



OFFICE *of*  
RAIL REGULATION

**Network Code reform phase 2:  
Conclusions – the way forward**

**November 2005**



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## Chairman's foreword

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Over the last 18 months or so, all sides of the industry (Network Rail, passenger and freight operators, Department for Transport (DfT) and others) have invested considerable time and effort in taking forward the reform of the Network Code first initiated by this office. The Government's Rail Review emphasised the importance of the Network Rail/train operator relationship and the need for all parties to work more closely together. They need to continue with this process of working co-operatively, recognising their mutual interests, with a view to improving the performance of the railways in an efficient and economic way to the benefit of not only themselves, but also their passengers, customers and funders. The Network Code, which is pivotal to the efficient day-to-day operation of the railway, particularly in terms of the interface between track and train, is clearly key to reflecting the roles of the industry parties and helping to achieve this aim.

Many aspects of the reform work are progressing well, but there were a number of issues where we felt that further consideration and consultation with the industry was required, particularly in relation to the further development of Part F (Vehicle Change) and Part G (Network Change). We have now considered the responses received to our emerging conclusions and this document sets out a package of changes and a clear timetable within which we expect the industry to develop and implement them.

We believe that these, together with our associated policy framework for investments, will achieve our aim of aligning the Network Code structure with the requirements of the industry. This will ensure that the revised arrangements facilitate and incentivise an efficient outcome from a whole-industry perspective through:

- clear, transparent, practical and relevant processes;
- the right incentives to ensure the optimum whole industry solution;
- a clearly defined facilitation role for Network Rail;
- the inclusion of clear railway planning permission processes for issues such as capability of the network, provision of information, vehicle characteristics, compensation arrangements and appeal rights;

- an appropriate level of consultation and involvement for all stakeholders in industry processes.

We look forward to working with the industry and continuing to offer such support and guidance, as it requires in order to achieve the necessary improvements to the contractual framework.

**Chris Bolt**  
**Chairman, Office of Rail Regulation**  
November 2005

# Executive Summary

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1. Following a consultation in the summer and subsequent consideration of the responses received, this document sets out a policy framework and timetable for taking forward a package of further changes to the Network Code relating to:

- Part F (Vehicle Change and Part G (Network Change));
- the approach to third party rights under the Code; and
- what we intend doing with Part K (Information).

The document also provides further updates to the industry on recent developments with other aspects of the work to reform the Network Code, particularly in respect of Joint Performance Improvement Plans (JPIPs) and Part L (Local Output Commitments).

2. We are grateful for the comprehensive responses received and the comments and suggestions made. Overall, respondents felt that the right areas of the Network Code are being tackled and that there is a need for the work to continue. Although there are clear differences between the parties in some areas, most noticeably vehicle change, we do not believe that there is anything in consultees' responses that suggests our proposed approach is wrong. However, respondents did make a number of valid comments and suggestions that we have taken on board.

## *Parts F and G*

3. We are looking to the industry to take forward the work on developing detailed drafting for Parts F and G so that they provide a co-operative and facilitative approach from a whole industry perspective through a structure that offers a fair allocation of costs and risks. To achieve this package of changes it is important to establish, in a clear and unambiguous way, what the processes are trying to address and what it is the industry expects to get out of them. As a starting point, we have revised the proposed overarching objective (see paragraph 3.8) developed to encourage and facilitate a co-operative cross

industry approach. This should be discussed and endorsed by the Network Code Steering Group (ISG)<sup>1</sup> at the earliest opportunity.

4. In terms of the specific issues we consulted upon, we have made the following conclusions.
- Network Rail should produce statements on its facilitation role for new trains/network enhancements for endorsement by the ISG.
  - Network Rail should be given the right to propose vehicle change, subject to the establishment of proper controls, including a requirement to produce a business case to justify the proposal demonstrating that it has considered all options, including change to infrastructure.
  - Rolling stock companies (ROSCOs) and other rolling stock owners should be able to have separate contractual arrangements and mechanisms for dealing with any compensation and other issues such as residual value risk. These would enable such issues to be addressed if they have not been through the general facilitation arrangements.
  - The proposed further changes to Parts F and G<sup>2</sup>, as published in our July 2004 document<sup>3</sup>, should form the basis for the legal drafting. These changes ensure that the definition of Network Change and the circumstances under which an operator can seek to block a change, and/or seek compensation, provide appropriate protection for 'quiet enjoyment' of access rights. This document provides the industry with a clear steer by developing the principles and criteria set out in the emerging conclusions document. It also develops the mechanism and

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<sup>1</sup> The Network Code Reform Phase 2 Steering Group was established in July 2004 to lead the work on reforming the Network Code. Network Rail and the Association of Train Operating Companies (ATOC) jointly chair it and its membership includes representatives from Network Rail, passenger and freight operators, the Department for Transport (DfT), the Scottish Executive and the Office of Rail Regulation (ORR).

<sup>2</sup> As part of the Phase 1 conclusions, the industry was consulted on further changes to Parts F and G to clarify the definitions, further improve the procedural arrangements and further increase the financial involvement of third parties in the consultation process (see footnote 3).

<sup>3</sup> *Reform of the Network Code: Conclusions on Phase One and notice of changes (corrected version)*, Office of the Rail Regulator, London, July 2004, available at <http://www.rail-reg.gov.uk/upload/pdf/207.pdf>.



criteria for adjusting Network Rail's contracted outputs to reflect the revised high level specification for industry outputs and specific Network Rail outputs, established following a periodic review, including giving it the right to 'buy out' access rights.

- Separate Parts F and G processes should be retained, but the industry should ensure that they are aligned.
- The industry should develop bespoke arrangements for larger and more complex projects.

### *Third parties*

5. We believe that similar arguments to those on Parts F and G apply to how this work is developed and taken forward with the industry developing proposals enabling third parties to have improved facilitation and consultation rights in respect of enhancements to vehicles and the network, based on a mechanism through scheme specific contracts and not on the face of the Network Code. In terms of third party involvement in industry processes, Network Rail, in conjunction with the industry, should press ahead with the development of a Code of Practice on consulting third parties. In doing so, the industry should have regard to the Office of Rail Regulation's (ORR) recently published conclusions setting out our policy framework for investments<sup>4</sup>.

### *Part K*

6. We accept that implementing any part of Part K would be premature at present and agree that the industry should be given time to review it and come forward with alternative proposals. However, we do not agree that implementation should be delayed beyond 31 March 2006 and we look to the industry to develop proposals for modifying Part K as soon as possible, with a view to them taking effect from 31 March 2006.

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<sup>4</sup> *Policy framework for investments: conclusions*, Office of Rail Regulation, London, October 2005, available at [www.rail-reg.gov.uk/upload/pdf/255.pdf](http://www.rail-reg.gov.uk/upload/pdf/255.pdf).

*General*

7. We believe it is important that the industry continues to lead the work. Accordingly, we look to the industry, under the auspices of the industry-led ISG, to take forward and develop this package of changes against the policy framework set out in this document with the aim of producing proposals for ORR's approval by the end of March 2006. We will of course remain closely involved in the work through our membership of the ISG and various working groups, but if the industry fails to come up with acceptable proposals by March 2006, then ORR will consider whether it is appropriate to step in and propose changes using the Condition C8 modification process.

# 1. Introduction

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1.1 On 5 July 2005, we published a document<sup>5</sup> (referred to here as the July 2005 document), updating the industry on progress with the reform of the Network Code and setting out our emerging conclusions on further changes to Part F (Vehicle Change) and Part G (Network Change) and our proposed approach to third party rights under the Code. This document provides a further update on progress and sets out our conclusions on:

- progressing further changes to Part F and Part G;
- the extent to which third parties should have rights under the Code; and
- how we propose to implement the new Part K.

1.2 This chapter briefly explains the background and the structure of the document.

## Background

1.3 As explained in Chapter 1 of the July 2005 document the industry has made considerable progress in taking forward phase 2 of the Network Code reform. However, there were three areas where we considered that further consultation by the Office of Rail Regulation (ORR) with the industry was required before we could achieve further progress.

*Parts F and G:* although a number of changes, aimed at improving the efficiency and transparency of the processes of Parts F and G, were made earlier this year these did not address certain underlying ‘economic architecture’ issues. Following extensive discussions with the industry on further changes, including consultancy advice from KPMG/NERA, a set of emerging conclusions evolved. These were set out in Chapter 3 of the July 2005 document and views of the industry and other stakeholders were invited.

*Third parties:* Chapter 4 of the July 2005 document set out our proposed approach on the extent to which third parties (i.e. industry parties other than

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<sup>5</sup> *Network Code reform phase 2: update and emerging conclusions*, Office of Rail Regulation, London, July 2005, is available at <http://www.rail-reg.gov.uk/upload/pdf/241.pdf>.

parties to access contracts) should have rights under the Code or similar to those conferred by the Code. This issue was closely linked with Parts F and G where third parties have a particular role in vehicle and network change. We invited the views of the industry on our proposals.

*Part K*: this issue concerns the exchange of information between Network Rail and train operators (and, potentially, third parties). Although Part K became part of the Network Code in January 2005, it only becomes live after 31 March 2006, or before if ORR issues an earlier notice. We therefore sought views as to whether ORR should issue a notice, and, if so, what that notice should say about the information to be exchanged. The position was outlined in Chapter 5 of the July 2005 document.

- 1.4 The closing date for responses to the July 2005 document was 19 August 2005. In total, 17 companies and organisations responded to the document. These are listed at Annex A and their responses have been posted on ORR's website<sup>6</sup>. We are grateful for the industry's comments, which were detailed and helpful. They have all been taken into account in reaching our conclusions and are addressed in this document.

## Structure of this document

- 1.5 This document represents our conclusions and is structured as follows.
- Chapter 2 addresses those issues raised on general areas of Network Code reform and on what other areas need further work and how it should be taken forward. The opportunity has also been taken to provide a further update on those areas where matters have developed, particularly in respect of Joint Performance Improvement Plans (JPIPs) and the revision of Part L.
  - Chapter 3 sets out our final conclusions on the further changes to Parts F and G.
  - Chapter 4 sets out our final conclusions on the extent to which third parties should have rights under the Code or similar to those conferred by the Code.

