



NEUTRAL CITATION: [2005] ORR 2

OFFICE OF RAIL REGULATION DETERMINATION OF AN APPEAL BY SILVERLINK TRAIN SERVICES LIMITED AGAINST A DETERMINATION OF THE ACCESS DISPUTE RESOLUTION COMMITTEE REGARDING THE ESTABLISHMENT OF ITS 2004-05 LOCAL OUTPUT COMMITMENT (REF. AD40)

DETERMINATION: Office of Rail Regulation determines that the appeal of Silverlink Train Services Limited in respect of determination reference number AD40 of the Access Dispute Resolution Committee is rejected.

Introduction

1. On 15 March 2005, Silverlink Train Services Limited ("Silverlink") served on the Office of Rail Regulation ("ORR") a notice of appeal against Determination AD40 of the Access Dispute Resolution Committee ("ADRC") published on 1 March 2005 pursuant to Condition L7.9 of the Network Code.
2. The ADRC had been asked to determine whether or not Network Rail Infrastructure Limited ("Network Rail") should issue to Silverlink revised LOC Statements¹ for the Relevant Year 2004 in accordance with Condition L7.10² of the Network Code. Silverlink believed that the delay minutes and values in Network Rail's original offer for a Class A Local Output ("LOC") were too high, and should have been reduced to take into account achievable improved performance on the part of Network Rail. Network Rail, on the other hand, argued that the offer it made to Silverlink represented a realistic projection of performance for 2004-05, taking into account the annual national delay target of 12.3 million minutes and performance risks associated with infrastructure work and the introduction of the new timetable on the West Coast Main Line, the route over which many Silverlink services operate. Following consideration of the information provided by the parties, including further statements provided in response to Directions issued by the ADRC, the ADRC determined that the LOC offer issued by Network Rail to Silverlink should not be reopened, and should be "Established" in accordance with the provisions of Part L.

¹ Capitalised terms that are not otherwise defined in this determination have the meaning set out in the Network Code.

² Silverlink's notice of appeal incorrectly identified the January 2005 version of Part L to be the relevant version of Part L for the purposes of its appeal to ORR. The correct version of Part L of the Network Code for the purposes of this appeal is Part L as at 1 August 2004. It was this version of Part L which was considered by the ADRC.



3. Following receipt of the notice of appeal, on 22 March 2005 ORR sought representations from Network Rail as to whether it considered this appeal should be heard by ORR. Following receipt of its representations made on 24 March 2005, ORR informed the parties on 6 April 2005 that, having reviewed both the notice of appeal and Network Rail's representations, it had decided that the appeal against the ADRC's determination should be heard by ORR.
4. Network Rail subsequently submitted a notice of objection on 3 May 2005 under Condition M5 setting out the reasons why it considered that the determination of the ADRC should be upheld.
5. On 13 May 2005, ORR wrote to both parties informing them that, on the basis of the information provided in the two submissions made at that stage, ORR was minded to conclude that it would not be necessary to hold a formal hearing as part of its process of determining this matter. In response, both parties confirmed that they were content with this approach. No further information has been received that has subsequently caused ORR to change its view on this issue.
6. Having considered fully the information contained in the two submissions, ORR wrote again to Network Rail on 25 May 2005 setting out a number of questions arising from Network Rail's notice of objection relating to its original arguments about the ADRC's handling of the dispute, and the process undertaken by Network Rail in determining Silverlink's 2004-05 LOC offer. Silverlink was also invited to provide representations on this latter point. Network Rail's response was submitted on 3 June 2005, with Silverlink's corresponding comments made on 2 June 2005. ORR subsequently copied these documents to the other parties for comment.
7. On 15 June 2005, Silverlink provided its representations on the Network Rail submission dated 3 June 2005, with Network Rail responding on the same date in respect of Silverlink's earlier submission.
8. Following receipt of this information, ORR concluded that it had received sufficient information from the parties to enable it to determine the appeal.

