

# Network Code reform phase 2: update and emerging conclusions

Network Rail's response

August 2005

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# 1. Introduction

## Executive Summary

Network Rail welcomes the opportunity to comment on the ORR’s emerging conclusions in respect of phase 2 of the reform of the Network Code.

We believe that the industry should continue to review the potential for reforming all parts of the code, particularly to increase its effectiveness as a contractual tool to facilitate improvements to the operational railway. Further changes are also required to deal with changing relationships within the industry where joint working and partnership at a local level are prevalent. Network Rail believes that consideration should also be given to enable changes to be made to the Network Code within much shorter timescales than are currently possible.

## Parts F and G

Network Rail believes that Parts F & G of the Network Code should be aligned to ensure consistency and transparency. Network Rail supports all access parties having the rights to propose changes to both the network and vehicles through a revision of the established industry processes. Where non-symmetric arrangements are proposed their should be clear reasons for this approach.

We do not object to the principle of including an objective in Parts F & G but believe the suggested wording should be reviewed to ensure this is capable of covering all change scenarios recognising that, according to circumstance, industry beneficial changes may include enhancements or reductions in capability.

There is still an urgent need to provide clear and unambiguous definitions of the components related to Network Change to prevent intra-industry disagreement and disputes as to what actually constitutes change. This must include what is compensatable and what is not (and by definition, therefore, where the allocation of risk lies).

There is also a need to ensure that there is an explicit understanding of the definitions of the components related to Vehicle Change as it affects both passenger and freight operator rolling stock.

We believe that Schedules 4 & 8 (probably in a revised form) should provide compensation for any disruptive effects on the operational railway and that a formulaic approach should be used where possible. Where a formulaic approach is not possible, the rules which should govern any claim based on actual losses and the process to be adopted to seek agreement on the amount of the claim should be clearly set out within Schedules 4 & 8 themselves.

We do not believe that a separate technical arbitration process for Parts F & G would be beneficial. It would serve only to duplicate the provisions of the current dispute process. However, there may be a need for a separate “deadlock breaking” mechanism for large/complex schemes which we believe should be dealt with, in the main, prior to the Part F & G processes.

We strongly support the emerging conclusion that there should be bespoke arrangements for larger and more complex projects and for those deemed to be of national interest. A three-stage process should apply to such projects focusing on (1) approval of technology and/or scope of the project; (2) operational trial of the technology developed under stage 1; and (3) roll-out of the project. The first two stages would be dealt with as development of an industry operational project; the final stage would be governed by commercial processes under the Network Code and would involve compensation payments where appropriate. We suggest that either the funder of the project or the ORR should act as the ‘deadlock breaking’ body in the first two stages to decide whether the proposed project is in the industry’s best interest and should be taken forward. ORR would continue to carry out this role in the final stage.

It has always been recognised that divergent views within the industry on the necessity for changes to Parts F & G suggest that any proposed changes should initially be drafted by the ORR. Final changes should be taken forward under the C8 process in the Network Code if consensus cannot be achieved.

### Third parties

Network Rail has already produced and is using model terms under Part G (although this suite of template enhancement contracts is still under discussion with ORR with a view to ORR final endorsement). We intend to reflect the same principles in the development of model terms under Part F.

In addition to this Network Rail believes that consideration should be given to developing a project methodology, as an end to end process, for new or substantial changes to traction and rolling stock. There is currently a similar methodology in use for delivering renewal or enhancement projects on to the network and this has been effective in facilitating third party involvement in such projects.

We expect to continue with the development of our Dependent Persons Code of Practice and will work with train operators to produce a joint code of practice in how we will work with third parties such as PTEs if this is considered beneficial.

### Part K

Network Rail considers that the industry should undertake further work together to agree the necessary information requirements. This is detailed in our response to ORR’s April 2005 “Proposed strategy for developing a rail industry information network”. Information should support business needs and not duplicate existing obligations such as those in Part F, Part G and Part L. We conclude that it would be premature for ORR to enable the provisions in Part K prior to at least April 2006, and suggest that there may be a need to delay these provisions beyond this date to allow for their amendment or deletion as appropriate. Furthermore, if Part K is to be activated Network Rail believes that the industry disputes processes should be adopted for resolving disputes.

Our response follows the structure of the consultation document and is not confidential.

## 2. Responses to questions under Chapter 2: Progress to date

### Paragraph 2.27

Consultees are asked to identify any areas where they believe further work to reform the Network Code is required.