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<sup>6</sup> They are available at [www.rail-reg.gov.uk/server/show/ConWebDoc.7347](http://www.rail-reg.gov.uk/server/show/ConWebDoc.7347).

- Chapter 5 sets out our final conclusions on our approach to the implementation of Part K.
- Chapter 6 sets out the process for implementation, including a timetable.

1.6 Copies of this document can be seen on the ORR website ([www.rail-reg.gov.uk](http://www.rail-reg.gov.uk)) and in the ORR library.



## 2. Network Code Reform Phase 2: progress to date

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### Introduction

2.1 Chapter 2 of the July 2005 document outlined:

- the interim changes made to the timetabling process in Part D of the Network Code to make it more efficient and integrated;
- the new dispute resolution arrangements, which were restructured to make them clearer and help improve the quality of determinations;
- the progress made on the development of the Railway Operational Code (ROC) in Part H of the Network Code, which will set out the procedures and criteria to be adopted by the industry for the day-by-day operation of the network and management of disruption; and
- the current position on the development of JPIPs to replace local output commitments (LOCs) in Part L of the Network Code.

It also briefly outlined the work being carried out in respect of Part B (Performance Monitoring), Part E (Environmental Protection) and Part J (Changes to Access Rights).

2.2 Consultees were asked in paragraph 2.27 of the July 2005 document, **“to identify any areas where they believed further work to reform the Network Code was required”**.

#### *Consultees' views*

2.3 Overall, respondents felt that the right areas were being tackled and that the reforms should continue to be pursued through the various industry working groups. The Association of Train Operating Companies (ATOC) suggested that a period of stability after completion of Phase 2 reforms would be beneficial before making any further major reforms.

2.4 Network Rail Infrastructure Limited (Network Rail) wants to see the momentum for progressing potential change through the established working

group structures maintained. It agrees with the work identified, but believes that further work is required on:

- *Part B*: to remove the tension that currently exists between the two main aims of delay attribution (e.g. diagnosing the root causes of delay and allocating performance payments). It proposes removing all aspects of delay attribution from Schedule 8 to Part B;
- *Part C*: to provide a more effective proposal for change process that is less bureaucratic and more timely; and
- *Part L*: to provide the industry with the comfort and clarity it requires on performance issues, particularly in relation to compensation for persistently poor performance.

2.5 Although National Express Group (NEG) is content with the work going forward, it had two concerns relating to:

- the dominance of Network Rail in the process, specifically the ability to review changes as a totality, at the end of the process. It wants to see the ability to review the Network Code as a whole at the conclusion of the process in addition to the ongoing workstreams; and
- the role ORR will take in regard to issues concerning performance management, particularly in relation to its position, role and authority in relation to performance orders. This stems from proposals to remove the performance order arrangements currently contained within Part L (Local Output Commitments) without the inclusion of a similar mechanism in Schedule 8 or elsewhere. In NEG's view, this would leave train operators with no alternative but to seek such orders through the courts, thus removing control of the process from ORR and effectively taking control out of the industry.

2.6 English Welsh and Scottish Railway Limited (EWS) said that the Network Code should be assessed for consistency with any relevant provisions contained in the Railways Infrastructure (Access and Management) Regulations 2005, which transpose EU Directive 2001/14/EC into British law and which came into force on 28 November 2005.



- 2.7 First Group plc (First) did not agree with the statement in the July 2005 document that JPIPs were not a suitable replacement for LOCs for open access passenger operators and in this respect strongly supported a JPIP for Hull Trains. Hull Trains was also surprised by the statement and pointed out that although it had not been involved in any dialogue about this matter, it had agreed in principle with Network Rail that a JPIP should be developed for the company. An update on the latest position on the development of JPIPs is at paragraphs 2.27 to 2.30 below.
- 2.8 Transport for London (TfL) said that it would be helpful if it could initiate and manage network change, station change, depot change and major project notices itself rather than relying on Network Rail. In addition, Network Rail should be obliged to provide the feasibility timetabling service, when considering the viability and performance of an enhancement, free of charge to third party financiers. Our approach on the rights of third parties, in respect of industry processes, is dealt with in Chapter 4 of this document.

*ORR response to consultees' views*

- 2.9 The reform of the Network Code has resulted in significant changes to the way in which the industry operates on a day-by-day basis. We agree with ATOC that there should be a period of time to allow these changes to bed in and be understood and respected by the industry before making any further major reforms. However, ORR also agrees with Network Rail that it is important to maintain the momentum. We should therefore retain the existing structure of working groups to first complete the phase 2 reforms and secondly to monitor the implementation and impact of the reforms and to make any necessary adjustments.
- 2.10 In this regard, we have also noted the general concern raised by NEG about Network Rail's "dominance in the process" and the "ability to review changes (to the Code) as a totality". However, we do not accept that this is a valid concern. It is the case that all of the Network Code Phase 2 reform work is being overseen by the industry-led Network Code Steering Group (ISG), which is jointly chaired by both Network Rail and ATOC (which is currently represented by NEG). It is the responsibility of that group to review both the day-to-day workstreams and the overall package. We certainly expect responsibility for the ongoing work on reform of the Network Code to remain with the ISG for the foreseeable future. The reform of the Network Code must

be seen as an evolutionary process that develops with, and is led by, the industry as a whole. As such we would expect the ISG to take responsibility for reviewing the effectiveness of the reforms. Given NEG's concern, we suggest that this is discussed and clarified at the next ISG meeting, scheduled for December 2005, and that consideration be given to amending and updating the group's remit to reflect the points discussed above.

- 2.11 We agree with EWS that the Network Code must be consistent with the new Regulations. Although the revisions to the Network Code reform programme have been developed before implementation of the first railways package, the Code has been developed in reference to the provisions of the relevant EC Directives. We have liaised closely with the Department for Transport (DfT) to ensure, so far as possible, that the two are consistent.
- 2.12 We believe that it would be sensible for a more general review of the Code to take account of changes post the Rail Review (e.g. minor technical updating, including legislative cross references and references to the franchising authority). Although we would expect the industry to take the lead, through the ISG, we would be happy to help in any way we can.
- 2.13 Network Rail and others also identified a number of areas where they felt further work is required. These are set out below, together with a further update on Network Code issues where the situation has changed or developed since we published our July 2005 document.

## **Part B (Performance Monitoring)**

- 2.14 The July 2005 document explained that the Delay Attribution Board (DAB), ATOC and Network Rail had jointly commissioned AEA Technology plc to review the delay attribution process and make recommendations. DAB, working with the industry, is taking this work forward over the coming months in order to allow the parties to promptly implement any changes needed, in particular to the culture, organisation, management and systems aspects of the current process. Although this work will lead to changes to the Delay Attribution Guide (DAG), which is incorporated into the Network Code, it is not at this stage clear what impact it will have in terms of requiring changes to Part B itself.
- 2.15 In respect of Network Rail's specific point about the tensions between the two main aims of delay attribution, it is recognised that commercial disputes often

arise because the facts are not clear, rather than being a dispute over principle or contractual terms. The distinction between the two aims is currently accounted for by Part B describing Network Rail's and train operators' duties in establishing an agreed factual record and by Schedule 8 describing how that record is used to operate the incentive compensation regime. The delay attribution aspects of Schedule 8 ultimately lead back to the DAG.

- 2.16 As Part B also forms part of Network Rail's track access agreements with non-franchised train operators, it may be that there are always specific references to attribution and responsibility which should remain in Schedule 8. We have considered the merits of moving all references in this way, but it is not evident that this, of itself, would necessarily reduce the number of disputes.
- 2.17 We believe that the BHLK working group should forge a closer working relationship with the DAB in order to assess the impact of its work on the Network Code. The BHLK working group also need to consider what other aspects of Part B, e.g. system responsibilities, audit provisions and the Performance Data Accuracy Code (PDAC), could be improved.

### **Part C (Modifications to the Network Code)**

- 2.18 Network Rail established a small working group in August 2005 to consider ways of improving the 'proposal for change' process contained in Part C of the Network Code; the 'democratic' process for making changes to the Code. Rather than introduce a new process, the group looked at the existing one to see what scope there was for cutting back on the existing timescales. This was done with the intention of making the Network Code change procedure more efficient, whilst at the same time protecting the consultation rights of access parties. Although many of the savings can be achieved through purely administrative change, a number will require amendments to Part C:
- to tighten up some deadlines;
  - to enable Class Representative Committee (CRC) to specify the effective date of a proposal for change once approved by ORR; and

- to allow ORR to issue approval notices to CRC members and those parties identified under Condition C9.1.1 of the Network Code rather than leaving it to Network Rail.

2.19 A proposal for change has been drafted and is currently being considered by the industry-working group. We agree with the principle of the proposal. We look forward to receiving a formal proposal for change for final approval in due course.

## **Part D (Timetable Change)**

2.20 The July 2005 document explained that as part of the phase one reforms, interim changes were made to the timetabling process to make the processes more efficient and integrated. The industry recognised that the whole process and systems for timetabling would need to be reviewed further to create a much more robust and efficient process for the future. Following consideration of proposals put forward by Network Rail, the ISG has agreed that Network Rail should establish and lead a cross-industry working group to deliver further enhancements to the industry timetabling processes, building on the changes already introduced. This will include:

- establishing planning standards and processes to underpin delivery of the timetable;
- developing further criteria to improve transparency and achieve whole industry benefits;
- underpinning the arrangements for the establishment of the base timetable, the principle of which was developed as part of the latest amendment to Part D; and
- changing the Systems Code to provide a common set of industry planning data and systems.

2.21 The ISG has endorsed a remit developed by a panel of industry representatives, for the Part D working group to deliver against. The working group has been set an extremely challenging timetable aimed at producing detailed drafting of a revised Part D by the end of March 2006 for implementation later that year. It recognises that the quality of the drafting must not be compromised and that these dates may need to be revised in the

light of consideration of the detail of the proposals. We will be looking for the industry to come up with a long-term solution to improve the timetabling process to ensure customer needs are met efficiently, including the development of appropriate system changes, and will expect the group to provide the ISG with regular progress reports and to inform it of any risks and issues as and when they arise. The group will need to have more effective input from the passenger and freight perspective, and may wish to consider recommending consequential changes to licence obligations concerning timetabling.

