Specific obligations

3. The following obligations in this condition are without prejudice to the generality of the general duty in paragraph 2 and compliance with these obligations shall not be regarded as exhausting that general duty. In fulfilling these obligations the SNRP holder shall at all times comply with the general duty in paragraph 2.

Planning services

4. The SNRP holder shall cooperate, as necessary, with Network Rail and other train operators to enable Network Rail to undertake appropriate planning of train services and to establish or change appropriate timetables, including when there is disruption.

5. In particular, the SNRP holder shall:

- (a) provide Network Rail with such information about the SNRP holder's licensed activities as may be reasonably necessary for Network Rail to fulfil its obligations relating to timetabling in its network licence;
- (b) participate constructively in any timetabling consultation carried out by Network Rail;
- (c) use reasonable endeavours to resolve promptly any timetabling disputes; and
- (d) respond expeditiously to any timetabling matter which Network Rail reasonably considers to be urgent.

Code(s) of practice and improvement plan(s)

6. The SNRP holder shall, unless ORR otherwise consents, publish one or more code(s) of practice or other documents setting out the principles and processes by which it will comply with the general duty in paragraph 2.

7. Where the SNRP holder considers, or is directed by ORR, that improvements to its arrangements for the provision of information to railway passengers and prospective passengers are necessary or desirable to enable it better to fulfil the general duty in paragraph 2, it shall develop, publish and deliver a plan, which sets out the improvements it intends to make and the dates by which such improvements will be made.

8. The SNRP holder shall, from time to time and when so directed by ORR, review and, if necessary, revise, following consultation, anything published under paragraph 6 and any plan under paragraph 7 so that they may better fulfil the general duty in paragraph 2.

9. ORR shall not make any direction under paragraphs 7 or 8 without first consulting the SNRP holder.

Provision of information to intermediaries

10. The SNRP holder shall as soon as reasonably practicable:

(a) provide to the holders of passenger and station licences; and

(b) provide to all timetable information providers on request reasonable access to appropriate, accurate and timely information to enable each on request to provide passengers with all relevant information to plan their journeys including, so far as reasonably practicable, the fare or fares and any restrictions applicable.

11. In this condition:

“Network Rail” means Network Rail Infrastructure Limited (a company registered in England and Wales under number 02904587), and its successors and assigns.

Annex B – Transport Focus letter to ORR of 1 April 2019

Stephanie Tobyn
Deputy Director, Railway Markets and Economics
ORR

By Email

1 April 2019

Dear Stephanie

I am writing in relation to the potential £5m fine announced by ORR for Govia Thameslink Railway (GTR) over its failure to provide appropriate, accurate and timely information during the introduction of the new timetable last summer.

Our evidence to the Glaister inquiry clearly sets out the impact that poor information provision had on passengers during the 'timetable crisis'. So we welcomed your announcement and hope it will be a wake-up call to train companies that accurate passenger information really matters.

We are very mindful, however, that it was passengers who felt the pain during this period. So while a £5m fine sends a message to GTR and the industry it will not directly benefit those passengers who suffered. We believe that the money from this fine would be better reinvested to benefit those passengers.

We are aware that the regulatory process ultimately results in fines being passed back to the Treasury but that there is provision for GTR to offer 'reparations' in mitigation of any such fine. We have contacted GTR urging that they consider making such an offer, with the focus on improving passenger information and making journey planning easier. Clearly this would need to be over and above existing commitments and be capable of being measured/monitored

Assuming an offer is put forward we would urge ORR to consider it. This would still send a clear message to train companies about the importance of passenger information while at the same time ensuring that some of those who suffered from the licence breach benefit from the penalty.

Yours sincerely

Mike Hewitson
Head of Policy

Annex C – GTR letter of 5 April 2019 and appended documents to ORR



5 April 2019

Stephanie Toby
Deputy Director, Railway Markets and Economics
Office of Rail and Road
One Kemble Street
London
WC2B 4AN

By post and email

Dear Stephanie

Re: Penalty Notice dated 14 March 2019 in accordance with Section 57C of The Railways Act 1993 (Penalty Notice)

1. We refer to ORR's investigation report published on 14 March 2019 (**Report**), the Penalty Notice and John Larkinson's letter to Patrick Verwer dated 14 March 2019. We are writing in response to ORR's findings in the Report that Govia Thameslink Railway Limited (**GTR**) breached Condition 4 of its GB Statement of National Regulatory Provisions: Passenger (**SNRP**) in respect of the provision of appropriate, accurate and timely information to passengers following the implementation of the 20 May 2018 timetable and during the subsequent disruption, and its proposal to impose a £5m financial penalty on GTR.

Executive summary

2. We welcome ORR's finding that GTR complied with Condition 4 in the period prior to 20 May. This demonstrates that we take the provision of passenger information seriously and operate effectively in that regard both in ordinary circumstances and in circumstances of "business as usual" disruption.
3. The disruption which followed the implementation of the May 2018 timetable was truly exceptional in nature (as recognised by ORR at pages 5 and 60 of the Report) and directly and materially impacted on GTR's ability to provide adequate passenger information. We do not believe that ORR's finding that GTR breached Condition 4 in the period following the implementation of the May 2018 timetable is correct and this letter sets out GTR's representations and objections in relation to ORR's findings and the proposed penalty.
4. Condition 4 of the SNRP provides that the SNRP holder shall:-

"...secure the provision of appropriate, accurate and timely information to enable railway passengers and prospective passengers to plan and make their journeys with a



reasonable degree of assurance, including when there is disruption...to the greatest extent reasonably practicable having regard to all relevant circumstances, including the funding available" (emphasis added).