Network Rail believes that there is the opportunity for the industry to work together to introduce further reform to the Network Code to increase its effectiveness as a contractual tool that enables the improved delivery of the operational railway. Other conditions or areas within the conditions discussed below are going through a process of formal industry review as detailed in Chapter 2 of ORR's document. Network Rail wants to keep the momentum for progressing potential change through the established working group structures.

We agree with the work identified in Chapter 2 of the ORR consultation document. We believe that further work is needed in the areas set out below.

- **Part C** – the CRC has historically only been used to make relatively minor modifications to the Network Code (apart from to Part D where an industry group has developed substantial changes through a planned programme or where new parts have been introduced). The CRC processes are not proving to be effective for dealing with significant Network Code reform particularly when there is already a high degree of industry consensus. Currently the elapsed time from receiving a Proposal for Change to the approved proposal coming into effect is between 83 and 149 days. We therefore suggest that:
  - for changes that have been agreed through a formally constituted industry working group it should be unnecessary to then be required to go through the entire consultation process through CRC. This makes planning change proposals more bureaucratic and is an additional hindrance to industry progress;
  - for any Proposal for Change that is being made via such an industry working group, it should be possible to agree to a condensed CRC process to enable CRC swiftly to endorse the change and then gain ORR approval;
  - we would encourage the ORR to commit to giving approval within at most 21 days as in these cases they will already have been involved in the development of any Proposal for Change. At the moment the ORR timescales are open ended which gives no certainty for planning purposes of when or if a change may be introduced; and
  - consideration should be given to reforming Part C to reduce the elapsed time for all change proposals, as discussed at the August Network Code Industry Steering Group.
- **Part B** – at present considers there is a degree of tension between the two main aims of delay attribution:

- (a) to diagnose the root causes of delays; and
- (b) to allocate performance payments as between the contracting parties.

This has led to disputes, which Network Rail believes could be avoided if the relationship between these two aims were clearer.

If possible a means needs to be found of unifying the two aims into a more coherent system. We believe moving all aspects of delay attribution from Schedule 8 to Part B should be considered, which could require changes both to the Network Code and the need for of a re-opener in Schedule 8 (as set out in our August 2005 response document “Review of the Schedule 8 performance regime: Draft conclusions”).

**Part L/LA** – The ORR document provides detail about progress with a transition from the current Part L (which requires the establishment of local output commitments) to Part LA, where the evolving joint performance improvement plans process will be contractualised. There remain some significant issues that need to be resolved, particularly regarding enforcement and the need, or otherwise, of specific performance order provisions. We discuss these in detail in our response paper referred to in the previous paragraph. We do, however, support the view that compensation for persistently poor performance should be based on relevant losses and not on a payment rate. We hope that the ORR can provide clarity and reassurance to all parties on this issue as soon as possible. However, we do believe that with sufficient engagement by the relevant parties we will be able to resolve outstanding concerns in time for April 2006.

## 3. Responses to questions under Chapter 3: Parts F and G

### Paragraph 3.12

**Views of consultees are sought on the objective in paragraph 3.11, and whether such an objective should be explicitly incorporated in Parts F and G as the purpose of the relevant provisions.**

Network Rail believes that an objective would serve to identify the spirit in which Network and Vehicle Change should be approached and in principle does not object to one being included in Parts F & G.

However, we believe any objective needs to be assessed as part of a wider workstream addressing the necessary definitions within Parts F & G. Providing unambiguous definitions of the intended components of Vehicle and Network Change will be crucial if we are seeking to achieve a common understanding, and to prevent intra-industry disagreement and disputes, of what constitutes “change” and what the change process is seeking to do (in both consultation and compensation terms). This work on definitions must seek to reduce to a minimum the current uncertainties about what is compensatable and what is not (and, therefore, where the allocation of risk lies).

Sorting the current confusion over definitions is key to eliminating unnecessary disputes and would, we believe, reduce the need for an objective.

If an objective is to be included, Network Rail does not believe the wording proposed in this consultation document would necessarily reflect all types of proposals seeking to optimise industry benefit through Network or Vehicle Change. For example, Network Rail believes the suggested wording in an objective should be capable of covering all change scenarios recognising that, according to circumstance, industry beneficial changes may include enhancements or reductions in capability.

### Paragraph 3.24

**Views of consultees are sought on the propositions that:**

- a) **existing network licence provisions give Network Rail the significant obligations in respect of general facilitation of new rolling stock and network commitments, and Network Rail should now make a statement setting out how it proposes to do this in the light of the obligations;**

Network Rail agrees that the provisions in the Network Licence (and other regulatory mechanisms) are sufficient to ensure Network Rail’s facilitation role in introducing new and modified rolling stock on to the network. Network Rail has developed standard forms under Part F and is currently working on model terms for the introduction of new rolling stock. These will be in a similar form to the asset protection agreements currently being finalised for Part G.

