



OFFICE *of*
RAIL REGULATION

**IMPLEMENTING *THE FUTURE OF RAIL*:
PROPOSED MODIFICATIONS TO
NETWORK RAIL'S NETWORK LICENCE**

MARCH 2005

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Chairman's Foreword

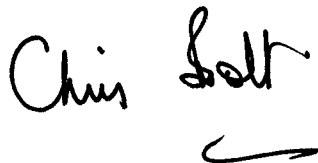
The Government's White Paper, "The Future of Rail", published in July 2004, envisaged a significant development of Network Rail's role. From being essentially an engineering and network operations company, its role is being extended to give it new responsibilities covering whole industry performance, industry planning and route utilisation strategies (RUSs).

These additional tasks all involve the public interest. It is therefore important that Network Rail is accountable for effective delivery of these tasks, and that the regulatory framework reflects these changes. ORR set out in September 2004 its initial views on the changes to Network Rail's licence that could be required to achieve this. This document sets out in detail the modifications to Network Rail's network licence we now consider necessary.

Network Rail must show industry leadership if the rail industry is to deliver the significant improvements in performance and efficiency which users and taxpayers expect. In taking on its new responsibilities, Network Rail will need to:

- resource new activities properly;
- engage effectively with all industry parties and secure their support in carrying them out; and
- ensure that its management of these tasks generates improved rail services and better value for money.

We look forward to receiving your views on the changes we propose to make to ensure that Network Rail is accountable in its new role.



Chris Bolt
Chairman, Office of Rail Regulation

4 March 2005

1. Introduction and summary

Background

- 1.1 The Government's Rail Review White Paper¹ envisaged a wider role for Network Rail, and a new set of public interest obligations for the company. The Railways Bill² currently before Parliament would abolish the Strategic Rail Authority (SRA), with Network Rail taking on certain of its functions. This document sets out ORR's proposals for holding Network Rail to account in respect of its new obligations.
- 1.2 In September 2004, ORR consulted³ on its proposed future work programme following the White Paper. In that document, we set out our initial views on how Network Rail's accountability might need to be reviewed and strengthened to achieve the aims of the White Paper, and sought views from consultees.
- 1.3 The purpose of this document is to seek consultees' views on specific proposals to modify Network Rail's network licence in order to reflect its role in the management of whole industry operational performance, industry planning and the development and establishment of route utilisation strategies (RUSs). These will promote the effective and efficient use and development of the network's capacity in a way consistent with the funding that is, or is reasonably likely to become, available during the period of the RUS. ORR's specific proposals to modify the licence are outlined in paragraph 1.8 below, and detailed in Chapters 2 – 4 and Annex A of this document.

Two tranche approach to network licence modifications

- 1.4 ORR's September 2004 consultation document identified a number of potential ways in which Network Rail's network licence might be strengthened. We said at that time that we believed there was wide industry support for making changes as quickly as possible and responses from consultees

¹ *The Future of Rail*, Department for Transport, Cm 6233, July 2004.

² Available at <http://www.publications.parliament.uk/pa/ld200405/ldbills/022/2005022.pdf>

³ *Implementing the Future of Rail: ORR's role and proposed work programme*, Office of Rail Regulation, London, September 2004.

endorsed this approach. The modifications proposed in this consultation document are not directly linked to legislation and Network Rail is already taking on some of the wider responsibilities envisaged by the White Paper. For example, work on performance management and RUSs is being moved from the SRA to Network Rail. For these reasons, ORR is keen to implement a number of modifications to Condition 7 of Network Rail's network licence (described in paragraph 1.8 below) as soon as is practicable.

- 1.5 ORR recognises that further modifications may need to follow either the enactment of legislation (for example, modifications relating to the transfer of safety regulation to ORR) or further consideration in the light of experience (for example modifications relating to the provision of information, in the light of ORR's new role as the coordinator of the information centre for the rail industry).
- 1.6 Consultees who responded to ORR's September 2004 document were generally supportive of further review and strengthening of the network licence, although Network Rail did not believe that any licence conditions other than Condition 7 (with the possible exception of Condition 6 on safety and standards) should be reviewed. ORR considers that there is merit in reviewing further Network Rail's accountability and any more modifications we consider necessary will be included in a second tranche of modifications later this year.

Key elements of the proposed modifications

- 1.7 We have assessed responses to our September document and have considered the options for changes to the company's network licence. We agree with Network Rail that any such changes should be made in Condition 7 of the network licence, rather than through a new licence condition, since they are integrally related to the existing Condition 7 obligation. We have concluded that some aspects of the wider role envisaged by the White Paper are already implicit in Condition 7, but that some modifications are desirable. We also propose to make some other, minor, modifications at the same time.

- 1.8 ORR proposes to make the following specific modifications to Condition 7 of Network Rail's network licence:
- changes to reflect the wider role envisaged in the White Paper for Network Rail in terms of industry planning and management of whole industry performance (described in more detail in Chapter 2 and Annex A);
 - the introduction of a requirement on Network Rail to produce and publish RUSs (described in more detail in Chapter 3 and Annex A). In addition to the proposed licence modification, ORR proposes to produce, in due course, guidelines for the production of RUSs, the content of which is outlined in Chapter 3 and Annex B; and
 - changes to paragraphs 4 and 5, concerning requirements for Network Rail's annual business plan (described in more detail in Chapter 4 and Annex A, along with details of a number of additional minor changes to the network licence, consequential to the Railways and Transport Safety Act 2003).
- 1.9 We have concluded that it is not necessary to make any modifications to reflect the need for Network Rail to take account of whole industry efficiency and value for money considerations. Our reasons for this are detailed in Chapter 2. In summary it is because we consider: (a) these to be implicit in the existing requirement for Network Rail to satisfy the purpose of Condition 7, "in accordance with best practice and in a timely, efficient and economic manner"; and (b) in performing the general duty in paragraph 2 of Condition 7, Network Rail is obliged to aim to satisfy any reasonably foreseeable reasonable requirements of stakeholders or future stakeholders, whether or not stakeholders have articulated those requirements.

