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Leonie Browner
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By email: publicsubmissions@erawa.com.au

Dear Leonie

Invitation for Public Submissions – Brookfield Rail’s Proposed Train Path Policy and Train Management Guidelines

We refer to the Economic Regulation Authority’s (**Regulator**) invitation for submissions from interested parties on the Train Path Policy (**TPP**) and the Train Management Guidelines (**TMG**).

Summary

Alcoa’s view is that the proposed changes made to the TPP and the TMG by Brookfield Rail are substantial and, for the most part, significantly reduce the ability of either the Regulator or access seekers to ensure that a fair and equitable process will occur.

It is our view that the TPP and the TMG have been watered down to now merely repeat various sections of the Railways (Access) Code 2000 (the **Code**). We fail to see how this is an improvement or enhancement to the existing TPP and TMG as approved by the Regulator in 2009.

Of particular concern to Alcoa is that the changes proposed by Brookfield restrict the application of both the TPP and TMG to those access agreements that are negotiated within the Code.

Given the way that access arrangements have evolved since the Code was established, with we believe nil agreements within the Code, this proposed change is completely unworkable in our view and should be rejected by the Regulator.

TPP

Definition of Access Agreement

The definition of Access Agreement now only includes those access agreements negotiated within the Code. This is a fundamental change made from the current TPP and, in our view, is unworkable.

When the Code was established, the expectation was that negotiations would occur within the Code. In reality, however, and with the express encouragement of Brookfield Rail, access negotiations have all, or at the very least predominantly, been negotiated specifically outside the Code.

If the TPP now applies solely to access arrangements within the Code, the TPP will become meaningless with respect to the vast majority of products being railed. Whilst not the subject of a specific request from the Regulator, Alcoa makes the point that the Code does need review so that any access agreement, whether within or outside the Code, comes under a robust TPP. It does not seem logical that in an open and fair access regime, Train Paths can be allocated under a different set of principles depending on whether an entity elects to seek access within or outside the Code.

Allocation of Train Paths

It is extremely concerning to Alcoa, and should similarly be of concern to the Regulator, that Brookfield is replacing specific obligations within the current TPP with vague statements such as “may be in a position” or “may also consider”.

The current TPP provides a clear process identifying and detailing Train Paths during the negotiation period between Brookfield Rail and an access seeker, and Alcoa believes that there is no need to modify the process.

Also of concern is the introduction of a test for the allocation of train paths based on satisfying “*Brookfield Rail's commercial objectives*”.

If a commercial objective is to maximise profits, which is a reasonable assumption for a listed organisation, it will be the access seeker willing to pay the most which is more likely to be allocated a Train Path. With access rates on many routes 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. Alcoa questions the stated objectives of the Code of fairly allocating Train Paths when a determining factor in allocating Train Paths, under the proposed TPP, is Brookfield Rail's commercial objectives.

TMG

Definition of Access Agreement

The definition of Access Agreement now only includes those access agreements negotiated within the Code. This is a fundamental change made from the current TMG and, in our view, is unworkable.

Brookfield makes the statement in section 1.1.4 that it may, “at its absolute discretion apply the TMG to access agreements other than Access Agreements” i.e.: those outside the code.

Whether trains are operated as part of an agreement within or outside the Code, the TMG primarily deals with the physical operation of trains. It is not at all practical to have one set of rules for trains within the Code, and potentially another set for trains outside the Code.

If the TMG now applies solely to access arrangements within the Code, it will become meaningless with respect to the vast majority of products being railed. Whilst not the subject of a specific request from the Regulator, Alcoa makes the point that the Code does need review so that any access agreement, whether within or outside the Code, comes under a robust TMG. It does not seem logical that in an open and fair access regime, Train Paths can be managed under a different set of principles depending on whether an entity elects to seek access within or outside the Code.

TPP and TMG

Compliance and Review

A regular review of the TPP and TMG should occur irrespective of any issue being raised with the Regulator. Similarly, a regular planned audit of Brookfield Rail's compliance needs to continue and should be explicitly stated in both the TPP and TMG.

The proposed changes to the TPP and TMG will effectively restrict the Regulator's audit rights to those circumstances when an organisation seeks access within the Code or where access is provided within the Code.

As noted above, Alcoa is not aware of any existing or planned access agreements that are within the Code. As a result, the ability of the Regulator to carry out its intended functions is severely restricted.

General

It is Alcoa's position that users of the rail system rely on the Regulator to visibly hold the rail owner accountable to the intent and thrust of the regulated below rail access environment.

As part of this, it is critical that publicly available documents such as the TPP and TMG are clear, unambiguous, and are seen as allowing access seekers to engage with Brookfield with the confidence that the "system" will protect captive users when negotiating with a monopoly provider.

The proposed TPP and TMG do not provide the level of detail and transparency that are required, and instead tip the commercial balance clearly in favour of Brookfield. We see this as a negative development which should not be endorsed by the Regulator.

If clarification is required on any of our comments, please do not hesitate to contact the undersigned.

Yours sincerely

A large black rectangular redaction box covering the signature of John Oliver.

John Oliver
Manager – Contract Services and Logistics