We also believe that consideration should be given to developing a project methodology (such as the Guide to Railway Investment Project methodology, known as GRIP) for the introduction of new trains onto the network, which could potentially solve a number of existing issues currently identified by network users and funders. Network Rail will be exploring the feasibility of this and if appropriate will develop a methodology as soon as is reasonably practicable.

- b) project specific facilitation contracts should be available once a project has been specified and the risk allocation defined and whether the existing arrangements are adequate; and**

We believe that the current arrangements can be improved but we do have a suite of contracts specifically designed to facilitate our dealing with our customers and third parties on renewal and enhancement projects that could be adapted for use for projects specifically related to rolling stock. As previously stated in (a) there are also model terms under development where we have recognised the need for a revised, clear and transparent process.

- c) ORR should not establish model contracts for bi-lateral VRACs, but that this should be dealt with through the Network Code.**

We agree that model contracts for bi-lateral Vehicle and Route Acceptance Contracts (VRACs) should not be established. Network Rail believes that the model terms in Part F should be progressed to be used to facilitate the introduction of new trains onto the network, with the potential for developing and utilising a methodology (such as GRIP) for such projects. This would ensure there is a clear methodology and contractual framework in place that supports the needs of the industry.

## Paragraph 3.30

ORR seeks views on:

- a) whether Part F of the Network Code should be changed:
  - i) to enable Network Rail to make proposals for vehicle change, and ultimately (subject to appeal) to require them;****

We strongly believe that there would be an overall industry benefit in enabling us to make proposals for changes to traction and rolling stock in appropriate circumstances. Currently through the Network Code the only parties that can propose change are the train operators. This leads to a system where changes are instigated because of train operator commercial need which is not necessarily resulting in optimal wheel-rail interfaces.

Network Rail believes that operators would have sufficient regulatory protection and compensation provisions to ensure that any proposed change would be reasonable and beneficial from an industry perspective. We are aware that there may be contractual issues outside of the regulatory environment, but we believe that third party agreements should be developed where necessary to allow for optimal industry solutions.

**ii) to extend the definition of vehicle change to include vehicle operation; and**

We would welcome an extension to the definition of Vehicle Change to include vehicle operation, which we expect could be demonstrated to add value to the Vehicle Change process. Such a definition should of course be developed through consultation with the train operators. Network Rail would expect the definition to include the operation of all trains on routes on which they have not been used before, the speed of trains operated on the network and other relevant changes to operating characteristics.

We also consider there needs to be greater clarity about the relationship between Part F and Variable Track Usage (VTU) charges for when new vehicles are introduced to the network. There is the potential for these vehicles to cause more costs than those recovered by the VTU charge, and therefore we would appreciate a definitive statement about whether or not we can recover these additional costs through Part F.

**b) whether they see any merit or justification for the provision of a technical arbitration process in Parts F and G and, if so, the nature and scope of such a process, and its relationship with the existing dispute resolution mechanisms.**

Network Rail believes that a technical arbitration process in Parts F and G needs further consideration and that this would need to include the mechanisms that already exist to see whether such a process is necessary.

The original Access Dispute Resolution Committee arrangements included a technical sub-committee but this was disbanded with effect from August 2000 as it was never used. Parties to a dispute can already use the services of an expert in the preparation of a case. The Chairman has the option in any dispute to employ “a technical assessor with a specific area of expertise relevant to one or more issues in the dispute...” (ADRR, Part A, 1.53(a)). The panel would not be bound by the assessor’s views but would need to explain any disagreement with them. The Chairman also has the option of setting up a new type of panel for a particular dispute.

Furthermore, we understand that the Access Disputes Committee (ADC) and the Rail Industry Dispute Resolution (RIDR) committee have now implemented the Rail Industry Mediation and Arbitration Service (RIMAS). We have asked for further clarification regarding what this means in practice and to what extent this covers all of the issues brought up in the consultation process on this subject last year. We believe that this needs to be clarified and considered alongside the options for the parties set out above, before a decision is made on any mandatory technical arbitration process.

In any cases other than for large schemes, where we think different considerations may apply (see our response to Paragraph 3.49), we believe a separate mandatory technical arbitration process may add extra layers and complexity to the process of dispute resolution and cannot readily think of any examples of technical disputes which could not be resolved through the current or proposed mechanisms.

