



Mr Charles Millstead
Chief Executive Officer
Queensland Competition Authority
Level 27, 145 Ann Street
Brisbane, Queensland 4000

15 October 2018

Dear Mr Millstead,

2017 Draft Access Undertaking – averaging period

I refer to your letter dated 2 October 2018 regarding information Aurizon Network provided the Queensland Competition Authority (QCA) on 20 September 2018. This information related to the averaging period to be used for the purposes of the 1 July 2017 to 30 June 2021 regulatory term (UT5). In that letter the QCA requested that Aurizon Network provide:

- › an explanation as to why it would be reasonable for the QCA to have regard to the late information contained in the 20 September 2018 letter (**September letter**), having regard to the criteria in section 168B(4) of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**); and
- › further details to support Aurizon Network's claim for confidentiality over the information contained in the September 2018 letter.

It is reasonable for the QCA to have regard to the information in the September letter, because it is updated and relevant information concerning the measurement of parameters that are critical determinants of the revenues Aurizon Network will be permitted to recover over the UT5 term.

Given the central relevance of the averaging period to the QCA's regulatory task, and the passage of time since the commencement of the regulatory term, it is difficult to conceive how the QCA could properly discharge its functions, without considering whether an averaging period that is so far removed from when it makes its decision under section 134 of the QCA Act remains appropriate in light of the factors listed in section 138 of that Act. The information provided in the September letter goes directly to this issue, being one that the QCA has not yet made a Final Decision on.

Aurizon Network responds to the QCA's requests in detail below.

Late information and section 168B(4) of the QCA Act

Section 168B(4) of the QCA Act sets out the factors the QCA must take into account in deciding whether it is reasonable in all the circumstances to make a decision without taking late information into account:

- whether the late information was available, or ought reasonably to have been available, to the person during the period for making the submission or giving the information;
- the length, complexity and relevance of the late information;
- how much time has elapsed since the period for making the submission or giving the information ended; and
- how advanced the QCA's decision making process is when the late information was received.

Each of the section 168B(4) factors are addressed below.

Section 168B(4)(a): whether the late information was available, or ought reasonably to have been available, to the person during the period for making the submission or giving the information

The September letter provides market data through to the [REDACTED] averaging period, which had been proposed in a letter from Aurizon Network to the QCA dated 8 May 2018. The September letter provided actual Commonwealth Government Security and Inflation data as at [REDACTED] and an updated Debt Risk Premium estimate as of [REDACTED].

This information was not available at the time stated by the QCA for submissions on Aurizon Network's proposal to change the averaging period, being 10 July 2018. The information, by its very nature, only became available once the [REDACTED] averaging period had passed. That information demonstrated that the use of an averaging period over a year removed (being the 20 business days ending 30 June 2017) was not appropriate as the market conditions prevailing during that period were not reflective of those experienced over the UT5 regulatory period to date, or those that are expected to prevail during the remainder of the UT5 regulatory period.

As the time that will have elapsed between the commencement of the UT5 regulatory term and the making of any Final Decision becomes even greater, the impact on Aurizon Network's ability to manage its risks becomes greater. The September letter provides information on this issue, which is one that must be understood by reference to how the market has moved with the passage of time. Aurizon Network is only able to provide such information to the QCA as updated market information becomes available.

Section 168B(4)(b): the length, complexity and relevance of the late information

The updated information provided by Aurizon Network in the September letter is highly relevant.

First, the selection of the averaging period will have a significant impact on determining Aurizon Network's Allowable Revenue for the UT5 regulatory term.

Second, the up-to-date data demonstrates that the market conditions during the June 2017 averaging period were not reflective of those experienced over the UT5 regulatory period to date, or those that are expected to prevail during the remainder of the UT5 regulatory period. This consideration is directly relevant to the factors affecting approval of a draft access undertaking in section 138 of the QCA Act, and in particular the pricing principles in section 168A. These principles include that the price of access to a service should generate expected revenue for the service that is at least enough to meet the efficient costs of providing access

and include a return on investment commensurate with the regulatory and commercial risks involved.

The information is not complex or lengthy. It is merely the provision of updated market information. The QCA is highly familiar with the nature of that information. The information does not go to aspects of the methodology for measuring or estimating parameters.

