



ESSENTIAL SERVICES COMMISSION
METRO ACCESS ARRANGEMENT MADE BY THE COMMISSION
24 August 2011

1 Background

Metro Trains Melbourne Pty Ltd (Metro) is an access provider for the purposes of the *Rail Management Act 1996* (Vic) (RMA). On 30 November 2009, Metro replaced Connex Melbourne Pty Ltd as the access provider to whom the binding access arrangement for the Victorian metropolitan rail network applies.

On 31 March 2011, Metro submitted to the Commission an application to renew its access arrangement. Under the RMA, Metro must have in place at all times an approved access arrangement. Metro's access arrangement was due to expire on 30 June 2011.¹ On 28 April 2011, the Commission released an issues paper and undertook a stakeholder consultation process whereby stakeholders and the public were invited to make a submission regarding the issues paper.

Following stakeholder consultation, the Commission released its draft decision on 15 June 2011 which was to not approve Metro's proposed access arrangement. The draft decision outlined the Commission's views on Metro's proposed access arrangement and set out the amendments and matters that Metro was required to address in order for the Commission to approve its proposed access arrangement.

On 6 July 2011, the Commission received submissions from stakeholders and Metro submitted its revised access arrangement in response to the Commission's draft decision. Metro also submitted a subsequent submission on 26 July which the Commission took into account.

Following further consultation and meetings with stakeholders and Metro, the Commission issued its final decision to not approve Metro's proposed access arrangement. The final decision outlines the outstanding matters that were not addressed by Metro, and the final amendments that are to be made to Metro's access arrangement.

As the Commission's final decision was to not approve Metro's proposed access arrangement, section 38ZJ of the RMA requires the Commission to make the access arrangement within 30 days of the Commission's final decision.

¹ The legislation provides that Metro's access arrangement continues until the Commission issues its final decision.

The Commission has made the Metro access arrangement (Annexure 1) under section 38ZJ of the RMA. This access arrangement made by the Commission is binding on the access provider (section 38ZN of the RMA) and commences operation from the date it is made in accordance with section 38ZM(1) of the RMA.

2 Matters raised in the draft decision

The Commission made its draft decision on 15 June 2011 not to approve Metro's proposed access arrangement. The draft decision identified the matters that Metro was required to address to obtain approval.

The Commission did not accept the revenue cap (forecast revenue requirement) proposed by Metro or the proposed access price, and required Metro to adopt the forecast revenue cap outlined in the draft decision. The Commission also identified a number of non-price issues including:

- the amendment of Metro's operating handbook to include certain protocols required under the Network Management Rules
- the amendment of Metro's train operating protocol to reflect the priorities in section 4.3(c) of the Network Management Rules, and
- a number of amendments to Metro's standard access agreement to make it even-handed in the rights and responsibilities it grants to operators and the access provider.

The Commission also sought further stakeholder comment on a number of issues in regard to the standard access agreement.

3 Metro's response to draft decision

In response to the draft decision and further consultation, Metro submitted revised versions of its proposed access arrangement documents. Metro accepted the model used by the Commission to determine the forecast revenue cap and freight reference tariff, however had disagreed with a number of issues regarding specific cost inputs and calculations, and therefore did not accept the determined cap and reference tariff. Metro proposed a revised reference tariff of \$6.21 per '000 GTK (in 2011-12 dollar value terms).²

In regard to the non-price issues, Metro made many of the necessary amendments to satisfy the requirements of the Network Management Rules. It also accepted the majority of the amendments required by the Commission, however a few issues remained outstanding.

Metro also submitted a number of additional revisions to the regulatory accounts templates and the operating handbook of its proposed access arrangement. These included revised versions of a number of protocols and procedures.

² Metro's response to the Commission draft decision p.4

4 Commission's final decision

The Commission made its final decision on 24 August 2011 to not approve Metro's proposed access arrangement. The final decision identified the matters that remained outstanding, and outlined the final amendments that the Commission would make to the access arrangement.