## **Part E (Environmental Protection)**

2.22 The ISG has considered a paper from Network Rail, which proposed a number of improvements to Part E to enable it and train operators to better fulfil their environmental obligations. There was general agreement by the ISG that the industry should look to strengthen its consideration and resolution of environmental issues on a joint basis. However, the ISG was also concerned that the paper raised wider considerations than Network Code reform and that the industry needed to gain a better understanding of its responsibilities and obligations across the piece. To this end, it would need to ensure that it was taking a co-ordinated approach to such issues. The ISG has accepted ORR's offer to facilitate a cross industry seminar/workshop by the end of 2005, the aim of which is to arrive at such a co-ordinated industry approach and determine how best to take forward the various workstreams, including any amendments to Part E.

## **Part H (Operational Disruption)**

2.23 The industry continues to make good progress with the development of the ROC, which replaces the existing provisions of Part H, and sets out the procedures and criteria being adopted by the industry in respect of the day-to-day operation of the network and management of disruption. Since publishing our July 2005 document, the industry has now put in place six of the eight sections that form the ROC (introductory and general, disruptive events, train regulation policies, emergency timetabling, control arrangements and adverse weather). We have repealed the equivalent provisions in the existing Part H.

2.24 The final two sections (clearance of track blockages and provision of customer information) are being developed and should be ready for cross-

industry consultation in January 2006, prior to their establishment in March 2006. This means that the industry remains on target to have the ROC established by 31 March 2006. All documentation relating to the establishment of the ROC is available from the Network Rail website.<sup>7</sup>

## **Part J (Changes to Access Rights)**

2.25 Since publishing the July 2005 document, we have taken the opportunity to consider and discuss with the ISG where the review of the operation of Part J sits within the overall Phase 2 Network Code reform process. In parallel with this, we have held exploratory discussions with Network Rail about the areas that need to be reviewed to ensure that the processes in Part J are working effectively and the way in which the information is presented by the parties is fit for purpose. Although not initially part of the Phase 2 reforms, the ISG has agreed that it makes sense for it to take responsibility for overseeing this work and we have agreed to establish and chair a cross-industry working group to take the review process forward.

2.26 We wrote to the industry on 7 October 2005 explaining that we intended to carry out a review to assess the effectiveness and efficiency of the mechanisms, identify those areas of the processes that need to be clarified or improved and to determine what changes, if any, to Part J are required and how they should be effected. The letter:

- set out those issues that we believe require further consideration;
- proposed possible solutions; and
- invited organisations to nominate representatives to participate on the working group.

The first meeting of the cross industry working group occurred on 21 November 2005.

## **Part L and Joint Performance Improvement Plans (JPIPs)**

2.27 Following the Rail Review White Paper, and in the light of initial experience of the operation of LOCs, franchised passenger operators and Network Rail have been developing an alternative process: the joint performance

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<sup>7</sup> [www.networkrail.co.uk/companyinformation/networkcode](http://www.networkrail.co.uk/companyinformation/networkcode)

improvement plan (JPIP) process. This reflects concerns that the LOC process may have encouraged the taking of unduly conservative positions rather than an aspirational approach to improving performance. It also reflects the expanded role for Network Rail in respect of whole industry performance envisaged in the White Paper.

2.28 As we said in the July 2005 document, ORR is supportive of the JPIP process and notes the industry desire for certain key elements of it to be contractualised through the Network Code. However, although the development of the JPIP process and the associated revision of Part L have moved on since we published our July 2005 document, it has not happened as quickly as the industry or ORR would have liked. The drafting around the JPIP process (Condition LA), for inclusion in Part L is largely complete, but it has not been progressed because of concerns raised by ATOC, on behalf of franchised passenger operators, over the following two issues.

- Firstly, what the sustained poor performance (SPP) threshold in Schedule 8 of the access contract will be. ORR has recently published an update on its review of the Schedule 8 performance regime<sup>8</sup> and provided an opportunity to comment on the level and implementation of the SPP threshold. As that document explains, the purpose of the SPP threshold is to enable train operators to have access to additional compensation over and above the standard Schedule 8 payments in circumstances of sustained poor performance. This is because it is possible that performance can reach a sufficiently poor level where the Schedule 8 payment rates are no longer reflective of the full impact on customers' future journey choices and train operators' businesses.
- Secondly, the relationship between the existing Part L, JPIPs, Network Rail's obligations under its Network Licence, and ORR's proposals for revising the Schedule 8 performance regime. Currently, if Network Rail fails to deliver against a LOC by more than a given threshold, a train operator can seek a performance order under the track access contract requiring Network Rail to take actions to recover the position. Under the proposed Schedule 8 arrangements, the focus would be on

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<sup>8</sup> *Review of the Schedule 8 performance regime: emerging conclusions on technical issues*, Office of Rail Regulation, London, September 2006, available at <http://www.rail-reg.gov.uk/upload/pdf/sch8-review-emergingconcllet-230905.pdf>.

compensating train operators for sustained poor performance rather than setting out the recovery plans to improve performance. As a result, it is not currently considered appropriate to include the right to apply for performance orders in Schedule 8. ORR is discussing with Network Rail and ATOC how to ensure that the industry is satisfied that there are sufficient recovery mechanisms through Part L, including the new JPIP process, and through ORR's monitoring and enforcement of Network Rail's Network Licence.

- 2.29 We acknowledge the points made by First and Hull Trains that they consider JPIPs are a suitable replacement for open access passenger operators and we are supportive of Hull Trains commitment to work with Network Rail to develop a JPIP. However, it is our understanding from the various meetings, including the working group, that it remains the view of freight operators that JPIPs are not considered acceptable. As a result Part L will remain in place for such operators pending the development of suitable alternative arrangements. One option is that the existing Part L and the proposed Part LA processes could run together, however we believe that to do this will create significant problems, one cause being, for example, the continuation of the compensation elements of Part L with the introduction of the revised Schedule 8 arrangements. Network Rail must work with operators to determine what processes are required to ensure that performance is considered from a whole industry perspective.
- 2.30 We will continue to work closely with the industry to ensure that the work on the implementation of the JPIP process is completed quickly and that the outstanding issues are resolved to ensure that the associated contractual arrangements are in place by March 2006.



## 3. Reform of Parts F and G

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### Introduction

3.1 Parts F and G provide, respectively, procedures by which changes may be made to railway vehicles and to Network Rail's network. They set out the processes for facilitating change, including the roles and responsibilities of the parties, consultation arrangements, compensation arrangements and appeal rights. Proposals for network change may be initiated either by Network Rail or by a train operator; but for vehicle change they may currently only be initiated by a train operator.

3.2 Chapter 3 of the July 2005 document set out:

- the purpose of Parts F and G, and outlined the changes made to them to improve the transparency and efficiency of the processes and to introduce facilitation obligations on Network Rail as part of the Phase 1 reforms;
- the work carried out by the industry working groups on the further development of Parts F and G, including the key working assumptions and objectives which ORR considered were necessary to achieve the best whole industry solution; and
- the key conclusions of the KPMG/NERA report that reviewed the underlying economic architecture of the Network Code.

The chapter then went on to discuss a number of specific issues that needed to be considered in more detail as part of the further development of Parts F and G. These issues were explained and discussed individually and for ease of reference this document deals with them in the same order.

### Purpose of Parts F and G

3.3 ORR agreed with the industry that it would be helpful in making the Part F and G arrangements work properly if they were underpinned by an overarching objective that encouraged and facilitated a co-operative cross industry approach through processes that offer a fair allocation of costs and risks. The July 2005 document suggested that the objective of any changes under the

Parts F and G processes should be to facilitate improved performance, capability and value for money of the railway system for customers and funders:

- in the most efficient and economic way; and
- in a way which enables funders, and providers of railway services, to plan their activities with a reasonable degree of assurance.

3.4 We sought the view of consultees in paragraph 3.12 of the July 2005 document on **“whether such an objective should be explicitly incorporated in Parts F and G as the purpose of the relevant provisions”**.

#### *Consultees’ views*

3.5 There was general support for the principle of an objective in Parts F and G, but some concern about whether it was entirely suitable as currently drafted, particularly in terms of making it clear that the ‘most efficient and economic way’ should be from the whole industry perspective. ATOC felt that it should reflect more the proposals for Parts F and G currently under consideration. Network Rail also felt that as drafted it did not reflect all types of proposals and needed to be developed in parallel with the work on developing the definitions in Parts F and G, to ensure that there is a common understanding of what constitutes a change and what the change process is seeking to do. The Railways Safety and Standards Board (RSSB) suggested the objective should also reflect the factors contained in the ROC Criteria.

3.6 TfL said that the proposed objective must be accompanied by a commitment from all parties involved in the change processes. The objective should underpin the arrangements for London Underground services where they operate over or interface with Network Rail infrastructure.

#### *ORR response to consultees’ views*

3.7 We welcome the general support for the incorporation of an objective in Parts F and G which will be helpful in:

- clarifying the purpose of the arrangements;
- developing a cross industry approach; and

- providing overarching criteria for decision making.

We also agree with TfL that it must be accompanied by a commitment from all parties involved in the change processes.

3.8 We therefore propose that the objective of Parts F and G should be:

*“To facilitate improved performance, capability, capacity and value for money of the railway system to the benefit of providers of railway services, passengers, freight customers and funders in a safe, efficient and economic way from a whole industry perspective in a manner that enables funders, and providers of railway services, to plan their activities with a reasonable degree of assurance.”*

3.9 In achieving this objective, appropriate protection needs to be incorporated to protect the holders of existing rights, providing for the receipt of fair compensation and the possible blocking of changes where compensation cannot adequately address the actual or potential loss of a rights holder.

3.10 We believe that the best way of ensuring that the industry is committed to the change processes is for it, through the Parts F and G working groups, to review this proposed objective and satisfy itself that it:

- is ‘fit for purpose’ and reflects the whole industry perspective;
- recognises the wider issues arising from any other changes that are taken forward as part of the reform, particularly the proposals discussed below; and
- will receive the commitment of all parties.