The relevant requirements of Part L of the Network Code

9. Part L of the Network Code establishes a process whereby Network Rail is obliged to enter into a contractual commitment with Train Operators for the implementation of plans to achieve improvements in operational performance or the capability or quality of the Network.
10. Part L provides for two classes of Local Output:
 - (a) a Class A Local Output whereby Network Rail commits to achieving a level of performance relating to delays to, or cancellation of, train services or other matters relating to operational performance in respect



of which an access agreement provides for an entitlement to compensation; and

- (b) a Class B Local Output whereby Network Rail commits to achieving a level of capability or quality of the Network or other matters which are not the subject of a Class A Local Output.

This appeal concerns a Class A Local Output.

11. Consultation between Network Rail and Train Operators is part of the process for developing LOCs under Part L. If any Train Operator, is dissatisfied with any aspect relating to the Establishment of its LOC, or subsequent variations proposed by Network Rail, it has the right to refer the matter to the ADRC under Condition L7.1, and ultimately to ORR.

12. On 28 May 2004, the Regulator's LOC Criteria for 2004-05 (the "LOC Criteria") were published. The LOC Criteria only applied to Class A Local Outputs and specified the matters to which the Regulator, and now ORR, will expect to have regard and the relative weight which it will expect to place on such matters when considering any reference made under Condition L7. In addition, Condition L7.6 requires that matters referred to the ADRC under Condition L7.1 are determined by reference to the LOC Criteria.

Grounds for appeal

13. In its notice of appeal, Silverlink considered that the Determination of the ADRC to be wrong and/or unjust because the ADRC:

- (a) failed to give proper consideration to the meaning and intention of the LOC Criteria, in particular failed to consider the proper weight to be given to criteria 7(d)(i) and (d)(ii) - Ground 1;
- (b) took into account factors which were not relevant to its determination, in particular whether the parties had considered the consequences of the appeal - Ground 2; and
- (c) did not give full consideration or determine all of the issues raised by Silverlink - Ground 3.

14. Paragraph 7(d) of the LOC Criteria states that:

"7. The [ORR] will expect any referral made to [it] under Condition L7.2, or to the Industry Committee under L7.1, to be considered against the following matters:

- (d) *the consistency of the LOC with a realistic projection of Network Rail attributable delay minutes for each Relevant Year, taking into account:*
 - (i) *Network Rail's network licence obligations, including in particular Condition 7, concerning network stewardship; and*



- (ii) *the [ORR's] national projections of future Network Rail performance at the preceding access charges review;*"

Paragraph (e) of criterion 7³ and criterion 8⁴ are referred to in the parties' arguments. They are dealt with to the extent necessary below but ORR is satisfied that their interpretation is not critical to its determination of this appeal.

15. At the time when Network Rail was preparing its offers for 2004-05 and when the initial reference was made to the ADRC, Condition 7 of Network Rail's network licence provided that:

7.1 "The purpose is to secure—

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) 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 the quality and capability of the network.

7.2 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."

Condition 7 has subsequently been modified. For the purposes of this determination, ORR has considered Condition 7 as set out above.

ORR's consideration of Silverlink's appeal

16. ORR's consideration of Silverlink's appeal has been limited to a review of the decision of the ADRC and of the representations made to ORR by the

³ Paragraph (e) provides for consideration of "the consistency of a LOC with the performance of Network Rail's obligations (i) to any other party under an Access Agreement...; or (ii) concerning health and safety...".

⁴ Criterion 8 provides that ORR "would expect to give priority to criterion (e) (consistency with Network Rail's other obligations) and then to give appropriate weight to each of the other criteria set out above, depending on the circumstances of any Appeal."



parties following the reference. ORR did not consider that a re-hearing was necessary in this case, as the questions at issue are relatively limited in scope and the positions of the parties were clear to ORR.

