



Office of Rail Regulation
One Kemble Street
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Network Rail
1 Eversholt Street
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16th January 2015

By email

Dear Gordon,

RE: Freightliner Heavy Haul Limited: Proposed 25th Supplemental Agreement: application under Section 22A of the Railways Act 1993 - Coal

Thank you for your letter of 14th January 2015 requesting further information on how the SoAR Panel reached the decision on why Level 1 rights are not in line with the SOAR Panel's policy for a more flexible approach to the sale of access rights.

I'll start with an apology as it was not clear in the original letter to the ORR (dated 12th January 2015) that the response was detailing the discussions that we had in SoAR Panel. In fact, the letter is agreed by Panel Members prior to sending to the ORR. Therefore the main detail in the letter that represents the discussion around Level 1 rights is copied in *italics* below:

- ***That FHH has provided commercial justification for Level 1 access rights as shown in Annex A of the application form.***

Annex A provides a description of the characteristics of the coal market and how the demand for rail services has changed over time. However there is little quantification of the specific benefits of Level 1 rights within it. What it does clearly indicate is a move towards trunk flows as opposed to sourcing coal from diverse points of origin. It also highlights the tight resourcing of operations which has evolved, but makes a presumption that the commercial risks that it has consciously taken on in so doing should now be mitigated by correspondingly tighter access rights. In so doing FHH is effectively seeking to transfer this business risk from itself to NR who was not party to the risk being taken on in the first place. Further, the requirement to deliver more highly specified rights would place constraints upon NR and restrict its ability to construct future timetables. A consequence of this could be the necessity to construct additional infrastructure to cope with further traffic growth or the inability to provide capacity for new market entrants. Whilst FHH has not quantified its cost savings in tightly resourcing its operations, it is entirely conceivable that the costs of such additional infrastructure or the dis-benefits of restricting access for new entrants could outweigh this.

A clear message from the Annex is that coal paths are in fact now more homogeneous. This supports, rather than detracts from the case for Level 2 rights and is likely to enable a clearer view to be taken when planning services which interact with passenger services that typically run at more regular intervals.

Importantly, FHH states that "If we only had Level 2 or quantum rights, we would have no contractual protection against deterioration of the efficiency of train paths"; this is untrue as regardless of the Level of right, operators have protection under Part D of the Network Code which is incorporated into the Track Access Contract. Should an operator be dissatisfied with a path offered by NR it has a right to dispute the matter.



Additionally, NR and the Freight Operating Companies (FOCs) running ESI coal services currently enjoy a very productive and collaborative process of mutually agreeing to swap or amend coal slot plans as required. If all coal rights were to become Level 1, then that process would be hindered by requiring Supplemental Agreements to change Level 1 rights each time FOCs amended or traded slot plans. Any negative impact on the current slot plan process would have an adverse effect on flexibility of FOCs to achieve slot plans that met their specific needs.

At the time it was noted in SoAR Panel that the specificity of rights in other operators Rights Tables was an important factor, and this is shown below for information:

- Approximately 30% of GBRf Coal Rights are Level 1
- Approximately 45% of DBS Coal Rights are Level 1
- For FHH, approximately 46% of Coal Rights are Level 1, with the 25th Supplemental now requesting 100% at Level 1

With this in mind and taking into consideration the discussions to date with operators detailing why a more flexible approach to the sale of access rights is required, Network Rail maintains that there does not need to be betterment to the specificity of Coal Access Rights before PCD 2016 based on the information that has been reviewed. Whilst we agree that there is no negotiated Level 2 policy in place, that should not prevent Network Rail making the case for Level 2 rights when we believe the flexibility that these offer for capacity planning, outweighs the commercial need of the operator for Level 1 Rights.

Comment [C1]: Summary?

Yours sincerely,

A handwritten signature in black ink, appearing to read "Rebecca Stonehouse".

Rebecca Stonehouse

Network Rail