With regard to Part F in particular, Network Rail believes that the current system of vehicle acceptance through the System Review Panels and the Network Rail Acceptance Board, together with the ongoing work of the System Interface Committees, covers all relevant technical issues including interface factors. In addition to this, most technical issues are driven through Railway Group Standards (RGS) and operators’ safety case requirements to comply with these standards. Compliance is mandatory and there is no scope for derogation from these standards unless a comprehensive case is put to the Rail Safety and Standards Board which would assess the application on its technical merits, changing the RGS if deemed necessary.

We would be concerned if the decisions made by an arbitration body concentrated purely on technical issues without consideration of any necessary regulatory and commercial issues. Consideration would need to be made of the most appropriate economical solution. For example, if a proposed change would cause additional damage to the track, any arbitration process should consider the cost effect in relation to the Variable Track Usage charges to ensure Network Rail is receiving sufficient funding to maintain and renew the network.

### Paragraph 3.31

In responding to consultation it would be helpful if:

- a) **Network Rail could identify any changes which it considers have been, or are being, hindered, by the existing arrangements; and**

It is important to provide mechanisms for change that are fit for purpose and do not add unnecessarily complex processes. We therefore believe that for major changes such as the introduction of new trains a process similar to GRIP would be beneficial in facilitating their introduction to the network. However, for vehicle changes where the potential impact is far less significant they should be covered by a Part F that provides a transparent process to enable a timely change.

We are aware of many situations where beneficial changes are being, or have been, hindered by the existing arrangements because we cannot propose changes to vehicles. The following are examples of some of these situations:

1. GSM-R – Network Rail has an existing and future obligation to install GSM-R onto the network and vehicles that operate on the network. This requires changes to both the infrastructure and rolling stock. The required changes to the infrastructure have their own Network Change related problems. However, significant costs and delay have been added to the project due to Network Rail not being able to propose vehicle change and thus having to negotiate changes to rolling stock with each train operator on a bespoke basis.
2. Reduction of Bogie stiffness – If Network Rail could propose vehicle change to specify vehicle stiffness parameters it would be more straightforward to make changes which would reduce some track wear, whilst paying the one off costs and realising a whole industry benefit.

3. ERTMS – This is another example where, for trial purposes, Network Rail is required to install new technology onto both the network and vehicles that operate on the network. Unfortunately significant delay and excessive costs are being incurred through negotiation of a bespoke contract with operators. Had we been able to propose these changes we believe the overall costs would have been reduced. At the very least it would have been much easier to achieve the same result.
4. Installation of unmanned network monitoring equipment – It would be of benefit to the industry if Network Rail could place unmanned network monitoring equipment onto rolling stock. If we are able to propose Vehicle Change for this purpose, it would be easier to introduce arrangements to monitor and maintain the network more effectively, appreciating even quicker where the network is potentially degrading, leading to an increasingly focused and proactive approach to maintenance that could reduce costs. There is currently no formal mechanism for proposing such changes.
5. Alteration of Couplers – The Industry would benefit if it was easier for us to propose changes to couplers. This would ensure a consistent type of coupler is used in a particular geographic area, which would assist greatly in the rescue of failed vehicles from the infrastructure and lead to a reduction in delays.
6. Selective Door Operation (SDO) – Allowing Network Rail to propose Vehicle Change would enable us to propose changes to SDOs to ensure a consistent use of an SDO system within a geographic area. This would ensure that different system types are not overlaid at the same locations leading to increased difficulty in maintaining the network.

We believe that Part F should be brought in line with the provisions of Part G, allowing Network Rail and the TOC/FOCs equal rights to propose changes to both the network and to vehicles operating on the network. This will allow greater transparency, efficiency and cooperation within the industry whilst benefiting from the established regulatory structure and processes.

### Paragraph 3.34

**ORR seeks views on its emerging conclusion that the separate F and G processes should be retained, but changes might be needed to ensure the processes work in parallel where appropriate.**

We support the emerging conclusion that separate F and G processes should be retained, on the basis that a joint and largely separate process should be introduced for larger and/or more complex projects (see response to Paragraph 3.49 below). There should be a fast track way of determining which process should be adopted in any given situation.

### Paragraph 3.42

**ORR seeks views on the emerging conclusions set out above, particularly:**

**a) the key principles set out in paragraph 3.36 above;**

In relation to the statement in 3.36(a) Network Rail’s position was outlined in further detail in our letter to David Robertson dated 21 February 2005 on Reform of the Network Code Phase 2. In summary, we support a widely drawn right to consultation, but do not believe the right to compensation should be so widely applicable.