In doing so, the working group should also consider whether an overarching objective for both parts is the appropriate approach or whether each Part should have its own distinct objective.

3.11 The industry should put the proposed objective(s) to the ISG for endorsement by March 2006, for subsequent inclusion in the detailed drafting of Parts F and G.

## Network Rail's facilitation role

- 3.12 The Phase 1 reforms introduced a number of changes to Parts F and G, including a general facilitation obligation on Network Rail to take all reasonable steps to facilitate the development, establishment and implementation of any proposals for vehicle or network change.
- 3.13 However, the July 2005 document also proposed that Network Rail be asked to set out more explicitly what stakeholders can expect in terms of facilitation of the development of the specification for new/changed vehicles and network enhancements (this was linked to third party involvement; see Chapter 4, paragraphs 4.10 to 4.13 below for our conclusions on this aspect). In addition, we proposed that the Network Code should contain an obligation on the parties to enter into project-specific contracts and that these reflect, and only apply to, the facilitation principles set out in the Code. We also indicated that Network Rail's facilitation role could be seen as both:
- a general facilitation role as the specification for a scheme is developed; and
  - a specific facilitation role for particular schemes once the specification has been developed.
- 3.14 The July 2005 document also said that we should no longer proceed with published proposals to establish model clauses for vehicle and route acceptance contracts (VRACs) because we felt that such a requirement can now be addressed through the existing facilitation obligation in Condition F1 of Part F.
- 3.15 We sought the view of consultees in paragraph 3.24 of the July 2005 document 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;**

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

#### *Consultees' views*

- 3.16 There was general agreement that the obligations on Network Rail under its existing contractual arrangements and licence conditions are sufficient and that Network Rail should now make a statement on how it proposes to meet its facilitation obligations. Respondents also made a number of suggestions as to what information the statement should include, including issues such as risk allocation and the application of appropriate and skilled resources. Network Rail said that it had already developed standard forms under Part F (similarly for Part G) and is currently working on model terms for the introduction of new rolling stock. It suggested that consideration be given to developing a project methodology, which had the potential to resolve a number of the existing issues currently identified by network users and funders. It will be considering the feasibility of this further.
- 3.17 EWS felt that because the Network Licence obligations are not directly enforceable by train operators, it would find it helpful if ORR could issue its own statement setting out the circumstances that would need to arise before ORR would expect licence enforcement action to be necessary. Angel said that Network Rail should be obliged to commit to vehicle specifications once agreed, particularly in relation to the introduction of new vehicles.
- 3.18 There was also general agreement on the need for project specific facilitation contracts. Again, respondents had their own views on the nature and content of such contracts.
- Network Rail pointed out that it already has a suite of contracts specifically designed for renewal and enhancement projects and considered that these could be both improved and adapted for use in specific projects. The development of the model terms should also help to provide a clear and transparent process.

- The DfT said that resources needed to be made available during tender and evaluation of bids as it can be too late once the contract for rolling stock is signed.
- EWS said that the Network Code should provide an obligation on Network Rail to enter into scheme specific contracts with Access Parties.

3.19 All respondents agreed that if the improvements proposed to the Network Code were introduced (i.e. a statement of intent from Network Rail, project specific contracts and model terms) bi-lateral VRACs would not be required.

3.20 South West Trains Limited (SWT) was concerned that the Network Code is silent on what Network Rail should charge for the provision of information under Part F1 of the Code. It has examples of where it has had to fund surveys of infrastructure, but is firmly of the opinion that the proposer of vehicle change should not pay Network Rail to understand its own assets.

#### *ORR response to consultees' views*

3.21 ORR remains of the view that Network Rail should produce a statement setting out more explicitly what stakeholders, including third parties, can expect in terms of facilitation of the development and implementation of the specification for new/changed vehicles and network enhancements. In preparing such a statement, Network Rail should ensure that it includes:

- how information and reasonable assistance will be provided in a timely and accurate way;
- how skilled and appropriate resources will be allocated;
- how it will deal with third parties through its Dependent Persons Code of Practice (DPCoP)<sup>9</sup>, which it currently operates under its Network Licence requirement;
- the arrangements for project-specific facilitation contracts when the design/specification have been established; and

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<sup>9</sup> This is available at:  
[www.networkrail.co.uk/CompanyInformation/RegulatoryDocuments/DirectoryList.aspx](http://www.networkrail.co.uk/CompanyInformation/RegulatoryDocuments/DirectoryList.aspx).

- how risk will be allocated in a fair and proportionate way.
- 3.22 The statement should set out explicitly how Network Rail will engage at all stages of the change process from the early stages of a scheme's development, through its design and specification stage to delivery and implementation.
- 3.23 We acknowledge, however, that the issues that need to be covered could be addressed in the draft supplementary section to Network Rail's *Code of Practice*. This document is referred to in paragraph 2.45 of our *Policy Framework for Investments: conclusions*<sup>10</sup> document. We agree with Network Rail that it should look at the feasibility of developing a project methodology that provides a structured approach to underpin the arrangements. We believe that Network Rail should build on the work it has already done or is doing in relation to developing model terms and a suite of contracts; in particular the on-going work with ORR in relation to its contracts for third party schemes.
- 3.24 Network Rail should look to submit the draft supplementary section to its Code of Practice to the ISG for endorsement by March 2006. Given the linkages to the investment framework and the development of model terms and a suite of contracts, we think that it is important that Network Rail liaises closely with ORR on the development of the statement.
- 3.25 On EWS's point, about ORR issuing a statement setting out the circumstances under which enforcement action will be taken, we will shortly be consulting on our *Enforcement Policy and Penalties Statement*, which will set out our general approach, the principles of which would apply to enforcement action in this respect.
- 3.26 The industry has already made considerable progress in improving the efficiency of the acceptance process and in the understanding and use of the process by train operators and manufacturers. Given that it is now the intention that once the design/specification of a network or vehicle change is agreed, a facilitation contract will be put in place, and that Network Rail has a suite of contracts that can be developed and adapted for this purpose, we do not propose to proceed with the introduction of model clauses.

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<sup>10</sup> London, October 2005, available at [www.rail-reg.gov.uk/upload/pdf/255.pdf](http://www.rail-reg.gov.uk/upload/pdf/255.pdf).

3.27 Regarding SWT's concern about the funding of information, the general principle is that Network Rail should cover the cost if it is work that it is funded for and is required to be done to fulfil its Network Licence obligations.

### **'Whole industry' approach to changes**

3.28 The July 2005 document said that consideration needed to be given as to whether the current Parts F and G adequately reflect the objective of ensuring that vehicle and network changes are considered from a whole industry perspective, particularly given the lack of symmetry in the vehicle change process, i.e. that Network Rail cannot currently propose vehicle change.

3.29 We also agreed that there were merits in considering the incorporation of a mechanism within Parts F and G to resolve disputes between Network Rail and operators in respect of technical matters.

3.30 We sought the view of consultees in paragraphs 3.30 and 3.31 of the July 2005 document 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;**
  - (ii) **to extend the definition of vehicle change to include vehicle operation; and**
- (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”.**

In doing so we asked if:

- (c) **“Network Rail could identify any changes which it considers have been, or are being, hindered, by the existing arrangements; and**
- (d) **train operators and rolling stock companies could set out how they believe current arrangements can or could ensure that changes which are of wider industry benefit will be made”.**



### *Consultees' views*

- 3.31 Network Rail believes that it would benefit the industry for it to be able make proposals for change to vehicles in appropriate circumstances and that operators would have sufficient regulatory protection and compensation provisions to ensure that such proposals were reasonable and beneficial. Network Rail provided a number of examples of situations where beneficial change is being hindered by the existing arrangements because it cannot propose changes to vehicles.
- 3.32 First felt there was some merit in the proposal, but ATOC did not agree that Part F should be changed in the way proposed because it has not seen any substantial evidence to show that train operators have been uncooperative in implementing changes that have been shown to be necessary. It suggested that efforts should concentrate on determining the best whole industry solution. In this context, the industry should be encouraged to work together, through System Interface Committees (SIC), to achieve the best whole industry solution. ATOC also sought ORR's view on the legality of any attempt to require train operators to change Technical Specification for Interoperability (TSI) compliant stock. Porterbrook Maintenance Limited (Porterbrook) also felt that the current mechanism for vehicle changes through the SIC and the RSSB had not yet proved problematic and it was therefore premature to implement a change to the Network Code.
- 3.33 The DfT on the other hand was of the view that whilst commercial negotiations had been successful to date, this was no guarantee of continuing future success. It felt that a symmetrical approach providing Network Rail with the right to propose vehicle change was essential.
- 3.34 EWS pointed out that the majority of the vehicles operating on the network were not owned by train operators and therefore any changes to vehicles proposed by Network Rail would require the consent of third parties, who are not party to the Network Code. It said that this would be particularly pertinent in respect of freight vehicles, which are hauled by a freight operator, but could be leased by the freight operator's customer from a leasing company. EWS also asked ORR to define what we meant by 'whole industry efficiency' and in doing so be clear about the implications for all parties, particularly from a safety and economic perspective. Like ATOC, EWS believes that changes to current vehicles should be left to commercial negotiation between the parties.

SWT pointed out that Network Rail does not operate or have any technical experience/knowledge of vehicles.

- 3.35 Angel, HSBC Rail UK Limited (HSBC) and Porterbrook said that if the Code were to be changed in the way proposed there could be a significant impact on rolling stock companies (ROSCOs), particularly in terms of cost implications. Angel and Porterbrook said that they would like to see ROSCOs have a direct contractual relationship with Network Rail. Such contracts should include rights to negotiate any proposed vehicle changes, mechanisms to ensure the best industry solution, effective and robust arbitration/dispute arrangements and appropriate compensation arrangements (including one for dealing with 'unexpected' costs).
- 3.36 Whilst Network Rail and the DfT welcomed an extension to the definition of vehicle change to include vehicle operation, other respondents either disagreed or had serious concerns. First pointed out that vehicle operation is the responsibility of train operators and extending the definition could have an impact on safety. EWS opposed the proposal saying that provided vehicles conform to the relevant route and vehicle standards, then they should be allowed to operate unhindered. It was also extremely concerned that the proposals would run counter to the European proposals on interoperability. Angel suggested that such changes should be formalised through the track access contracts. The Strathclyde Passenger Transport Executive (SPTEx) was concerned at the suggestion Network Rail could propose changes to maintenance practices because of the possible impact on an operator's ability to deliver the contracted quality of service. SWT supported the proposal in general terms, but said that the "word and notion of 'operation' would need to be tightly defined – for example, it should not include driving technique".
- 3.37 EWS remains committed to the idea of a technical arbitration process, a view shared by SWT. ATOC accepts that the proposal for technical arbitration may have some merit, but that it requires careful consideration and suggests that it is considered separately from the phase 2 reforms. Network Rail also agreed that it needs further consideration against the background of the mechanisms and systems that already exist. First said that although most operators had access to their own experts, it agreed that there may be circumstances where a technical arbitration panel might be useful.