The Commission did not accept the access price or revenue cap (forecast revenue requirement) proposed by Metro. Furthermore, the Commission did not accept Metro's proposed standard access agreement, due to six outstanding amendments that the Commission believes Metro had not satisfied:

- A definition for Passenger Weighted Minutes is to be inserted in section 1.1 (with respect to delay payment indemnity in clause 14.6).
- Clause 2.3 relating to the option to extend the access agreement is to be amended to reflect the intent that the access provider and operator are to enter into good faith negotiations in order to determine the terms of an extension of the access agreement.
- In line with the amendment to clause 2.3, clause 4.3 relating to variation of the access charge during the extension of the access agreement is to be removed.
- Clause 4.4 (previously 4.3) relating to incremental costs is to be amended to provide that where incremental costs are attributed to any *users of the network*, the access provider will make a reasonable allocation of these costs between these *users of the network* (including Metro in its capacity as an above rail operator, where applicable).
- Clause 4.10 (previously 4.9) relating to the payment of a performance bond is to be amended to clarify the circumstances where Metro will require an operator to pay a performance bond. Consequential amendments are to be made to the definitions of CPI Multiplier and Performance Bond Amount, while a definition of Trigger Date (which was missing) is to be inserted.
- Clause 12.4 relating to the reporting of incidents is to be amended to include a reasonableness requirement – that is, the operator must provide any information requested by the access provider to meet its *reasonable* internal accident investigation requirements.

The Commission also identified that, for accuracy and clarity, clause 6.5 of Metro's train operating protocol, which refers to 'The Victorian Rules & Operating Procedures', is to be amended to refer to the 'Book of Rules and Operating Procedures'.

The Commission was satisfied that the other revisions made by Metro to the operating handbook and regulatory accounts templates were acceptable.

5 Access arrangement made by the Commission

The Commission has made Metro's access arrangement as per the requirements of section 38ZJ of the RMA. In making the access arrangement, the Commission has incorporated the amendments as specified in its final decision on Metro's proposed access arrangement.

The Commission has made the access arrangement reflect the following:

- forecast revenue cap outlined in Table A, and
- an access price path as set out in Table A.

Table A: Commission determined access price, price path and revenue requirement

| | 2010/11 | 2011/12 | 2012/13 | 2013/14 | 2014/15 | 2015/ 16 | Total |
|--|---------|-------------------|---------|---------|---------|-------------|-------|
| Freight forecast GTK | 207 | 210 | 216 | 223 | 229 | 236 | |
| Access price (\$/000 GTK) (\$2010/11) | 6.00 | 6.00 | 6.00 | 6.00 | 6.00 | 6.00 | |
| Revenue (\$ million) | | 1.260 | 1.298 | 1.337 | 1.377 | 1.419 | |
| Discount factor | | 0.94 | 0.88 | 0.83 | 0.78 | 0.73 | |
| Discounted required revenue (\$ million) | | 1.184 | 1.146 | 1.109 | 1.073 | 1.038 | 5.50 |
| Access price path ¹ (\$/000 GTK) (\$2010/11) ¹ | 6.00 | 5.94 ² | 5.88 | 5.82 | 5.77 | 5.71 | |
| Revenue (\$ million) | | 1.248 | 1.272 | 1.297 | 1.323 | 1.349 | |
| Discounted required revenue (\$ million) | | 1.172 | 1.123 | 1.076 | 1.031 | 0.987 | 5.39 |

1. Price path discounted by an X factor of 1 per cent.

2. As per the variation for inflation clause (clause 3.1 of the access arrangement and clause 4.2 of the access agreement) this price becomes \$6.14 once adjusted for inflation.

The Commission has also made the following amendments to Metro's standard access agreement:

- A definition for Passenger Weighted Minutes has been inserted in section 1.1 (with respect to delay payment indemnity in clause 14.6), as follows:

***PWM** is the Passenger Weighted Minutes (as determined within Schedule 7 for the Franchise Agreement – Train dated 31 August 2009) incurred by the Access Provider across the Network in the relevant calendar month.*

- A definition for Acceptable Credit Rating has been inserted in section 1.1 (with respect to performance bonds) as follows:

Acceptable Credit Rating means a minimum long term credit rating of BBB from Standard & Poor's or Baa2 from Moody's.

