



Genesee & Wyoming Australia

Review Of Regulatory Guidelines

Submission - 24th February 2017



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1. EXECUTIVE SUMMARY

This submission has been prepared by Genesee & Wyoming Australia Pty Ltd (**GWA**) for consideration by the Essential Services Commission of South Australia (**ESCOSA**) in its review of the guidelines under railway access regimes under its jurisdiction. GWA would like to thank ESCOSA for the opportunity to present our input into the review.

The Tarcoola to Darwin Railway (**TDR**) is regulated through the AustralAsia Railway (Third Party Access) Act 1999 (SA & NT) (**TDR Code**). The TDR Code provides for ESCOSA to publish guidelines relating to various matters. Four guidelines under the TDR Code have been published to date.

The South Australian regional rail network (**SA Regional Network**) is regulated through the Railways (Operations and Access) Act 1997 (SA) (**SA Regional Regime**). ESCOSA has published a guideline in the form of an Information Kit that covers the SA Regional Regime.

The current ESCOSA review covers the guidelines published under both the TDR Code and the SA Regional Regime.

ESCOSA has not published an issues paper for this review. In the absence of any issues raised by ESCOSA, this submission is directed towards GWA's view of the efficacy of the guidelines. In addition to this, the submission responds to several issues raised in relation to the guidelines previously by stakeholders, about which ESCOSA has not, as yet, commented. These issues relate to ring-fencing, transparency and information asymmetry.

In general, GWA is of the view that the guidelines are working effectively and are appropriate for the task in the particular circumstances relating to the railways that they cover. GWA's experience is that applications for access are infrequent and varied, reflecting the nature of markets serviced by the networks. The approach taken in the current guidelines to provide broad guidance without detailed prescription is appropriate and gives GWA scope to respond to access applications flexibly according to the requirements of access seekers. It is noted that few matters have been referred to the regulator by parties seeking access to GWA's networks and that there have been no arbitrations under the two regulatory regimes relating to GWA's networks. Therefore, GWA is not, at this time seeking significant changes to the guidelines.

Notwithstanding this, there are two areas where ESCOSA may wish to consider minor amendments. These are:

- In respect of Guideline No.3, it would be helpful to clarify some of the terms used to distinguish between regulatory and financial accounts. There are also several minor administrative matters that are noted in section 6 of this submission.
- In respect of the Information Kit, there are some minor facts that have become outdated and should be amended for completeness. Examples are provided in section 8.

2. INTRODUCTION

The Tarcoola to Darwin Railway (**TDR**) is regulated through the AustralAsia Railway (Third Party Access) Act 1999 (SA & NT) (**TDR Code**). The TDR Code provides for the regulator, the Essential Services Commission of South Australia (**ESCOSA**) to publish guidelines relating to various matters. Four guidelines under the TDR Code have been published to date.

The South Australian regional rail network (**SA Regional Network**) is regulated through the Railways (Operations and Access) Act 1997 (SA) (**SA Regional Regime**). ESCOSA has published a guideline in the form of an Information Kit that covers the SA Regional Regime.

ESCOSA is currently undertaking a review of the guidelines published under both the TDR Code and the SA Regional Regime. The review offers Genesee & Wyoming Australia Pty Ltd (**GWA**) and other stakeholders the opportunity to advise ESCOSA regarding the effectiveness of the guidelines and to seek changes where appropriate.

GWA is the leaseholder for a number of regional lines in SA covered by the SA Regional Regime and through the related entity GWA (North) Pty Limited is also the current leaseholder for the TDR. For convenience, this submission refers to all entities related to GWA as GWA.

As the main access provider covered by both regulatory instruments, GWA has a significant interest in the form and substance of the guidelines. This submission provides comments on the guidelines and sets out areas where GWA believes they can be improved. The submission also addresses those issues raised previously by stakeholders in the ESCOSA 2015 Tarcoola Darwin Rail 10 Year Review Of Revenues (**10 Year Revenue Review**) that have not, as yet, been addressed by ESCOSA.

2.1. TDR CODE GUIDELINE HISTORY

The guidelines under the TDR Code have been published by ESCOSA variously between 2004 and 2008. The guidelines were the subject of a review in 2008 which resulted in Guideline No.2 being amended. Key areas of amendment to Guideline No.2 include:

- The inclusion of a specific commencing value for the TDR of \$1,696,9m (\$ July 2003).
- The inclusion of a specific private capital invested commencing value for the TDR of \$731.6m (\$ July 2003).
- Implementation of a methodology for the annual roll-forward of both the total and private values of the TDR.
- Consequential amendments to other areas of Guideline No.2.