- 3.38 Network Rail also said that it would be helpful to have greater clarity about the relationship between Part F and Variable Track Usage (VTU) charges for when new vehicles are introduced to the network, particularly in terms of a definitive statement about whether or not they can recover any additional costs through Part F.

*ORR response to consultees' views*

- 3.39 While we have considered carefully all the points made by consultees, we remain of the view that Network Rail should have a right to propose vehicle change because of the need to ensure that such changes are considered from a whole industry perspective. Therefore, the ISG needs to ensure that a mechanism is developed for Part F that allows changes to vehicles, including vehicle operation, identified by Network Rail to be taken forward.
- 3.40 However, we recognise the concerns of train operators and the need for relevant safeguards and proper controls to protect their interests, but believe that these can be met by appropriate mechanisms, including consultation rights, decision criteria, appeal rights, and appropriate compensation arrangements, on the face of the Network Code. These should include a requirement on Network Rail to produce a business case to justify the proposal and to demonstrate that they have considered all options such as operational and safety considerations. This would need to include evidence that a vehicle change was more beneficial from a whole industry perspective than an infrastructure one and therefore the best solution.
- 3.41 We also recognise that vehicles are not in the main owned by operators and this is why we believe that third parties, including rolling stock owners, should be able to have separate contractual arrangements with Network Rail. Network Rail should therefore consider how best to facilitate this to ensure that appropriate contractual relationships are established. Our conclusions on how this should be taken forward can be seen in Chapter 4.
- 3.42 We agree with ATOC that SICs have an important role to play in the early stage of a scheme's development, particularly in terms of identifying system optimal solutions, and believe that they should be included as a matter of course and their role specifically outlined in the Part F facilitation arrangements. However, it is important to remember that SICs are only able to make recommendations and, other than through the Railway Group

Standards process, there is no mechanism for requiring changes to be made to vehicles. Where changes are required to be made the vehicles change process would have the advantage of dealing with ‘winners and losers’, albeit recognising possible difficulties for ROSCOs.

- 3.43 We have also concluded that our proposal to extend the definition of vehicle change to cover vehicle operation should go ahead because the wider industry benefits such a move would produce outweigh the disadvantages. We have noted consultees’ concerns, but would reiterate that the arrangements would be subject to the usual appeal process (ultimately to ORR) and that in drafting the relevant provisions of Part F, it is for the industry to ensure that the relevant protections are in place.
- 3.44 On EWS’s point about interoperability, it is the case that all new, upgraded or renewed vehicles entering into service, if they are likely to travel on the Trans European Network, will be subject to interoperability requirements. This happens whether or not their intended operating routes are already interoperable (in the sense of complying with TSIs) or currently planned to be interoperable. It is likely that this will mean that all new, upgraded or renewed vehicles will have to be interoperable though existing rolling stock will not have to be adapted. Where it has been decided that new rolling stock must comply with TSIs, these will of course take priority and solutions to whole industry problems may be constrained if there is a conflict.
- 3.45 Turning to EWS’s proposal for a technical arbitration process, we agree that this is worthy of further consideration and that the responsibility for taking it forward should rest with the ISG. We also agree with ATOC and Network Rail that the proposal requires careful consideration against the background of existing systems and procedures. In the circumstances, Network Rail should, in conjunction with EWS, develop a proposal for consideration and discussion by the ISG. In doing so, it is suggested that they consider:
- the scope of the problem;
  - the detail of the process;
  - how any proposal will fit in with existing industry systems and processes and whether there are other options; and

- how they see it sitting in Parts F and G, including whether it should be a formal contractual process or not.

Although this proposal should not be developed at the expense of other Network Code reform work, we expect the ISG to agree a firm programme for taking this workstream forward.

- 3.46 Finally, Network Rail said that it would be helpful to have greater clarity about the relationship between Part F and VTU charges. If Network Rail is correct that there is potential for new vehicles to cause more costs than those recovered by the VTU charge, then Part F could be an option for enabling these additional costs to be recovered. We have discussed this with Network Rail and have not seen convincing evidence that there are any such additional costs that are not already covered by other elements of the contract. Accordingly, we do not propose any changes to Part F. However Network Rail may wish to consider providing further information to support their view and justify further revisions to Part F.

### Single ‘system change’

- 3.47 Although, in the July 2005 document, we were of the view that separate processes should remain for the majority of vehicle and network changes, we also said there was a need to ensure that, where appropriate, the processes are carried out in parallel and that there may be an argument for having a single ‘system change’ for complex major projects. We therefore sought the view of consultees in paragraph 3.34 of the July 2005 document on our 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”**.

#### *Consultees’ views*

- 3.48 The majority of respondents agreed the retention of separate processes, but that they should be better aligned and enhanced and brought into line with any overarching objective that was agreed. Network Rail suggested that there should be a fast track way of determining which process should be adopted in any given situation. The DfT believes that a single ‘system change’ would be the better long term position, but it would be content with the continuation of Parts F and G processes providing they are similar and offer symmetrical rights. Merseytravel said there would be benefits in a single system that

simplified and streamlined the change process, particularly where a whole industry solution might involve changes both to the network and vehicles.

*ORR response to consultees' views*

3.49 We have concluded that separate Parts F and G processes should be retained, but that the industry, through the Parts F and G working groups, should consider what further changes are required and propose detailed drafting changes to Parts F and G in order to:

- allow for parallel working arrangements in those cases where it would prove beneficial from a whole industry perspective;
- provide for proper co-ordination and transparency between related vehicle and network changes;
- ensure that they have regard to the overarching objective set out at paragraph 3.8 above;
- ensure all relevant parties are consulted; and
- provide a mechanism for determining what process should apply to a particular change. This should include those large/complex projects where bespoke arrangements are considered more appropriate (see paragraph 3.75 below).

### **Definition of Network Change and the rights of train operators**

3.50 In the July 2005 document, we suggested that the process needed:

- to ensure extensive consultation with those parties affected by a change; and
- to secure appropriate 'quiet enjoyment' of existing access rights.

We listed a number of key principles that flowed from this, including the right to seek to block change in certain circumstances and, that the expanded definition of Network Change proposed in Annex 4 of the July 2004

consultation document<sup>11</sup> would provide the widely drawn definition for rights of consultation.

- 3.51 Paragraph 3.42 of the July 2005 document sought consultees' views, **“particularly on the key principles and the right to seek to block a change being subject to specific criteria”**.

#### *Consultees' views*

- 3.52 ATOC supported the expanded definition of Network Change proposed in Annex 4 of the July 2004 document. EWS also firmly supported the principles, particularly the proposed blocking right where a change is likely to affect future capability of the network, and agreed criteria are important to ensure blocking rights are properly exercised. First supported the principles and criteria, but felt that the latter would require further clarification. SPTE had a general concern about the impact that the adoption of the proposed principles and compensation regimes might have on services, and wanted to see the ability to object to a change. SWT felt that the first criterion dealing with a right to block a change, where the proposed change would necessarily require Network Rail materially to fail to deliver existing access rights (see paragraph 3.38(a) of July 2005 document), should be broadened to include a significant deterioration in performance of an operator's services as a result of change. TfL believe that the criteria to block changes should expand upon the consistency and efficiency criteria to ensure that social benefits are taken into account.
- 3.53 Network Rail supported a widely drawn right to consultation, but believed that further consideration was required to the suite of different definitions. It did not believe the right to compensation should be so widely applicable. It believed that Schedules 4 and 8 should be revised to enable them to be the source of compensation for the effects of any possessions or of the performance of services and not Network Change. It also believed that there should be a clearer process for offsetting benefits against costs associated with changes.
- 3.54 The DfT was concerned to ensure that the right to block a change, where it is likely to lead to a future loss of capability or is difficult to compensate (see

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<sup>11</sup> *Reform of the Network Code: conclusions of phase one and notice of changes (corrected version)*, Office of the Rail Regulator, London, July 2004, available at <http://www.rail-reg.gov.uk/upload/pdf/207.pdf>.

paragraph 3.36(d) of the July 2005 document), is clearly defined to avoid an access party being able to preserve some degree of option value (it is concerned that Government and not the access party will pay for this option value). For similar reasons, it also had difficulty with criterion (c) where the consequence of blocking a change meant that existing rights could not be met (see paragraph 3.38 of the July 2005 document). Nor would it expect Network Rail to progress any change that was inconsistent with the efficient use and development of the railway, as this would be inconsistent with its duties under the Network Licence. It also had difficulty in envisaging circumstances where criterion (b), relating to “quiet enjoyment of rights”, would arise (see paragraph 3.36(b) of the July 2005 document).

- 3.55 HSBC was very concerned that the provisions appeared to contemplate a relationship between Network Rail and train operators and as it had indicated, if the former were granted the right to propose vehicle change then it was essential for ROSCOs to have a contractual right to be consulted, to challenge Network Rail’s decision and to be awarded appropriate compensation. Angel agreed with the proposed principles, but not the basis for compensation, which it felt should include compensation for any increased costs incurred by vehicle owners as a result of the vehicle change proposed. Angel did not believe that the criteria reflected the possible impact on the residual value of rolling stock and believed that further consultation and discussion with ROSCOs is required.
- 3.56 ATOC, the DfT and First see no need to change the existing change of law provisions. However, EWS believes that the principle of ‘costs lie where they fall’ is disadvantageous to freight operators because they cannot generally pass their costs on to their customers. Network Rail too felt that further consideration was required as to how costs of such changes are allocated, particularly in those cases where there are options for achieving a mandated change and there would be varying cost implications for different parties. It also felt that the definition of competent authority could usefully be revisited.