Further, as the QCA has indicated that it will make its decision on the averaging period when making its Final Decision as part of its overall assessment, it is information that the QCA would need to come to terms with in order to make that assessment.

Section 168B(4)(c): how much time has elapsed since the period for making the submission or giving the information ended

As noted above, the period for making submissions on Aurizon Network’s proposal to change the averaging period ended on 10 July 2018. However, the time elapsed by reference to that timeframe is not of relevance in this instance. Aurizon Network has been consistent in stating that the appropriate averaging period should be aligned, as closely as possible, to the timing of the Final Decision. It would always be the case that updated information would need to be provided to the QCA concerning the measurement of parameters once the averaging period had passed to ensure the Final Decision was made based on the appropriate information.

Section 168B(4)(d): how advanced the authority’s decision-making process is when the late information is received

The QCA’s letter states that it has not made any decision about Aurizon Network’s proposal to revise the averaging period at this time and that it will do so as part of its Final Decision. Further, it states that the QCA will do so as part of its overall assessment of the draft access undertaking, having regard to the section 138 factors as they relate to the proposal to revise the averaging period. This suggests that the QCA’s decision making process with respect to the averaging period issue has not concluded. Indeed, the QCA’s response to Aurizon Network’s request for reasons as to why it is not inclined to support revising the averaging period suggests that the QCA’s decision making process on this issue is not advanced.

The stated reason given by the QCA is a concern that revision of the averaging period gives rise to opportunistic behaviour (addressed below). As an aside, Aurizon Network notes that it is entirely unclear how a concern as to opportunistic behaviour comes within, or overrides, consideration of the section 138 factors.

QCA concerns of biased outcomes

Aurizon Network rejects the implication that it is acting opportunistically in order to seek “windfall financial gain”¹; Market performance within the averaging period nominated in the September letter still remains uncertain and is not without risk. Aurizon Network reiterates that it has made its nomination sufficiently in advance of the averaging period commencing, which thereby exposes Aurizon Network to both favourable and unfavourable movements in market parameters – and in this regard, should not give rise to concerns as to bias. This was confirmed in the September letter:

‘Specifically, Aurizon Network propose that any 20-business day period between [REDACTED] (being the start of the 20 business days leading to a [REDACTED] [REDACTED]

¹ Queensland Competition Authority, 2017 Draft Access Undertaking – revision to the proposed averaging period (late information); 2 October 2018; pg.2.

averaging period) and the QCA making its Final Decision pending resolution of the current judicial review proceedings be used in setting the averaging period for UT5.'

Aurizon Network has provided updated data outlining clear and compelling evidence that the averaging period ending 30 June 2017 does not reflect the prevailing market conditions for the term of UT5 to date.

Aurizon Network contends that the QCA's consideration of up-to-date market data would be consistent with the principle of evidence-based decision making. The QCA has requested that Aurizon Network provide its actual maintenance cost data for FY2018 through a written Request for Information on 4 July 2018, following the publication of the quarterly maintenance cost report in accordance with clause 10.3.2 of the 2016 Access Undertaking (**UT4**).

While the QCA has not made it clear how it intends to use the actual FY2018 maintenance costs in the context of the Final Decision, it is concerning that the QCA is considering more up-to-date information for maintenance but is not considering the same approach in relation to an up-to-date averaging period. From Aurizon Network's perspective, this highlights a potential inconsistency in the QCA's assessment process for the 2017 Draft Access Undertaking (**2017 DAU**).

Aurizon Network maintains that there are strong economic arguments and regulatory precedents that would support the QCA amending the averaging period to account for up-to-date information. Aurizon Network reaffirms its positions articulated in previous correspondence with the QCA and detailed in the September letter.

Communication without prejudice to judicial review proceedings

This communication is without prejudice to the judicial review proceedings filed by Aurizon Network on 30 April 2018 and is provided to the QCA against the possibility that the QCA does not restart the decision-making process for the 2017 DAU under a new Chair or a Court does not make the orders sought in the application. This letter should therefore be read in the context of the proceedings and Aurizon Network's letter to the QCA in connection with the judicial review proceedings dated 1 May 2018.

Should you have any queries in relation to this submission, please do not hesitate to contact Jon Windle on jon.windle@aurizon.com.au.

Yours sincerely,



Michael Riches
Group Executive Network