Regulatory Impact Assessment

- 1.10 When the Railways Bill was tabled, the Department for Transport (DfT) published Regulatory Impact Assessments⁴ (RIAs) of the impact of the Bill's proposals on the public sector, rail industry and wider society.

⁴ The RIAs, published on 25 November 2004, are available on DfT's website at: http://www.dft.gov.uk/stellent/groups/dft_railways/documents/divisionhomepage/032961.hcsp.

- 1.11 ORR is committed to best practice in regulation. This includes the Better Regulation Task Force's principles that regulation should be proportionate, accountable, consistent, transparent and targeted. ORR is also committed to the Regulatory Impact Unit's initiatives to reduce any undue bureaucratic burden on Network Rail. ORR will produce an assessment of the impact on the rail industry of the proposed modifications when we proceed to the statutory consultation stage.

Responses to this consultation

- 1.12 Responses to this consultation document should be sent in hard copy and electronic format, by no later than 17.00 on 4 April 2005, to:

Gill James
Manager, Network Regulation
Office of Rail Regulation
1 Waterhouse Square
138-142 Holborn
London
EC1N 2TQ

Email: gill.james@orr.gsi.gov.uk

- 1.13 It is expected that responses will be made available in ORR's library, published on its website and may be quoted from by ORR. Respondents should indicate clearly if they wish all or part of their response to remain confidential. Where a response is made in confidence, a statement summarising the submission should accompany it, which excludes the confidential information but can be treated as above. ORR may also publish the names of respondents in future documents or on its website, unless a respondent indicates that they wish their name to be withheld.
- 1.14 Copies of this consultation document may be seen on ORR's website (www.rail-reg.gov.uk) and in its library.
- 1.15 Following receipt of consultees' comments on this consultation document and subject to consideration of any representations or objections made, ORR expects to issue a statutory 28 day consultation on the specific modifications proposed and our aim is to modify the licence in May 2005.

2. Network Rail's role in industry performance and planning

Background

- 2.1 In our September 2004 document, we stated that we intended to implement certain parts of the White Paper proposals quickly, where ORR was responsible for initiating changes, and where legislation was not required.
- 2.2 The White Paper envisaged that, in future, Network Rail would be responsible for:
- directing network operations, and getting services back on track following incidents and delays;
 - driving up the operational performance of the network and accounting publicly for performance; and
 - co-ordinating industry planning, based on a clear specification from Government of its desired outputs, and for providing leadership where there is a need for cross-industry action.
- 2.3 We asked whether Network Rail's network licence should be amended to reflect these responsibilities.

Views of consultees

- 2.4 Many consultees agreed that it would be appropriate to define Network Rail's wider accountability for performance and industry planning in its network licence, either as a new separate condition or by modifying Condition 7. Network Rail stressed that it was keen to implement the new arrangements quickly, and considered that it would be helpful to modify Condition 7 to include clear and explicit references to its increased role in relation to whole system performance and the development of RUSs. Network Rail considered that incorporating these requirements into a new separate condition could lead to overlap or inconsistency with the existing stewardship requirements of Condition 7.

2.5 Consultees also made the following comments:

- ATOC stated that any modification would need to be considered carefully to ensure that Network Rail's responsibilities were specified in terms that related closely to matters over which the company exerts genuine control;
- the Rail Freight Group considered that any measure of whole-industry performance must include freight operators;
- the SRA stated that it would be helpful for the industry to see details of how the licence was to be enforced as well as the specific licence changes. It considered that a broader review of the licence might be needed to deliver the intended "binding arrangement" with Government; and
- Transport for London (TfL) considered that Conditions 7 and 14 needed to be strengthened with respect to London specific involvement.

ORR assessment

2.6 ORR shares Network Rail's view that there should be no overlap with, or disconnect from, the company's existing stewardship and business planning obligations. We therefore consider it appropriate to consider modifying Condition 7 to be more explicit about how Network Rail discharges its stewardship duty, and to emphasise its wider role in respect of whole industry planning and performance, rather than to introduce a separate condition. However, we recognise the point made by ATOC that responsibilities should be specified in terms relating to the matters over which Network Rail exercises genuine control.

2.7 As far as the views expressed by the Rail Freight Group are concerned, we agree that Network Rail's accountability for whole industry performance should include both freight and passenger services. Currently for franchised passenger services the key measure is the Government's public performance measure. It is necessary to develop a measure for freight services; one possibility is that this should be minutes delay to freight trains. We consider that the precise measures for which Network Rail is held to account for performance are best considered outside the licence condition.

- 2.8 We consider that, in respect of the SRA's response, clarifying Network Rail's accountability for whole industry planning and performance will help the industry understand its role and the scope for ORR enforcement. ORR intends to develop and publish an enforcement policy, and guidance to the industry on compliance with legal requirements, by the end of 2005.
- 2.9 ORR believes that it is important that Network Rail engages fully with TfL in pursuing its wider industry role. We consider that a strengthened Condition 7, together with the explicit requirements of the existing Condition 14, should ensure that it does so.

Proposed modifications

- 2.10 In developing the proposed modifications to Network Rail's network licence, we have focused on the implications for Network Rail's role of the White Paper and Railways Bill, including the abolition of the SRA.
- 2.11 This has three aspects:
- Network Rail having wider accountabilities concerning whole industry performance;
 - a reinforced expectation that Network Rail's planning will be based on whole industry outputs and efficiency; and
 - funders having a more explicit role in specifying key railway outputs, with the implication that Network Rail will have to balance different specification requirements.

Whole industry performance

- 2.12 In terms of performance, the current Condition 7 general duty and purpose are focused on carrying out activities (including operation of the network) so as to secure an objective concerning quality and capability of the network. Quality and capability of the network include performance of the network (as covered for instance by the enforcement order the Rail Regulator made in 1999). However, it is not sufficiently clear, in our view, that they cover the whole industry performance role envisaged by the White Paper.
- 2.13 We believe that consider that while the "operation of the network" does cover exercise of Network Rail's powers in this regard (including those under the

network code), the objective in Condition 7 should be broadened to include something concerning wider railway service performance. Given that the delivery of such performance is effectively a “joint venture” between Network Rail and train operators, we believe Network Rail’s objective should concern facilitation of railway service performance. This could involve, for example, wider industry leadership as part of its network operation responsibilities by, for example, promoting the application of best practice in the way train operators manage their rolling stock.

