

27 August 2019

Mr. Mark Caputo
Manager Economics
Essential Services Commission
Submitted by email: escosa@escosa.sa.gov.au

Dear Mr. Caputo

Further Draft Decision on review of rail guidelines for the Tarcoola-Darwin railway

Pacific National is pleased to provide a submission to the Commission on its Further Draft Decision on its review of the rail guidelines for the Tarcoola-Darwin railway (Further Draft Decision).

Our 16 May 2019 submission on the review explained the AustralAsia Railway (Third Party Access) Code (the Code) Schedule provides the regulator (the Commission) with the power to ensure appropriate ring fencing of the access provider's accounts and the ability to review relevant revenues to determine if access prices quoted or charged are excessive.

Accordingly, we submitted various improvements (including greater information provision) which are allowable under the Code; access seekers need to have information on the access provider's costs of providing rail services and pricing methodologies.

Unfortunately, the Commission has not included these changes in the guidelines. It appears the Commission's appetite to materially change the guidelines is low due to a full Code review commencing in 2020. We strongly disagree with this approach.

Pacific National applied for access on the Tarcoola-Darwin railway operated by vertically integrated Genesee and Wyoming (GWA) in 2017. We approached GWA to run three intermodal services which could be easily accommodated on its network. GWA quoted a price with a fixed charge of \$74,000 per path with a variable charge of \$2.00 per '000 GTK.

To put in to perspective, a comparable service of Port Augusta to Kalgoorlie on the ARTC network is significantly lower - \$7500 and \$3.25 '000 GTK respectively. Importantly, we were not able to substantiate the basis for the costs or whether the quote was consistent with its pricing for its own above-rail provider. The current guidelines provided no basis for GWA to provide this information.

In its final recommendation on certification, the National Competition Council stated the AustralAsia Railway access regime which applies to the Tarcoola-Darwin railway:

'...relies heavily on the independent regulator to ensure that it can adapt as circumstances change during the period of certification'¹.

The circumstances which have changed is that access was requested on a bona fide basis and monopolist pricing was offered.

¹ National Competition Council Final recommendation – AustralAsia Railway, p 5

'The access seeker should be provided with the level of information similar to that it would extract in the process of negotiating in a competitive market. For instance, in a competitive market a consumer could gain information on relative costs by securing a number of quotes. These would also specify the quality of the service linked to those costs, any technical details and relevant conditions of sale. As a consequence, it is important that the Regime ensures that arbitrated outcomes resemble those expected in a competitive market and that sufficient information regarding this probable outcome is provided to the parties².'

As stated above, we were unable to substantiate the costs, as a consequence the guidelines did not aid negotiations to replicate a competitive market.

Section 6 of the Code provides the Commission with wide ranging powers to monitor and enforce compliance with the Code. Further Section 39 allows the Commission to require certain information including financial information for the purposes of monitoring. Given the circumstances outlined by Pacific National there is a strong reason to do this.

We contend the Code provides the Commission with the power to (and accordingly should):

- Mandate the provision of indicative pricing information in the form of reference prices with methodologies and principles (Section 39, Schedule, Division 1 (2) (5)).
- Include a 'most favoured nation' clause to ensure non-discrimination between GWA's related party above-rail provider and its below-rail network compared to the prices offered to other above-rail providers (Section 39).
- Request information on whether GWA received access proposals and offered access pricing on a non-discriminatory basis (Section 10(4), Section 46 (2)(c), Schedule, Division 1 (2) (5)).
- Require separate regulatory accounts for its above and below rail businesses and to publish this information (Section 46).
- Conduct a compliance review of the ring fencing and confidentiality provisions and non-discrimination requirements (Section 12A and Section 46); to our knowledge there has been no Commission compliance review undertaken on ringfencing compliance.

More generally, section 11 of the Code imposes a duty to negotiate in good faith. During the negotiation process, the access seeker may call on the Commission for advice or to verify that an element of the access provider's proposal is within the bounds of the regime. The implication is the Code allows the Commission to prescribe information for verification purposes. To aid and encourage commercial 'like' negotiations the above information needs to be mandated in the guideline.

While we note this Further Draft Decision only relates to the interstate Tarcoola-Darwin Railway access regime, given the similarities between the two regimes, the Commission should incorporate these recommendations in its final decision on the review of the South Australian rail access regime information kit.

Yours sincerely



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² Ibid p, 23