

10 June 2011

Economic Regulation Authority
PO Box 8469
PERTH BC WA 6849
Email to: publicsubmissions@erawa.com.au

Attention: Assistant Director Access

Dear Sir,

WNR Submission on ERA Issues Paper – “Review of the Requirements for Railway Owners to Submit Floor and Ceiling Cost Proposals, May 2011”

WestNet Rail (WNR) welcomes the opportunity to comment on the need for regular, time-based reviews of railway owners’ regulated floor and ceiling costs. As one of the railway owners which has been required to adhere to the existing rules since their inception, WNR is well aware of the compliance effort undertaken during each review period, and understands why the regular review requirement is being reconsidered in the issues paper.

WNR broadly supports the notion that railway owners no longer be required by the Regulator to undertake regular, time-based reviews of their floor and ceiling costs irrespective of whether or not there is (or may be) an access agreement under the regime. The remainder of this paper responds specifically to the items in the Issues Paper, and elaborates on related issues which WNR considers to be of particular importance.

Briefly, WNR supports the replacement of existing requirements with more effective requirements dealing with a railway owner’s ability to calculate ceilings at the time of an access request, and during the term of any access agreement under the Regime. Concurrently, WNR sees a need to modify the response timeframes in the Railways (Access) Code 2000 (the Code) so that all parties have more realistic timeframes to work with, and to modify the Code or related instruments to allow for regular reviews when an access agreement is in effect under the Regime.

Items in the Issues Paper

Item One

Do regular floor and ceiling cost reviews potentially require duplication of effort on the part of the Railway Owner if an access proposal is received for a set of route sections for which floor and ceiling costs have not been determined?

WNR agrees that there is substantial potential for duplicated effort for both the Regulator and the railway owner where time-based resets are required. At any time an access request is received, the railway owner is required to have the relevant floor and ceiling costs approved by the Regulator. It is not necessarily the case that costs previously approved by a regular time-based review would be automatically applicable or accepted by the Regulator, in which case duplication of work would be likely for both the railway owner and the Regulator.

Item Two

Would regular reviews of floor and ceiling costs assist the Railway Owner in the event of a proposal being made, by ensuring that route section costs are instantly available?

WNR does not believe that mandated, regular reviews provide a readiness that would be otherwise unavailable to the railway owner. Given the substantial importance the Regime has for a railway owner, it is prudent for the railway owner to maintain an ability to calculate up to date costs for any part of the network. Additionally, WNR understands that a railway owner is entitled to request that the Regulator review and approve a railway owner's floor and ceiling costs where it can demonstrate to the Regulator that there has been a material change in the network compared to a previous determination.

Because of these two factors, WNR does not believe regular reviews improve the ability of a railway owner to respond to access requests; similarly, the absence of regular reviews would not diminish that ability.

Item Three

Is there an advantage to the Access Seeker in having determined floor and ceiling costs available on the Authority's website, as opposed to discovering those via the proposal process?

WNR does not believe there is any such advantage for an Access Seeker. WNR considers it likely (given the non-discriminatory access goal of the Regime) that any access request under the Regime would contemplate sections of the network which are already utilised by one or more customers. It is the case that an individual access seeker's access price can be substantially influenced by the price paid by other users (inside and outside the Regime). Given the confidential nature of commercial access agreements and price arrangements, the railway owner is not obliged to publically provide information on the amount paid by other users. This being the case, publically available, up-to-date floor and ceiling costs do not offer Access Seekers information that would help them make anything but the broadest of price based commercial decisions.

WNR believes that it is far better for the Access Seeker to communicate to the railway owner the seeker's specific network needs, such that any commercial decisions that the Access Seeker makes are based on considerations of the network and the Regime as they apply specifically to that Access Seeker. To the extent that publishing floor and ceiling costs on the Authority's website precludes such interaction and leads Access Seekers to make insufficiently informed commercial decisions, there is certainly not an advantage to the Access Seeker.

Item Four

Would the availability of "pre-determined" floor and ceiling costs on the Authority's website minimise the likelihood that a potential access seeker will seek to have the Authority instigate a floor and ceiling cost determination for a combination of route sections (under Clause 9) but rather approach the Railway Owner directly with a proposal, thereby initiating a determination under Clause 10?