17. Network Rail in its notice of objection argued that Silverlink introduced a number of new grounds of argument following the ADRC's directions of 11 January 2005. Network Rail argued that these grounds should not be considered by ORR. In particular, Network Rail made reference to the arguments made by Silverlink in relation to Condition 7 of the network licence. The ADRC has the power under Condition L7.6(a) to give directions as to the procedure to be followed in the appeal, including in relation to the making of any written or oral submissions. ORR understands that Network Rail argued at the hearing that the ADRC should not consider the additional points raised by Silverlink in its written submissions. ORR considers that the ADRC acted quite properly in seeking additional written submissions from the parties and as the LOC Criteria identify Condition 7 as a relevant consideration for the appeal body, ORR does not agree with Network Rail's argument that this issue should not have been considered by the ADRC and has therefore considered these grounds of argument to the extent relevant.

18. Silverlink's notice of appeal raised three grounds for its appeal against the ADRC's determination and, in particular, its first ground includes a number of points where it considers that the ADRC's determination was wrong or unjust. In this determination, ORR has agreed with a number of Silverlink's arguments. However, ORR has concluded that the ADRC's decision should be upheld and Silverlink's 2004-05 LOC should be Established in accordance with Determination AD40. The basis for this determination is that ORR has concluded that the principal issue that this appeal requires it to determine is the correct interpretation and application of criterion 7(d)(i) under Ground 1. For the reasons set out below, ORR has not agreed with Silverlink's arguments on this issue. Where ORR has otherwise agreed with Silverlink it has concluded that the arguments on these points do not affect its overall conclusion that Silverlink's 2004-05 LOC should be Established. The remainder of this document explains the reasons for this determination.

19. In relation to each ground, the arguments of the parties are first summarised and then ORR's analysis and conclusions are set out.

Ground 1 - Interpretation of LOC criteria 7(d)(i) and 7(d)(ii)

Silverlink's arguments

20. Silverlink's notice of appeal raised a number of issues in respect of the ADRC's consideration and interpretation of paragraphs 7(d)(i) and 7(d)(ii) of the LOC Criteria.

Interpretation of the term "consistency"

21. Silverlink was concerned that, in interpreting criterion (d) the ADRC raised the issue of whether the term "*consistency*" has the same meaning as



"*absolutely equal to*" (see paragraph 11.4 of the ADRC Determination). Whilst the ADRC concluded that this interpretation was acceptable, it subsequently stated (in paragraph 11.5) that that "*it cannot be argued that the chosen process is axiomatically fair*". In addition, the ADRC said that whatever construction is placed on "consistency with" it reasonably applies with equivalent force to criteria (d) and (e). In Silverlink's view, the ADRC's final determination was therefore at odds with its reasoning.

22. Silverlink argued that the wording of both paragraph 7 and paragraph 8⁵ of the LOC Criteria clearly indicate that the term "*consistency*" should not be taken to mean that the sum of all LOC offers must be "*absolutely equal to*" the national allocation of delay minutes, and the ADRC should therefore have concluded that appropriate weight should have been given to criteria 7(d)(i) and 7(d)(ii) behind the obligations contained in criterion (e).

Balance between criteria 7(d)(i) and 7(d)(ii)

23. Silverlink was concerned that, whilst the ADRC had been requested to consider the balance between criteria 7(d)(i) and 7(d)(ii), it had failed to give proper consideration to the appropriate weight to be given to them.

Interpretation of criterion 7(d)

24. Silverlink expressed the view that to achieve the "realistic projection" envisaged by ORR under the LOC Criteria, account must have been taken of criterion 7(d) as a whole with appropriate weight being given to both criteria (d)(i) and (d)(ii) in arriving at a suitable conclusion. In its opinion, Network Rail was required to take account of both the national projection of delay minutes and its licence condition obligations, and that there should be no priority given to either of these considerations.

