

2 May 2007

Mr E J Hall
Chief Executive Officer
Queensland Competition Authority
GPO Box 2257
BRISBANE Qld 4001

Dear Mr Hall,

QR ACCESS UNDERTAKING AMENDMENT – RELINQUISHMENT FEES

Thank you for the opportunity to comment on the proposed amendment to QR's Access Undertaking to address changes to the relinquishment fees applicable in the case that an access contract holder voluntarily relinquishes access rights prior to termination of the contract.

Pacific National notes that this is a matter that has been subject to negotiation between QR and the Queensland Resources Council (QRC), and that the QRC is substantially in agreement with the proposed amendment to the extent that it is necessary to have relinquishment fees at all under a revenue cap. Pacific National's view is that a relinquishment fee is an inappropriate method for managing QR's revenues in the central Queensland coal systems and the QRC has also expressed reservations about the benefits of this approach.

Notwithstanding this, to the extent that the QCA is minded to approve such fees, Pacific National accepts that, prima facie, where there is substantial agreement between key stakeholders, that it would be appropriate for the QCA to approve the proposed arrangement. However, there are several areas of concern that Pacific National has with the proposal that are not specifically addressed in the documentation provided by QR. These are discussed below.

Inconsistent Arrangements

It is noted that the current QR Access Undertaking (UT2), both prior to the amendment and in the current proposal sets up a differentiation of treatment for relinquishment fees between train paths that were contracted under the first access undertaking (UT1) and UT2 for coal trains. The difference is potentially substantial with the UT1 relinquishment fee calculated on the 'take or pay' component of access charges for only 2 years whereas the proposed fee under UT2 covers 50% of the 'take or pay' access charges for the remaining life of the contract.

This formulation for the treatment of pre-existing (ie UT1) access arrangements for coal trains is contained in paragraph 10.1(i)(B) in the proposed amended version of UT2. This is different to the formulation actually contained in UT1 (see page 79 of the QR Rail Access Undertaking December 2001). Paragraph 10.1(i)(B) of UT2 reads:

“for coal carrying Train Services included in Access Agreements in place on the day immediately prior to the Commencing Date, the amount equivalent to the payment of the take or pay amount that would have been payable for the following two (2) year period if the Access Agreement remained on foot but the Access Holder did not operate the relevant Train Services”

The UT1 formulation for relinquishment fees is contained verbatim in the QR internal access contract “CFS Access Agreement Coal, June 2004” at page 25, quoted below:

““Relinquishment Fee” means for coal carrying Train services, at any point in time that amount that would be payable over the following two (2) year period if CFS were to pay forty per cent (40%) of the Access Charges that would be payable if it operated all of the relevant Train Services it would have been entitled to operate in that period.”

The relinquishment fee under this formulation would appear to be, on its face, different to that which would apply to a UT1 train path under paragraph 10.1(i)(B) of UT2.

It would seem that the intention in UT2 (and the proposed amendment of UT2) is that the provision operates retrospectively to apply to an arrangement executed under UT1. However, if the view is that a change in regulation does not disturb a contract formed under the prior regulation (ie the position stated in QCA Draft Decision QR's Proposed Schedule F Amendment p.3), then it would seem that the inclusion of paragraph 10.1(i)(B) in UT2 is redundant as it could not come into operation as it affects only pre-existing contracts.

It would be helpful for the QCA, in its decision on this proposed amendment, to detail its understanding of the status of the relevant provisions under UT1 and UT2 and the consequential relinquishment fees that would arise under the different arrangements.

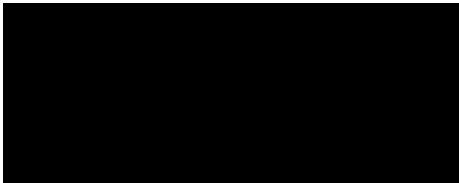
Divergent Access Arrangements Between Undertakings

The only party that holds an access contract for central Queensland coal trains under UT1 is QR. It is readily apparent that, regardless which of those two forms of relinquishment fee applies, this places the incumbent in an advantageous position compared to any new entrant. Disparities of this nature are inconsistent with the spirit of access arrangements that are intended to level the playing field between the incumbent integrated service provider and third parties. By building in disparities they necessarily serve to discourage competition. This is an example of a wider issue that Pacific National raised in its submission to the QCA regarding the change to a revenue cap (March 2007), that potential problems arise where contracts are entered into under different regulatory arrangements unless the contracts are made subservient to regulatory changes, or else the contracts are aligned with regulatory periods. This is clearly a difficult issue for all stakeholders and undermines the certainty and equality of treatment that was intended to accompany approval of an undertaking.

It is noted that the QR internal access contract runs until 2020 and that substantial volumes of traffic will remain under that contract for a significant part of that period. For example, 56% of the paths in 2005/06 remain under that contract until 2015/16 in the Goonyella system alone. Thus this issue is unlikely to recede to inconsequentiality in the near or even medium term and will most certainly extend through the UT3 regulatory period and potentially beyond that.

In attempting to remedy this type of problem, the QCA has required QR to transfer the take-or-pay obligations applicable to pre-existing access rights that are transferred to another operator (QCA Draft Decision QR's Proposed Schedule F Amendment p.4). However such a remedy is not available in the case of a voluntary relinquishment and it is unclear to Pacific National how the different arrangements could be reconciled without adopting a different approach to inter-temporal arrangements such as expressly providing for transition in each undertaking and the contracts that are executed under them.

This is an issue that will require careful management by the QCA to prevent unintended consequences, ever increasing complexity in regulatory arrangements and a loss of confidence by access seekers in the access undertaking process.



Paul Bugler
Access & Regulation