In relation to the statement in 3.36 (b) we believe that Schedules 4 & 8 should be the source of compensation for the effects of any possessions or for the performance of services, and not Network Change. We believe compensation should concentrate on the effect on train operators of unforeseen events, rather than having to try to concentrate on perceived causes of those events and having to attempt to categorise them as “Network Change” or not. Schedules 4 & 8 should be revised with sufficient rigour to ensure all disruptive effects can be dealt with explicitly within these revised Schedules, where possible through a formulaic approach but (in exceptional cases) also capable of dealing with a relevant loss/claim process that is unambiguous. Reforms should aim to specifically help eliminate disputes (particularly those made retrospectively), between train operators and Network Rail which are costly and use management time that would surely be better deployed on improving the current and future operational railway.

We also believe that a clearer process for offsetting benefits against costs associated with changes is needed. Consideration should be given as to whether it might be possible to capture windfall gains enjoyed by operators if there is a practical solution as to how this could be achieved. It is recognised that to isolate evidence of small gains or losses is difficult, and there could be the need for a pre-agreed de minimis threshold in order to prevent an increase in bureaucracy and transaction costs. It may be possible to devise a system where, say, there would be a claw back by the funder of 80% of net benefits from a previous scheme to be netted off a current scheme where the operator faces costs. Such an approach would ensure a more realistic assessment of the effects of change over the course of an operator’s track access agreement.

In relation to the statement in 3.36 (c) Network Rail accepts that this current provision within Part G, which allows operators to block a change if it would breach any existing access rights, should remain.

In relation to the statement in 3.36 (d) Network Rail accepts the theory that train operators should be able to block a change if it will lead to loss of future capability where a business case to preserve such future capability exists. However, it will be important to define clearly and comprehensively the criteria for determining the likelihood of this.

In relation to the statement in 3.37, as set out above, Network Rail supports a widely drawn definition for consultation purposes. However, we believe that consideration should be given to the suite of different definitions required (for consultation, compensation, blocking, etc.) before determining those that should be adopted to ensure clarity of risk allocation and practicability of application are achieved.

**b) the right to seek to block a change being subject to specific criteria as set out in paragraph 3.38 above; and**

The criteria listed are substantially the same as the existing criteria under G2.1(a) & F3.1(a) and as such Network Rail does not object to them. Network Rail particularly supports the requirement in the third criterion to consider the industry best option.

We welcome the use of the term “resilience of network operation” in 3.38(b) which we consider requires a whole industry approach to the consideration of the effects of proposed Network Changes, rather than concentrating solely on delay minutes for an individual operator.

- c) **no change to the existing compensation arrangements for changes of law.**

Network Rail believes that the definition of Competent Authority requires attention in terms of the allocation of costs for such changes. If the change is mandated, costs and losses currently lie where they fall. But where only the end goal is stipulated/ mandated and not the route to achieve that goal, there are likely to be options for change that have varying cost implications for different parties. Clarity and consistency is needed on how these options are progressed and where the cost should fall. For example, even TPWS was difficult to introduce using Parts F & G since no consensus could be reached about whether this fell under the definition of Competent Authority or not.

The definition could usefully be expanded specifically to include recognised industry standards such as Railway Group Standards and TSIs and perhaps also other areas such as the SRA’s Code of Practice for access by mobility impaired persons.

We also believe that recommendations produced as the result of formal inquiries should be covered by Competent Authority Network Change. Such recommendations are currently not mandatory and, therefore, Network Rail is not strictly obliged to carry them out. However the advice of a panel of competent experts, who have spent much time examining the lessons to be learnt from a previous incident or event, must be considered and to the extent that these proposals are implemented it will generally be appropriate to treat them as Competent Authority for the purposes of Network Change.

Network Rail is aware, however, that it is important to recognise potential funding problems for open-access operators if costly obligations are placed upon them through Competent Authority Network Changes.

In practice, changes in law will often be dealt with through the provisions discussed above and below (e.g.ERTMs), for example where it is most effective for one party to coordinate the process and to provide a single channel for funding. It is therefore necessary to consider these arrangements together.

### Paragraph 3.45

**ORR seeks views on its emerging conclusion that there should be a mechanism for adjusting Network Rail’s outputs by giving them the right to make changes to access rights subject to compensation, and appeal to ORR.**

Network Rail supports this conclusion and the emphasis placed on facilitating alignment between the key industry relationships. We think that the detail of this requires further consideration. For example, whilst we understand ORR’s current view that this mechanism should not generally apply to new route utilisation strategies, it may be the case that a route utilisation strategy may be the only way of developing the detailed plans required to implement an aspect of a Periodic Review. We believe that consideration should be given to the mechanism allowing for such cases.