2.14 We have considered two further points in coming to this conclusion:

- whether this is a matter for the network licence rather than purely for the network code, which is incorporated in each track access contract between train operators and Network Rail. We consider that, although in general the obligation at local level should be addressed through contract with the train operator (and thus through the network code), any systemic and national issues are better addressed through the network licence; and
- whether the obligation should cover “railway service performance”, a broad definition as specified in the Railways Bill⁵ or the narrow definition of reliability and punctuality. On balance, we believe it should cover the broader definition to avoid an undue focus on one aspect of performance and to reflect the need to ensure the best outcome for passengers and freight customers.

2.15 The draft licence modification at Annex A makes the change set out above by inserting an additional sub-section in the general duty concerning facilitation of railway service performance.

Criteria for industry planning

2.16 We have considered modifying the network licence to reflect the need for Network Rail to take account of whole industry efficiency and value for money considerations. We have concluded that this is not necessary because:

⁵ Railway service performance as defined in the Railways Bill includes, in particular, performance in securing each of the following in relation to railway services – (a) reliability (including punctuality); (b) the avoidance or mitigation of passenger overcrowding; and (c) that journey times are as short as possible.

- in performing the general duty, and developing its business planning criteria, we would expect Network Rail to take account of whole industry efficiency and value for money considerations, as a function of the “best practice...timely, efficient and economic manner” requirement in the existing purpose in paragraph 1 of Condition 7; and
- in performing the general duty in paragraph 2 of Condition 7, we consider that Network Rail is already obliged to aim to satisfy any reasonably foreseeable reasonable requirements of the classes of stakeholders or indeed future stakeholders, identified in the general duty (whether or not existing stakeholders have articulated those requirements), and thus plan ahead to meet them.

2.17 We believe, however, that two changes should be made to the provisions concerning the business planning criteria in paragraph 3 of Condition 7. These criteria set out how Network Rail will determine the priority and timing of work carried out on the network to comply with the purpose and duty of Condition 7, and form the basis of the company's business planning process. The proposed changes are detailed in the draft modification in Annex A and comprise:

- an explicit reference to the criteria including how Network Rail prioritises the requirements of different stakeholders. We believe this is appropriate given the role of different funders in specifying railway outputs; and
- removing the date (31 March 2003), by which Network Rail had to produce its first business planning criteria. We consider that this should be replaced by an obligation to review the criteria when required by ORR. We believe the latter point is implied in the current condition, but that it could usefully be made explicit.

Effect of modifications

2.18 The effect of the proposed modifications described above would be to:

- clarify Network Rail's accountability for whole industry performance;
- make explicit reference to the business planning criteria in paragraph 3 of Condition 7 showing how Network Rail prioritises the requirements of different customers; and

- allow ORR to direct Network Rail to review the criteria.

Reasons

2.19 ORR believes that the modifications described above are consistent with our duties under section 4 of the Railways Act 1993 (including amendments proposed in the Railways Bill), in particular our duties to:

- promote improvements in railway service performance or otherwise to protect the interests of users of railway services;
- promote the use and the development of the railway network; and
- promote efficiency and economy on the part of persons providing railway services.

2.20 ORR has reached this view because we believe that Network Rail must be accountable to the public interest for the delivery of its role in industry planning and the management of whole industry performance. We consider that the proposed licence modification clarifies Network Rail's new obligations and is consistent with the company's existing stewardship and business planning obligations.

Questions for consultation

Consultees are asked to comment in particular on:

- the overall approach;
- whether it is right to include a reference to the facilitation of railway service performance;
- including the definition of railway service performance in its entirety from the Railways Bill;
- the need to ensure that the business planning criteria demonstrate how Network Rail will prioritise different customer requirements; and
- whether ORR should have the power to direct Network Rail to review the criteria.

3. *Route utilisation strategies*

Background

3.1 The White Paper envisaged that Network Rail would become responsible for the production of route utilisation strategies (RUSs), to facilitate the effective and efficient use and development of the network, following the enactment of the Railways Bill and subsequent abolition of the SRA. Since publication of the White Paper, action has been taken to effect the transfer of work on RUSs from the SRA to Network Rail and to develop processes in conjunction with the industry and funders for the development and establishment of RUSs. In our September 2004 document, we sought consultees' views on whether, and if so how, Network Rail's network licence should be amended to reflect its new responsibilities in respect of RUSs.

Views of consultees

3.2 We stated in our September 2004 document that we considered it appropriate to incorporate a specific requirement in respect of RUSs into Network Rail's network licence. Consultees (including Network Rail) supported this approach. They stressed the need for clarity and certainty of Network Rail's responsibilities and how competing interests (including existing contractual rights) would be taken into account and reconciled during the development of a RUS.

3.3 At this time, we asked whether RUSs should continue in the form developed by the SRA or form an element of the route plans developed by Network Rail. Our view was that it was important that the Network Rail route plans reflected proposed route utilisation and that in-depth studies continued to be undertaken to meet specific needs (e.g. associated with franchise replacement or specific performance and/or capacity issues). Network Rail considered that it should prepare "route utilisation studies" which would be given effect in route plans.

3.4 EWS and Freightliner said that RUSs should be prepared within the context of a national utilisation strategy, which should be established quickly. National Express stressed the need to clarify responsibilities of all industry parties in respect of their contribution to the RUS process. Strathclyde Passenger

Transport Executive (SPTE) was concerned at the narrowness of the scope proposed by Network Rail for RUSs. It considered that since RUSs are intended to inform future franchise specifications, they should take account of wider spatial and other planning considerations and must not be used as a means of inhibiting developments which can be justified in terms of their wider social, economic or environmental benefits.