From WNR's understanding of these clauses and their practical application, this item is not an issue. Regardless of whether a determination comes about by Clause 9 or Clause 10 of Schedule 4 of the Code, both the railway owner and the Regulator must do essentially the same amount of work. At some point or another, the railway owner must provide the Regulator with its proposed ceilings, and the Regulator must approve them.

Clause 9 does not force the Regulator to determine the ceilings from scratch, and it seems likely the Regular would utilise the railway owner's initial determination (from Clause 9.2) and supporting documents as a starting point. Similarly, when only approving the proposed costs in Clause 10, the Regulator would have to review the railway owner's work in detail or conduct its own

determination to evaluate the validity of the proposed costs (or to provide alternative ones as per Clause 10.3(a)).

Regardless, WNR does not believe the availability of costs on the Authority's website influences either way an Access Seeker to instigate Clause 9 or 10; there are no notable barriers to seeking a determination from the railway owner under Clause 10.

Item Five

In the absence of pre-determined route section costs, do the provisions of Clauses 9 and 10 of Schedule 4 of the Code allow sufficient time for an adequate review of proposed floor and ceiling costs to be undertaken?

WNR notes that Clause 9 of Schedule 4 of the Code does not appear to require the same timeframes as Clause 10; nonetheless, WNR does not believe Clause 10 (and Clause 9, if the intention is the same) allows sufficient time for a review of the proposed floor and ceiling costs. It is WNR's perception that an unscheduled review of floor and ceiling costs could prove to be extremely difficult for the Regulator to achieve in the timeframes specified; additionally, the specified timeframes appear brief for the purposes of receiving public submissions on the matter. WNR believes this remains true whether or not there are regular reviews of the floor and ceilings taking place.

Item Six

The Authority is interested to learn of any stakeholder views on additional issues in relation to the requirements to submit floor and ceiling cost proposals that have not been identified above.

There are several related items that WNR would like to provide additional commentary on.

Firstly, WNR is of the belief that the timeframes specified in Clauses 8 and 9 of the Code are not adequate. With reference to its own experience with negotiations for commercial access agreements, WNR believes that the response timeframes of fourteen days for preliminary information and seven days for an access proposal are inadequate, particularly given the amount of information specific to the access proposal/seeker that must be considered and integrated into the calculation of access prices. Given that commercial agreements in question are often measured in periods of ten years or more and that such projects are several years in planning, it seems unrealistic to require final approved access prices a mere thirty-seven days after they are requested.

WNR suggests the Code should be changed to contemplate a more appropriate timeframe for each stage, not only for the railway owner but for the Regulator also. It is in the interest of all parties, including Access Seekers, to ensure sufficient time is available to undertake each step of the process efficiently and correctly, particularly in relation to access prices derived from floor and ceiling costs.

Secondly, as the category of regular reviews would encompass reviews for the purpose of updating costs for indexation and changes to the Weighted Average Cost of Capital (WACC), WNR suggests that provision for the update of floor and ceiling costs (and therefore access prices) due to indexation and changes in WACC should be considered in the Code – either as something to be stipulated in the Costing Principles, or perhaps more appropriately, one of the matters for which provision is to be made in an access agreement as listed in Schedule 3 of the Code.

As a broader consideration, WNR would draw attention to the object of the Railways (Access) Act 1998 (the Act), which exists to establish the Code. That objective is “to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.” Consistent with this objective, WNR considers that it is inefficient for effort to be expended when it is not needed, and particularly if that effort will be

duplicated regardless. The Issues Paper is contemplating changes to existing requirements which would remove this inefficiency.

Additionally, WNR feels that its ability as a railway owner to respond to access requests will not be diminished in any way by these changes. As previously mentioned, WNR feels that the timeline for response is already too short. Nevertheless, it is in a railway owner's commercial interest to maintain current and relevant costs, and the tools to do so, given the importance of this facet of the Regime to a railway owner. It is WNR's intention to maintain these costs, and when engaging with Access Seekers or the Regulator, to share and utilise such information freely and without bias as is the intention of the Act and the Code, and as would ultimately be required by the Regulator.

In summary, WNR supports the removal of a requirement for regular cost reviews when the costs are not needed by an Access Seeker or an Operator under the Code. WNR believes there are substantial efficiencies to be gained, particularly on the part of the Regulator, and that those gains would not come at the cost of disadvantage to any party.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'P. Larsen', with a stylized flourish extending to the right.

Paul Larsen
Chief Executive Officer
WESTNET RAIL