

Paul Carey
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

30th September 2011

Dear Mr Carey,

**Review of Part J (Changes to Access Rights) of the Network Code –
Emerging Conclusions**

This letter contains the representations of CoalImp (the Association of UK Coal Importers) to the ORR's emerging conclusions on its review of Part J of the Network Code. The twenty members (listed in the attached Appendix) account for the handling, transportation and use of the majority of imported coal supplies into the UK and include major electricity generators, rail operating companies, coal suppliers, ports and other infrastructure operators.

This response focuses on those aspects of the ORR's proposals that particularly impact on the transportation of coal on the UK national railway network. The views set out here are the consensus views of the Association's members (excluding Network Rail) and have been approved by them for submission in this form.

Introduction

CoalImp supports ORR's review of Part J of the Network Code to ensure that the mechanisms available to the industry in respect of adjustment to access rights and the surrender of train paths (either voluntarily or otherwise) remain appropriate when considered against the changing requirements of the railway and its customers. However, CoalImp has strong concerns over the wide reaching reforms being proposed by ORR to the Use It or Lose It ("UIOLI") mechanism in Condition J4 of the Network Code, which could have a particular effect on CoalImp's members involved in the rail transportation of coal to and from UK Power Stations. This is a market that operates largely on 'call off' contracts between electricity generators/coal suppliers and freight operators providing capability to move coal from a number of different source points to each Power Station on an as required basis. If freight operators are overly susceptible through UIOLI to the loss of access rights to Power Stations from source points from which trains do not regularly operate, they would have little option but to rely on space being available at short notice as and when coal is required to move.

With the national railway network becoming increasingly congested, the chances of sufficient and appropriate capacity to be available at short notice will become increasingly small. This, coupled with the fact that many locations do not have capacity for stocking coal, it is crucial that certainty for the flexible and efficient transportation of coal by rail continues and is not adversely affected by ORR's proposals. Otherwise, apart from the direct adverse impacts on the businesses of rail freight operators and their customers, there may also be consequences for the wider UK economy as a whole. If the transportation of coal is interrupted, particularly during the winter months, electricity generation could be affected which may compromise security of electricity supply both for domestic and industrial use.

The nature of ESI coal movements makes the issues surrounding track access rights and pathing particularly complex. It is difficult to identify genuine need for a path or right because FOCs operate a portfolio of movements for many customers and can claim that a path - or part of a path - is useful for many different customers. Nevertheless, CoalImp believes that the following principles should be applied:

- The wishes of end users should be paramount in cases of access dispute;
- In general, the path should 'follow' the coal; i.e. if a movement transfers from one operator to another the loser of the business should not be able to retain a path or right to use for another flow;
- If an operator faces losing a path due to non-use the end user associated with that path should be able to advise ORR (or another appropriate party - e.g. Network Rail) whether this is due to a change in contracted haulier or a temporary interruption in supply (with genuine prospect of resumption with the same haulier); and
- Blatant tactics of running a single train in a path just to preserve an access right which would otherwise expire should be penalised.

Condition J4 – UIOLI & ROCN

CoalImp acknowledges ORR's aim to achieve a simpler, mechanistic and straightforward UIOLI mechanism which is clear and unambiguous, will reduce industry costs, reduce the degree of monitoring required and generally reduce the administrative burden and room for dispute. However, CoalImp considers that achieving this aim should not be at the expense of the certainty and assurance that operators and their end customers derive from holding access rights to train paths to ensure contractual requirements can continue to be met. If the UIOLI mechanism allows train paths and access rights to be removed from operators too easily without sufficient checks and balances being in place, it will be difficult for freight operators, in particular, to be able to give assurance to their end customers that they will be able to continue to hold the necessary access rights to meet their contractual requirements. Given the nature and flexibility required by customers for the transportation of coal, this is a particular concern for those involved in that market and could lead to customers questioning whether rail as a transportation mode can continue to deliver the assurance and certainty required.