3.5 The Department for Transport (DfT) has established and chairs an industry working group on RUSs. At the working group, there is consensus from members that future RUSs should include:

- better utilisation of infrastructure through improved capacity and reliability trade-offs;
- combining the efficient use of the network with efficient use of fleet;
- reconciliation of local and regional aspirations with Government aims;
- integration of Network Rail's route planning, and hence planning for the maintenance, operation and renewal of the network, with a network utilisation strategy;
- decisions between passenger and freight priorities;
- decisions on service allocation at the margin, between franchises; and
- decisions on trade-offs between engineering access and train running.

ORR assessment

3.6 Production of RUSs will be a public interest obligation carried out by Network Rail. ORR considers that safeguards for the public interest incorporated in Network Rail's network licence are necessary, and that these need to cover:

- the definition and scope of RUSs;
- criteria for evaluation; and
- procedural arrangements, including in particular consultation requirements.

- 3.7 ORR shares Network Rail's view that there should be no overlap with, or disconnect from, the company's existing stewardship and business planning obligations. We therefore consider that it would be more appropriate to modify Condition 7 to clarify Network Rail's RUS obligations, rather than to introduce a separate, new condition.
- 3.8 ORR recognises the work done by the SRA and believes that an evolutionary approach to RUS development can be adopted, building on this. Pending completion of the RUS programme under the new arrangements, ORR would expect Network Rail to take into account in its planning the existing RUSs produced by the SRA.
- 3.9 ORR considers it is important that a RUS contains plans for the effective and efficient use and development of the network, which are sufficiently developed to enable train operators and funders to plan ahead with a reasonable degree of assurance. In some cases, for instance, there will be options setting out what future franchise specifications might contain, or future network enhancements (subject to scheme development and available funding). Thus a RUS will be a direction of movement, but it must be more than purely a list of aspirations.
- 3.10 It is also important that RUSs are consistent with Network Rail's general network stewardship duty, as set out in paragraphs 1 and 2 of the proposed modification to Condition 7 of its network licence, at Annex A of this document.
- 3.11 ORR accepts the point, made in particular by freight operators, that the RUSs need to include a "national" utilisation strategy which sets out principles for services that operate across more than one route (such as long distance freight and cross-country passenger trains) and business consistency across the network in the way they are treated. This follows on from the SRA's Capacity Utilisation Policy and Network Utilisation Strategy.
- 3.12 ORR accepts the points made by National Express that there should be clarity about the role of industry parties in the process to develop a RUS, and by SPTTE that RUSs should take account of wider spatial and other planning considerations.
- 3.13 Network Rail needs to set out transparently its programme for producing, publishing and revising RUSs, and we suggest this programme be subject to

approval by ORR. ORR would expect that prior to submission of such a programme, it would have been the subject of full consultation with relevant stakeholders, and that it should reflect in particular:

- opportunities perceived by train operators, Network Rail and others to improve performance and capacity utilisation;
- opportunities perceived by train operators, Network Rail and others for cost effective enhancement (e.g. at the time of infrastructure or rolling stock renewal); and
- the need to confirm the franchising programme, but also to allow new ideas from franchises to be included.

3.14 ORR would expect Network Rail to prioritise its programme for RUSs. We would also expect the company to demonstrate that any decision not to produce a RUS in respect of a specific part of the network was consistent with its general network stewardship duties under Condition 7 and the requirements of Directive 2001/14/EC⁶ for capacity analyses and enhancement plans. In practice, this means that the work on RUSs is likely to be focused on those routes where capacity to meet different demands is a concern.

3.15 The Railways Bill is likely to result in some different arrangements in Scotland, compared with England and Wales. We consider that the overall principles for RUSs should be the same, but that there may be a need to address particular issues in relation to Scotland in the RUS guidelines described below.

Criteria for RUS development and evaluation

3.16 As noted above, in carrying out the function of producing RUSs, Network Rail is carrying out a public interest duty, and it is important that this be governed by explicit public interest criteria.

3.17 ORR suggests that these criteria be twofold:

⁶ Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification.

- the business planning criteria that set out how Network Rail complies with the general duty in Condition 7 concerning operation, maintenance, renewal, development and enhancement of the network; and
- guidelines published from time to time by ORR.

3.18 At Annex B, a note sets out the scope ORR would anticipate for guidelines on which views of consultees are sought. In the light of this consultation, ORR expects to produce draft guidelines providing a clear steer to Network Rail on the questions raised in Annex B at the same time as the statutory consultation on the licence modification; to publish initial guidelines at the same time as the modifications to Network Rail's licence take effect; and to keep the guidelines under review in the light of experience. In publishing guidelines, ORR would need to have regard to its public interest duties under section 4 of the Railways Act 1993 and the purpose and specific requirements of 2001/14/EC.

3.19 Key elements of the proposed guidelines would include:

- how Network Rail should establish demand and technological assumptions and availability of funding;
- evaluation criteria initially based on the SRA appraisal criteria; and
- links with Network Rail's other responsibilities.

Procedural arrangements

3.20 The process for RUS development has demonstrated the importance of involving the full range of stakeholders. If the Railways Bill is enacted, devolved governments and local funders (such as PTEs and TfL) will have a new role in the specification of services.

3.21 ORR suggests that the procedural safeguards should involve:

- a requirement for full consultation with a full range of stakeholders;
- that Network Rail publishes a draft RUS, following this consultation, for final consultation;
- Network Rail then to propose and publish a final RUS; and

- ORR then having 60 days in which to issue a notice of objection.
- 3.22 ORR considers it essential that industry stakeholders engage in the consultation process throughout the development of a RUS, and that contentious issues are raised and addressed as early as possible during the development process. We would not expect to see stakeholders raising new issues following the submission of the final RUS to ORR. We see the option for ORR to issue a notice of objection as an important safeguard in the event that significant issues remain unresolved, following full engagement between Network Rail and its stakeholders during the development of the RUS.
- 3.23 ORR further believes it is important that Network Rail establishes governance arrangements for the RUS process, and for individual RUSs, which involve key stakeholders. We do not however believe that it is necessary to prescribe these in detail in the licence condition.

