

**NOTICE IN ACCORDANCE WITH SECTION 55(6) OF THE RAILWAYS ACT 1993, AS AMENDED, OF THE OFFICE OF RAIL AND ROAD DECISION NOT TO MAKE A FINAL ORDER, OR MAKE OR CONFIRM A PROVISIONAL ORDER, IN RELATION TO NETWORK RAIL INFRASTRUCTURE LIMITED'S CONTRAVENTION OF CONDITION 1 OF ITS NETWORK LICENCE**

**16 October 2015**

1. This document constitutes a notice issued by the Office of Rail and Road (ORR) published in accordance with section 55(6) of the Railways Act 1993, as amended (the Act) stating that:
  - a. ORR is satisfied that Network Rail Infrastructure Limited (Network Rail) is contravening Condition 1 of its network licence by not acting in accordance with best practice and in a timely, efficient and economical manner, to achieve the purpose in paragraph 1 of Condition 1 to the greatest extent reasonably practicable having regard to all to all relevant circumstances including the ability of Network Rail to finance its licenced activities, in that it is failing to adequately plan and deliver its enhancements programme due to systemic weaknesses in the planning, and delivery of its enhancement portfolio. Although Network Rail has started to address these issues through its Enhancements Improvement Plan (EIP), it does not currently have a comprehensive plan in place and therefore ORR is satisfied that there is a high risk that milestones will continue to be missed.
  - b. Nevertheless, ORR will not at present make an order under section 55 of the Act because:
    - i. Network Rail has agreed to take, and is taking, all such steps as appear appropriate to ORR for the purpose of securing or facilitating compliance with condition 1 of its network licence. In particular Network Rail is committed to finalising its EIP on or before 30 October 2015, and publishing it by mid-November. After finalising the EIP and to ensure integration and oversight of the business changes, reports will be made to Network Rail's Business Change Committee which will ensure there is no duplication of accountabilities and that Network Rail's resources are appropriately optimised across the business.
    - ii. Where a weakness has not been addressed in the remit of the EIP, Network Rail has set out steps it has taken and will take to address them, as set out in the Annex.

- iii. ORR does not consider it appropriate to make an order because it is satisfied that an enforcement order would not, at this stage, deliver a better result than would be achieved by:
  - a. implementing and delivering the EIP; and
  - b. taking the steps set out in the Annex

and would not provide greater impetus on Network Rail's delivery to secure more effective or timely compliance with condition 1 of its network licence.

### **Background**

2. This Notice follows ORR's investigation into missed enhancement milestones in the first year of Control Period 5 (CP5).
3. ORR's PR13 final determination defined the regulated outputs for enhancements in CP5 as scheme development milestones (for early stage projects) and scheme completion milestones. These milestones are set out in Network Rail's CP5 Enhancements Delivery Plan, which is revised quarterly using a regulated change control process.
4. ORR refers to these regulated output milestones using Network Rail's GRIP<sup>1</sup> stage-gates, as set out below:
  - a. GRIP 3 completion (single option development) – scheme development regulated output
  - b. GRIP 6 completion (infrastructure ready for use) – scheme delivery regulated output
5. In 2014-15, Network Rail missed 16 of 44 (36%) GRIP 3 regulated outputs and 14 out of 40 (35%) GRIP 6 regulated outputs.
6. ORR raised concerns about the high number of slipping and/or missed milestones with Network Rail in July 2014 through its regulatory escalator, which is ORR's method of raising regulatory concerns. ORR further escalated the issues through formal letters sent from November 2014.
7. ORR also raised concerns (and taken separate safety enforcement action locally) regarding Network Rail's approach to risk assessment and safety by design since early 2014.
8. Network Rail's response to the above concerns was slow and localised, but began to be properly co-ordinated in January 2015 by its initiation of a review led by one of its non-executive directors who chaired a specially convened task force known as the Major Projects Delivery Committee (MPDC.) In addition, in April 2014 ORR agreed a

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<sup>1</sup> Governance for Railway Improvement Projects

set of actions for Network Rail to take to improve its approach to securing interoperability authorisations

9. ORR wrote to Network Rail on 31 March 2015 initiating an investigation into its ability to plan, manage and deliver its enhancement regulated outputs.<sup>2</sup> The investigation focused on the late completion of Network Rail's development and delivery milestones. ORR also considered whether there was evidence of systemic weaknesses relating to the delivery of these regulated outputs, with a particular focus on the following concerns:
  - a. project development (including estimating costs, assessing risks, compliance with legislation and ensuring safety by design);
  - b. project delivery;
  - c. delivering major complex programmes (such as Great Western Route Modernisation); and
  - d. management of the CP5 portfolio.
10. During the course of ORR's investigation, Network Rail presented several iterations of its EIP, which was produced under the auspices of the MPDC and was designed to draw together a range of cross-Network Rail actions to improve its capability and address ORR's concerns. As part of its investigation, ORR analysed whether the EIP adequately addresses the weaknesses identified in paragraph 14.