5. As explained further below, GTR's position is that:-
 - a. ORR has: (1) failed to take all relevant circumstances into account when formulating the remit of its investigation; and (2) failed to give other relevant circumstances due and proper weight in arriving at its findings;
 - b. if all relevant circumstances are considered, GTR was not in breach of Condition 4 in the period following the implementation of the 20 May 2018 timetable; and
 - c. without prejudice to the preceding point, no penalty should be imposed upon GTR in respect of any breach found by ORR or, alternatively, the £5m financial penalty is in any event disproportionate and not reasonable in light of the factors highlighted below.

The remit of ORR's investigation

6. Paragraph 4.6 of the Report states that:-

"The remit of this investigation is to consider the provision of passenger information during the disruption that occurred in the period following 20 May irrespective of the reasons for that disruption or the decision not to implement an emergency timetable" (emphasis added).

7. When ORR informed GTR that it was commencing its investigation and described its remit there was no mention of disregarding the circumstances that led to the disruption that occurred after 20 May or the "*decision not to implement an emergency timetable*" (see the Annex to your letter dated 3 October 2018). Further, when the investigation had reached an advanced stage and you wrote to GTR with ORR's preliminary findings on 29 January 2019, that letter did not make clear that these two material and highly relevant considerations would not be taken into account.

The reasons for the disruption

8. In response to ORR's preliminary findings, we expressed concern in our letter dated 13 February 2019 that ORR had not given sufficient consideration to the factors that caused the severe disruption suffered following the introduction of the May 2018 timetable (see paragraph 6 of that letter). Specifically, we explained that to divorce the investigation into GTR's compliance with Condition 4 from the wider context of the May 2018 disruption is not only an artificial exercise but one which would inevitably, and did in fact, lead to GTR being judged against a flawed standard. As noted above, ORR is required to have regard to all relevant circumstances and it is submitted that the reasons for the May 2018 disruption – broadly, industry-wide failings in the implementation of a timetable change of unprecedented size and complexity, in respect of which Network Rail was best placed



to take action to avoid – are amongst some of the most relevant circumstances for ORR to consider and take into account.

9. ORR has now expressly confirmed that it has not considered the factors which led to the May 2018 disruption in producing the Report and imposing and setting the level of the financial penalty on GTR. This demonstrates that the concerns raised in our 13 February letter were well-founded, that ORR has not considered the exceptional circumstances of May 2018, and that ORR has failed to apply Condition 4 correctly.
10. In order that these factors can be considered now, we set out below an overview of the key issues, from GTR's perspective, that led to the May 2018 disruption. These have been covered in greater detail in our previous submissions and in the Glaister Report itself:-
 - a. There were significant failings by Network Rail which ultimately led to the timetable disruption. The primary cause of the difficulties experienced in May 2018 was that the timetable offer made to GTR by Network Rail in November 2017 was not fit for purpose. This took several months to rectify; the last of the material changes were not resolved until 9 April 2018 when the new timetable offer was received from Network Rail, three months after GTR submitted its bid. This delay in providing the final timetable was critical. It meant that there was insufficient time to optimise the train crew diagrams – the diagrams that were issued for scrutiny were necessarily "first draft" versions whereas normally these would have been iterated several times to improve their efficiency – and the inevitable outcome was a high proportion of poor quality diagrams and then imbalanced rosters, resulting in the delays and cancellation of services experienced in the period following the timetable change. The volume of the cancellations only became apparent at a very late stage in the process, and was magnified by the complexity of the changes being made once the timetable was actually implemented.
 - b. Staff consultation took place in a very compressed timescale preventing GTR from optimising solutions.
 - c. The delays to the finalisation of the timetable had a particularly damaging impact on GTR's ability to finalise its resourcing plans and on the time available to GTR to match the skills and route knowledge of its train crew with the requirements of the timetable and associated operating plans. That compressed the time available to carry out the necessary planning to ensure that sufficient route-trained drivers were in place. A process that usually takes 18 weeks was compressed into a 5 week period.

GTR's interim timetable

11. GTR's ability to provide accurate and timely information to passengers cannot be considered in isolation from what you refer to as our "*decision*" not to implement an emergency timetable. Clearly, if GTR had been able to introduce an emergency timetable, it would have been able to provide passengers with more accurate and timely



information sooner. However, as set out at paragraph 21 of our 13 February 2019 letter, emergency timetables are only suitable for very short term disruption and the 8-week period of disruption resulting from the May 2018 timetable change could not have been adequately addressed by an emergency timetable.