25. Silverlink argued that the ADRC's apparent conclusion that a top down process for the allocation of delay minutes was acceptable was wrong. Silverlink considered the allocation of nationally derived targets in priority to local reasonable requirements to be unjustified and unfair and that it would serve automatically to exclude or inappropriately constrain the other LOC Criteria.

26. Silverlink set out what it considered to be the correct interpretation of criterion 7(d)(i). Silverlink's view was that, when producing a LOC offer, Network Rail should consider a train operator's "reasonable requirements" (ie criterion 7(d)(i)) alongside the effect of the national projection (ie criterion 7(d)(ii)). A "top-down" approach should therefore not predominate, as it would exclude or constrain the other LOC Criteria.

⁵ "8. The [ORR] would expect to give priority to criterion (e) (consistency with Network Rail's other obligations) **and then give appropriate weight to each of the other criteria set out above**, depending on the circumstances of any Appeal." [*emphasis added*]



27. Silverlink considered that the correct application of criterion 7(d)(i) was that Network Rail must take account of projected performance improvements. In this context, Silverlink considered that it had a reasonable requirement to a range of performance improvements as a consequence of the completion of the WCML works without there being any requirement for additional funding to realise the improvements.

28. In paragraphs 4.9 to 4.19 of its response to Network Rail's statement, Silverlink set out why it considered that Network Rail's failure to take into account its reasonable requirements can be identified by analysing Network Rail's Annual Business Plan. Silverlink stated that it did not consider that Network Rail had shown how it considered its business plan commitments when preparing the LOC for Silverlink.

29. Silverlink did not agree with the comments of the ADRC in paragraph 12.5 of the determination regarding the extent to which previous disruption should be a factor when calculating its reasonable requirements for performance. Although the ADRC expressed sympathy for Silverlink's position it went on to note a number of counter arguments made by Network Rail.

30. Silverlink argued in support of its interpretation of the LOC Criteria that, if the sum of all TOC "realistic projections" exceeded the national projection, the "Excess Aggregate Local Output" provisions incorporated into Part L specifically to address such an occurrence would then apply. Silverlink argued that Network Rail's obligations under its network licence must be regarded as part of the "targets and other requirements of Network Rail" referred to in the definition of this term.

Re-opening of local outputs

31. Finally, in Silverlink's opinion, the ADRC's conclusion in paragraph 12.6 that Network Rail's argument that *"a finding in favour of one Train Operator cannot result in a need to raise that Train Operator's LOC offer, or that any such adjustment would necessarily require to be compensated for in variations to other offers, is weak..."* is wrong. Silverlink considered that this position is contrary to the ADRC's statement in paragraph 11.6 of the determination that, *"the Committee does not accept that its discretion (in respect of determining that a LOC offer requires to be altered) can be constrained by Network Rail's choice of management process. Condition L7.10⁶ would be unnecessary were there no such authority, or were Network Rail unilaterally to circumscribe it."*

⁶ Condition L7.10 of the Network Code (dated 1 August 2004) placed an obligation on Network Rail once any Appeal brought under Condition L7 has been concluded, to issue a revised LOC Statement to the Train Operator taking into account the outcome of any such Appeal.



Network Rail's response

32. Network Rail did not consider that Silverlink had proved that its process was unfair and considered that Silverlink's only real argument in its notice of appeal related to the top down nature of the process.

Interpretation of the term "consistency" and balance between criteria 7(d)(i) and 7(d)(ii)

33. Network Rail agreed that the same construction should apply to the use of the term "consistency" in criteria (d) and (e) but did not accept that this is inconsistent with ADRC's final determination. It also agreed that appropriate weight should be given to criterion (d)(i) and (ii) behind criteria (e).

Interpretation of criterion 7(d)

34. Network Rail did not consider that as a matter of fact it conducted a top down process and argued that it took into account all the LOC Criteria, including the nationally derived targets and local reasonable requirements.

