

Public Submissions – Brookfield Rail’s Proposed Train Path Policy

Co-operative Bulk Handling Limited (“**CBH**”) makes the following submissions in relation to the Economic Regulation Authority’s (**Regulator**) invitation for submissions from interested parties on Brookfield Rail’s revised Train Path Policy (**TPP**).

Summary

CBH notes that the proposed changes made to the TPP by Brookfield Rail are substantial and effectively water down the TPP to merely repeat various sections of the Railways (Access) Code 2000 (the **Code**).

It is unfortunate that the Code does not provide more detailed guidance as to what must be contained in the TPP as this would assist all interested parties. Presumably the purpose of section 44(2) of the Code, requiring a railway owner to prepare the TPP, is to provide access seekers and users with clear and detailed processes, rights and obligations to help ensure the fair allocation and use of Train Paths.

In its proposed new form, CBH does not understand what the revised TPP achieves other than highlighting various sections of the Code. By removing most of the detail and diluting the Regulator’s rights contained in the TPP, it is difficult to see how the Regulator can ensure that train paths are allocated in a manner which is fair to all users. To this end, the Regulator ought to consider changes to the Code to enshrine the matters proposed to be removed from the current TPP and which are discussed in more detail below.

Introduction

Paragraph 3

A fundamental change made from the current TPP has been the removal of the following:

“WestNet, nevertheless, will apply the TPP to each allocated Train Path regardless of whether access applications are made inside or outside of the Code.”

Although only voluntary, the current application of the TPP to all access arrangements sought within and outside of the Code provides a practical method of treating all access seekers and current users equally and consistently.

If the TPP applies solely to access arrangements under the Code, there will be no access allocation safeguards for entities seeking access outside of the Code. It seems counter-intuitive that in an open and fair access regime, Train Paths can be allocated under a different set of principles depending of whether an entity elects to seek access inside or outside the Code.

CBH would prefer for the current regime to remain whereby the Regulator approved TPP applies to all access applications.

Whilst CBH does appreciate that the Code itself generally only applies to entities who seek access under the Code, CBH is not aware of any entity with an access agreement under the Code or of any access seeker currently seeking access under the Code. Confining the application of the TPP to situations where access is sought under the Code would therefore appear to limit substantially (if not entirely remove) the application and utility of the TPP.

Allocation of Train Paths – Guidelines for Allocating Train Paths in Access Agreements

Paragraph 11

Paragraph 11 provides that if an access seeker complies with the process outlined in the Code, "Brookfield Rail and the entity *may* be in a position to detail Train Path allocation in an Access Agreement."

The use of the word "may" implies that Brookfield Rail can withhold detailing specific Train Paths even though the Code process has been followed. What other requirements imposed in the Code must be satisfied before Brookfield Rail and an access seeker will be in a position to discuss Train Path allocation as this is fundamental to an access agreement?

Section 2.2.2 of the current TPP (proposed to be deleted in its entirety) provided a clear process identifying and detailing Train Paths during the negotiation period between Brookfield Rail and an access seeker and CBH submits that this section should remain.

Paragraph 12

The first line of paragraph 12 states:

"If there is a competing demand for Network capacity at the time of proposal and negotiation..."

Presumably paragraph 12 only applies to demand sought solely under the Code rather than demand made within and outside the Code as a result of the proposed changes to paragraph 3 discussed above.

If this is the case, how does Brookfield Rail determine the allocation of Train Paths between an entity seeking access within the Code and another seeking access outside the Code?

Even in the limited circumstances where paragraph 12 is to apply, CBH is unsure of the meaning of sub paragraph c) where the allocation of Train Paths is allocated in such a way that "*satisfies Brookfield Rail's commercial objectives*". There is no transparency for access seekers in this criteria and there is no such criteria in the existing TPP.

If a commercial objective is to maximise profits, then in determining who should receive a Train Path, it will be the entity willing to pay the most. With access rates having a large differential between floor and ceiling prices, there is a wide range of rates that can be paid and those with deepest pockets will be best able to satisfy a profit maximisation objective. CBH does not object to Brookfield Rail receiving a reasonable commercial return on its investment but questions whether the objectives of the Code of fairly allocating Train Paths can be met when a determining factor in allocating Train Paths is Brookfield Rail's commercial objectives.

Paragraph 13

Paragraph 13 places no obligation on Brookfield Rail to take into consideration the matters listed therein. Rather, Brookfield Rail "may" consider those matters when allocating Train Paths. This is a fundamental change from the previous TPP which required Brookfield Rail

to apply the guidelines for a request for a new Train Path and is a change which CBH opposes.

CBH further notes that the proposed TPP removes all references to "Conditional Paths" and "Conditional Train Paths". This appears to be another step in the gradual erosion of the acknowledged need for allocating Train Paths for grain.

In the Train Path Policy approved in 2001, Conditional Train Paths for grain were specifically acknowledged:

"WestNet may create Conditional Train Paths at the request of an Operator for two purposes.

Firstly, if an Operator requests a Train Path and can demonstrate a contractual arrangement which would require the Operator to run Services within 6 months the Train Path will be added to the Master Control Diagram up to 6 months before the service is scheduled to operate as a Conditional Train Path.

Secondly, if an Operator requests a Train Path which is seasonal in nature (such as for grain services) the Train Path may also be added to the Master Control Diagram as a Conditional Train Path. In this case, the Access Agreement must specify the conditions required in terms of use and it will only remain as a Conditional Train Path if the conditions of the Access Agreement are met."