### **Condition 1**

11. The relevant condition of Network Rail's licence is Condition 1
12. Condition 1 requires Network Rail, by virtue of paragraph 1.2, to:

“...achieve the purpose in condition 1.1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.”

The purpose referred to in paragraph 1.2 is defined in paragraph 1.1, and is:

“...to secure:

- (a) the operation and maintenance of the network;
- (b) the renewal and replacement of the network; and
- (c) the improvement, enhancement and development of the network.

In each case in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of persons

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<sup>2</sup> [link to Terms of Reference]

providing services relating to railways and funders, including potential providers or potential funders, in respect of:

- (i) the quality and capability of the network; and
- (ii) the facilitation of railway service performance in respect of services for the carriage of passengers and goods by railway operating on the network

### **The Contravention**

13. ORR is satisfied that Network Rail is contravening Condition 1 of its network licence by not acting in accordance with best practice and in a timely, efficient and economical manner, to achieve the purpose in paragraph 1.1 of Condition 1 to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of Network Rail to finance its licensed activities.
14. In particular, as detailed above, ORR is satisfied that Network Rail is failing to adequately plan and deliver its enhancements programme. ORR considers that Network Rail failed to meet its regulated outputs for a number of reasons and identified the following weaknesses:
  - a. poor setting of project requirements (front-end definition) with inadequate change control against a baseline;
  - b. inadequate governance and challenge of projects as they pass through development gateways;
  - c. inconsistent consideration of safety issues during design and optioneering;
  - d. blurred accountabilities of the client, sponsor and deliverer are blurred, as projects move through their lifecycle;
  - e. cost estimation and risk functions inadequately resourced or governed through the early project lifecycle;
  - f. no defined framework, tools and techniques for managing complex infrastructure programmes resulting in underestimates of timescales, costs and impact on operational performance;
  - g. absence of portfolio management capability to validate project reporting in terms of cost and schedule, for example by peer reviewing and challenging projects to provide early warning of failure or by better identification of shortages in critical resources;
  - h. late requirements identified when handing asset over to operator;
  - i. land and consents issues underestimated causing delays in purchasing land and obtaining building consents, leading to extra project costs and schedule delays;

- j. unknown asset condition, resulting in late increases to scope and re-planning;
  - k. lower than planned productivity;
  - l. weak assurance of compliance with safety legislation and standards; and
  - m. inadequate and late technical files for authorisation under interoperability regulations.
15. ORR is satisfied that the wide range of identified weaknesses indicate that Network Rail's project development and delivery weaknesses are systemic, rather than the result of individual project failings or adverse circumstances. This is also evidenced by the wide range of causes and the scale of the required long-term improvements that ORR considers Network Rail needs to develop and embed into its business.
16. Although Network Rail has started to address these issues through its EIP and other actions, it does not currently have a comprehensive plan in place and therefore ORR is satisfied that there is a high risk that milestones will continue to be missed.

#### **Section 4 of the Act**

17. ORR must exercise its functions (including its enforcement function) in the manner which it considers best calculated to achieve a series of duties set out at section 4 of the Act.

#### **Section 55 of the Act**

18. Section 55(1) of the Act obliges ORR to make a final order if it is satisfied that a licence holder is contravening, or is likely to contravene, any condition of its licence. Section 55(2) of the Act provides that ORR must instead make a provisional order where it is requisite to do so. In determining if it is requisite, ORR must have regard in particular to the extent to which any person is likely to sustain loss or damage in consequence of anything which is likely to be done, or omitted to be done before a final order can be made.
19. Any enforcement order must contain such provisions as are requisite for the purpose of securing compliance with the relevant licence condition.
20. The obligations to make an enforcement order contained in sections 55(1) and 55(2) are subject to a number of exceptions, as follows:
- a. Section 55(5) provides that ORR must not make an Order if it is satisfied that the duties imposed upon it by section 4 of the Act preclude making an Order;
  - b. section 55(5A) provides that ORR must not make an Order if it is satisfied that the most appropriate way of proceeding is under the Competition Act 1993;
- and

- c. section 55(5B) requires that if ORR is satisfied that:
  - i. the relevant operator has agreed to take, and is taking, all such steps as it appears to ORR for the time being, to be appropriate for it to take for the purposes of securing or facilitating compliance with the condition or requirement in question; or
  - ii. where the contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure;it must only make an Order if it considers it appropriate to do so.

21. ORR does not consider that the exception in section 55(5) applies. ORR is satisfied that its section 4 duties do not preclude the making of an Order.

22. ORR is satisfied that the exception in section 55(5A) does not apply. In this case ORR has no reason to believe that NR's failure to deliver its enhancement regulated outputs could amount to an infringement of the Competition Act 1998.