12. As set out in our 16 October 2018 letter "*...the better option was to stabilise services as best we could, whilst we planned to introduce a more robust and sustainable timetable on the 15 July, with optimised driver diagrams to ensure sufficient resources were available, and a timetable our passengers could rely on.*" The interim timetable introduced on 15 July was, in effect, an emergency timetable, but one that could provide the capacity that was needed, provide surety of consistent delivery and a timetable that could be communicated to passengers effectively. We were unable to create an immediate emergency timetable because of the time required to re-write the timetable and rolling stock and train crew diagrams that also needed to interface with Southern, Gatwick Express and other operators' timetables.
13. More fundamentally, even if some form of emergency timetable could have been introduced before 15 July, it would have resulted in a severely limited, unviable service. As we explained when we met on 24 October 2018, an emergency timetable would have involved running 70% of GTR's pre-May timetable services (transcript of 24 October 2018 meeting, page 19, lines 1-4) whereas, even on the worst days following 20 May, GTR ran roughly the same number of trains as we did prior to 20 May (page 19, lines 15-19); on most days we ran more. Demand would therefore have exceeded capacity to an unacceptable extent.
14. GTR's status as a commuter operator, the complexity of the railway services it provides, and the interfaces with other train operators across numerous Network Rail routes are significant and have not been given due consideration and weight by ORR. If they had been, ORR would have appreciated that, rather than "deciding" not to introduce an immediate emergency timetable, such an option was never available to GTR. As a commuter operator, GTR runs a high volume train service – approximately 3,500-4,000 trains are operated per day carrying 1.06 million passengers per weekday, many of whom are travelling to the same destinations on a regular/routine basis. This means that capacity is necessarily a key focus even in times of minimal disruption. The Report and ORR's own guidance states that Condition 4 "*is not intended to undermine the primary objective of providing the best available service for passengers*", but ORR has not applied this principle (see paragraphs 4.6 and 4.65 of the Report and paragraph 25 of *Information for passengers: Guidance on meeting the licence condition*). GTR's actions were governed by the need to provide as much capacity as possible and by the fact that the earlier introduction of an emergency timetable was not an option (since, amongst other reasons, it would have meant that tens of thousands of passengers would not have been able to travel). This could and should have been taken into account by ORR.
15. ORR has correctly recognised that the circumstances that arose following the introduction of the May 2018 timetable were exceptional (see, for example, paragraph 4.64 of the Report). On the bank holiday of 28 May 2018, once the extent of the problems had become clear, GTR's Chief Operating Officer called a crisis meeting in order to develop a recovery plan that would restore Thameslink and Great Northern back to a

good level of service (a recovery plan was not required for Southern/Gatwick Express because passengers of those services were, by comparison, less affected by the May 2018 disruption (as noted at paragraph 47(b) of the Penalty Notice)). At this meeting it was identified that drastic action was required to arrest the decline in service and, as you are aware (see paragraph 4.8 of the Report), a three-phase programme was formulated. Phase 2 ("Achieve Stability") commenced on 4 June and was aimed at learning lessons from the two weeks following the implementation of the new timetable and removing a consistent set of diagrams from the timetable. During that phase, GTR also planned for the implementation of an interim timetable. Phase 3 ("Deliver Consistent Service") began from the implementation of the interim timetable on 15 July.

16. As we informed you when we met on 24 October 2018:-

- a. Any emergency timetable would have to be for the duration of the timetable period (i.e. to December 2018) (see page 15, lines 15-16 of the transcript) because there is limited opportunity to change rolling stock and train crew diagrams other than at the industry timetable change dates. Furthermore, validation of the new emergency timetable was required by Network Rail, which was outside of the usual industry timescales.
- b. It would have only been possible to use the standard short term emergency timetable. Such timetables are not validated against other train operators' normal timetables but are designed to interface with other operators' emergency timetables. This is because the normal arrangements for the introduction of emergency timetables are generally as a result of incidents that restrict normal operation. If GTR had implemented these short term emergency timetables, this would have resulted in service clashes and disruption extended to other operators, such as LNER, East Midlands Trains and Southeastern. This would also have had a knock-on effect for the Southern and Gatwick timetables which were operating robustly at the time.
- c. The interim timetable that was introduced in July 2018 included approximately 70% of the increased capacity that we expected to put in place on peak services through the full implementation of the May 2018 timetable (page 22, line 24-26 of the transcript).
- d. It was not possible to introduce the interim timetable earlier than 15 July because of the constraints of the trade union agreements which allow adjustments (changes to diagrams, rosters and timetables) every 8 weeks. In ordinary circumstances, such changes are minor in nature, however, GTR took the opportunity afforded by the break in the roster cycle on 15 July to negotiate the interim timetable (which required major changes to diagrams, rosters and timetables). As a result, the viability and success of the interim timetable was heavily reliant upon cooperation and support from the unions, which GTR received. Given that the interim timetable would subsist until December 2018, it was important to ensure that it was done correctly and effectively at the first opportunity (pages 54-55 of the transcript).



- e. The aim of the interim timetable was to provide stability; to produce a service that we could run and communicate effectively to passengers.
17. The Report acknowledges that GTR's interim timetable:-
- a. resulted in an improvement in service reliability (paragraphs 2.4 and 4.3);
 - b. resulted in delay compensation claims returning to normal levels (paragraph 2.36); and
 - c. was preceded by a proactive communications campaign for passengers (paragraph 4.3).
18. Therefore, on the basis of the Report, the implementation of the interim timetable on 15 July was a positive and effective step, which produced a service that GTR was both able to run and able to communicate to passengers. The Report failed to recognise that the implementation of the interim timetable on 15 July introduced significant enhanced capacity, which would not have been the case if an emergency timetable had been introduced earlier. An emergency timetable would have delivered approximately 2,300 trains per day whereas, between 4 June and 13 July, we operated approximately 3,200 trains per day. The interim timetable introduced on 15 July 2018 resulted in the operation of 3,400 trains per day which, as stated above, amounted to approximately 70% of the planned additional capacity for May 2018. Therefore, an interim timetable could not have been implemented sooner without materially sacrificing capacity. GTR therefore considers that the implementation of the interim timetable represents a highly relevant factor – and one which it believes demonstrates its compliance with Condition 4.
19. We note that Northern's implementation of an interim timetable correctly formed a material element of ORR's decision that Northern complied with Condition 4 in the post-20 May period. Therefore, we cannot see any justification for failing to take due account of the implementation of GTR's interim timetable, which was introduced at the earliest opportunity.