*ORR response to consultees’ views*

- 3.57 We remain of the view that it is important to establish key principles and criteria, but recognise that consultees have raised valid concerns. In the light of these we have concluded that the key principles should be as follows:



- (a) there should be a widely drawn right to consultation on changes to the network or to vehicles which are likely to impact on others;
- (b) compensation generally should be the remedy for loss of “quiet enjoyment” of rights (e.g. in relation to possessions and to performance of services);
- (c) there should be a right to seek to block a change where it can be shown that as a consequence of that change existing access rights cannot be met; and
- (d) there should be a right to seek to block a change where it is likely to lead to loss of future capability of the network (including use above and beyond the existing access contract), or is otherwise very difficult to compensate (e.g. loss of overall network resilience).

3.58 Furthermore, we believe that the expanded definition of Network Change (see Annex B) as proposed in Annex 4 of the July 2004 document is suitable and should form the basis for the detailed drafting.

3.59 In terms of the specific criteria underpinning the right to seek to block a change, we have concluded that the proposed change would:

- (a) necessarily require Network Rail materially to fail to deliver existing access rights;
- (b) have a material effect on the resilience of network operation which is not compensatable; and
- (c) have a material effect on the ability of train operators (beyond existing access rights) and funders to plan their activities; **and** it is not consistent with the efficient use and development of the railway network.

3.60 We look to the industry through the ISG to incorporate appropriate mechanisms into the Network Code, based on the principles and criteria above and taking account of existing compensation arrangements. ORR will assist in the process of developing these mechanisms by providing further guidance on appropriate compensation mechanisms if the industry cannot reach agreement.

- 3.61 We have noted the concerns raised by EWS and Network Rail about the existing assumption for compensation in respect of the changes of law provisions, but do not find them very persuasive. We are not aware that this has caused any serious problems and have no evidence to suggest that it will in the future. Therefore we do not propose that any changes should be made. However, it is open to those organisations to come forward with proposals for improving the clarity of the provisions for discussion by the Parts F and G working group and the ISG.

### **Network Rail’s right to ‘buy out’ access rights**

- 3.62 We sought the view of consultees in paragraph 3.45 of the July 2005 document on our emerging conclusion “**that there should be a mechanism for adjusting Network Rail’s outputs by giving it the right to make changes to access rights, subject to compensation, and appeal to ORR**”.

#### *Consultees’ views*

- 3.63 ATOC recognised the need for such a mechanism, and that in order to protect the commercial position of franchised passenger operators, access agreements should be granted for the whole franchise term, the effect of any changes should be compensated on that basis and there should be a right of appeal to ORR. It also asked ORR to give some consideration to what mechanism would be required to link the outcome of an access charges review to changes in access rights, and suggested that Network Rail be required to include a plan setting out the consequences for access rights as part of its annual business plan. SWT was content with the proposal, subject to it not putting an operator in the position of being in breach of its Franchise Agreement. TfL would want to be assured that the necessary regulatory controls were in place and that the appeal rights to ORR took account of certain specified criteria. Network Rail believed that further consideration needed to be given to the mechanism required, particularly in terms of the relationship with route utilisation strategies (RUSs), where it believed there may be instances where a RUS is the only way of developing the necessary detailed plans.
- 3.64 EWS expected that any such mechanism must conform to the relevant provisions of Schedule 4 of the Railways Act 2005. It did not believe that this would be the case if the mechanism provided for Network Rail deciding the

implications for the network of the high level outputs (paragraph 3.34(b) of the July 2005 document).

- 3.65 First had similar reservations to EWS. Whilst accepting that the proposal may have merits for franchised passenger operators, this is not the case for freight and open access where the high-level outputs specification (HLOS) can effectively remove access rights and the ability to plan their businesses. It also felt that it was contrary to the European first railway package and that an appeal to ORR could prove an expensive business for a small operator.
- 3.66 Angel and HSBC reiterated their previous points and said that that this proposal did not recognise the potential impact such a right would have on the use of rolling stock, particularly in the long term.

*ORR response to consultees' views*

- 3.67 ORR remains of the view that there should be a mechanism for Network Rail to adjust its outputs by giving it the right to make changes to access rights, subject to appropriate compensation and appeal to ORR, for the reasons given in the July 2005 document. These were that we believe such a mechanism should:
- (a) be based on the assumption of a negotiated outcome, but with Network Rail ultimately having the ability to require changes to access rights to be made (subject to appeal to ORR);
  - (b) cover changes which arise as a direct result of the implementation of a periodic review. In practice, the review is likely to set out high-level outputs, with Network Rail responding in its business plan with the implications for the network. Proposed changes to access rights would arise from the business plan;
  - (c) include appropriate compensation arrangements. Consideration will need to be given to the implications for the term of access rights, and what special provision should be made to avoid perverse behaviour as a result of this (e.g. reluctance by Network Rail to sell access rights);
  - (d) apply equally to all operators, not just franchise passenger operators;
  - (e) in the case of franchised passenger services, align with mechanisms in the franchise agreement;

- (f) only apply to changes directly resulting from periodic review (not to other changes, e.g. those resulting from a new route utilisation strategy);
- (g) be complementary with the mechanisms in the franchise agreement to adjust service level commitments; and
- (h) provide a key way of facilitating alignment between the key industry relationships.

3.68 Regarding ATOC's point about aligning track access contracts with franchises, this was covered in our recently published policy on long-term track access contracts<sup>12</sup>, which said that with regard to track access contracts for franchised passenger train operators we would be prepared to consider applications to extend franchised passenger operators' existing contracts to make them coterminous with their franchise agreements, subject to a maximum term of ten years. This can include a period of up to two years to ease transition at the end of a franchise. For any new contract, we will consider terms of longer than five years and up to ten years to ensure that it will either terminate or be transferred to the new franchisee at the expiry of the franchise agreement.

3.69 ORR looks to the industry to develop the mechanism for adjusting Network Rail's outputs, outlined in paragraph 3.43 of the July 2005 document, for inclusion in Part G of the Network Code. In doing so, the industry should consider the implications for third parties and consider further the point made by Network Rail about the relationship with RUSs.

3.70 On EWS's point about Schedule 4 of the Railways Act, we confirm that any mechanism developed by the industry will of course need to conform and be consistent with the relevant law.

3.71 On First's point about the first railway package, the proposed Railways Infrastructure (Access and Management) Regulations 2005<sup>13</sup> provide for Framework Agreements (which include in particular long-term access agreements). Under the regulations, most Framework Agreements allow for

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<sup>12</sup> *Long-term track access contracts; final conclusions*, Office of Rail Regulation, London, June 2005, available at <http://www.rail-reg.gov.uk/upload/pdf/240.pdf>.

<sup>13</sup> [www.dft.gov.uk/stellent/groups/dft\\_railways/documents/page/dft\\_railways\\_038503.hcsp](http://www.dft.gov.uk/stellent/groups/dft_railways/documents/page/dft_railways_038503.hcsp).

the agreement to be amended or modified if such changes would enable more efficient use to be made of the railway infrastructure.

## Large and complex projects

3.72 The current vehicle and network change provisions provide a ‘one size fits all’ arrangement for all types and sizes of change, but experience has shown the need for specific governance arrangements for complex projects involving a large number (or all operators) and Network Rail. We proposed that provision should be made for the very small number of large and/or complex pan-industry projects to be covered by specific bespoke contractual arrangements within, or derived from, the Network Code. Paragraph 3.49 of the July 2005 document sought consultees’ views on our emerging conclusion “**that there should be bespoke arrangements for larger and more complex projects**”.

### *Consultees’ views*

3.73 ATOC supports the emerging conclusion, provided such bespoke arrangements are limited to the administration of the change process and recognise that the principles underlying the compensation arrangements remain unchanged. The DfT said any such arrangement should not change the principles of Parts F and G. EWS also supported the proposals, but would prefer to see them included within the Network Code so that they apply equally to all access parties. First agreed, but suggested that further guidance beyond “specific bespoke contractual arrangements within or derived from, the Network Code” is required. Network Rail also agreed and, based on its experience of the GSMR project, suggested a three-stage process as a model for bespoke arrangements, involving:

- approval of technology and/or scope of project, involving Network Rail;
- trialling to identify issues or problems; and
- rollout of the technology/product, to be governed by Part G (the first two stages would be outside the Code).

3.74 SWT was concerned to ensure that whatever arrangement was put in place, adequate protections were ensured for operators and that their requirements were fully taken into account.

*ORR response to consultees' views*

- 3.75 In the light of general consensus by consultees, ORR has concluded that the principle of bespoke arrangements for large/complex projects should be taken forward by the industry producing detailed drafting for incorporation in the Network Code. In doing so, the industry should have regard to the overarching objectives as agreed by the ISG (see paragraph 3.8), as well as:
- (a) governance arrangements;
  - (b) the specification of project and financial arrangements;
  - (c) the need for a change control process; and
  - (d) risk allocation.
- 3.76 We agree with ATOC that the commercial principles underlying the compensation arrangements should remain unchanged and the industry should take this into account in producing drafting.
- 3.77 We believe that this should be carried out by building on the development of the general facilitation arrangements, including project specific contracts outlined above in paragraph 3.21, to ensure issues such as compensation are covered and to avoid duplication of effort, particularly in terms of producing contracts and a project methodology. On the latter, Network Rail's three stage proposal appears to be a sound starting point and basis for discussion.

**Implementation of changes to Parts F and G**

- 3.78 Subject to the responses received, we suggested in the July 2005 document that the work be progressed by the Parts F and G working group with a view to seeking an industry consensus on the way forward. There were then two options for implementing any changes, either by:
- ORR publishing a policy statement setting out its views on the way forward, with the detailed drafting led by the industry (under the leadership of Network Rail); or
  - ORR taking the leadership on drafting the proposed changes, in consultation with the industry, with a view to changes being sponsored through the C5 process or through ORR's compulsory change power under Condition C8 if necessary.