Implications of a RUS

- 3.24 Once established, a RUS must be given effect. In particular:
- Network Rail must have due regard to an established RUS in carrying out its activities, for instance in carrying out its operation, maintenance, renewal and network development obligations, and in the timetabling of the network;
 - the RUS will facilitate development of franchise specifications and High Level Output Specification (as appropriate) by DfT, Scottish Ministers and other funding bodies;
 - ORR expects to have regard to the provisions of established RUSs in carrying out its functions concerning approval and direction of access constraints for Network Rail's network, and in the exercise of its jurisdiction under the network code; and
 - train operators and suppliers (e.g. rolling stock manufacturers and ROSCOs) should be better able to plan their businesses.

Proposed modification and its effect

- 3.25 At Annex A to this document is a proposed modification to Network Rail's network licence which ORR considers would have the effect of implementing

the policy principles set out above. The modification is in the form of a new paragraph 3A to Condition 7. Key elements of it are as follows:

- paragraph 3A.1 requires Network Rail to establish RUSs both at national level and in respect of parts of the network, to which it will have due regard in carrying out its licensed activities;
- paragraph 3A.2 defines a RUS as a strategy which will promote the effective and efficient use, and development, of the capacity available, consistent with the funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with Network Rail's performance of the general duty in paragraph 2;
- paragraph 3A.3(a) requires Network Rail to produce, subject to ORR approval, a programme of RUSs;
- paragraph 3A.3(b) requires RUSs to be produced in accordance with the process set out in the licence condition, with the business planning criteria produced under paragraph 3 of Condition 7 and with any matters specified in ORR guidelines;
- paragraph 3A.3(c) enables ORR to issue guidelines specifying the format, structure, standard, period and other matters concerning RUSs;
- paragraph 3A.4 sets out the process for establishing a RUS, including stakeholder consultation, publication of a draft RUS, and publication and submission to ORR of a proposed final RUS;
- paragraph 3A.4 to 3A.7 enable ORR to issue a notice of objection to a proposed RUS. In this event, Network Rail would be required to remedy the RUS's failings within the timescales specified; and
- paragraph 3A.8 requires Network Rail to review RUSs from time to time or if specifically directed to do so by ORR.

3.26 ORR believes the approach proposed gives an appropriate balance, which includes the necessary substance and procedural safeguards, without being unduly detailed or prescriptive. Views are however sought on this approach, including scope for simplification of the process.

Reasons

3.27 ORR believes that the proposed licence modifications are consistent with the discharge of ORR's duties under section 4 of the Railways Act 1993 and in particular the duties:

- to promote the use and development of the railway network to the greatest extent ORR considers economically practicable; and
- to enable providers of railway services to plan the future of their businesses with a reasonable degree of assurance.

3.28 ORR has reached this view because:

- RUSs can provide an important foundation for planning by funders and operators, and to identify opportunities for more effective and efficient use and development of the network;
- following the abolition of the SRA, Network Rail is in the best position to produce them; and
- the proposed licence modification ensures that the approach taken will be one which reflects the public interest.

Questions for consultation

Consultees are asked to comment in particular on:

- the overall approach;
- the content of the proposed licence modification; and
- whether the approach should be different in Scotland, and whether there should be other national or regional differences.

4. Additional changes to the licence

- 4.1 There are some additional modifications to Network Rail's network licence which raise few, if any, policy issues and which we propose to make at the same time as the more substantial modifications to Condition 7. These are described below.

Network Rail's annual business plan

Date of issue of the business plan notice

- 4.2 Network Rail has asked ORR to bring forward the date by which we issue the business plan notice each year, so that it fits better with Network Rail's business planning processes. At present, paragraph 4 of Condition 7 states that such a notice will be effective only if it is given on or before 15 December in the year before the year in which the business plan is to be published.
- 4.3 We accept the case for bringing forward the business plan notice. We consider that there is a need to achieve a balance between, on the one hand, Network Rail's needs for certainty and sufficient time to incorporate ORR's requirements into its business planning processes and, on the other hand, ORR's need to retain sufficient flexibility to require Network Rail to address current issues of concern (including any arising from our consideration of the previous year's business plan and the annual return) in the following year's business plan.
- 4.4 ORR intends to publish the business plan notice at the same time as we aim to publish our annual statement on Network Rail's stewardship of the national rail network, i.e. in September each year. To allow for any unforeseen delay in publication of the stewardship statement, we propose to bring forward the date specified in the licence (i.e. the latest possible date by when the notice could be issued) to 31 October each year. We consider that bringing the date forward from 15 December to 31 October each year provides a more appropriate balance between the needs of Network Rail and the requirements of our statutory duties.

Contents of Network Rail's annual business plan

- 4.5 ORR considers that there is also a case for streamlining the requirements in paragraph 5 of Condition 7, relating to the production of Network Rail's annual business plan. It is important for Network Rail to provide the information concerning its policy and practices as set out in paragraph 5(a) and 5(j) of the Condition 7, to demonstrate compliance with the duty of Condition 7. However, we believe that this information would be more suitably incorporated within the business planning criteria required by paragraph 3 of Condition 7, than in the company's business plan. This is because Network Rail's policies and practices are long term matters which should be consistent over time. Whilst we would expect Network Rail to review its policies and practices from time to time to ensure that they remain compliant with the Condition 7 duty, we would not expect to see major changes year on year.
- 4.6 Paragraph 5(h)(i) of Condition 7 requires Network Rail to include in its business plan forecasts of cashflow and profit and loss for each period of the first year of the plan. While ORR considers it very important to monitor Network Rail's financial position, it may not be necessary for the company to provide such a level of detail in its published plan. The modifications described above provide an opportunity to review whether this level of detail is required and should be specified in Condition 7. Options might include removing this requirement or requiring Network Rail to provide the information forecast quarterly (in line with the proposed approach to the financial information accompanying the quarterly Network Rail monitor).
- 4.7 The proposed modification does not detract from ORR's powers to specify the format, structure and content of the business plan.
- 4.8 The proposal to streamline the requirements in respect of the annual business plan is consistent with the actions set out in the Regulatory Impact Unit's report⁷ on reducing the administrative burden on Network Rail as far as practicable. The proposal is also consistent with ORR's duties under section 4 of the Railways Act 1993 to impose on the operators of railway services the minimum restrictions consistent with ORR's performance of its duties under Part I of the Act, and to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

⁷ *'Making a difference': reducing burdens on Network Rail*, Regulatory Impact Unit, London, April 2004.