ORR's findings - post-20 May

20. As stated in paragraphs 4.68-4.79 of the Report, ORR found failings in the following areas:-
- a. aligning service recovery with passenger information obligations;
 - b. provision of "Alpha list" and other journey information; and
 - c. day to day amendments.
21. For the reasons explained below, GTR considers that ORR has failed to give relevant considerations due and proper weight in arriving at these findings.

Aligning service recovery with passenger information obligations



22. As ORR has recognised in paragraph 25 of its guidance on complying with the licence condition (extracted at paragraph 1.12 of the Report):-

"The licence conditions are not intended to undermine the primary object of providing the best available service for passengers. Making justified changes to the train plan to meet passengers' needs should not be conditional on providing perfect advance information about these. However, we would expect licence holders to use reasonable endeavours to get such information out as widely as possible and as quickly as possible. We will take circumstances into account during any assessment of compliance".

23. Further, at paragraphs 4.64-4.66 of the Report, ORR notes that:-

"We consider that the exceptional circumstances that followed the introduction of the 20 May timetable meant that providing perfect advance information for all services was, from the outset, an impossible task. Evidence demonstrates that GTR's overriding focus throughout the period that followed 20 May was on providing as much capacity as it could to meet customer demand.

Our guidance to support compliance with condition 4 recognises that timetabling services and providing information to passengers are difficult, complex tasks. There is a balance to be struck between service delivery and the ability to provide appropriate, accurate and timely information for passengers during sustained periods of disruption. The licence condition is not intended to undermine the primary objective of providing the best available services for passengers.

We accept that the immediate response to the timetable change required a period of reactivity as both the scale and severity of the disruption emerged."

24. Despite these statements, the finding made by ORR (paragraphs 4.68-4.69) is that the efforts made and decisions taken by GTR to stabilise and improve service levels were not sufficiently "aligned" to its passenger information obligations. In short, GTR is said to have failed to give *"adequate regard to the fact that running a train service (or rail replacement bus) is only helpful to passengers if they know when and where the service will arrive, where it is going and how long the journey will take"*. In arriving at this finding, it is clear that ORR has again failed to give due and proper consideration to the particular characteristics of GTR's franchise.
25. As set out in paragraph 20 of our 13 February 2019 letter, and as explained again above, GTR is a commuter operator, which means that its priority during the May 2018 disruption was necessarily *"to enable as many of its passengers as possible to undertake their journeys"*. To put it another way, as noted at paragraph 4.64 of the Report, *"GTR's overriding focus throughout the period that followed 20 May was on providing as much capacity as it could to meet customer demand"*.
26. GTR's status as a commuter operator means that the value provided by every additional train it is able to run is not significantly diminished by an inability to provide passengers with the level of advance information that it would provide in ordinary circumstances.



Due to the high volume of passengers using GTR's services, if rolling stock and train crew became available at short notice, it was important to run the service even if it could only be accompanied by, for example, a station announcement to passengers, rather than more comprehensive advance information. This point was emphasised at the 24 October 2018 meeting and is relevant to ORR's criticism of the so-called "ghost trains" (see pages 43-44 of the transcript and paragraph 4.76 of the Report). Furthermore, these so-called "ghost trains" would then become available to form further timetabled services which otherwise would not have been provided and for which sufficient time was available to disseminate information to passengers about those services.

27. If GTR had limited the services it ran to those it was able to provide comprehensive advance information about, it would have resulted in a significant decrement in capacity, severe overcrowding and a completely unacceptable outcome with a poorer service for passengers.
28. GTR does not accept that there was a lack of alignment between its service recovery and passenger information operations. As set out in paragraph 14 of our 13 February 2019 letter, GTR's operational and information teams are both located in the Rail Operating Centre at Three Bridges, and the customer information teams were manually updating the passenger systems as the operational decisions were being made. Further, in our 16 October 2018 letter we set out various measures taken by GTR which were specifically targeted at improving the quality of the passenger information we were able to provide. Amongst many other things, this included increasing resources within the control, social media and customer contact centre teams, establishing the station thread to enable communication between the station and control teams, and acting upon the feedback generated by the station thread (such as by placing additional station stop orders on trains).
29. Whilst the exceptional circumstances of May 2018 made providing perfect advance information impossible (paragraph 25 of the Penalty Notice), it is not correct to say that this was exacerbated by a misalignment of GTR's respective teams.
30. In summary, the finding that "*running a train service (or rail replacement bus) is only helpful to passengers if they know when and where the service will arrive*" ignores the fact that announcements were made before these trains departed and, more fundamentally, would lead to a perverse scenario where an operator is penalised for running services that passengers would otherwise use if it is not possible to disseminate information about those services more widely. That cannot be correct, but it is the natural result of the ORR's determination.

Provision of "Alpha list" and other journey information

31. As noted at paragraph 4.70 of the Report, a key element of GTR's service recovery efforts was the use of selective cancellations of services on the Alpha list. However, ORR criticises GTR for failing to disseminate the Alpha list information to passengers sufficiently or quickly enough. In short, ORR's finding is that there was a "*failure to clearly communicate known cancellations in a timely manner*" (paragraph 4.73 of the Report).