23. ORR does, however, consider that the exception in section 55(5B) applies:

- a. Network Rail has agreed to take, and is taking, all such steps as appear appropriate to ORR for the purpose of securing or facilitating compliance with condition 1 of its network licence. In particular Network Rail is committed to finalising its EIP on or before 30 October 2015, and publishing it by mid-November. The EIP will address the following areas of enhancements planning and delivery:
  - i. Clienting and Governing the Enhancements Portfolio
  - ii. Sponsorship and Transition Management
  - iii. Cost planning, estimating, risk and whole life costs
  - iv. Project Governance and Stage Gate Assurance
  - v. Project and Portfolio Monitoring
  - vi. Project and Portfolio Delivery Capability
  - vii. Safety by Design
- b. After finalising the EIP and to ensure integration and oversight of the business changes, reports will be made to Network Rail's Business Change Committee which will ensure there is no duplication of accountabilities and that Network Rail's resources are appropriately optimised across the business.
- c. Where a weakness has not been included in the remit of the EIP, Network Rail has set out steps it has taken and will take to address them, as set out in the Annex.
- d. ORR does not consider it appropriate to make an order because it is satisfied that an enforcement order would not, at this stage, deliver a better result than would be achieved by:

- i. implementing and delivering the EIP; and
- ii. taking the steps set out in the Annex

and would not provide greater impetus on Network Rail's delivery to secure more effective or timely compliance with condition 1 of its network licence.



**Richard Price**  
**Chief Executive**

**Annex – Additional areas addressed by Network Rail outside the remit of the EIP:**

<b>Concern raised by ORR</b>	<b>Network Rail's response</b>
<p>Governance arrangements for all workstreams in the plan should be fit for purpose and sustainable beyond the life of the MPDC.</p>	<p>Network Rail has set out 4 levels of governance to hold itself to account for delivery of the EIP:</p> <ul style="list-style-type: none"> <li>• L1 – Working level (Project Management Office)</li> <li>• L2 – Director level (National Investment Portfolio Strategic Review Meeting - NIPSRM)</li> <li>• L3 – CEO level (Whole business review)</li> <li>• External – High Level Trilateral (NR/ORR/DfT) and Director Level Meetings</li> </ul> <p>Network Rail is also considering continuing a quarterly MPDC review throughout 2016 to strengthen the transition towards the new governance arrangements</p>
<p>Clear reporting and monitoring arrangements should be agreed between Network Rail and ORR in relation to the EIP, so that ORR can monitor progress on delivery with an appropriate level of independent assurance to verify that benefits are being delivered.</p>	<p>Network Rail has agreed to four-weekly reviews of progress at the outset, maybe changing to quarterly in longer term.</p> <p>The EIP is also a standing agenda item at quarterly Infrastructure Projects Director Level Meetings and the High Level Trilateral with the Department for Transport.</p>
<p>Productivity per shift should be improved in OLE projects.</p>	<p>Network Rail proposes to address productivity issues in existing forums, instead of in the EIP, as these provide more focussed and effective opportunity to seek industry engagement.</p> <p>Specific examples provided for the Great Western Route Modernisation. Network Rail has worked with industry partners to identify management/engineering process opportunities. Network Rail has also identified a number of initiatives to improve productivity inside possessions.</p> <p>Network Rail is developing key performance indicators to measure productivity and is using Rail Electrification Delivery Group chaired by the Rail Industry Association to work with suppliers.</p> <p>Network Rail highlighted that the EIP includes workstreams to improve supply chain capacity and to identify and reward high performing contractors.</p>
<p>The issues raised in the Independent Reporter study (by Nichols) CN031 must be properly taken into account in the EIP.</p>	<p>Network Rail has referred to a meeting planned for 14 October, where recommendations of CN031 will be reviewed. Network Rail stated it is likely that most will sit within the EIP. Network Rail requested that timely implementation is tracked via the normal independent reporter recommendation tracking process.</p>



<p>Authorisations –assurance required that Network Rail's Safety Technical &amp; Engineering organisation has a timetabled plan to:</p> <ul style="list-style-type: none"> <li>a) assimilate Technical Specifications for Interoperability (TSI) into its business processes and standards framework; and</li> <li>b) review its company and other relevant standards, designs etc. to bring up to date with TSIs and other relevant statutory provisions.</li> </ul>	<p>Network Rail has identified several actions:</p> <ul style="list-style-type: none"> <li>• Work in progress to address conflicts within Work Activity Risk Assessments.</li> <li>• Business Critical Rules Programme allows Network Rail to move away from on-size-fits-all approach to risk based approach.</li> <li>• Network Rail is completing workshops to establish process for implementation of TSIs compliance in late November. Network Rail will then complete gap analysis and establish hierarchy of compliance to address by end of December 2015.</li> <li>• Governance processes for bringing Network Rail's standards in-line with TSIs and other statutory provisions will be in place in early December.</li> </ul>
<p>Greater clarity is needed on actions to improve sponsorship capability and stage gate robustness to take into account the need to improve safety by design and risk assessment.</p>	<p>Network Rail is introducing a systems engineering approach for all enhancements projects and design gate reviews with guidance and checklists are being developed to enable challenge of non-compliant projects.</p> <p>Network Rail has set up an Interface and Risk workshop during October, to identify and log interdependencies of this type across the EIP and build into the final programme.</p>