During the review of the TPP in 2006, and without any CBH input, the Regulator's Draft Determination on the Proposed TPP dated 10 May 2006 (at paragraph 70) provided:

"The Authority understands that the traffic specific concept has specific application in the transport of bulk commodities. With the expected increase in the transport of bulk commodities through expansions in the alumina industry and the expected development in iron ore projects in the mid-west region of the state there may be a future requirement for traffic specific capacity within the context of conditional train paths. The Authority agrees with PN, that with the introduction of this type of train path greater competition in the "above rail" market will be encouraged. As one of the objectives of the WA Rail Access Regime is to promote competition in the "above rail" market, the Authority believes that traffic specific capacity should be introduced as part of the conditional train path process."

Again, without any CBH input, the Regulator's Final Determination and Approval of the Proposed TPP dated 28 August 2006 (at paragraphs 45 to 47) provided:

"45. The Authority supports the draft recommendation for traffic specific capacity where rail lines carry a single type of bulk commodity displaying multiple source single destination route characteristics. However, the Authority recognises that these characteristics do not exist in the existing freight network except for the grain lines which are under-utilised. The Authority considers that while this may be the current situation, the expected development of new iron ore projects in the mid-west region of the state may cause a future requirement for traffic specific capacity within the context of conditional train paths.

46. Having considered the issues raised in the submissions from DPI, WNR and Worsley, the Authority is of the view that making provision for traffic specific capacity in the proposed TPP is premature at this stage. The Authority will monitor the situation and should the need arise the Authority has the ability under section 9 of the TPP to require an appropriate change to this document.

47. Based on the above, the Authority has removed the requirement for Amendment 3 in the final determination."

CBH, on behalf of the 4,600 grain grower members it represents, submits that with Train Path rights in the Kwinana and Geraldton zones already in high and increasing demand from the resources industry (with the Albany and Esperance zones not too far behind), the Regulator ought to exercise its discretion under the Code to ensure that the TPP provides the grain industry with specific conditional Train Paths. Given the time constraints imposed on the return of public submissions on the proposed TPP by 6 June 2012, CBH would welcome the Regulator gathering interested parties to discuss this issue in more detail at a later time.

In any event, CBH opposes all the changes proposed in the TPP regarding Conditional Paths.

Provision of Access to Underutilised Train Paths – Identification of an underutilised Train Path

As a general comment, CBH submits that grain Train Paths ought to be excluded from an underutilisation test. Given the seasonality of grain and its dependence on weather conditions, an underutilisation test for grain Train Paths is not appropriate.

Conditional Train Paths, by their nature, should not be subject to an underutilisation test which does not appropriately take into account the seasonality (or other variability) in the relevant haulage task. This is recognised in section 2.6 of the existing TPP, which states that Brookfield Rail and the Operator will agree the basis on which the performance of Conditional Paths will be assessed. There is no corresponding provision in the proposed TPP. CBH submits that there should be, consistent with the preceding comments about Conditional Paths.

Compliance and Review

While the TPP continues to apply to all access applications made inside or outside the Code, the Regulator's ability to audit Brookfield Rail's compliance every two years has some merit. The proposed changes to the TPP at paragraph 20 will effectively restrict the Regulator's audit rights to those circumstances when an entity seeks access under the Code or where access is provided under the Code. This will severely hamper the Regulator's ability to ensure compliance as CBH is not aware of any entity with an access agreement under the Code or of any access seeker currently seeking access under the Code.

CBH notes that the Regulator is currently obliged to publish a final audit report on its web site (excluding confidential information). This appears to have been removed. In the interests of fairness and openness, CBH submits that this obligation should remain.

General - deletion of major sections

Having a publicly available policy that deals with the allocation of Train Paths and which is approved by the Regulator provides a threshold of fairness and balance which cannot be lowered when negotiations for access commence.

It is disappointing that most of the safeguards and processes which exist in the TPP are proposed to be removed. For example:

- sections 2.3, 2.4 and 2.6 (variation and review of Train Paths) which provides a clear procedure which parties have to comply with as any variation may have a material impact on an access user's operations;
- section 2.7 (cancellation of services using Train Paths) giving an Operator the right to avoid penalties where there is a justifiable reason for cancelling a service; or
- section 4 (rights to sell a train path) allowing an Operator to sell a Train Path subject to Brookfield Rail's framework.

Without these processes embedded into the TPP (or in the Code), it will be up to the parties to negotiate similar provisions in their access agreement. However, in the event of a dispute, the access seeker can only seek to rely on its right under the Code to refer a dispute to arbitration. In the absence of reasonably detailed principles and processes in the TPP, there is little guidance for the arbitrator. In any event, the right to arbitrate does not provide a sufficient safeguard to an access seeker. Any decision to arbitrate must be considered in the context of commercial practicalities and pressures where an access seeker is more likely to avoid a costly and lengthy arbitration in favour of commencing operations – even on unfair access terms.

Having a framework and processes approved by the Regulator covering the matters dealt with by sections 2 and 4 of the current TPP would provide the simplest solution to Brookfield Rail and an access seeker avoiding the need to negotiate and potentially arbitrate basic train path allocation matters.

CBH appreciates the opportunity to comment on the proposed TPP.