ESCOSA conducted the 10 Year Revenue Review in 2014/15. The purpose of that review was to determine whether revenues received by the track owner from certain traffics were excessive, having regard to matters set out in the TDR Code. While that review did not cover a review of

the TDR Code guidelines, the Final Report noted concerns raised by some stakeholders regarding ring-fencing, transparency and information asymmetry and flagged that these issues would be considered in a future review of the guidelines (i.e. this review).

2.2. SA REGIONAL REGIME GUIDELINE HISTORY

The Information Kit under the SA Region Regime has been revised by ESCOSA from time to time with the most recent version (version 3.1) dating from March 2010. Version 3.1 included amendments resulting from a review of the Information Kit carried out by ESCOSA in 2009-10.

3. RING-FENCING

Some stakeholders raised concerns in their submissions to ESCOSA 10 Year Review that the level of separation between above and below rail operations for the TDR (termed ring-fencing) is less than applies to other vertically integrated railways in Australia. The argument being that an overt demonstration of ring-fencing gives confidence to access seekers that they will not be disadvantaged through their confidential information being provided to the track owner's related above rail operator.

Ring-fencing arrangements can take many forms ranging from placing obligations on the track owner without setting specific procedural requirements through to a scheme that is heavy with procedural and reporting obligations. The argument made by stakeholders in their 10 Year Revenue Review submissions appears to be unrelated to any specific instances where an access seeker has been disadvantaged by the absence of strict ring-fencing guidelines but rather that it is necessary for a heavier-handed approach to give access seekers confidence when seeking to compete against the incumbent vertically integrated operator. As always, where it is necessary to regulate a party, it is necessary to balance the benefit gained from more regulation against the cost, inconvenience and potential inefficiency that can arise through the imposition of intrusive, mandatory processes and reporting requirements. Ultimately, it is a question of whether the additional burden placed on the track owner can be justified in the specific circumstances. The circumstances of the TDR and SA Regional Network are very different from those that apply in say the Aurizon Network central Queensland coal network. These differences apply to almost every aspect of the access arrangements and competitive framework with significantly different traffics, volumes, haul characteristics, potential access requirements and the level of interest in seeking access. In the case of Aurizon Network the ring-fencing arrangements under their access undertaking are stringent and detailed. They are also expensive to implement and burdensome for the access provider, the access seeker and the regulator who is required to maintain a more detailed oversight of the arrangements. GWA is of the view that it would be inappropriate to attempt to implement a similar ring-fencing arrangement on either the TDR or the SA Regional Network where the needs are so different, the level of interest from access seekers is very low and the experience to date has shown no obvious need to change the current approach.

It should be clearly understood by all stakeholders that both the TDR Code and the SA Regional Regime place obligations on GWA to treat information provided by an access seeker as confidential and the track owner is specifically prohibited from providing this information to its

related above rail operator.¹ To GWA's knowledge there have been no breaches of that duty of confidentiality since the commencement of both regulatory regimes. This would suggest that there is no specific shortfall in the existing access guidelines that requires that they should be amended to increase the regulatory burden on the track owner.

TDR Guideline No.4 lists the protection of confidential information as a material issue² that GWA is required to demonstrate compliance to the regulator. This requires GWA to have a rigorous compliance reporting system in place and to report any breach of its confidentiality obligations (amongst others) immediately in the case of a material breach as well as annually. This should give stakeholders confidence that any access seeker information provided will be managed appropriately and that the regulator will have oversight in the case of any breach. GWA is of the view that this should be sufficient to ensure that the track owner has appropriate incentives to properly manage an access seeker's confidential information.

Finally on the matter of ring-fencing, both TDR Code and the SA Regional Regime have been certified as effective. To achieve certification, they have been required to be reviewed by the National Competition Council. That certification process provided all stakeholders with an opportunity to argue for a heavier-handed approach to the management of separation between the above and below rail activities of the relevant track owners. That the certification process resulted in the current regulatory requirements strongly suggests that the review found that the level of ring-fencing required under both access regulatory structures was appropriate under the circumstances. GWA is not aware of any change in circumstances that would warrant the imposition of an increased burden with regards to the ring-fencing requirements.

In light of the above, GWA recommends to ESCOSA that the guidelines not be altered to impose additional obligations in regard to ring-fencing.

4. TRANSPARENCY & INFORMATION ASYMMETRY

Stakeholders have raised with ESCOSA that access to the network would be substantially improved by requiring GWA to provide a wide range of information such as detailed costs and standard terms and conditions. A mechanism to do this would be to specify the obligatory information to be provided through the guidelines.