- 3.79 We sought the views of consultees in paragraph 3.52 of the July 2005 document on **“the way changes to Parts F and G should be implemented”**.

*Consultees' views*

- 3.80 There was no consensus on this question with ATOC, First, HSBC, Network Rail, the SPTE, TfL all favouring ORR taking the lead (but via Condition C5 route not Condition C8) and Angel, the DfT, EWS, Merseytravel and SWT favouring the industry-led option.

*ORR response to consultees' views*

- 3.81 This document represents our policy statement for taking this work forward. As explained earlier in this document, ORR will continue to be involved as it has been to date, but we believe that the industry must take responsibility, under the auspices of the ISG, for delivering the further work. Chapter 6 of this document sets out the implementation arrangements, including a timetable for delivering the various workstreams. We will of course remain closely involved in the work through our membership of the ISG and various working groups, but if the industry fails to come up with acceptable proposals by March 2006, then ORR will consider whether it is appropriate to step in and propose changes using the Condition C8 modification process.
- 3.82 In addition, the DfT has recently commenced Sections 16A to 16I of the Railways Act 1993. These sections give us powers to direct Network Rail (or another “appropriate person”) to enhance an existing facility or provide a new facility, following an application supported by Government (the DfT or the Scottish Executive). We are considering what, if any, modifications may now need to be made to the change processes in the relevant industry codes, including Part G. We will provide briefing to the ISG on this issue as soon as is practicable.





## 4. Rights for third parties under the Network Code

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### Background

4.1 The Network Code already provides third parties with general consultation rights on certain matters, some of which were extended under Phase One of the Code reform work. However, ORR believes that the structure of the industry following the Rail Review means that it is time for a review of the existing arrangements for consulting third parties and whether there should be any extension of such rights, particularly in respect of providing a mechanism for involving third parties in the facilitation arrangements for vehicle and network change.

### Third party involvement in vehicle changes and network enhancements

4.2 In the July 2005 document we said that we believed that:

- rolling stock manufacturers, owners and financiers should have facilitation rights in respect of the introduction of new and changed rolling stock; and
- third party deliverers and financiers of infrastructure investments should have rights in respect of facilitation of schemes by Network Rail.

We also said that funders/promoters of rail schemes (e.g. the DfT, devolved governments, Passenger Transport Executives (PTEs), TfL and local authorities) seeking to make infrastructure changes also had an interest in the facilitation and delivery of schemes by Network Rail. The document offered a mechanism for involving third parties in the general facilitation arrangements.

4.3 We sought the view of consultees in paragraph 4.10 of the July 2005 document 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; and**
- (d) **what the appropriate mechanism for doing this is”.**

We also invited Network Rail in paragraph 4.11 of the July 2005 document to provide a statement **“of the approach it proposes to adopt in relation to scheme-specific contracts for third parties in respect of facilitating vehicle change and facilitating and delivering infrastructure improvement. The approach would of course need to be able to reflect ORR’s economic framework for investment in the network (recognising that this was as yet unpublished).”**

#### *Consultees’ views*

- 4.4 ATOC believed that vehicle changes on the network should always be led by a train operator-holder of an access agreement on behalf of third parties, rather than Network Rail, and that Network Rail must consider changes to its own assets from the whole industry perspective. It agrees that a scheme specific contractual mechanism would be required by third parties, as the rights and obligations will be different from those in the Network Code. First suggested that a framework for such contracts would be useful and that an accession contract to the Network Code for third parties would be a sensible approach.
- 4.5 Network Rail pointed out that it already carries out work on the network on behalf of third parties and that such work is generally subject to contractual arrangements. Network Rail believes that the model contracts it has been developing over recent months are the appropriate mechanism for forming the basis for bespoke arrangements, and it is already using them for the majority of third party schemes. As already referred to, Network Rail is also developing model terms and contracts for vehicle changes under Part F, similar to those developed for Part G, and it believes that these would be the appropriate mechanism for facilitating third party vehicle change. Network Rail provided a

statement on its approach to scheme specific contracts for third parties in response to ORR's consultation on an investment framework<sup>14</sup>.

- 4.6 EWS believes that only those third parties who are either actively engaged on infrastructure improvement to the network, or who are developing a non-network project which has an impact on the network, should be able to require Network Rail to facilitate changes. In such circumstances it agreed that a scheme specific contractual mechanism would be appropriate, in line with the same functions and obligations under Part G but under Network Rail's Network Licence rather than the Network Code. In terms of vehicle change, EWS does not believe Network Rail should have the right to propose a vehicle change, so the third party must either become party to the Network Code by obtaining a track access agreement or by entering into an agreement with a train operator.
- 4.7 The DfT would expect to see a right in the Network Code for third parties to receive support or facilitation in a timely and economically efficient manner, including the provision of any industry specific knowledge, subject to a corresponding degree of protection for Network Rail and other affected parties. All such schemes promoted by third parties, and for which Network Rail is expected to provide services, should be covered by a formal agreement covering responsibilities, risk allocation and decision criteria for all stages of the process.
- 4.8 TfL endorsed the need for third party rights to be strengthened and would like to see facilitation arrangements and the procurement of them set out as an obligation under the Network Code. Merseytravel was interested in the facilitation and delivery of schemes by Network Rail and believed that the appropriate mechanism would be through the Code itself. As delivery agent for the Scottish Executive, the SPTe thinks that it is fundamentally important that Network Rail should be required to facilitate changes and would have no objection if this were achieved through a specific contractual mechanism.
- 4.9 Angel believes that more detailed discussion and consultation is required with ROSCOs. HSBC reiterated the points it made on Parts F and G about the

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<sup>14</sup> *Policy framework for investments: conclusions*, Office of Rail Regulation, London, October 2005, available at <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>.

need for robust arrangements for ROSCOs to ensure that they are fully involved and their interests protected.

*ORR response to consultees' views*

- 4.10 ORR has noted the views of respondents, but believes that there are considerable benefits to be gained for the industry as a whole by granting certain classes of funders (e.g. the DfT, the Scottish Executive, TfL and PTEs) and suppliers (such as ROSCOs and manufacturers) specific rights to be consulted and involved in discussions about vehicle and network changes, similar to the general facilitation arrangements of Part F and G, to ensure that their long-term interests are protected.
- 4.11 We therefore believe that third parties should have access to the general facilitation arrangements, similar to those enjoyed by parties to the Network Code, but that this should be through a requirement on Network Rail, and if necessary enforced through its Network Licence. In developing these proposals, the industry should have regard to ORR's recently published conclusions document setting out our policy framework for investments<sup>15</sup>, which provides a definition of a third party.
- 4.12 Network Rail's approach to third party schemes is a key aspect of its obligations under our investment framework. This approach will be contractualised through model templates requiring our approval under Part G of the Network Code. It is suggested that facilitation for schemes, once the specification has been established, is provided through a contractual arrangement, building on the suite of contracts and project management arrangements already developed by Network Rail. Network Rail therefore needs to ensure, in consultation with the industry, that this suite aligns with the provisions of Parts F and G.
- 4.13 This work on third party rights should be taken forward by the Parts F and G working group, under the auspices of the ISG and in parallel with, and to the same timetable as, the consideration of the other Parts F and G changes. In doing so, we would expect the industry to consult the third parties concerned. We will consider what, if any, modifications are required to Network Rail's Network Licence in the light of the proposals received.

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<sup>15</sup> *Policy framework for investments: conclusions*, Office of Rail Regulation, London, October 2005, available at [www.rail-reg.gov.uk/upload/pdf/255.pdf](http://www.rail-reg.gov.uk/upload/pdf/255.pdf).

## Consultation of third parties in respect of industry processes

- 4.14 The July 2005 document said that we believed that third parties have legitimate interests in key industry processes (e.g. those concerning the timetable to be operated and the longer-term capability of the network). At the same time we recognised the importance of avoiding introducing any unnecessary complexity into processes or micromanagement of processes that are best left to the industry to operate.
- 4.15 We proposed that an appropriate approach is for Network Rail and train operators to develop a code of practice setting out how they will consult interested third parties in the development of the timetable and operating procedures. Although Parts F and G already require Network Rail to consult funders and others; and all proposed changes are published on Network Rail's website, we suggested that it would be sensible to include the consultation of funders, rolling stock owners and any other relevant stakeholders in the code of practice.
- 4.16 We sought the view of consultees in paragraph 4.17 of the July 2005 document 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 Code should contain”**.

### *Consultees' views*

- 4.17 Consultees agreed that a code of practice would be a good idea and Network Rail confirmed that it would be happy to work with the industry in developing it. EWS agreed, subject to it applying only to third parties that conform to the requirements set out in paragraph 4.4 of the July 2005 document, i.e. those either actively engaged in a vehicle/network change or those whose business is directly affected by the operation of industry processes. First agreed, subject to the involvement of freight operators. HSBC also agreed that a code of practice would be useful, but that third parties like ROSCOs require contractual rights. SPTE suggested that a code should be developed under the auspices of ORR.

*ORR response to consultees' views*

- 4.18 Given the level of support for a code of practice we will now look to the industry to put this work in hand as a matter of urgency. We expect such a document to be produced for endorsement by the ISG, and then consultation with the relevant third parties, by March 2006. We have noted SPTE's suggestion that ORR should lead the work, but as explained above, we are firmly of the view that the industry itself is best placed to take on this role. However, as with all aspects of the Network Code reform, we are happy to be involved in the development of a code and offer advice as required. We would in any event expect to be consulted on the industry's proposals through the ISG.
- 4.19 We have noted Network Rail's point about the DPCoP and agree with it that it should look to see how it can be helpfully developed to apply specifically to consultation procedures.