35. Network Rail argued that its approach which ensured that the various LOCs added up to the national regulatory target reflected a pragmatic approach. However, it asserted that this approach also accorded with its contractual commitments. Network Rail considered that otherwise it would have assumed contractual liabilities beyond the outputs for which it was funded.

36. Network Rail agreed with Silverlink that the correct approach was for it to consider a Train Operator's "reasonable requirements" as well as the effect of the national projections and that it must take **account** (Network Rail's emphasis) of projected performance improvements. However, Network Rail argued that it must strike a balance, particularly where there is potential for a greater level of performance risk to attach to a particular LOC. Network Rail concluded that it was not required to strike a balance so as to exceed the national projection of delay minutes.

37. Network Rail disagreed with Silverlink's view that the correct interpretation of "Excess Aggregate Local Outputs" under Part L included its obligations under the network licence. Network Rail considered that it is critical to note that this provision is expressed in terms of a level of operational performance instead of a level of expenditure. It also considered that the reference to targets in the definitions are to the specific targets for delay minutes and other indicators determined by ORR as part of the relevant access charges review.

38. In this context, Network Rail also set out its interpretation of a "reasonable requirement". It considered that unfunded "requirements" are not "reasonable" unless a party is willing to pay for them. In summary, Network Rail argued that its funding for performance improvements was limited to the regulatory specification of performance targets under the 2003 access charges review. Network Rail therefore considered Silverlink's attempt to



extend the scope of reasonable requirements in this context to be inappropriate.

39. In particular, Network Rail considered that Silverlink's references to the Network Rail's business plan in this context to be wrong – as its business plan did not create commitments between Network Rail and its customers which are enforceable in the manner suggested by Silverlink. Network Rail observed that Silverlink's case amounts to an analysis of the content of performance plans against its business plan. In particular, Network Rail pointed out that Note 11 to the LOC Criteria states that [ORR] "would not expect a Train Operator to Appeal about the detailed content of a Performance Plan".

40. Network Rail argued that it was inaccurate to state that a top down approach predominated. It relied on its statement of 26 January 2005 to explain how local activities to improve performance were integrated into the LOC offer process. It explained that local activities to improve performance and identify performance risks were identified in a special database. Network Rail did not consider that including a top down element in its LOC processes placed an "inflexible constraint" on the preparation of the LOC offers.

ORR's assessment

41. The purpose of the LOC Criteria is to set out the matters to be considered when a Train Operator appeals in respect of a Class A Local Output with which it was dissatisfied. Silverlink's dissatisfaction with its Class A Local Output has focussed on the proper interpretation and application of criterion 7(d).

Interpretation of "consistency"

42. The correct interpretation of the term "consistency" in criterion 7(d) has been raised as a particular issue. ORR is unable to understand the manner in which the interpretation of this term affected the ADRC's overall conclusion. In particular, ORR notes that the determination does not include a final decision by the ADRC on this point. However, as the determination indicates that the ADRC considered that an interpretation of the term as meaning "absolutely equal to" is tenable, ORR considers that it is necessary to set out the correct interpretation of this term in the LOC Criteria.

43. ORR can see no reason for adopting an interpretation of this term other than its natural and ordinary meaning. ORR considers that it would be wrong to interpret "consistent" as only meaning "absolutely equal to" although this interpretation would be included within "consistent". ORR notes that the ADRC also considered ORR's covering letter which referred to "the realistic projection being **more or less** equal to the regulatory target". ORR considers that its covering letter provided further guidance on the intended meaning of the term "consistent" in the LOC Criteria. In addition, paragraph 3.24 of the former Regulator's draft conclusions on 'Local Output Commitments and the



provision of information' (the "Draft Conclusions")⁷ made it clear that consistency with the national regulatory target did not mean they should necessarily be identical. Consistent is, therefore, capable of including a range of outcomes of which "equality" is one. Whether "equality" is the appropriate meaning in relation to the establishment of any particular LOC (i.e. whether it gives rise to a realistic projection of delay minutes) will depend on a number of factors. The appropriate meaning of "consistency" in relation to this particular appeal is considered in paragraphs 48 to 55 below.