### Paragraph 3.49

**ORR seeks consultees’ views on our emerging conclusion that there should be bespoke arrangements for larger and more complex projects.**

In relation to GSM-R there was some confusion in relation to new franchises as to whether the train fitment should be dealt with under Network Change as opposed to it being included as a franchise commitment at the point at which the new franchise is awarded. Network Rail believes that where there is sufficient knowledge available to make a reasonable assessment of the impact of a change then it is more efficient to include such a change in a franchise specification rather than through a negotiated Part G settlement. Where this is not possible, however, it is important to ensure that the baseline assumptions underlying franchise bids are understood since this would provide the basis for any Network Change compensation. Further consideration needs to be given to this in relation to future schemes.

Network Rail agrees that there should be bespoke arrangements for larger and more complex projects. There needs to be a clear and constructive process for delivering whole industry solutions together with clarity on how they are funded at the start of the project. Our ongoing experience with the GSM-R project serves only to strengthen this belief – we are trying to deliver a project which is generally accepted as being the right way forward for the industry, yet there is an on-going and seemingly endless series of challenges to aspects of the operational proposal itself, all being discussed under the commercial Network Change banner. It would have been significantly more productive to have finalised the purpose and scope of the operational project first before embarking on the commercial negotiations.

It would be more practical and pragmatic if project teams could seek approval for the concept of their proposed scheme in advance of having to plan possessions for the work and entering into commercial negotiations with train operators over the effects of the change. At the early stage the discussion should be focussing purely on whether the proposal, in operational/ technical etc. terms, is positive and appropriate for the railway. Currently, if Network Rail wishes to get train operator’ collective sign-off in principle for a project, we have no choice but to go through the formal Network Change process, even if at that stage we have no formal plans for possessions/ compensation etc. We would, therefore, like to see an obligation under the Network Code to revert to a joint process for large, complex and industry-wide Network Changes.

Complexity and a lack of manageability also arise at the point at which the change crosses the wheel-rail interface in a material way. Where vehicles are included in larger projects which require use of both Parts F & G, Network Rail's internal process (Vehicle Acceptance/Vehicle Change) would have to be considered and associated with the overall project timescales and requirements.

In general, we believe bespoke arrangements should assist the industry in delivering large/ complex projects and those deemed to be of national interest (however that should be defined). Examples of such projects include GSM-R, ERTMS, the Thameslink (2000) project and the Olympics-related works around the Stratford/Hackney areas. However, smaller projects may also benefit from the option of using bespoke arrangements, e.g. complex re-signalling schemes which would benefit from being 'approved in theory' by train operators before the commercial negotiations start.

Our experience of the large and industry-wide GSM-R project suggests a three-stage process would be a useful model for bespoke arrangements:

- Stage 1 – Approval of technology and/or scope of project

No change process works if you cannot clearly define what the proposed change should be. This stage would, therefore, involve identifying the precise technical scope of the change and whether the technology being suggested is fit-for-purpose. At this stage work is centred on delivering a rail industry project, rather than concentrating on agreeing the commercial way forward under a formal change process. Network Rail and train operator operational representatives should be involved at this stage and in stage 2. We also believe that the ROSCOs should often be involved in the first stage(s) of the process.

We believe that pan-industry schemes need direction, a strong element of decision making and a deadlock breaking mechanism; the funder of the project or the ORR should be in a position to make the final decision on whether a project is the best option for the industry on an economic and practical level.

- Stage 2 – Trialling

This stage would be aimed at identifying whether there are any issues or problems which arise from using the technology. This stage could be skipped if no trial work is required, e.g. for non-technical projects such as work associated with the Olympic Games.

In order to move the project forward (or to stop it) so that the industry's best interests are achieved, it may be necessary to give the funder of the project or ORR similar powers to those outlined in Stage 1 above to make a decision as to whether the trial is a success and to direct the industry as appropriate.

- Stage 3 – Rollout of the technology/ project

This stage would be governed by commercial arrangements under Part G. Having gone through the previous two 'development' stages, industry parties should at this point have a clear idea of the type and even value of costs that can be agreed in advance of the change actually happening.