The TDR Code provides for certain information to be provided by the access provider under s.9(1). Guideline No.1 specifically gives effect to and augments these requirements.

GWA is of the view that the forms of information outlined in s.9 of the TDR Code and Guideline No.1 have been carefully considered by the legislatures of South Australia and the Northern Territory and ESCOSA. The TDR Code was certified as effective after an exhaustive public consultation process by the National Competition Council. This has already provided stakeholders the opportunity to present a case for a higher level of information to be provided and the means by which it is made available. Since the time that Guideline No.1 has been in place, the number of access requests has been quite limited. GWA is not aware of any

¹ TDR Code section 12A and SA Regional Regime section 33A.

² TDR Code Guideline No.4 p.17

situations where access negotiations have been forestalled or limited due to the lack of information provided by GWA. While access seekers always have the option to refer a matter to the regulator where they believe they have not received information to which they are entitled, this is a rare event. Given these circumstances, GWA believes that the current provisions in Guideline No.1 for the provision of information are working appropriately. The guideline reaches an appropriate balance to facilitate the negotiation of access and that there is no obvious need for the guideline to be amended.

4.1. PUBLICATION OF REFERENCE PRICES

The TDR Code section 9(1)(e) and Guideline No.1 require GWA to provide an access seeker with a reference price on application. This is a different approach to some other access regimes that provide for reference prices to be published.

For freight where a sustainable competitive price exists the TDR Code does not specify the form of competition to which competitive imputation prices apply. While the competition could come from a variety of transport modes, in practice competition comes from road transport and generally is applicable to intermodal traffics. Intermodal movements form the majority of the traffic on the line. Other freight traffics that are not amenable to a road transport solution that have used the line to date (and are most likely for the foreseeable future) are in the nature of high volume bulk minerals hauls.

The competitive imputation access price applicable to intermodal traffics is derived through the formulas contained in the TDR Code (which also includes worked examples). The starting point for these prices is the market price for transport via the competitive alternative. This is quite different from any other Australian access regime and the source of information on that price is not related to the costs of the access provider, but is in fact related to the prices provided by the market. As such, the imputed prices will vary according to the market, a factor over which GWA has no control. This impacts on GWA's ability to produce and keep up to date reference prices. This point was recognised by ESCOSA in its 2008 Guideline Review. This remains the situation and GWA believes that there has not been any change in circumstances such that it would be appropriate to modify the guidelines to provide for reference prices to be published.

The provision of prices, be they 'reference' or otherwise requires consideration of the detailed requirements of the proponent. To this end, GWA has a strong view that the current requirement in Guideline No.1 that applications be in writing and set out the details as required in the information form published by GWA on its website be retained unchanged. The computation of access prices under both competitive imputation pricing and where there is no sustainable competition is non-trivial and is substantially dependent on the requirements of the proponent. It is often the case that requests for access prices relate to projects at their feasibility stage and it would potentially be misleading to provide the access seeker with a reference price devoid of any understanding of the intended train operations and scope of the task. The access price will depend on a number of factors such as the length of haul, the scale of task, availability of capacity on the network, the proposed life of contract, the relative condition of the required portion of the network and whether any additions or augmentations to the network are required. GWA is of the view that there is no benefit to access seekers and

potentially a disbenefit from prices that are somehow struck independently of their detailed requirements which may or may not ultimately have relevance to the access seeker. It is noted that there are relatively few access requests. Once a request for reference prices has been received then GWA provides the reference prices within 10 days as required under the guideline unless it is clear that the information provided by the access seeker is insufficient to allow for a meaningful price to be provided.

Therefore, GWA recommends that ESCOSA continue its current approach which requires the provision of prices once an access seeker has provided the details of the proposed operation as set out in the form available from the GWA website.

4.2. PROVISION OF TECHNICAL INFORMATION

TDR Code section 9(1)(b) requires GWA to provide an access seeker with technical information regarding the railway. Guideline No.1 does not cover this aspect.

GWA's experience is that access seekers have different needs in regard to technical information regarding the railway, some requiring more detail and some, say an enquiry at the early stage of the project, have little use for technical details beyond the bare minimum. GWA has, therefore, adopted an approach to tailor the information to the specific requirements of each access seeker at the time of the enquiry. This is more efficient and less burdensome on all parties than the alternative which would be to send out a whole of railway detailed information pack that may only serve to confuse the recipient.

The obligation to provide technical information already resides in the TDR Code and that obligation remains as a protection to access seekers even though the guidelines do not expressly address the provision of this type of information. If the guideline was to include a more detailed obligation to provide specific elements of technical information, it is likely that the elements will be either too detailed or not detailed enough for an individual access seeker.