Balance between criteria 7(d)(i) and 7(d)(ii)

44. ORR agrees with Silverlink that it is correct as a matter of interpretation that the whole of criterion 7(d) should be taken into account in order to achieve the objective of a "realistic projection of delay minutes". The opening sentence of paragraph 7 states that ORR "*will expect any referral made ... under Condition L7.2, or to the Industry Committee under L7.1, to be considered against the following matters:*" (emphasis added). The correct interpretation of criterion 7(d) includes both criteria 7(d)(i) and 7(d)(ii).

45. Paragraph 8 of the LOC Criteria indicates that ORR would expect priority to be given to criterion (e) (the consistency of the LOC with Network Rail's obligations in respect of access rights and Health and Safety) when determining any Appeal. ORR therefore agrees with Silverlink that appropriate weight should be given to all of the other criteria under paragraph 7, after giving priority to the considerations set out in criterion (e). ORR notes that Network Rail does not dispute that this is the correct interpretation of criterion 7(d).

46. ORR considers that it is important to note that the determination does not expressly state that the ADRC considered that a contrary interpretation of criterion 7(d) was correct. Paragraph 12.4 of the determination states that "the reliance placed by Network Rail on LOC Criteria (d)(ii) to advance its argument in relation to an absolute and inflexible commitment to a National Regulatory Target, might reasonably, as Silverlink assert, require it to give an equivalent absolute and inflexible commitment to the provisions of LOC Criterion (d)(i)". Paragraph 11.8 of the determination states that "the Committee considered that it had not been presented with sufficient arguments to make a judgement as to what effect an equivalence between (d)(i) and (d)(ii) might have, and how that equivalence might translate into a different LOC offer". ORR considers that it was wrong of the ADRC not to explore this issue further (eg by adjourning the hearing and requiring the parties to present supplementary arguments and evidence). The ADRC should have made a determination in respect of the weight to be given to criterion (d).

⁷ <http://www.rail-reg.gov.uk/upload/pdf/160.pdf>



47. This appeal, however, provides an opportunity for ORR to set out the correct interpretation of this criterion and apply it to this appeal.

Interpretation of criterion 7(d)

48. As ORR notes above it has concluded that the correct interpretation of this criterion 7(d) and, in particular paragraph (i) is the critical issue which is raised by Silverlink's appeal. In considering this, ORR has had to consider the position at the time the LOC was being developed (ie in the summer of 2004), not with the benefit of knowledge of actual performance in 2004-05.

49. In order to ascertain the effect of criterion 7(d)(i) it is necessary to consider the relevant obligations under Network Rail's network licence and what Network Rail needed to do to comply with them at the time the LOC offer was being developed. Silverlink's argument focuses on Condition 7, and in particular the obligation set out in paragraph 15 above concerning taking the steps necessary or expedient to meet the reasonable requirements of train operators in respect of the operation, maintenance, renewal and enhancement of the network.

50. ORR has concluded that Network Rail's "realistic projection" for Silverlink for 2004-5 was **consistent** with the requirements of criterion 7(d). The reasons for ORR's conclusion are that:

- (a) the LOC process followed soon after the 2003 Access Charges Review that was published on 12 December 2003⁸ and established annual network wide targets for a five year period. The target for the first year (2004-05) was 12.3 million minutes delay. Network Rail's operational performance forecast for 2004-05 as set out in its 2004 business plan⁹, produced in accordance with Condition 7 and published on 31 March 2004, was also based on this 12.3 million minutes delay target; and
- (b) although Silverlink did identify a number of initiatives which it considered Network Rail should be carrying out to improve Silverlink performance (such as reductions in the impact of Temporary Speed Restrictions (TSR), T2¹⁰ patrolling, freight train regulation and vegetation clearance), and these were being taken forward, Network Rail was also entitled to take into account the very significant risks associated with the West Coast project and the new timetable in producing Silverlink's LOC. These risks included the impact of West

⁸ Access charges review 2003: final conclusions, ORR, December 2003.

