Genesee & Wyoming Australia Pty Ltd

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Submission to
The Essential Services Commission of SA
2009 RAIL ACCESS REGIME ENQUIRY

BACKGROUND

Genesee & Wyoming Australia Pty Ltd (GWA), formerly Australia Southern Railroad Pty Ltd, a wholly owned subsidiary of Genesee & Wyoming Inc acquired the South Australian intrastate rails assets of Australian National in November 1997.

GWA has contracts to haul export grain in South Australia, manages the rail operations of OneSteel in Whyalla and hauls gypsum for GRA from Kevin to Thevenard and marble for Penrice from the Barossa Valley to Osborne.

GWA also supplies equipment and drivers to other operators to run trains between Adelaide and Melbourne, Adelaide and Perth, Port Augusta and Parkes and Adelaide and Darwin.

The railway assets GWA owns and controls include, the Eyre Peninsula narrow gauge rail network, the Mid-North and Barossa Valley broad gauge networks, standard gauge railway lines to Pinnaroo and Loxton and a number of railway yards and goods sidings in South Australia servicing the interstate main line between Melbourne and Perth.

GWA has managed these assets under auspices of the Railway (Operations and Access) Act 1997 (ROA ACT), since its inception. In 2008 GWA agreed to over 3,700 separate uses of its rail assets by other operators, most of which were under the auspices of this access regime.

KEY ISSUES FOR DISCUSSION

COMPETITION AND INFRASTRUCTURE REFORM AGREEMENT (CIRA)

"Clause 2.1 The Parties agree to establish a simpler and consistent national approach to economic regulation of significant infrastructure.

GWA believes that the current access regime in South Australia is a simple model, based on negotiation, which requires limited regulation and intervention by Government. The Act has been in operation for over 11 years and the conciliation and

arbitration provisions have not to date been required. Where issues arise between access seeker and infrastructure manager they have been resolved through negotiation.

GWA considers that the South Australian model if applied nationally would greatly simplify the access process.

"Clause 2.2 The Parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms commercially agreed between the access seeker and the operator of the infrastructure."

GWA has negotiated access terms with a number of our major customers. All terms have been commercially negotiated and agreed. The South Australian rail access regime does allow access seekers and access providers to negotiate a position, which is commercially acceptable for all parties.

"Clause 2.3 The introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation".

GWA believes that price monitoring is not necessary in the South Australian Access Regime. Commercial negotiations are encouraged and if they are unsuccessful a conciliation and arbitration process has been created to resolve disputes. Pricing guidelines are in place which will be taken into account if arbitration takes place. This encourages the access provider to consider the guidelines when calculating prices.

A move to monitor prices would, GWA believes, be a step towards a more intrusive regime, which is not needed in South Australia. As mentioned earlier, arbitration has not been necessary since the regime was put in place and use of GWA owned and managed track has been significant.

GWA also believes that price monitoring if put in place in South Australia, might narrow the price window in which negotiations can take place and discourage full commercial negotiation.

GWA is obliged under Part 3, Division 1 Section 23 of the ROA Act not to discriminate between access seekers. Price monitoring would not add to the protection that currently exists in the Act for access seekers.

"Clause 2.4 All third party access regimes for services provided by means of significant infrastructure facilities will include the following consistent regulatory principles.

a. Objects clauses that promote the economically efficient use of, operations and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

b. Regulated access prices should be set so as to:

i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved

ii. allow multi pricing and price discrimination when it aids efficiency

iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

iv. provide incentives to reduce costs or otherwise improve productivity.

c. Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.

The current pricing principles formulated by the Essential Services Commission of South Australia (ESCOSA) in accordance with Part 4 Division 1 of the ROA Act, provide a framework for GWA to model access prices, combined with the requirements of the access seeker and information on volumes hauled on a line.

GWA attempts to supply prices to the access seeker which provide sufficient revenue to cover costs and commercial and regulatory risk while meeting the commercial needs of the access seeker.

While the expectations of the access seeker can be some way from the pricing GWA initially supplies, especially where it is based upon pricing pre the current regime or interstate experience on higher volume lines, GWA believes that the commercial negotiation process provides the flexibility

required to come to an agreement which is mutually satisfactory to both parties.

The fact that the arbitration process has not been required to date in South Australia, would attest to the fact that GWA has been successful in meeting expectations.

The competitive transport environment combined with the need for GWA to negotiate commercially with access seekers provides incentive to reduce costs and improve productivity.

While the ROA Act does not in its own right provide a merit review system for regulatory changes the Essential Services Commission Review Act 2002 (the ESC Act) provides sufficient "merits" review through its enquiry and review process to ensure that regulatory changes are appropriate. While the current regulatory framework is in place GWA believes that it is not necessary to adjust the ROA Act to incorporate a merits review process.