CoalImp believes that ORR's proposals have gone too far and will have a significant adverse impact on the transportation of coal by rail as the proposed new UIOLI mechanism will result in access rights and train paths being too easily removed from freight operators irrespective of whether or not that capacity is required for other uses. Under ORR's proposals, CoalImp understands that as soon as a train path has not been used at least once in 90 days not only could the train path be removed from the freight operator concerned but the access right supporting that train path could also be removed thereby removing the ability for that freight operator to obtain paths in future timetables. As already mentioned above, the transportation of coal by rail operates largely on a 'call off' contract basis. Therefore, if coal is not transported from a particular source point to a Power Station at least once in every 90 days, then any paths and associated access rights may be removed from the freight operator. This would mean that when that coal is required to be moved it would be dependent upon sufficient capacity being available at short notice. The uncertainty that this would create, in CoalImp's view, would not be conducive to enabling freight operators plan their businesses with a reasonable degree of assurance. At least in the current process a freight operator can challenge the removal of a train path and associated access right by providing evidence that they are required to support a continuing commitment in a customer contract. However, under ORR's new UIOLI mechanism, when taken into account with the proposed removal of the reasonable ongoing commercial criteria ("ROCN"), the only grounds for preventing UIOLI would be to demonstrate that the non-use is as the result of temporary non-economic reasons outside of the freight operator's control irrespective of whether or not the access rights are required to support contractual commitments to customers.

In support of its proposals for a new UIOLI mechanism (including the removal of ROCN) CoalImp notes that ORR has referred to Regulation 26 of the Railways Infrastructure (Access and Management) Regulations 2005. CoalImp notes that this legislation states that "*the infrastructure manager shall require the surrender of a train path which, over a period of at least one month, has been used less than a threshold quota to be laid down in the network statement, unless this was due to non-economic reasons beyond the operator's control*". However, CoalImp also notes that this legislation refers solely to the surrender of train paths and does not also provide for the surrender of access rights under a framework (access) agreement. It is also primarily aimed at infrastructure that has been declared as "congested" by the infrastructure manager rather than necessarily the entire network. Therefore, CoalImp considers that whilst it may be arguable that the UIOLI mechanism should only provide caveats preventing the loss of train paths in the timetable that are specified in the Regulations (i.e. use period/quota and non-economic reasons beyond the operator's control), it believes that a further caveat should be included to avoid the permanent loss of the supporting access rights (i.e. if the operator concerned can demonstrate that the access rights are required to support a customer contract), particularly in cases where the capacity is not required by another operator (i.e. for UIOLI notices under Condition J4 rather than J5).

This additional caveat should also be available for Failure to Use under Condition J4.1.1(a), particularly as ORR is also proposing to delete Condition J4.2.2 which CoalImp understands was originally designed to avoid freight operators losing

Level Two access rights that were required for the transportation of coal in cases where freight operators have failed to secure train paths in respect of those Level Two rights in the timetable. This additional caveat would, CoalImp believes, help to mitigate the strong concerns that its members currently have in respect of ORR's proposals.

Summary

For the reasons set out above, CoalImp has strong concerns over ORR's proposals for a new UIOLI process coupled with the associated removal of ROCN and the deletion of Condition J4.2.2. It considers that these proposals go too far in creating a simple and mechanistic process at the expense of certainty for freight operators to plan the future of their businesses with a reasonable degree of assurance in respect, particularly in respect of traffic that operates under 'call off' contracts (which includes the transportation of coal by rail). This may result in discouraging the use of rail for such traffics thereby reducing the ability of rail to compete with other transportation modes, particularly road transport.

Therefore, CoalImp asks ORR to reconsider its proposals in light of the concerns expressed in this response and, in particular, to give consideration to the modification proposed above (i.e. providing an additional caveat for the retention of access rights) which it believes will still enable ORR to achieve its overall aims whilst mitigating the concerns of CoalImp's members. CoalImp also believes that the following general principles should be applied:

- The wishes of end users should be paramount in cases of access dispute;
- In general, the path should 'follow' the coal; i.e. if a movement transfers from one operator to another the loser of the business should not be able to retain a path or right to use for another flow;
- If an operator faces losing a path due to non-use the end user associated with that path should be able to advise ORR (or another appropriate party – e.g. Network Rail) whether this is due to a change in contracted haulier or a temporary interruption in supply (with genuine prospect of resumption with the same haulier).

Yours sincerely

Nigel Yaxley
Managing Director

CoalImp Membership

Associated British Ports

Clydeport

DB Schenker

Drax Power

EDF Energy

E.ON Energy Trading

Fergusson Group

Freightliner Heavy Haul

GB Railfreight

Hargreaves Services

International Power

Network Rail

Oxbow Coal

Port of Tyne Authority

Rio Tinto Alcan

Rudrum Holdings

RWE Trading

Scottish Coal

Scottish Power Energy Management

SSE Energy Supply