



GREAT SOUTHERN RAIL

a serco company

February 5, 2008

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ACCC
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Dear Ms Arblaster

ARTC - Access Undertaking December 2007

We refer to the ACCC's issues paper of 14 January 2008 (**Issues Paper**) on the ARTC's application of 20 December 2007 to assess the proposed Access Undertaking for its interstate rail network (**December Undertaking**).

As you are aware, Great Southern Railway (**GSR**) lodged a submission with the ACCC on 6 August 2007 (**Initial Submission**) in respect of the Access Undertaking application lodged by ARTC on 8 June 2007 (**June Undertaking**). As the ACCC has indicated in its Issues Paper that it will have regard to submissions made on the June Undertaking in assessing the December Undertaking, the following additional submissions focus on changes made by ARTC to its Access Undertaking. While GSR does not repeat here the submissions made in its Initial Submission, it continues to rely on those submissions and requests that, as indicated, the ACCC will take them into account in assessing the December Undertaking.

GSR provides the following further submissions in respect of the December Undertaking.

Non-Indicative Services

In section 4 of its Initial Submission, GSR observed that the June Undertaking was inconsistent with the criteria in s44ZZA(3) of the *Trade Practices Act 1974* because it provided no guidance or certainty as to what access charges would apply to services that differ from Indicative Services¹

¹ As described in section 4.6 of the June and December Undertakings.



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GSR submits that ARTC should either limit the scope of any Access Undertaking which it lodges for ACCC acceptance to Indicative Services, or provide guidance and certainty in that Undertaking for prices for Non-Indicative Services. As the December Undertaking extends to Non-Indicative Services, but provides no guidance or certainty with respect to what ARTC will charge for Non-Indicative Services or how it might vary those charges, the ACCC should reject the December Undertaking.

Term of Undertaking

GSR would be satisfied with the term of the Access Undertaking being 10 years if it provided certainty regarding how prices, in particular access prices for Non-Indicative Services, are set and increased.

If the Access Undertaking fails to provide this certainty, as the December Undertaking does, then GSR submits that the term of the Access Undertaking should be 5 years. This is because in such circumstances GSR considers that it and other network users should not be exposed to the situation where they are dissatisfied with ARTC's unilaterally set access prices, but are prevented from seeking declaration of the interstate network for 10 years. Acceptance of a 10 year Access Undertaking in those circumstances would be contrary to the criteria in s44ZZA(3) of the Act, in particular the interests of persons who might want access to the service.

Arbitration Provisions

Costs of arbitration

In the Issues Paper, the ACCC also sought comments on ARTC's amendments to clause 3.12.4 regarding how the costs of arbitration will be met where a dispute proceeds.

The relevant provisions of the December Undertaking are:

- Clause 3.12.4(a) which provides that where an access seeker serves notice on the arbitrator of a dispute to be determined by arbitration, that notice includes an agreement by that access seeker to pay the costs of the arbitration described in clause 3.12.4(b)(xiii).
- Clause 3.12.4(b)(ii) which provides that the arbitrator will not proceed with the arbitration unless and until the access seeker has agreed to pay costs as determined by the arbitrator under clause 3.12.4(b)(xiii).
- Clause 3.12.4(b)(xiii) which provides that the arbitrator may charge for its costs of conducting an arbitration of a dispute amounts and rates (if any) prescribed by the Trade Practices Regulations 1974 (**Regulations**), and where those Regulations do not prescribe such amounts, the arbitrator may charge the amounts and rates in regulation 6F of the Regulations.

Regulation 6F of the Regulations enables the ACCC to charge a pre-hearing fee and a hearing fee (per day or part day) for its costs in conducting an access dispute arbitration. Under the Regulations, the pre-hearing fee is payable by the person who notified the access dispute and the hearing fee is apportioned between the parties appearing at the hearing on the relevant day.



The provisions of clause 3.12.4 are ambiguous as to whether where the access seeker notifies a dispute for arbitration:

- the access seeker is required to pay the entire costs of the arbitrator; or
- whether the costs of the arbitrator are to be paid by the parties in accordance with regulation 6F of the Regulations. That is, the access seeker will pay the pre-hearing fee and the hearing fee will be apportioned between the parties appearing at the hearing on that day (ie. ARTC and the access seeker(s)).

If the intention of clause 3.12.4 is to modify the Regulations such that the access seeker is required to pay the entire costs of the arbitrator, then there is a risk that ARTC may seek to increase the length of the hearing and thus the costs borne by the access seeker so that access seekers are discouraged from seeking access to the network. In any event, an access seeker might be wary to bear the costs of arbitration, and thus reluctant to seek arbitration where the extent of those costs is not wholly within its control. GSR observes that the extent of the arbitrator's costs in an arbitration will depend upon the conduct of both parties during the arbitration process. Accordingly, a requirement that the access seeker agrees to pay the arbitrator's costs prior to submitting a dispute to arbitration could limit the efficacy of arbitration as a dispute resolution mechanism.

Further, under clauses 3.12.4(b) (ix) and 3.12.4(x), the arbitrator has the ability to join separate arbitrations and to join additional persons to the arbitration. Taking either such action will likely cause the arbitrator's costs of arbitration to increase. It is unclear from the December Undertaking who will bear the arbitrator's costs in such circumstances. If the access seeker that is a party to the original arbitration is required to bear the arbitrator's costs this would likely place a higher cost burden on that access seeker than would result if the arbitrator were to hear that access seeker's arbitration alone and not to join parties to that arbitration. For this reason also, an access seeker may be deterred from exercising its arbitral rights under the December Undertaking in the event of a genuine dispute.