2.6 The Parties agree to introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information.

a. Regulators will have the discretion to determine when the six month time limit is suspended:

i. grounds for commencing time limits include when the regulator considers that sufficient information has been provided to enable the regulatory process to commence; and

ii. grounds for suspending time limits include requests for further information from significant infrastructure facility service providers, provided these are on reasonable grounds, and consultation periods during which the regulator seeks submissions from third parties or the community.

b. Where the service provider of a significant infrastructure facility has not provided the requested information, a regulator will be permitted to make a determination on the information before it in order to satisfy six month time limits.

The access regime in South Australia to date has not required change, so it is difficult to comment on whether regulatory time limits are necessary. Inaction and uncertainty in a regulatory environment makes decision making by asset owners difficult and could lead to inefficiencies. Time limits on the regulatory process could be of assistance to the rail industry if changes to the regulatory environment were required.

Summary of CIRA clause 2 aspects of the enquiry:

GWA believes that the ROA Act is working well and encourages a commercial negotiation process between access provider and access seeker which in turn encourages efficient use of rail resources. Access pricing of GWA rail assets under the provisions of the ROA Act allows, with efficient pricing of above rail resources, rail transport to compete with road transport on medium to long term routes.

GWA does not believe that there is a requirement currently to impose additional price regulation.

Although GWA believes that changes to the regulatory environment for rail access are not at this stage required, uncertainty in a changing environment is always counterproductive. A time limit on the regulatory change process could be of assistance in reducing uncertainty.

4.2 Other Factors

Are there any rail infrastructure to which coverage of the Access Regime should be extended? If so, what arguments for doing so?

GWA owns or manages many of the goods sidings serving grain loading facilities on the standard gauge main line in South Australia.

Access to the sidings GWA owns comes under the ROA Act.

GWA also manages a number of sidings owned by ARTC. GWA believes that the access terms set by ARTC under its own access regime also encourage access.

In 2008, 93 separate accesses were agreed for operators other than GWA to load grain in sidings owned or managed by GWA. This was in a year where gain tonnages available for transport were below average.

GWA was also able, as were other operators, to load grain in sidings it does not own or manage.

GWA does not believe that access to goods sidings to load grain is an issue.

As ownership of rail sidings changes in South Australia especially where GWA divests itself of the asset, the siding could go from being a siding where access is regulated under the ROA Act while owned by GWA to a private siding which is not regulated. GWA is sensitive to the cost impacts of full regulation, but believes that these sidings should at least be open access and subject to the pricing provisions of the Act.

Are the information requirements set out in Part 4 of the ROA Act sufficient in facilitating negotiation of access? Do access seekers need additional information in order to make an informed decision about obtaining access?

GWA, with the assistance of ESCOSA, put considerable effort into its Information Brochure in 2007 to ensure that it complied with the ROA Act and the ESCOSA Guidelines.

GWA believes from recent experience that its Information Brochure does provide adequate information for an access seeker to make informed decisions on applying for access. It has been noted that fewer requests for additional information have been received since rail operators working between states have become more familiar with the requirements of different access regimes.

Have there been any instances whereby an access seeker and access provider have encountered difficulties in negotiating access to intrastate railways, due to the regulatory framework? If so, what were the impediments?

Is the negotiation process set out in Part 5 of the ROA Act adequate for facilitating commercial negotiation of access? If not, how can the process be improved?

GWA believes that the negotiation framework set out in Part 5 of the ROA Act is sufficient to allow negotiation and agreement on commercial access terms if both parties are willing participants.

The fact that the arbitration process in the ROA Act has not yet been tested in South Australia would GWA believes add weight to this contention.

Is the conciliation/arbitration process set out in Part 6 of the ROA Act adequate for resolving an access dispute? If not are there any ways in which the process can be improved?

As the conciliation/arbitration process in the ROA Act has not to date been tested it is difficult to comment on its suitability.

As mentioned previously GWA believes from its study of the ROA Act that the process set out is fair and would lead to good arbitrated outcomes. These provisions also act as encouragement for access providers to take care when formulating prices and to actively negotiate commercial settlements for access requests.

Other

GWA has had difficulty with the provisions of the ROA Act relating to the definition of an access contract. While GWA has no problem with supplying ESCOSA with copies of the formal contracts it negotiates, the current definition of a contract in the ROA Act means that minor Ad Hoc accesses to GWA yards and sidings are defined as contracts and need to be reported to ESCOSA. The number of Ad Hoc access requests have reduced as more formal period contracts are negotiated with access seekers, but the process of isolating these access requests and forwarding them to ESCOSA requires considerable administrative effort, with seemingly limited benefit to ESCOSA.

GWA requests that the requirement for disclosure of access contracts be limited to period contracts with estimated revenues of over $50,000 annually, to reduce administrative effort.