32. GTR repeats the following points from its 13 February 2019 letter in relation to the Alpha list, which do not appear to have been taken into account:-
- a. It would not have been appropriate to publish the Alpha list in its operational form to passengers; that list did not contain details of the intermediate stops (see paragraph 18 of our 13 February 2019 letter).
 - b. The information in the Alpha list was made available to passengers via the journey planners from 11 June (see paragraph 19 of our 13 February 2019 letter and Appendix 5). The vast majority of GTR's passengers use live journey planners in preference to printed/PDF timetables, and GTR actively encouraged passengers to check the planners on a regular basis. For our passengers, it was essential that the journey planners were prioritised. It is therefore not correct to say that this information was "*not clearly communicated to passengers between 6 June and 25 June*" (paragraph 4.70 of the Report). The PDF timetables were made available on 25 June.
 - c. The best approach for passengers, and the approach taken by GTR, was to produce accurate revised timetables for passengers and disseminate the information once it was stable (see paragraph 18 of our 13 February 2019 letter).

Day to day amendments

33. The Report notes that GTR's Service Recovery Plan permitted the removal or cancellation of services on a day-by-day basis (the Beta list) which, ORR finds, "*led to very short notice changes to the timetable and a severe lack of certainty for passengers up until the point of travel*" (paragraphs 4.75 to 4.79 of the Report). The exceptional circumstances of the May 2018 disruption were such that GTR was receiving information on an hour-by-hour basis. This inherently restricted our ability to provide greater advance notice of cancellations to passengers, hence the guidance to passengers to keep checking journey planners and to speak to station staff prior to their planned journey. However, the primary means by which we were able to do so was as a result of the introduction of the interim timetable on 15 July. As noted above, it was not possible for that timetable to be introduced any sooner, and the introduction of an emergency timetable in the immediate aftermath of 20 May was not a viable alternative option.

The Penalty

34. GTR's position is that once all relevant circumstances are taken into account and given the appropriate weight, as outlined above, it should be found that GTR did not breach Condition 4 in the period following the implementation of the May 2018 timetable. Without prejudice to that point, it is submitted that if the finding that GTR has breached Condition 4 in that period is maintained, it is not appropriate to impose a financial penalty or, alternatively, the £5m financial penalty imposed is excessive and unreasonable.
35. It is submitted that in addition to the points made below, the points made above in relation to the question of breach are equally relevant to the question of the appropriateness of



imposing, and the amount of, a financial penalty. The points made above are therefore also relied upon here.

A penalty is not appropriate

36. As stated in paragraph 122 of ORR's economic enforcement policy and penalties statement dated November 2017 (**Penalties Statement**), in deciding whether a penalty is appropriate ORR "*shall take full account of the particular facts and circumstances of the contravention*".
37. GTR submits that, given that ORR has failed to take into account all relevant circumstances in arriving at its finding of breach (see, for example, the points made above regarding the wider May 2018 context, GTR's interim timetable and its status as a commuter operator), it follows that ORR has also failed to "*take full account of the particular facts and circumstances of the contravention*" for the purposes of its finding that a penalty should be imposed. GTR submits that, when placed in its proper context of the exceptional circumstances of May 2018 caused by industry-wide failings, any breach of Condition 4 found by ORR in respect of GTR should not be met with a penalty.
38. ORR emphasises that the imposition of a penalty is "*likely to be a 'last resort'*" (paragraph 123 of the Penalties Statement).
39. The Penalty Notice states that "*ORR is not satisfied that there is sufficient evidence that this contravention is a current breach because GTR has taken some steps to ensure that the same situation would not happen again*" (paragraph 34) and that "*[t]he penalty that ORR proposes to impose on GTR therefore relates to a past breach of condition 4*" (paragraph 35).
40. Notwithstanding this, the Penalty Notice continues (paragraph 37) that "*ORR's primary objective in setting a penalty is to change the future behaviour of a licence holder and to incentivise it and others to comply with their obligations*" and two justifications are given for imposing a penalty on GTR in this case (paragraph 38):
 - a. "*a penalty would incentivise GTR to ensure that the provision of information to passengers is managed more effectively in the future*"; and
 - b. "*a penalty could also act as a future deterrent to other licence holders*".
41. Given that ORR found no "current" breach by GTR and acknowledged the various steps taken by GTR to guard against the same situation re-occurring (including in relation to the subsequent December 2018 timetable change), it is submitted that it is neither necessary nor appropriate to impose a penalty even partially on the basis of seeking to "*change*" or "*incentivise*" GTR's future behaviour. On the basis of ORR's findings, there is insufficient evidence to indicate that any kind of "incentive" is required or warranted and, in those circumstances, a penalty imposed partially or wholly for the purposes of deterring other operators is unjustifiable. An example should not be made of GTR in this manner: to the extent that ORR has any concerns about the activities of other operators, then those concerns fall properly to be investigated with the operators concerned.

42. Further, in relation to the factors listed at paragraph 39 of the Penalty Notice as justifying the imposition of a penalty, GTR makes the following submissions:-