Time period for arbitration

GSR observes that the December Undertaking does not provide any time period within which the arbitrator should seek to resolve the arbitration. While by clause 3.12.4 of the December Undertaking, the access dispute arbitration procedures in Division 3 Subdivision D of Part IIIA of the Act apply to arbitration under the Undertaking, these provisions do not include the target time period in s44XA of the Act for determination of the dispute. Section 44XA in Division 3 Subdivision C of Part IIIA of the Act provides in respect of ACCC arbitrations of access disputes that the ACCC must use its best endeavours to make a determination within 6 months of the date of notification of the access dispute or such extended period as applies. GSR submits that there should be a target time period in the December Undertaking for determination of an arbitration notified under clause 3.12.4 so that access seekers can make an informed decision as to whether or not to pursue arbitration. Where arbitration is unable to deliver an outcome



within a relatively short period of time, it may not be a commercially viable option. In the absence of a target time period there is, therefore, uncertainty as to whether or not arbitration is worthwhile pursuing.

For all of the above reasons GSR submits that the ACCC should reject the December Undertaking as it is inconsistent with the criteria in s44ZZA(3) of the Act.

We are happy to further assist the Commission in its assessment of the December Undertaking and meet with Commission staff to discuss our submissions (including our Initial Submission). Please contact me if you would like to discuss our submission or arrange a meeting.

Yours sincerely



Tony Braxton-Smith
Chief Executive Officer



(Non-Indicative Services).

While the June Undertaking and the December Undertaking contain indicative access charges for Indicative Services, they do not contain any indicative access charges for Non-Indicative Services. . Further, the June Undertaking and the December Undertaking contain a clause setting out how ARTC can vary the indicative access charges for Indicative Services, however, they do not contain any provision for how ARTC can vary charges for Non-Indicative Services. In fact, each of the June and December Undertakings fail to provide any guidance or certainty as to what access charges will apply to Non-Indicative Services or how ARTC might vary those charges over the course of the Undertaking.

As recognised in the Issues Paper, Non-Indicative Services are regular users of the network. The ACCC notes on p22 of the Issues Paper that information provided by ARTC indicated that Non-Indicative Services accounted for about 40 per cent of total revenue.

In response to concerns expressed in submissions of users of ARTC's network (including GSR) about the lack of guidance or certainty in the June Undertaking on access charges for Non-Indicative Services, ARTC has merely amended clause 2.7(b)² of the Access Undertaking, under the 'contact details' heading, to inform users that prices for access to services other than Indicative Services will be published on ARTC's website.

Clause 2.7(b) of the December Undertaking provides:

'Applicants are also encouraged to search ARTC's internet website at www.artc.com.au on which will be published various information regarding ARTC and this Undertaking including:

- (iv) prices for which Access has been granted to Services other than Indicative Services, together with a general description of the Services to which such prices relate;

GSR observes that this indication from ARTC in clause 2.7(b) that it will continue to publish prices for Non-Indicative Services on its website does not provide any guidance or certainty with respect to how ARTC will price access to those services in the event that the December Undertaking is accepted and does not address any of the issues raised in section 4 of GSR's Initial Submission.

Mere internet publication of access prices for Non-Indicative Services, subsequent to the time of ACCC acceptance of the December Undertaking, means that those prices set by ARTC are not subject to public comment or scrutiny by the ACCC in accordance with the pricing principles.

² While page 23 of the Issues Paper states that ARTC has amended clause 2.6(b) of the December Undertaking in this manner, it appears from the December Undertaking that ARTC has amended clause 2.7(b).



Further, it is GSR's experience that ARTC discourages bilateral price negotiations. ARTC does not willingly 'negotiate' access prices with it³, but rather unilaterally decides those prices and seeks to require GSR to pay those prices if it wishes to continue to access the ARTC network. ARTC will only engage in price negotiations where it is compelled to do so. Mere internet publication of access prices for Non-Indicative Services does not prevent or hinder in any way ARTC's ability to continue to engage in this conduct of unilaterally deciding access prices for Non-Indicative Services and imposing those prices on users of its network.

If the December Undertaking is accepted by the ACCC, then this will foreclose declaration of the ARTC interstate network for the term of the Undertaking.⁴ If users of Non-Indicative Services, such as GSR, are dissatisfied with the prices published on ARTC's website, they will have no recourse by way of declaration.

While there is a right of arbitration in the December Undertaking for access seekers dissatisfied by the terms of access offered by ARTC, arbitration delivers limited, if any, additional certainty. Relying on a right of arbitration to resolve any issues with access price terms for Non-Indicative Services will mean that any assessment of those prices against the pricing principles is delayed until arbitration, rather than scrutinised by the ACCC at the earlier stage of its assessment of the Access Undertaking. Further, under the December Undertaking arbitration is time consuming for both parties and the user has to pay for the costs of arbitration. Rather than relying on an uncertain and potentially expensive right of arbitration, the December Undertaking should provide for certainty with respect to access prices.

As GSR observed in its Initial Submission, the lack of transparency and therefore certainty provided by the pricing terms of the December Undertaking:

- 1 prevents proper scrutiny of the terms of the December Undertaking by access seekers; and
- 2 prevents the ACCC being affirmatively satisfied that the December Undertaking is consistent with the criteria in s44ZZA(3) of the Act and that it would be appropriate to accept the Undertaking.

³ GSR observes that this is contrary to the statement at page 23 of the Issues Paper that 'ARTC indicates that rail access pricing has historically been negotiated and included in access agreements subject to confidentiality provisions.'

⁴ Section 44G(1) and 44H(3) of the Act prevent declaration of a service the subject of an access undertaking in operation under Division 6 of the Act.