We would expect the obligation to go through the staged approach to be within the Network Code, but for the 'rules of engagement' for stages 1 & 2 to be set out outside the Code. It is important to make the distinction between (a) what is solely development of a rail industry project which need not be governed by Network Code rules and (b) the Network/ Vehicle Change commercial negotiation work which should begin once the project has been established, i.e. in Stage 3 and which should be covered by the Code. Industry parties would bear their own risk for the development of schemes in the first 2 stages with the split of risk being negotiated and agreed in the early stages – the 'decision-maker' e.g. the funder of the project or the ORR would be charged with resolving any disputes.

### Paragraph 3.52

**ORR seeks views of consultees on the way changes to Parts F and G should be implemented.**

We believe large projects already in progress would need to be considered on a case-by-case basis to decide whether the benefits of applying the new rules retrospectively would outweigh the dis-benefits.

Changes to Part F should not be applied retrospectively to current Vehicle Changes, although agreed changes should be published as soon as is reasonably possible.

We agree with the suggestion in paragraph 3.51(b) of the consultation document that the ORR should draft the relevant changes and, if consensus is not achievable within the industry, take these changes forward under C8.

## 4. Responses to questions under Chapter 4: Rights for third parties

### Paragraph 4.10

ORR seeks views of consultees on:

- a) the circumstances under which third parties may require Network Rail to facilitate changes to the network or to vehicles operated on it;
- b) whether a scheme specific contractual mechanism is the appropriate means;
- c) what rights and obligations these contracts should contain and whether they are different from those enjoyed by and imposed on train operators under Parts F and G of the Network Code;
- d) what the appropriate mechanism for doing this is.

Network Rail already carries out work on the network on behalf of third parties, which can include local authorities, Passenger Transport Executives, developers etc. We do not know of any circumstances where third parties would require Network Rail to facilitate changes to vehicles, if they had the ability to do so. However this may help to facilitate delivery of outputs required by third parties in the most efficient whole industry manner.

Work being carried out on the network on behalf of third parties is generally subject to contractual arrangements with the third party in question. Network Rail has been reviewing the procedures and processes relating to third party involvement in enhancements since October 2003, as neither we nor the industry considered the existing arrangements to be satisfactory. We have produced a “Paper on Contractual Framework for Customer Sponsored Enhancements” in response to the ORR’s “Policy Framework for Investments”, published in February 2005. The principles cited in Network Rail’s paper have been reflected in the nine template enhancement contracts we have produced. We consider these template contracts to be the appropriate mechanism for the majority of third party involvement in Network Change and we are already using them for this purpose. There are also situations where ‘bespoke’ agreements are required.

The nature and structure of the rolling stock market ensures that third parties, through contract, are able to require changes to vehicles. Network Rail is not party to such contracts. Such changes are based on commercial requirements and may fail to cover, or allow for, optimal technical solutions at the point of interface with the network. Network Rail is working on developing a contractual framework for Part F which will be supported by the model terms, and which will mirror that currently available under Part G. We consider these contracts will be the appropriate mechanism for facilitating third party Vehicle Change.

We consider the appropriate mechanism for requiring contracts with third parties is likely to be most suitably held within the Dependent Persons Code of Practice (DPCoP).

## Paragraph 4.11

**We would welcome a statement from Network Rail of the approach it proposes to adopt in relation to scheme-specific contracts for third parties in response of facilitating vehicle change and facilitating and delivering infrastructure improvement. The approach would of course need to be able to reflect the ORR’s economic framework for investment in the network (we recognise that this is not due for publication until August 2005).**

Network Rail will continue its policy of engaging with third parties to undertake enhancement work through a binding contract. Further detail is set out in the “Paper on Contractual Framework for Customer Sponsored Enhancements”. A full response to the ORR’s “Policy Framework for Investments” will be provided under this consultation.

With regard to traction and rolling stock Network Rail believes that further consideration should be given to the potential for developing a robust end to end process for railway projects specifically relating to vehicles. This could be similar to the GRIP currently used for infrastructure projects and would allow Network Rail to contractually engage with third parties involved in vehicle introduction and change, illustrating a clear process and risk matrix in order to facilitate the needs of the industry.

To ensure our facilitation role is as effective as possible, Network Rail should be made aware of new vehicle introductions and changes to vehicles at the earliest opportunity. Otherwise there is a potential for not achieving the optimal solution within required timescales.

## Paragraph 4.17

**ORR seeks the views of consultees on the proposal that Network Rail and train operators develop a code of practice setting out how they will consult interested third parties in respect of industry processes in the Network Code and what the Network Code should contain.**

We would be happy to work with train operators in developing joint codes of practice to inform how we would consult with third parties that have an identified interest in industry processes. In line with its licence requirement, Network Rail currently operates the DPCoP. This applies to Network Rail’s relations with potential customers and suppliers but could be further developed to apply specifically to consultation procedures, although obviously this would be limited to Network Rail’s activities.