- a. GTR has paid out over £17.7m under its additional passenger compensation scheme (paragraph 9 of our 13 February 2019 letter). In addition to this, GTR has paid out in excess of £2.5m under the delay repay scheme over and above the normal run rate, and almost £30,000 in enhanced compensation for the period from 20 May to 14 July. Further costs incurred by GTR are set out in paragraph 45 below.
- b. The delivery of accurate and timely information to passengers was, and continues to be, one of GTR's key priorities; we constantly review our performance in this area in order to make improvements. As noted at paragraph 34 of the Penalty Notice, ORR acknowledges the various tangible steps taken by GTR to improve in this area following May 2018, and it is therefore not correct to say that there is a "*lack of evidence that GTR undertook a significant lessons learnt exercise relating to passenger information*". However, it remains GTR's position that the primary lesson to be learnt from May 2018 in relation to passenger information has to be that a timetable change of such scale and complexity cannot be permitted to re-occur without strict adherence to the established industry processes for timetable development and implementation. Issues with the provision of passenger information are indivisibly linked to the wider May 2018 disruption. In ordinary circumstances, and even in cases of "business as usual" disruption, GTR is effective in its provision of passenger information (as supported by ORR's "no breach" finding for the pre-20 May period and the provision of information during the Brighton Mainline Improvement Project (paragraphs 22 and 27 of our 13 February 2019 letter)); this demonstrates that quality passenger information is heavily influenced by, and necessarily follows, a competently implemented timetable change.
- c. It is not correct to say that GTR has "*not acknowledged responsibility for its failure to provide adequate information to passengers*" (paragraph 39(d) of the Penalty Notice). GTR has acknowledged responsibility for its passenger information not reaching the standards it would ordinarily meet, and has consistently apologised for the unacceptable levels of disruption suffered by passengers, both publically and in its submissions to ORR. See, for example, paragraph 2 of our 13 February 2019 letter, page 4 of our 16 October 2018 letter and the enclosed press releases.

43. Paragraph 122 of the Penalties Statement also states that ORR "*shall take account of the six penalty principles*" set out in the Macrory Report (reiterated in paragraph 36 of the Penalty Notice). As summarised in the Penalties Statement, those principles are:-

- a. aim to change the behaviour of the offender;
- b. aim to eliminate any financial gain or benefit from non-compliance;

- c. be responsive and consider what is appropriate for the particular offender and regulatory issue;
 - d. be proportionate to the nature of the offence and the harm caused;
 - e. aim to restore the harm caused by regulatory non-compliance, where appropriate; and
 - f. aim to deter future non-compliance.
44. Principles a) and f) have no application to these circumstances; ORR has found no current breach of Condition 4 in respect of GTR and so it is not appropriate to impose a penalty partially or wholly on the basis of seeking to change future behaviour and/or deter future non-compliance.
45. In relation to principles b) and e), ORR notes that GTR has already suffered "*reputational damage*" and "*additional costs*" in relation to the May 2018 timetable change (paragraph 39(a) of the Penalty Notice). At least the following costs have been incurred by GTR as a result of the industry-wide disruption of May 2018:-
- a. GTR will make no profit from its franchise in this financial year;
 - b. GTR's profits for subsequent financial years are capped until the end of the franchise;
 - c. over £17.7m in compensation has been paid to passengers under GTR's additional compensation scheme (see paragraph 9 of our 13 February 2019 letter);
 - d. GTR has paid £15m into a Passenger Benefits Fund as agreed with the Department for Transport;
 - e. GTR incurred operational costs of over £10m in mitigating the impact of the disruption on passengers and staff;
 - f. over £2.5m in compensation has been paid to passengers under the delay repay scheme; and
 - g. almost £30,000 in enhanced compensation has been paid to passengers.
46. GTR has therefore already been subjected to very severe financial repercussions as a direct result of the disruption caused following the introduction of the May 2018 timetable. These do not appear to have been appropriately factored into ORR's reasoning and we note in this regard the following statement at paragraph 39(b) of the Penalty Notice:-
- "GTR have taken some steps to compensate passengers through delay compensation schemes and have paid a passenger benefits fund to the Department for Transport. However, these sums were paid in response to its wider failings in relation to the 20 May*



timetable change and do not address the harm caused by its additional failings to provide adequate information to passengers."

47. In relation to the £15m Passenger Benefits Fund, it is not correct to say that this investment does "*not address the harm caused by its additional failings to provide adequate information to passengers*". The agreement reached with the Department for Transport addressed all aspects of the issues associated with the implementation of the May 2018 timetable, which included the failure to provide adequate information to passengers. We refer in this regard to the letter sent by the Department for Transport to ORR dated 10 December 2018 (copy enclosed for ease of reference) in which the Department set out the financial impact of the agreement reached with GTR and confirmed that this outcome was in respect of the Secretary of State "*... holding GTR to account for their role in the unacceptable performance following the introduction of the May timetable*". The letter concluded by stating that ORR "*... may wish to take GTR's obligations under this agreement into account when determining any enforcement action or sanction against GTR in respect of its role in the implementation of the May 2018 timetable*". It does not appear that GTR's obligations under the agreement with the Department have been taken into account at all and, in fact, the scope and extent of that agreement has been misrepresented and misunderstood in the Penalty Notice.
48. GTR is engaging with passengers in respect of the expenditure to be funded from the Passenger Benefits Fund, which is aimed at providing tangible improvements to passengers on the GTR network who were affected by the disruption. User groups and passenger representatives will be able to decide for themselves what improvements are delivered by the Fund – this could range, for example, from new waiting shelters or additional lighting to new information screens. The Passenger Benefits Fund is designed to address the full circumstances surrounding the May 2018 disruption.
49. There can be no suggestion of any financial gain or benefit being received by GTR; the May 2018 disruption has had a substantial financial impact on GTR and it is submitted that it is not appropriate to penalise GTR again under Condition 4. As set out above, GTR considers that the harm suffered by passengers was as a direct result of the industry-wide failings during the May 2018 timetable change – it is submitted that such harm has been addressed by the significant compensation and investment it has made.
50. In deciding whether to impose a penalty, ORR must also take account of the "*five principles of good regulation*": proportionality, accountability, transparency, consistency and targeting (paragraph 36 of the Penalty Notice). GTR submits that a financial penalty in this case would not comply with those principles:-
- a. **Proportionality:** a penalty should only be imposed where necessary and only to the extent required. ORR's finding that there is no current breach and the significant costs and investment incurred by GTR to date demonstrate that it is not necessary or proportionate to effectively re-penalise GTR when its current compliance is not in question.
 - b. **Accountability/Transparency:** in light of GTR's submissions regarding the factors ORR has excluded from the remit of its investigation, it is submitted that

imposing a penalty on the basis of that investigation would not serve the interests of accountability or transparency. It is not clear to GTR why ORR has conducted its investigation in this way and GTR was not notified about or given an opportunity to make representations about ORR's decision to exclude these factors from the scope of its investigation.

