

Office of Rail Regulation  
One Kemble Street  
London  
WC2B 4AN

Network Rail  
1 Eversholt Street  
London  
NW1 2DN

12<sup>th</sup> January 2015

Dear Bill,

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

Thank you very much for your letter of 19 December 2014 seeking the representations of Network Rail (NR) regarding the proposed 25<sup>th</sup> Supplemental Agreement to the Track Access Contract between Network Rail Infrastructure Limited (NR) and Freightliner Heavy Haul Limited (FHH).

Regarding the application, NR notes that as stated by FHH in Section 3.2 of the application form;

- NR has agreed to the proposed changes to the Schedule 5, on the basis that new and amended access rights are at Level 2 access rights.
- NR has not specifically objected to any of the requested access rights or paths.
- NR has stated that they are not prepared to agree Level 1 access rights for new/and or amended coal access rights.

The parties are therefore agreed regarding the extent of the rights and any more extensive or less extensive use of the network which this entails. The area of disagreement is solely regarding the level of specificity as to whether such rights are Level 1 or Level 2.

NR contends that the proposed rights should be approved at Level 2 for the following reasons in response to the specific points made by FHH in Section 3.2 of the application form;

- **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.

- **That a Level 2 access rights policy for coal has not been agreed with freight operators and;**
- **That the freight operators and NR are in discussions about changes to the Schedule 5 template from PCD 2016, these discussions have not yet concluded. In FHHs view any revised policy should not be applied until after PCD 2016, as this risks inconsistency between freight operators.**

As it notes in its application, FHH is a participant in industry discussions involving the freight operators and NR regarding future access rights in general. The degree to which such a policy could be defined, if at all, remains the subject of continued discussions and pending the conclusion of this NR would expect to continue to consider any applications on a case-by-case basis.

- **That NR has recently agreed an extension to DB Schenker’s (DBS) access rights to PCD 2016, which includes Level 1 coal rights. There appears to be an inconsistent application of policy.**

As noted in response to the previous point, NR currently considers applications on a case-by-case basis. As noted, the application in question extended existing rights without amendment, thereby placing no further restriction upon NR in its ability to apply flex, whereas the FHH application seeks more highly specified rights which will further restrict the ability of NR to apply flex.

FHH’s original Section 22 Supplemental Agreement did contain some Level 1 rights that were being amended to reduce the capacity of those rights. NR has now agreed to sell those at L1 because they do not represent an increase in capacity. This is entirely consistent with NR’s agreement to the DBS 116th Supplemental Agreement Section 22 application.

To be clear, the trains described by the head codes which are amended that are a reduction in mileage, but remain on the same line of route are shown in the table below:

Head code	Days per Week	Original Origin New Origin	Original Destination New Destination
4N31	MSX	DRAX POWER STATION	BUTTERWELL OPENCAST POTLAND BURN
6E84	FSX-Y	HUNTERSTON HIGH LEVEL	EGGBOROUGH POWER STATION FERRYBRIDGE C POWER STATION
4S11	MSX-Y	DRAX POWER STATION FERRYBRIDGE POWER STATION	HUNTERSTON HIGH LEVEL KILLOCH COLLIERY

6M61	SX-Y	HUNTERSTON HIGH LEVEL	RUGELEY POWER STATION CREWE BASFORD HALL
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Network Rail agrees to sell the 4 rights described in this table at Level 1 for the reasons described above.

- **That NR has not agreed to apply the principles set out in the ORR's West Coast decision letter (2 April 2013) for granting rights prior to PCD 2016. FHH's view is that the principles should equally apply across all NR routes, as stated in the 2 April letter, and that there should be a 'balancing, net-nil effect' where new Level 1 rights balance with Level 1 rights relinquished (see attached Annex B).**

NR believes that the Level 2 rights which it has indicated that it is willing to sell are in accordance with the ORR's West Coast decision letter of 2 April 2013. Indeed, in the letter ORR highlights the danger of ossification which could arise from the sale of overly-specified rights and makes it clear that it would expect to consider applications on a case-by-case basis.

Yours sincerely,



Rebecca Stonehouse

Network Rail