Generally, the provision of technical information has not been a matter of controversy and GWA has little to gain by withholding such information from an access seeker. Therefore, GWA supports the existing guideline in not addressing the provision of technical information.

4.3. PROVISION OF POLICY INFORMATION

The TDR Code section 9(1)(a), (c) and (d) and Guideline No.1 require GWA to provide an access seeker with documents (herein referred to as policies) relating to:

- the allocation of train paths;
- train control procedures, specifically in relation to the management of out of course running and disruptions; and
- standards for maintaining service quality and compliance with the access regime.

GWA has such policies in place and these are provided to an access seeker as part of the information pack provided once the access application request has been received. It is noted the obligation to provide information relating to the extent of use of the network (TDR Code section 9(1)(a)) is fulfilled through the provision of the master train plan which is a component of the train path allocation policy, as required under Guideline No.1.

5. GUIDELINE NO.2 ARBITRATOR PRICING REQUIREMENTS

TDR Guideline No.2 sets out matters that an arbitrator would be required to take into consideration in the event of a dispute over access prices.

GWA does not wish to raise any matters in relation to Guideline No.2 at this time.

6. GUIDELINE NO.3 REGULATORY INFORMATION REQUIREMENTS

GWA has no fundamental issues with the scope of the reporting requirements in Guideline No.3. At ESCOSA's discretion we note the following matters could be clarified/augmented to align with GWA's understanding of its requirements:

- Section 2 – add flexibility to allow the annual compliance statement to be signed by a Non-Executive Director of a related entity of the Access Provider in the event the Access Provider does not have a Non-Executive Director.
- Section 3 – clarify that future reporting periods for Cost Information will align with the Commissions revenue review cycle. (i.e. the next report will cover the five year period ending 30 June 2018).
- Section 5 – clarify that the requirement to calculate capital costs in accordance with the Pricing Schedule of the Code is only relevant to Section 3 (Cost Information) and that all other reporting under Guideline 3 should be prepared “in accordance with accounting principles and policies applicable to audited ... financial statements”.
- Section 5 – remove the reference to “general” purpose financial statements on the basis that “special” purpose financial statements are sufficient provided they are audited.

7. GUIDELINE NO.4 COMPLIANCE SYSTEMS & REPORTING

TDR Guideline No.4 covers the compliance system and reporting to the regulator. The SA Regional Regime Information Kit section 6 covers the same ground as applies to the SA

Regional Network. The requirements under these two guidelines are consistent and GWA is of the view that there is no cause to amend these requirements at this time.

8. SA REGIONAL REGIME INFORMATION KIT

The Information Kit published by ESCOSA was last updated in March 2010. The kit is intended to inform access seekers about the nature of access, their rights under the legislation and the information that they can expect to receive. The kit also informs track owners of their obligations under the SA Regional Regime and the expectations of the regulator in certain areas. As such, the Information Kit fulfils the role played by the four guidelines under the TDR Code in a single, concise document.

The SA Regional Regime differs significantly from TDR Code, particularly in the form of pricing, where the SA Regional Regime conforms to the less complex floor and ceiling model that is common among rail access regimes in Australia. The SA Regional Network also differs from the TDR in that it is more in the nature of a branch line network with usage varying greatly, dependent on the seasonal demand for the transport of agricultural products (principally bulk grain), port preferences and crop yields from year to year.

In these circumstances, it is difficult to provide a generic set of information to an access seeker. For example, it would be difficult to set out a reference train and pricing for each line that was useful. The Information Kit has been drafted by ESCOSA with an understanding of this difficulty and the kit recognises that different information might be suitable to different access applications. GWA supports this approach.

The information kit covers the following:

- detailed information on the SA Regional Regime;
- the pricing principles;
- the information required in an Information Brochure to be provided by the track owner to access seekers;
- the information required to be provided by the track owner in response to an initial access application;
- the reporting requirements of track owners to ESCOSA; and
- the track owner's compliance system and required reporting to ESCOSA.

GWA's experience in applying the Information Kit in managing access applications and complying with the regulator's requirements has generally been positive. In GWA's opinion, the Information Kit appropriately balances the needs of access seekers and the track owner without imposing unnecessary obligations. Therefore, GWA believes that the Information Kit is appropriate to the network over which it applies. GWA is not seeking to amend the Information Kit at this time. Notwithstanding this, GWA notes that there are some non-material factual

entries that ESCOSA may wish to review, e.g. the reference to operations on the Leigh Creek line which have recently ceased and references to APT.