## 5. Responses to questions under Chapter 5: Information

### Paragraph 5.12

ORR seeks views on the broad approach and specifically:

- a) whether ORR should be switching on Part K;

Network Rail agrees that all access parties need to work together to identify and define the information required to work effectively and to deliver the joint working envisaged in the White Paper. These requirements then need to be compared with the information currently available via existing obligations under other parts of the Network Code (e.g. Parts F and G; Part L), the network licence and current bespoke bilateral agreements. Network Rail expects that, in some areas, the existing provisions and practices may prove to be sufficient for the provision of information required by the industry and that some amendment of Part K may be required as a result. Furthermore, given the changes that have occurred since the initial development of Part K we believe that removing Part K altogether should not be ruled out.

We are currently working constructively with operators to improve information flows between parties including in relation to:

- Route plans including further information on renewal plans for relevant parts of the network;
- Joint Performance Improvement Plans; and
- Route Utilisation Strategies

This is through various industry forum and working groups, such as the recently formed Route Investment Review Group (RIRG). We would be happy to talk to train operators about any other requirements operators may need and are concerned that Part K may have the unintended consequences of undermining this joint working approach and duplicating effort. We are willing to support a working group proposal that Part K should be redrafted to replace the existing provisions with a process for train operators and Network Rail to request information and escalate to the ORR if they do not believe that the response to such a request is reasonable. This could act as a backstop contractual proposal if parties are unable to resolve all their requirements for information through other mechanisms.

Were this approach not to be pursued, we are concerned that the current provisions of Part K do not include specific dispute procedures. As currently drafted any dispute between the parties will be subject to resolution through arbitration. Network Rail would support using the standard process of parties submitting a joint paper to an Access Disputes Panel utilising the Access Dispute Resolution Rules with appeal to ORR where necessary.

We conclude that it would be premature for ORR to enable the provisions in Part K at this time and suggest that the industry looks to developing alternative provisions for Part K. Otherwise, at the very least the introduction of these provisions should be delayed until April 2007 to allow for their amendment or deletion as appropriate.

**b) what the content of the annual information report, and the regular monitoring reports should be;**

We believe that the annual information set out in the current Part K is on the whole likely to be provided in Network Rail’s business plan. We are considering how best to make available to operators detail on our renewal plans to provide the basis for further discussion, for example, at RIRG.

We are still considering how best to monitor in-year progress, including reporting material changes to our work programme, the current year’s train performance and our plans for the addition and removal of temporary speed restrictions. Measures of the efficiency of possession utilisation are currently being considered by the industry working group which has recently been created to inform the ORR’s interim review of possessions. We therefore consider that the requirement for reporting possessions utilisation in a quarterly monitoring report should not be determined until this work has been completed. Quarterly reporting is clearly linked to Network Rail Monitor published by the ORR and we would expect it would be more sensible for us to publish a full quarterly report that states what we have done in the quarter and what implications are for rest of the current year and beyond. This is likely to include the specific items currently set out in Part K.

We note that our business plan does not include a description of our policies and practices for carrying out and resourcing our activities (as recognised in the recent change to Licence Condition). We believe that this should not be included in any regular reporting in the future since this information will be set out in our Business Planning Criteria and other supporting documentation, which will not necessarily be produced on an annual basis.

**c) what provision should be made for specific information flows.**

Currently the industry has bespoke commercial arrangements through which required information is exchanged between parties that have identified a need for the information. In addition to this, there is extensive work currently being undertaken through the Information Network Working Group and Network Modelling Framework Working Group to identify required information flows and appropriate governance arrangements. In our response to the ORR’s Information Network consultation, Network Rail proposed that the ORR undertake a needs analysis to identify what information was needed by industry parties, to ensure information was being provided to those parties that have a quantifiable business need for the information. Network Rail believes that through this work information flows will be identified which will ensure information is used in an efficient, effective and transparent manner. Once these information flows are identified, the appropriate governance arrangements should be established to support and develop information management across the industry, ensuring relevant parties receive appropriate information to plan their business.

We are working on identifying our data and information requirements for our current business needs, including information we are required to supply to our customers. We are also assessing our needs in order to carry out our new roles following the Rail Review (specifically RUS development, and investment appraisal). We are informing the ORR of our information requirements, though it should be noted that this is an iterative process and these are likely to develop over time.