The proposed modification and its effect

4.9 The proposed modification to paragraphs 4 and 5 of Condition 7 of the network licence is at Annex A. The effect of the proposed modification would be to:

- bring forward the date by which ORR must issue the annual business plan notice to 31 October in the year before the year in which the business plan is to be published; and
- remove the requirements for Network Rail to provide in its annual business plan details of its policies, practices and decision making processes for carrying out activities to fulfil its stewardship duties.

Minor changes to the licence

4.10 There are a number of minor changes to the network licence arising from consequential modifications, following enactment of the Railways and Transport Safety Act 2003 and subsequent secondary legislation. The changes are outlined in this chapter for clarity. However, as the licence has already been modified by legislation, ORR is not consulting on these changes.

4.11 The first change comprises deletion of Condition 4 (Transport Police), which has ceased to have effect in accordance with Statutory Instrument 2004 No 1573 (The British Transport Police (Transitional and Consequential Provisions) Order 2004). Article 10 of that Statutory Instrument provides that: in a licence granted under section 8 of the Railways Act 1993 before 1 July 2004, a condition requiring the licence holder to enter into an agreement for police services shall cease to have effect.

4.12 The remaining changes reflect the effect of the transfer (in accordance with section 16 of the Railways and Transport Safety Act 2003), of the functions of the Rail Regulator to the new Office of Rail Regulation, on 5 July 2004. For all parts of the licence, the changes are as follows:

- for "the Regulator" substitute "the Office of Rail Regulation";
- for "he" and "him", where they refer only to the Regulator, substitute "it";
and
- for "his", where it refers to the Regulator, substitute "its".

Questions for consultation

4.13 Consultees are asked to comment on:

- the modifications to the requirements for Network Rail's business plan described in this chapter; and
- the level of detail to be provided in the business plan of Network Rail's forecast cashflow and profit and loss for the first year of the plan.

Annex A: Proposed modifications to Condition 7 of Network Rail's network licence

Proposed draft of modifications (marked in bold and underlined type for additions, and with strike-out markings for deletions) of the purpose and business planning criteria

1 Purpose

The purpose is to secure -

- (i) the operation and maintenance of the network;
- (ii) the renewal and replacement of the network; and
- (iii) the improvement, enhancement and development of the network,

in each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons providing services relating to railways and funders in respect of:

(a) the quality and capability of the network; and

(b) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network.

2 General duty

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

3 Criteria

- 3.1 The licence holder shall develop and publish the criteria which it will apply to comply with the duty including its method for determining the priority and timing of different types of work, the parts of the network on which it

will be carried out, **the priority to be accorded to the different requirements of the persons and funders referred to in paragraph 1 and (in each case)** the basis for reviewing such priority.

3.2 The criteria provided for in paragraph 3.1 shall be published -

(a) on such date as the **Office of Rail Regulation** shall specify after consultation with the licence holder; ~~and~~

~~(b) in any event not later than 31 March 2003.~~

3.3 The licence holder shall from time to time **and when so directed by the Office of Rail Regulation** -

(a) review the criteria to determine whether they are sufficient to comply with the duty; and

(b) revise the criteria so as to make them sufficient to comply with the duty, and shall publish any such **revised** criteria.

Proposed draft of route utilisation strategy obligation (new paragraph to be inserted after paragraph 3)

3A. *Route utilisation strategies*

3A.1 The licence holder shall establish and maintain route utilisation strategies -

(a) in respect of the network in its entirety; and

(b) in respect of parts of the network,

to which it will have due regard when carrying out the licensed activities.

3A.2 "Route utilisation strategy" means, in respect of the network or a part of the network, a strategy which will promote the effective and efficient use and development of the capacity available, consistent with the funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with the licence holder's performance of the general duty in paragraph 2.

3A.3 Each route utilisation strategy shall be established -

- (a) by such dates as are specified in a programme or programmes proposed by the licence holder and approved by the Office of Rail Regulation;
- (b) in accordance with -
 - (i) the criteria provided for in paragraph 3.1;
 - (ii) such other matters as the Office of Rail Regulation shall have specified in the guidelines referred to in paragraph 3A.3(c); and
 - (iii) the process set out in paragraph 3A.4; and
- (c) in such format and structure, to such standard, in respect of such periods and having regard to such other matters as the Office of Rail Regulation shall, from time to time, specify in guidelines to the licence holder.

3A.4 The process for establishing a route utilisation strategy shall be as follows -

- (a) the licence holder shall develop a draft route utilisation strategy in consultation with:
 - (i) providers and potential providers of services relating to railways;
 - (ii) funders and potential funders of services relating to railways;
 - (iii) the Rail Passengers' Council or such other public body or bodies as may be performing that Council's duties, other representatives of persons using services for the carriage of passengers by railway, and representatives of persons using services for the carriage of goods by railway; and
 - (iv) the Secretary of State and the Scottish Ministers;
- (b) after concluding the consultation referred to in paragraph 3A.4(a), the licence holder shall publish the draft route utilisation strategy, specifying a period (which shall be a reasonable period) within which representations or objections with respect to the draft route utilisation strategy may be made;

- (c) as soon as practicable after the period for receiving representations or objections on the draft route utilisation strategy has expired, and having taken account of any representations or objections received, the licence holder shall provide the route utilisation strategy which it proposes to establish to the Office of Rail Regulation and on the same day shall publish it and any representations or objections received under 3A.4(b); and
- (d) the route utilisation strategy shall be established within the meaning of paragraph 3A.1, in the terms of the route utilisation strategy provided to the Office of Rail Regulation and published under paragraph 3A.4(c), 60 days after the date on which it was so provided and published, unless the Office of Rail Regulation shall have given a notice of objection in relation to it before the end of that 60 day period.