- c. **Consistency:** it is submitted that ORR has not been completely consistent in its approach to its investigation into Northern's compliance with Condition 4 compared to its investigation into GTR. As noted above, Northern's interim timetable was (correctly) a key consideration in ORR reaching a finding of no breach (and therefore no penalty). However, ORR has expressly not considered the particular circumstances which meant that GTR could not introduce an interim timetable sooner or the impact of that timetable once introduced. It is submitted that such inconsistency cannot properly result in the imposition of a penalty. The inconsistent treatment of GTR is further compounded by the fact that we have found no record of any fine being imposed by ORR on Network Rail, despite a finding that Network Rail was in breach of conditions 1.23 and 2.7 of its licence and despite Network Rail being best placed to take action to avoid the widespread disruption caused by the implementation of the May 2018 timetable, which impacted on the passengers of both GTR and Northern. As stated in ORR's letter to Network Rail of 27 July 2018, the rationale behind not imposing a penalty in relation to the breach is that it would not be "*appropriate as it would not further incentivise compliance*". As noted above, imposing a financial penalty on GTR would not be appropriate for precisely the same reason (amongst others).
- d. **Targeting:** it is submitted that, in failing to properly consider the wider May 2018 context, ORR has necessarily been unable to accurately quantify the level of harm suffered by passengers which is attributable to any passenger information failings by GTR (as distinct from harm which is attributable to the May 2018 disruption generally). As a result, any penalty imposed by ORR is insufficiently targeted at the specific issue of passenger information.
51. In summary, in the event that ORR maintains its finding of breach, GTR submits that a penalty cannot be justified on the grounds cited in the Penalty Notice, the Macrory Report principles or the associated principles of good regulation. In effect, a penalty would re-penalise GTR for matters for which it has already suffered financially to a significant extent, would be made on the basis of an incomplete and misleading range of relevant factors and is currently justified on the basis of an aim (influencing future behaviour) which, on its own findings, ORR acknowledges is not necessary.

The amount of the penalty is excessive

52. In the event that ORR maintains that GTR has breached Condition 4 and maintains that a financial penalty is appropriate, it is submitted that a penalty amount of £5m is excessive and not reasonable in the circumstances.



53. As noted in paragraph 8 of the Penalty Notice, under section 57A of the Railways Act 1993, upon making a finding of breach, ORR may impose a penalty "*of such amount as is reasonable*".

54. It is submitted that the amount of the penalty is not reasonable for the following reasons:-

- a. ORR acknowledges that "*ineffective passenger information was not the only cause of harm as passengers were already suffering disruption to services because of the timetabling problems*" (paragraph 46 of the Penalty Notice). As a function of its exclusion of the wider May 2018 context from the remit of its investigation, it is submitted that ORR has attributed too much of the harm suffered by passengers to the matters identified by ORR as GTR's passenger information failings. It is submitted that the substantial majority of any harm suffered by passengers is attributable to the May 2018 disruption generally (and therefore to the industry-wide failings which Network Rail was best placed to prevent) and that the level of penalty imposed is disproportionate to the level of harm directly attributable to issues with passenger information.
- b. ORR acknowledges that there is no current breach, that any past breach is not "*systemic*" in nature and that the effects were largely limited to an 8-week period (paragraph 45 of the Penalty Notice).
- c. ORR acknowledges that the majority of GTR's passengers – the 63% travelling on its Southern and Gatwick Express services – were "*not as significantly affected as the passenger information was held and displayed correctly within the industry information systems*" (paragraph 47(b) of the Penalty Notice).
- d. GTR does not accept that its approach to the provision of passenger information can fairly be characterised as "*towards the negligent end of the spectrum*", much less that at any point there was a "*level of knowing acceptance of the problem*" (paragraphs 52-53 of the Penalty Notice). ORR appears to justify these conclusions on the basis of GTR's stated focus on capacity. Again, this conclusion fails to take into account GTR's status as a commuter operator, which makes a focus on capacity absolutely essential. GTR also considers that this finding is influenced by ORR's failure to consider the impact of GTR's interim timetable which, as noted in the Report, resulted in an improvement in service reliability (paragraphs 2.4 and 4.3), resulted in delay compensation claims returning to normal levels (paragraph 2.36) and was preceded by a proactive communications campaign for passengers (paragraph 4.3). The submissions made at paragraphs 56-59 below in relation to the role of senior management apply equally here.
- e. ORR raises no issues with GTR's cooperation with the investigation (paragraph 54 of the Penalty Notice).