## 5. Information to be exchanged by Network Rail and train operators

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### Background

- 5.1 Part K of the Network Code was introduced as part of the Phase 1 reforms and provides a mechanism for a two-way flow of key information between Network Rail and train operators on both a regular and an ad-hoc basis. As already explained, Part K can be brought into effect by notice by ORR from any date after 31 March 2005. Such a notice can specify the extent to which the full Part K obligations come into effect in respect of type and classes of information, times of information provision, different classes of persons to whom information is to be supplied, and quality and level of detailed information. We have not so far issued a notice bringing Part K into effect.
- 5.2 Part K comes into full effect automatically from 31 March 2006 unless ORR gives a notice stating the extent to which it shall not have full effect (including stating when it will have full effect, and ORR's reasons for limiting the extent of introduction).
- 5.3 We sought the view of consultees in paragraph 5.12 of the July 2005 document on **“the broad approach and specifically:**
- (a) **on whether ORR should be switching on Part K;**
  - (b) **what the content of the annual information report, and the regular monitoring reports should be; and**
  - (c) **what provision should be made for specific information flows”.**

### *Consultees' views*

- 5.4 Network Rail considered that the industry should work together to agree the necessary information requirements and that it would therefore be premature to switch on Part K prior to April 2006 and there might be a need to delay its introduction further in the light of the discussions. It also believed that in the event of Part K being activated, the industry disputes processes should be adopted. ATOC also believed that Part K should not be switched on in its current state and believed that the industry needed to take stock and, through

the appropriate working group (BHLK), come back with revised proposals. EWS agreed, but emphasised the importance of retaining a Part K, so that an operator has its own remedies against Network Rail where information is not forthcoming (e.g. freight capability of the network where it believes data should be provided at a detailed level) and suggested that as a minimum, from March 2006, Part K should provide a mechanism for requesting information from Network Rail, together with an appeals process.

- 5.5 Other consultees (First, Merseytravel, the SPTE and TfL) felt that Part K should be switched on now. First said that in doing so it would be helpful to have more detail on capability and possessions. SWT was concerned to ensure that the provision of information should be at no extra cost to the industry and should be in a readily understandable format.

*ORR response to consultees' views*

- 5.6 Although there have been changes in the industry since Part K was conceived, we believe that it still has an important role to play as a mechanism for the timely exchange of accurate and relevant information between industry parties.
- 5.7 We recognise that there is an increasing amount of co-operation between Network Rail and operators over information flows and accept that much of the information covered by Part K will be picked up under other arrangements, including other parts of the Network Code and through the Information Network<sup>16</sup>. Whilst we also accept that this will develop over time, we share the view of those that are concerned at the idea that Part K should be removed altogether and remain of the view that it is important for the Network Code to include a process which could be triggered if there was a failure to deliver by any party.
- 5.8 We also accept that there may need to be some changes to Part K as published. As noted by a number of the consultees, the question of whether to switch on Part K has recently been the subject of discussion at the BHLK working group, of which ORR is a member. That group agreed that a sub

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<sup>16</sup> The ORR published a consultation document on this entitled *Better Information, Better Decisions: ORR's proposed strategy for developing a rail industry information network*, in April 2005. This document can be found at: <http://www.rail-reg.gov.uk/upload/pdf/234.pdf>. The main purpose of the Information Network is to improve data quality and accessibility in the industry. ORR's conclusions on the Information Network will be published shortly.



group should be established with a view to producing revised drafting to reflect the industry's current requirements. ORR is also represented on that sub group, which recently put forward a proposal to the BHLK working group; a proposed approach that would retain the structure of Part K, but allow greater flexibility for Network Rail and individual train operators to agree what information is relevant to them. There would also be an appeal mechanism, ultimately to ORR.

- 5.9 It is now for the BHLK working group to decide how to take this forward. In doing so, the industry should bear in mind that there are specific information flows that are particularly relevant to the Network Rail/train operator relationship and that will not necessarily be picked up through other arrangements. It is therefore important that the sub group ensures the drafting provides for Network Rail and train operators to address any gaps. The sub group also needs to ensure that its proposals are compatible with the strategy being developed for the Information Network.
- 5.10 In the circumstances, ORR agrees that implementing any part of Part K would be premature at present. However, we do not agree with delaying implementation until April 2007 and would expect the industry to come up with revised proposals for discussion with us as soon as possible, and in time for changes to Part K to become effective by 31 March 2006.



## 6. Implementation

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- 6.1 As this document makes clear, we believe that the industry should continue to lead the Phase 2 reform work, under the auspices of the Network Rail/ATOC jointly-chaired ISG, and to be responsible for taking forward the package of changes set out in this document. ORR will of course continue to offer advice, guidance and support and remain actively engaged in taking this work forward through its membership of the ISG and various working groups.
- 6.2 Although we recognise that some of the issues will prove to be more difficult than others to resolve and that there has to be some flexibility in the timetable, we believe that it is important that the industry maintains the considerable momentum that has been generated over the last 18 months and that it adheres as closely as possible to March 2006, the originally planned implementation for many of the Phase 2 reforms. That is why we are looking to the industry to come up with proposals, including detailed drafting in respect of Parts F and G and on third parties, by the end of March 2006.
- 6.3 By March 2006, we expect the industry to have completed the following.
- (a) **Part B:** through the BHLK working group agreed (paragraph 2.17):
- with the Delay Attribution Board the possible implications of the DAB's programme of work on the Network Code;
  - what other aspects of Part B could be improved; and
  - established a programme of work for taking forward any improvements to Part B.
- (b) **Part C:** established a more efficient change process (paragraph 2.19).
- (c) **Part D:** developed proposals for the establishment of a more robust and efficient timetabling process, so that instructions for the legal drafting of revisions to Part D can be issued (paragraph 2.21) to enable any changes to come into effect by the end of June 2006.

- (d) **Parts F and G:**
  - (i) agreed an overarching objective (paragraphs 3.7 – 3.10);
  - (ii) agreed Network Rail's statement on how it proposes to meet its facilitation obligations, including the establishment of project specific contracts (paragraphs 3.21 – 3.24);
  - (iii) developed appropriate mechanisms for inclusion in Part F giving Network Rail the right to propose vehicle change, extending the definition of vehicle change to include vehicle operation;
  - (iv) developed appropriate blocking rights principle and criteria for inclusion in Parts F and G (paragraphs 3.57 – 3.61 inclusive);
  - (v) developed a mechanism for adjusting Network Rail's outputs (paragraph 3.69);
  - (vi) agreed what changes are required to Parts F and G to ensure that the processes work in parallel (paragraph 3.49); and
  - (vii) issued drafting instructions to lawyers.
- (e) **Part H:** implemented the ROC.
- (f) **Part K:** submitted revised drafting to ORR for approval (paragraph 5.9) such that it replaces the current drafting before it comes into effect. If revised proposals have not been agreed and approved by ORR, the existing provisions of Part K will become effective.
- (g) **Part L:** gained approval for implementation of the JPIP process (Condition LA) to become effective by the end of March 2006 (paragraph 2.30).

In addition the industry should have produced a **Code of Practice** setting out how it will consult interested third parties (paragraph 4.18), and agreed a programme of work for the consideration of a **technical arbitration process** (paragraph 3.45). ORR will have facilitated further work on environmental responsibilities, including consideration of what changes, if any, are required to **Part E**.

ORR will ensure that proposals for Part J have been developed, in conjunction with the industry, and submitted to CRC for approval with a view to them coming into effect in June 2006.

6.4 By the end of May 2006, we will expect the industry to have:

(a) **Part E:** submitted to the CRC any required changes for them to come into effect by the end of July 2006; and

(b) **Parts F and G:**

(i) established bespoke arrangements for large and complex projects (paragraph 3.75); and

(ii) completed and agreed with ORR legal drafting of revised Parts F and G for submission to the CRC for it to come into effect by the end of July 2006.

6.5 More generally, the ISG should have established arrangements for monitoring and reviewing the effectiveness of the Network Code reforms (paragraph 2.10).

6.6 Although we clearly prefer the industry to take the lead in delivering this work, it must be understood that if the industry fails to come up with acceptable proposals by the end of March 2006, then we will have to consider the possibility of stepping in, developing the necessary drafting and sponsoring the changes using the Condition C8 modification process in the Network Code. We would of course liaise closely with the industry, through the ISG, before taking such action. It is vital that the ISG continues to closely monitor progress of the various workstreams through regular reporting arrangements and resolve issues and risks as they arise.



## ***Annex A: Respondents to the July 2005 document***

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The following organisations responded to the July 2005 document.

Angel Trains	17 August 2005
Association of Train Operating Companies (ATOC)	23 August 2005
Department for Transport (DfT)	19 August 2005
English Welsh and Scottish Railway Limited (EWS)	19 August 2005
First Group	19 August 2005
HSBC Rail	18 August 2005
Hull Trains	1 August 2005 (received 13 September 2005)
Merseytravel	28 July 2005
National Express	19 August 2005
Network Rail	19 August 2005
Porterbrook	12 August 2005
Rail Safety and Standards Board (RSSB)	15 August 2005
Rail Industry Association (RIA)	19 August 2005
Shearman and Sterling LLP	19 August 2005
South West Trains Limited (SWT)	11 August 2005
Strathclyde Passenger Transport Executive (SPTE)	19 August 2005
Transport for London (TfL)	24 August 2005





## ***Annex B: Revised definition of Network Change***

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1. The revised definition of Network Change as proposed in Annex 4 of the July 2004 document and referred to in paragraph 3.58 above is:

“Network Change”

means, in relation to a Train Operator:

- (a) any change in or to any part of the Network (including its layout, configuration or condition) which is likely materially to affect the operation of:

- (i) the Network; or

- (ii) trains operated by that Train Operator on the Network;

- (b) any change to the operation of the Network which:

- (i) is likely materially to affect the operation of trains operated by that Train Operator on the Network; and

- (ii) has lasted or is likely to last for more than six months,

including:

- (x) a temporary speed restriction;

- (y) a material change to the location of any of the specified points referred to in Condition B1.1(a); or

- (z) a change to the format of any operational documentation (other than Railway Group Standards) owned or used by Network Rail or a

Train Operator; or

- (c) any material variation to an established Network Change, other than an authorised variation,

but does not include a closure (as defined in section 39(1)(a)-(c) or 40(1) of the Act)<sup>17</sup> or a change made under the Systems Code;

for the purposes of the definition of “Network Change” and Condition G1.9:

“change”

includes:

- (a) improvement or deterioration, enlargement or reduction; and
- (b) for the purpose of paragraph (b) of the definition of Network Change, a series of changes;

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<sup>17</sup> This reference will need to be changed to Section 45(1) of the Railways Act 2005.