⁹ Network Rail's 2004 Business Plan published 31 March 2004.

¹⁰ A possession of the track taken under section T, part (ii) of the railway Rule Book.



Coast Route Modernisation work and corresponding restrictions on network availability and risk of increase in TSRs, and the anticipated early reliability of the newly installed infrastructure.

51. Therefore ORR considers that the “realistic projection” produced by Network Rail for Silverlink for 2004-05 was consistent with criteria 7(d)(i) and 7(d)(ii). ORR does not therefore agree with the arguments put forward by Silverlink in respect of the correct application of criterion 7(d)(i) in the context of the Establishment of this particular LOC.

52. Furthermore, paragraph 3.24 of the Draft Conclusions made it clear that projections for operational performance should be consistent with the Condition 7 standards of stewardship in respect of which Network Rail is funded. Thus, the projections for each train operator would need to be broadly consistent with the national monitoring target. The Draft Conclusions indicated instances where a higher level of performance should be possible – the example given was where through efficient OMR this should influence the level of the local commitment. The Draft Conclusions also made it clear that Network Rail would need to have regard to national considerations, such as the need to prioritise the deployment of scarce resources and the overall availability of funding. Paragraph 3.24 concluded that the former Regulator would generally expect the sum of the projections to be “at, or close to, the national regulatory target in aggregate”.

53. Silverlink also argued that the ADRC’s apparent conclusion that a top down process is acceptable was wrong. ORR considers that a purely top-down process is not appropriate given that both Part L and Condition 7 refer to individual operators and thus require local circumstances/ opportunities to be taken into account. However in the circumstances of this particular case, having considered the evidence put forward by the parties for this particular appeal, ORR considers that Network Rail did in this case of this LOC strike an appropriate balance and that it did not conduct a purely top-down process.

54. The evidence that ORR has seen in relation to this appeal has satisfied it that whilst a top down allocation of the national regulatory target was central to Network Rail’s approach to the preparation of Silverlink’s Class A Local Output adequate account was taken of local issues. Network Rail’s various responses to the notice of appeal indicate that it did undertake a process of consultation in a manner that ORR would have expected in order that the requirements of the LOC Criteria were met. It appears that this process did seek to consider and address, where possible, Silverlink’s representations. In particular, Network Rail explained how the performance plans were used to set individual route delay minute targets which were in aggregate consistent with the national regulatory target. ORR is, therefore, content that an appropriate method of constructing a LOC offer for Silverlink for 2004/05 was undertaken and it is not correct to categorise it as simply a top down approach.



55. It is for the reasons set out above that the ORR has concluded that Silverlink's LOC should be Established.

Interpretation of EALO

56. The determination and appeal also raised the issue of the correct interpretation of the "Excess Aggregate Local Output" provisions of Part L. Silverlink referred to the Excess Aggregate Local Output mechanism in support of its arguments in relation to the interpretation of the LOC Criteria. The Excess Aggregate Local Output mechanism in Part L can be triggered in a number of circumstances and operates as a backstop mechanism of last resort to prevent Network Rail over-committing itself.

57. ORR does not consider that the interpretation of this provision is directly relevant to the issue of whether or not a LOC should be Established and notes that Silverlink's arguments in relation to the interpretation of this term are made in support of its interpretation of criterion (d)(i). For the reasons set out above, ORR does not accept Silverlink's arguments in relation to the interpretation of criterion (d)(i) and ORR has therefore concluded that it is not necessary to consider Silverlink's arguments in relation to the interpretation of the Excess Aggregate Local Output mechanism further in this determination.