3A.5 A notice of objection under paragraph 3A.4(d) -

- (a) may be given if the Office of Rail Regulation considers that the proposed route utilisation strategy is deficient in either of the following ways:
 - (i) it does not fulfil the requirements of paragraph 3A.3;
 - (ii) it does not adequately promote the effective and efficient use and development of the capacity available, consistent with the funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with the licence holder's performance of the general duty in paragraph 2;
- (b) shall specify the ways in which, in the Office of Rail Regulation's consideration, the proposed route utilisation strategy is deficient; and
- (c) shall be given by serving a copy on the licence holder and on the Secretary of State and on the Scottish Ministers, and by publishing it.

3A.6 If the Office of Rail Regulation has given a notice of objection in accordance with paragraph 3A.4(d) in respect of any proposed route utilisation strategy -

- (a) the licence holder shall, no later than 60 days after the notice of objection has been given, provide to the Office of Rail Regulation a revised proposal for a route utilisation strategy which:

- (i) remedies the deficiencies specified in the notice of objection;
- (ii) fulfils the requirements of paragraph 3A.3 (except for paragraph 3A.3(b)(iii)); and
- (iii) adequately promotes the effective and efficient use and development of the capacity available, consistent with the funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with the licence holder's performance of the general duty in paragraph 2,

and shall, on the same day, publish it; and

- (b) the route utilisation strategy shall be established within the meaning of paragraph 3A.1, in the same terms as that revised proposal, 30 days after the date on which that revised proposal was so provided and published, unless the Office of Rail Regulation shall have issued a notice, before the end of that 30 day period, stating that that revised proposal has failed to remedy the deficiencies specified in the notice of objection or is otherwise deficient in either of the ways referred to in paragraph 3A.5(a)(i) (with the exception of the requirements in paragraph 3A.3(b)(iii)) or 3A.5(a)(ii).

3A.7 The licence holder shall publish each route utilisation strategy established in accordance with paragraph 3A.4(d) or, as the case may be, paragraph 3A.6(b), as soon as practicable after establishment and, in any event, no later than 15 days after establishment.

3A.8 Each route utilisation strategy shall be reviewed by the licence holder -

- (a) from time to time; and
- (b) when so directed by the Office of Rail Regulation

and, if necessary, the licence holder shall propose amendments of that route utilisation strategy to ensure that it promotes the effective and efficient use and development of the capacity available, consistent with the funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with the licence holder's performance of the general duty in paragraph 2, and is in accordance with the criteria and matters referred to in paragraph 3A.3(b)(i) and (ii). The provisions of paragraph 3A.3,

4, 5, 6 and 7 shall apply to the amendment of a route utilisation strategy under this paragraph as to a new route utilisation strategy.

- 3A.9 Where this Condition provides for anything to be done by any person within a particular period of time or on or by a particular day or date, the Office of Rail Regulation may vary that period, day or date by giving notice to the licence holder and such other persons as appear to it likely to be affected by the variation.

Proposed modification (marked in bold and underlined type and with strike out markings for deletions) to paragraphs 4 and 5

4. *Annual business plan*

4.1 The licence holder shall prepare, provide to the **Office of Rail Regulation** and publish a business plan in respect of the next following ten years.

4.2 The business plan shall—

- (a) be provided to the **Office of Rail Regulation** and be published no later than 31 March in each year or such other date as the **Office of Rail Regulation** may, after consulting the licence holder, specify;
- (b) be prepared in such level of detail, in such format and structure, to such standard and in respect of such periods (within the ten-year period to which the business plan relates) as the **Office of Rail Regulation** shall by notice to the licence holder specify so as to enable—
- (i) providers and potential providers of services relating to railways to plan their businesses; and
- (ii) funders and potential funders of services relating to railways to plan their future financial and service requirements

in each case with a reasonable degree of assurance.

4.3 No notice of the **Office of Rail Regulation** under paragraph 4.2(b) shall be effective unless—

- (a) it is given on or before **31 October** in the year before the year in which the business plan is to be published; and

- (b) the **Office of Rail Regulation** has first consulted the licence holder and taken into consideration any representations or objections timeously made and not withdrawn.
- 4.4 A notice given by the **Office of Rail Regulation** under paragraph 4.2(b) may specify different levels of detail, different standards and different periods in respect of different parts or aspects of the business plan.
- 4.5 If the **Office of Rail Regulation** has not given a notice under paragraph 4.2(b) in respect of any year, the notice last given under that paragraph shall apply to that year.
- 4.6 The licence holder shall be excused from the obligation to publish any part of the business plan to the extent that the **Office of Rail Regulation** —
- (a) is satisfied, after consultation with the licence holder, that publication would or might seriously and prejudicially affect the interests of the licence holder or any other person; and
- (b) gives notice to the licence holder to that effect.
5. *Contents of business plan*
- The business plan shall demonstrate the way in which the licence holder expects to carry out the duty and satisfy the criteria. In that respect and without prejudice to the generality of paragraph 4.2(b), the business plan shall include—
- (a) ~~an explanation of how the licence holder will carry out its relevant activities, including details in respect of each relevant asset category as to—~~
- (i) ~~—policies and practices for the carrying out of relevant activities;~~
- (ii) ~~—policies and practices in relation to the resourcing of the carrying out of relevant activities;~~
- (iii) ~~—policies and practices for acquiring and improving information about relevant activities, including the costs of carrying them out;~~
- (iv) ~~—an assessment of the extent to which improvements may reasonably be made to such policies and practices;~~

