

Pacific National

Over-Payment Rules

Comments on the

Draft of the

**Determination of the Western Australian
Independent Rail Access Regulator**

**in accordance with the requirements of
section 46 of the Railways (Access) Code
2000**

Over-Payment Rules to Apply to WestNet Rail

Comments on the Draft of the Western Australian Independent Rail Access Regulator

1. Pacific National welcomes the opportunity to comment on the Draft Determination on the Overpayment Rules to Apply to WestNet Rail. Pacific National considers that generally the over-payment rules are appropriate. However, Pacific National believes that there are some issues which require clarification or amendment.

Non-Regime Operators' Revenue

2. Under the proposed overpayment rules, payments from operators with access agreements negotiated outside the Regime will be assessed in evaluating compliance with the maximum and minimum combinatorial revenue limits of the Code. Item (7) of the Regulator's overpayment rules provides that, "*Any payments to non-Regime operators calculated in Item (8) will be returned to the WNR for its discretionary application as the Code does not apply*". Similarly, in section 3(3) of the Draft Determination it states, "*However, the Code does not provide non-Regime operators a legal entitlement to any refund for any overpayment. These over-payments will be returned to WNR but it Regulator's intention to publish this information whenever such payments are returned.*"
3. However, in section 3(3) of the Draft Determination states:

Furthermore, in assessing the extent of over-payment under Section 47 of the Code, payments from non-Regime operators are included in assessing the quantum of refunds to Regime operators.

This sentence suggests that the payments from non-Regime operators would be included in the amounts received by non-Regime operators.

4. In Pacific National's view, it is not appropriate that any amount of the overpayment should be returned to WNR. Such an approach creates inappropriate incentives for WNR to seek to negotiate arrangements outside the Regime on route sections where the ceiling may be breached. The appropriate course is for any refund amount attributable to non-Regime operators should be shared proportionate to the access fees paid between Regime operators on the relevant route section.

Three Year Period

5. As Pacific National understands the approach to the three year period, an annual assessment will be made of the revenues over the previous three year period. In other words, the three years operates on a rolling basis. If this is the correct understanding of the proposed operation of the over-payment rules, Pacific National considers that this approach is appropriate. Pacific National would consider any other approach to be inappropriate.

Reasons for Over-payment

6. WNR proposed a distinction in treatment depending on the reason for the overpayment and specifically whether the reasons for the breach were short term or long term fluctuations. Short term fluctuations are effectively ignored for the purposes of the overpayment rules. No express definition of short and long term is provided. It may be that it is intended that short term fluctuations are ones that occur within any given year and long term fluctuations are ones that have impact over multiple years. As is reflected in the Regulator's decision, such a distinction is inappropriate and the proposed treatment of "short term fluctuations" is inconsistent with the intent of the Rules.
7. Pacific National strongly endorses the Regulator's proposed treatment of these issues as reflected on p.6 of the Draft Determination. It would be helpful if some indication could be given of what constitutes short term and what long term for the purposes of these rules.