Re-opening of local outputs

58. ORR agrees with Silverlink's view that the ADRC's conclusion under paragraph 12.6 of its determination was at odds with its reasons under paragraph 11.6. In paragraph 11.6 the ADRC correctly stated that it did not accept that "its discretion (in respect of determining that a LOC offer requires to be altered) can be constrained by Network Rail's choice of management process" adding that "Condition L7.10 would be unnecessary were there no such authority..." In paragraph 12.6 it states that Network Rail's argument that this is not the case is "weak". Silverlink argues it should have concluded the argument was "wrong".

59. ORR considers that this is primarily an issue of the language used by the ADRC in paragraph 12.6 of its determination. ORR assumes that when the ADRC referred to the argument being weak, it meant that it did not accept this argument. In any event, ORR is not clear how this issue affected the ADRC's overall determination of whether or not Silverlink's LOC should be Established. To the extent that the determination might have been unclear on this matter, ORR has now reached its own decision on this particular appeal. Any lack of clarity by the ADRC does not affect ORR's conclusion that Silverlink's LOC should be Established.



Ground 2 – Significance of conclusion that (d)(i) and (d)(ii) have equal effect

Silverlink's arguments

60. Silverlink did not agree with the ADRC's concern that the parties had not considered the consequences of giving criteria d(i) and d(ii) their proper weight. Silverlink's view is that, consideration of the consequences of giving the two criteria appropriate weight is that it will achieve a "realistic projection" of performance.

61. In any event it is Silverlink's view that consideration of the consequences should not be a factor when making a determination of the correct interpretation of the LOC Criteria.

Network Rail's response

62. Network Rail agrees with Silverlink that consideration of the consequences should not be a factor when determining the correct interpretation of the LOC Criteria.

63. Network Rail also argues that the appeal should be considered in the context of the wider background. In particular, in relation to the on-going reform of the performance planning regime and compensation regime for poor performance.

ORR's assessment

64. ORR agrees with both parties that for this particular appeal whether or not the parties had considered the consequences of their arguments should not be a relevant factor when determining the correct interpretation of the LOC Criteria. ORR also agrees with Silverlink's interpretation of the consequences of giving the two criteria appropriate weight.

65. In respect of Network Rail's supplementary argument, ORR considers that it would be wrong for it or the ADRC to consider the appeal in the context of the wider background as suggested by Network Rail and as referred to in paragraphs 12.7 and 12.9 of the determination. Silverlink exercised its contractual rights to refer the dispute to the ADRC and then make an appeal to ORR. It would be wrong for either the ADRC or ORR when determining the matters in dispute to take the wider background into consideration.

66. It is not clear from the determination how these considerations affected the ADRC's determination that the LOC should be Established. However, ORR has now reached its own decision in relation to this appeal. For the reasons stated above, ORR has not considered the consequences of giving the criteria their proper weight or other background issues in deciding that Silverlink's LOC should be Established.



Ground 3 - Insufficient consideration or determination of all issues raised

Silverlink's arguments

67. Silverlink noted that the Committee did not consider the following concerns that it raised under the original Appeal:

- (a) the establishment of the projection by reference to the 2003-04 performance;
- (b) the application of the tolerance level without any consideration of whether that allowance is fully required or appropriate; and
- (c) whether the LOC set is sufficiently demanding.

Silverlink did not otherwise put forward any arguments on these points in its notice of appeal.

Network Rail's arguments

68. Notwithstanding the fact that Silverlink did not put forward any supporting arguments, Network Rail set out its view on these issues in its response.

ORR's assessment

69. ORR considers that the burden is on an Appellant to set out the basis of its appeal and to ensure relevant issues are not only raised in the documentation provided to the ADRC but in their arguments before the ADRC. On the basis that Silverlink did not consider it appropriate to include any arguments in relation to these concerns in its appeal, ORR concluded that it was not appropriate for it to consider them further as part of its determination of this appeal.

Conclusion

70. For the reasons given above, ORR rejects the appeal by Silverlink.

Michael Beswick
Director, Rail Policy
Office of Rail Regulation

30 November 2005