- A definition for Trigger Date has been inserted in section 1.1 (with respect to performance bonds) as follows:

Trigger Date means the date on which a Performance Bond provided under clause 4.9 expires.

- The definition of CPI Multiplier has been replaced with the following:

CPI Multiplier between any two times means:

- (a) the CPI for most recent March Quarter at the more recent time, divided by,
- (b) the CPI for the most recent March Quarter at the less recent time.

- The definition of Performance Bond Amount has been replaced with the following:

Performance Bond Amount means \$[insert], multiplied by the CPI Multiplier between the date on which the relevant Performance Bond is provided and the Effective Date.

- Clause 2.3 has been replaced with the following:

2.3 Option to extend term

- (a) At least 6 months prior to the expiry of the Initial Term either the Access Provider or Operator may by notice to the other require the parties to enter into good faith negotiations in relation to a possible extension of this agreement.
- (b) If a notice is given under paragraph (a) the Access Provider and the Operator must negotiate in good faith an extension to the term of this agreement and any changes to be made to the agreement during any agreed extension period, although nothing in this clause 2.3 requires either party to agree to any such extension.

- Clause 4.2(a) has been amended as follows, as a result of the change to the definition of CPI Multiplier:

On and from 1 July each Financial Year (commencing on 1 July 2011), each dollar figure component of the Access Charge set out in Schedule 1 will be varied in accordance with the following formula:

$$A_n = A_{n-1} \times \text{CPI Multiplier} \times (1-X)$$

where,

A_n = The relevant element of the Access Charge to apply from 1 July of the Financial Year 'n' (commencing on 1 July TBC).

An-1 = The relevant element of the Access Charge that applied from 1 July of the Financial Year 'n-1'

X = The "x factor = 1%" as approved by the ESC for the Reference Service.

CPI = The CPI Multiplier between the date the Access Charge is varied and the date one year before that date.

- Clause 4.3 relating to variation of the access charge during the extension of the access agreement has been removed.

- Clause 4.4(a) (now clause 4.3(a)) has been amended as follows:

The Operator must pay any Incremental Costs to the Access Provider. Where any Incremental Costs are attributable to both the Operator and any ~~Third Party Operator~~ other users of the Network, the Access Provider will make a reasonable allocation of those Incremental Costs as between the Operator and the ~~Third Party Operator~~ other users of the Network (based on a causal allocator).

- Clause 4.10 (now clause 4.9) has been amended to include the following clarification:

For the avoidance of doubt, this clause 4.10 only applies to an Operator who does not have an Acceptable Credit Rating, or who has defaulted in payment of any monies owed by it to the Access Provider under this Agreement and has not remedied that default before the expiry of seven (7) days.

- Clause 4.10(a) has been amended as follows:

(a) ~~The operator must, on or before the Effective Date~~ If the Operator at any time does not have or ceases to have an Acceptable Credit Rating, or has defaulted in payment of any monies owed by it to the Access Provider under this Agreement and has not remedied that default before the expiry of seven (7) days, the Access Provider may issue a notice to the Operator requesting that the Operator procure the issue to the Access Provider of a Performance Bond within seven days of receiving the notice which:

(i) is issued by an Issuer with a Required Rating and approved by the Access Provider (which approval must not be unreasonably withheld);

(ii) has a face amount which is no less than the Performance Bond Amount;

(iii) expires no earlier than the second anniversary of the ~~Effective Date~~ date of issue to the Access Provider; and

(iv) is payable at an office of the Issuer in Melbourne.

- Item 6 in clause 12.4(c) has been amended as follows:

all other information as required by Access Provider to meet information requests from TSV or other relevant investigating bodies or the Access Provider's reasonable internal accident investigation

requirements, to enable the Access Provider to meet any of its obligations in relation to its Accreditation or under the Rail Safety Act 2006 (Vic).

Finally, the Commission has amended clause 6.5 of the train operating protocol at attachment G.3 of Metro's access arrangement to refer to the correct title of the 'Book of Rules and Operating Procedures'.