- (b) projections of future network quality and capability requirements;
- (c) planned activities and volumes of work in respect of the carrying out of—
 - (i) relevant activities; and
 - (ii) network services in relation to the licence holder's network to be carried out by any other person;
- (d) the expected effect of relevant activities on the quality and capability of the network, the quality of network services and the ability of users to provide improved services to their customers;
- (e) the expected effect of relevant activities on the outputs required of the licence holder and established in the last access charges review;
- (f) a plan for identifying and managing the material risks which are likely to be faced in carrying out relevant activities;
- (g) a statement of the licence holder's expected expenditure in carrying out relevant activities in the format used by the **Office of Rail Regulation** in that respect in the last access charges review;
- (h) forecasts of:
 - (i) cashflow and profit and loss, prepared for each relevant period for the first year, and on an annual basis for the remaining nine years; and
 - (ii) balance sheets, prepared on an annual basisin the same format as required in the Regulatory Accounting Guidelines established under Condition 22;
- (i) the steps which the licence holder plans to take to secure the necessary finance to enable it to carry out the relevant activities, including details of the licence holder's—
 - (i) existing and planned borrowings; and
 - (ii) liquidity management and hedging policies;
- (j) ~~the licence holder's processes for making decisions in relation to the carrying out of relevant activities;~~

- (k) a statement of the material changes to the business plan compared with the business plan for the immediately preceding year;
- (l) such further information as the **Office of Rail Regulation** may by notice to the licence holder require.

Proposed draft of modification (marked in bold and underlined type) to the interpretation provision in paragraph 8, consequential on the proposed modifications set out above

8 *Interpretation*

[The following should be inserted after the definition of “the purpose”.]

“railway service performance”

includes, in particular, performance in securing each of the following in relation to railway services -

- (a) reliability (including punctuality);**
- (b) the avoidance or mitigation of passenger overcrowding; and**
- (c) that journey times are as short as possible.**

[NOTE: This tracks the current definition proposed in the Railways Bill.]

Annex B: Proposed guidelines on route utilisation strategies

Introduction

1. ORR is seeking views from consultees on the issues that need to be covered in route utilisation strategy (RUS) guidelines and the approach we should be taking. We expect to consult on draft guidelines at the same time as the “statutory” consultation on the licence modification. At this stage we are seeking views in particular on whether, and if so how, the following points should be addressed, and what, if any, other points should be covered in the guidelines.

Overall objective and purpose of the route utilisation strategies

2. A route utilisation strategy is defined in the draft licence condition as: “in respect of the network or a part of the network, a strategy which will promote the effective and efficient use and development of the capacity available, consistent with funding that is, or is reasonably likely to become, available during the period of the route utilisation strategy and with the licence holder’s performance of the general duty in paragraph 2”.
3. ORR considers that this sets out clearly the overall objective of RUSs. However, ORR suggests the guidelines should make it clear that such strategies should aim to:
 - (a) enable Network Rail and train operators better to plan their businesses, and funders better to plan their activities; and
 - (b) set out feasible options for timetable outputs and network capability, and funding implications, for train operators and funders.

The need to enable train operators and funders to plan with a reasonable degree of assurance should be balanced with the need to enable innovation to meet new market needs and competitive requirements.

4. ORR considers that in order to do this, a RUS is likely to focus on:

- (a) balancing different uses of the network (e.g. passenger and freight, and the different sorts of passenger and freight services);
- (b) combining efficient use of the network with efficient use of other railway assets (e.g. fleet);
- (c) balancing local, regional and national aspirations and objectives;
- (d) balancing use of the network and performance;
- (e) balancing use of the network and time for maintenance and renewal activity; and
- (f) identifying cost-effective opportunities to improve the capability, performance and efficiency of the network (e.g. at the time of renewal).

Guidance from funders

- 5. ORR considers that there should be an explicit requirement on Network Rail to have regard to guidance from funders concerning:
 - (a) available funding;
 - (b) key outputs being sought and options they would like to see tested; and
 - (c) assumptions relevant to forecasting demand for capacity (e.g. fares policy and crowding standards).

Establishing demand requirements

- 6. ORR considers that Network Rail should develop demand forecasting assumptions and sensitivity tests for RUSs based on:
 - (a) guidance from funders on public policy issues;
 - (b) engagement with train operators and other stakeholders on likely passenger and freight demand, and implications for the likely effective demand for network capacity (including open access services); and
 - (c) regional planning assessments prepared by the Department for Transport (DfT), as well as assumptions on other specific funder requirements, the availability of funding and spatial and other planning considerations.

Establishing what can be done

7. Infrastructure maintenance and renewal requirements/committed network enhancements should be derived from Network Rail's route plans. However, ORR suggests that the RUS is an opportunity to identify potential benefits arising, for instance, from accelerating or packaging renewal programmes.
8. Network Rail should engage with stakeholders with regard to assumptions on:
 - (a) technological change; and
 - (b) rolling stock deployment.
9. ORR considers that a RUS needs to have due regard to Network Rail's contractual commitments (including any mechanisms for output variation), and any other constraints (e.g. other contracts, such as franchise agreements).

Option selection

10. Selection of options for evaluation is likely to be a critical part of the evaluation and ORR suggests that the option selection process needs to reflect the outcome of initial consultation with stakeholders.

Evaluation criteria

11. ORR suggests that the existing SRA Appraisal Criteria⁸ should be the initial basis for the evaluation of outputs. These will need to be maintained and developed over time. ORR suggests this should be led by Network Rail, working with stakeholders. The criteria will need to reflect guidance on public policy issues from DfT and the Scottish Executive, and contain appropriate cost benefit ratios.
12. ORR suggests that the overall performance measure should be the Government's public performance measure (for franchised passenger services) and minutes delay (for freight and open access passenger services). ORR seeks views on whether there should be any specific criteria in the guidelines concerning other matters, such as safety and possessions requirements.

⁸ *Appraisal Criteria, a guide to the appraisal of support for passenger and freight services*, Strategic Rail Authority, London, April 2003.

Procedural requirements

13. ORR seeks views on whether the RUS guidelines should contain:
 - (a) anything to ensure consistency with EU requirements on capacity analyses and capacity enhancement plans;
 - (b) any procedural requirements in addition to those set out in the licence (e.g. clarifying the minimum scope of stakeholder consultation); and
 - (c) anything further on specific requirements of funders.