55. GTR agrees with the mitigating factors identified by ORR at paragraph 60 of the Penalty Notice. It is submitted that greater weight should be given to these factors and that the following additional factors are relevant and should be considered:-

- a. The primary mitigating factor in this case is the wider context of the May 2018 timetable change, which ORR has expressly excluded from the remit of its investigation. GTR's compliance with Condition 4 cannot be accurately assessed without a consideration of the context in which GTR was operating.
 - b. ORR has acknowledged the efficacy of GTR's remedial measures and has made a finding that there is no continuing breach by GTR. In addition, as explained above GTR implemented an interim timetable on 15 July which ORR acknowledges stabilised service levels and was accompanied by a proactive communications campaign. These factors are highly significant as they demonstrate that GTR proactively took steps to rectify any failings and minimise the chances of the failings re-occurring and that there have been no continuing issues identified by ORR. These constitute three distinct mitigating factors under the terms of paragraph 137 of the Penalties Statement.
56. ORR identifies one aggravating factor justifying the amount of the penalty (paragraph 61 of the Penalty Notice): namely, that GTR's senior management were made aware of passenger information issues but that ORR has not seen sufficient evidence that senior management were involved in developing and implementing a response to those issues. That is not a fair characterisation.
57. GTR held Gold Command "Control calls" five times per day between 20 May and the end of the first week of the interim timetable, which were chaired by the Head of Network Operations and attended by GTR's operational managers and Head of Customer Information. The attendees discussed the passenger impact of the disruption, information delivery and the operational plan of the day, and the Head of Customer Information – informed by real-time feedback from passengers – took the decisions required to implement the various measures targeted at improving GTR's passenger information provision during the disruption. Such measures have been set out in GTR's previous submissions to ORR (see, in particular, our 24 July 2018, 16 October 2018 and 13 February 2019 letters and supporting documents) and include:-
- a. Increasing the number of ground staff at stations to provide information to passengers, particularly in hotspot areas.
 - b. Establishing the station thread to enable station teams to communicate with each other and staff in the control centre.
 - c. Placing additional stop orders on trains based on information received from the station thread.
 - d. Providing additional support to the social media team as Twitter took on a greater role in providing real-time information to passengers.
 - e. Additional resources in the control centre and customer contact centre to support passenger information provision.
 - f. Working closely with National Rail Enquiries to ensure that live journey planners were as accurate and up-to-date as possible.
 - g. Engaging with Transport Focus to ensure that passenger communications were clear and informative.
 - h. Use of leaflets, PA announcements and CIS screens at stations.



58. GTR's passenger information strategy was therefore developed and directed by its senior management, in particular, through the Head of Customer Information who in turn was acting on the authority of, and was briefing, GTR's executive via the daily "exec calls" chaired by GTR's Chief Operating Officer (referred to on page 58 of the transcript of our 19 July 2018 meeting).
59. In addition, GTR held "*war room meetings*" every 48 hours which brought together the relevant members of GTR's executive to discuss key decisions, risk mitigations, stakeholder feedback and performance issues (see page 70 of the transcript). These meetings were attended by a range of senior managers at GTR, including, amongst others, the Service Recovery Crisis Management Team (which included GTR's Programme Lead for Communications), Chief Operating Officer, Business Improvement Director, Service Delivery Director and Operations Planning Director. The primary outcome of the war room meetings was the production of the service recovery plan, which recognised that the immediate priority had to be achieving a period of service stability in order to provide a basis for disseminating reliable passenger information. It is not correct to say that the service recovery plan prioritised running services at the expense of providing passenger information. On the contrary, the service recovery plan had at its heart a recognition of the importance of passenger information, and reflected the simple truth that GTR would not have reliable information to give to passengers until a certain level of service stability had been achieved. It was also an initiative in which GTR's senior management were heavily involved.
60. It follows from the above that GTR considers that the relevant mitigating factors in this case significantly outweigh any aggravating factors (it being disputed that there are any aggravating factors in this case in any event), and that the level of the penalty should be reduced to reflect this.

Conclusion

61. We have set out in this letter the reasons why we believe ORR has failed to take all relevant circumstances into account when formulating the remit of its investigation and failed to give other relevant circumstances due and proper weight in arriving at its findings. We remain firmly of the view that, if all relevant circumstances are properly considered, GTR was not in breach of Condition 4 in the period following the implementation of the May 2018 timetable and that, even if such a finding could be made, there is no basis on which a financial penalty should be imposed. In particular, we believe that ORR has failed to take proper account of GTR's status as a capacity-constrained commuter operator whose overriding aim in the aftermath of the introduction of the May 2018 timetable had to be to ensure that as much capacity as possible was made available to our passengers. As explained above, the perversity at the heart of ORR's determination is perhaps best illustrated by the fact that, if it is followed to its logical conclusion, GTR would have been better advised not to run services in circumstances where it was not able to provide what would normally be considered an acceptable level of information to passengers – this cannot be right and, even with the benefit of hindsight, would not be the way in which GTR would choose to react to the exceptional circumstances that followed the introduction of the May 2018 timetable.



62. We have set out above why, in seeking to impose a financial penalty, ORR has failed to take proper account of its own guidance, the "*five principles of good regulation*" or the six penalty principles set out in the Macrory Report. In particular, either no (or inadequate) account has been taken of the very significant financial penalties which GTR has already incurred as a result of the events following the implementation of the May 2018 timetable – these include the fact that GTR will make no profit in the current financial year, will be subjected to capped profits in subsequent financial years and has paid £15m into a Passenger Benefits Fund. Imposing any further financial penalty in these circumstances cannot be justified, let alone one at the unprecedented level that is proposed.

We trust that, in light of the submissions made above, ORR will reconsider its decision.

This letter is being copied to the Secretary of State for Transport and Polly Payne, Ruth Hannant and Tim Rees at the Department for Transport.

Yours sincerely

Keith Jipps
Infrastructure Director
Govia Thameslink Railway Ltd