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By Hand and Email

The Chairman
Economic Regulation Authority of Western Australia
Level 6, Governor Stirling Tower
197 St Georges Terrace
Perth Western Australia 6000

and

Assistant Director, Rail Access
Economic Regulation Authority of Western Australia
mike.jansen@era.wa.gov.au

Dear Sirs,

Draft Determination of WestNet Rail's Proposed Floor and Ceiling Costs for Certain Rail Lines dated 20 March 2007 (*Draft Determination*) by the Economic Regulation Authority (*Authority*)

Background

Pursuant to various agreements between WestNet Rail Pty Ltd (**WNR**) and Australia Western Railroad Pty Ltd (**AWR**), AWR is granted access to the railway the subject of the Draft Determination (**Railway**).

AWR has reviewed the Draft Determination and makes this submission with respect to Required Amendment 4 of the Draft Determination, which provides (inter alia):

"The determined floor and ceiling costs for the mainlines and the Worsley line will apply from 1 July 2006 to 30 June 2009. The determined floor and ceiling costs for the grain lines and Terminal Ends will apply from 1 January 2007 to 30 June 2009."

Potential impact of Draft Determination on AWR's Business

AWR has entered into various rail haulage contracts with its customers based on the known costs at the time and access costs are directly linked to the ceiling as determined by the Authority from time to time. Some of AWR's major haulage contracts and corresponding access agreements include an access calculation to be made in each billing period based on the known costs at the time of billing.

Subject to the issues raised below, the Draft Determination, if backdated, is that those "known costs" are increased and AWR may be forced to pay substantial backdated

access charge for each billing period from 1 July 2006 to the date of the Authority's final determination.

AWR cannot commercially accept any backdated costs especially in light of the fact that the delays in the review process were in no way attributed to, in whole or in part, by AWR.

Retrospectivity in the Draft Determination

As Required Amendment 4 of the Draft Determination stands, the floor and ceiling costs provided in the Draft Determination will take effect retrospectively (from 1 July 2006 and 1 January 2007 respectively), in circumstances where the Draft Determination was made on 20 March 2007 and with the Authority's final determination to be made in around May of 2007.

We are advised that it is unlikely that the Authority has the power to make such a retrospective determination. Neither the *Railways (Access) Act 1998* nor the *Railways (Access) Act Code 2000* expressly confer such a retrospective power. In the absence of an express conferral of retrospective power, it is generally the position that no retrospective power is intended to be conferred by the legislation and retrospectivity is not permitted. In particular, we note that:

- Under the access regime under the *Trade Practices Act 1974 (Cth)*, where a power to backdate determinations is intended to be conferred on the ACCC, that Act specifically grants such a power (see Sections 44ZO and 152DMA).
- A proposal to amend the *National Third Party Regime for Natural Gas Pipeline* (Schedule 2 of the *Gas Pipelines Access (Western Australia) Act 1998*) to allow the Regulator to backdate "reference tariffs" was rejected by the Productivity Commission (see *Review of the Gas Access Regime (Report No 31)*, Productivity Commission, Inquiry Report, Aug-04).

Yours faithfully

Simon Bradshaw
National Manager Track Access
Australia Western Railroad Pty Ltd