

QRC

submission

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QRC submission to the QCA

**Aurizon Network Amended 2014 Draft
Access Undertaking**

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1. Overview:

The Queensland Resources Council (**QRC**) provides this submission on behalf of its coal members.

QRC welcomes Aurizon Network's decision to submit an Amended 2014 Draft Access Undertaking which largely reflects the QCA's Final Decision of April 2016. We would also like to acknowledge the constructive consultation undertaken by Aurizon Network ahead of submitting the DAU. This consultation was effective in resolving a significant number of issues. However, as the process did not provide for consultation with QRC's members, or sufficient time for a final legal review of drafting, the QRC has a number of remaining concerns with the DAU. These concerns are set out below.

2. Capacity shortfalls (8.9.4)

Aurizon Network's proposed amendment to Part 8.9.4 limits Aurizon Network's obligation to fund Shortfall Expansions to shortfalls arising from Expansions which are commenced after the Approval Date. This means that Capacity Shortfalls arising from previous projects are not addressed under Part 8 (as amended by Aurizon Network). Part 7A also lacks an obligation for Aurizon Network to rectify Capacity Deficits.

QRC considers that any existing Capacity Deficits, as revealed by the Baseline Capacity Assessment, ought to be remedied by Aurizon Network by funding an Expansion, if an Expansion is found to be the most appropriate solution, and is required by Access Holders. The same applies to a deficit identified from projects completed during the term of the undertaking, regardless of the date on which the projects were commenced. In committing to fund expansion projects, and signing Access Agreements which commit Aurizon Network to provide a defined number of train paths, Aurizon Network has accepted an obligation to provide those paths and therefore to provide the associated capacity.

Reflecting the contractual position in the undertaking does not create a new obligation or an exposure of which Aurizon Network was unaware at the time of committing to undertake the projects. Item 14 of the Investment Framework Principles (Schedule J of the current undertaking) provided that Aurizon Network must fully fund "*capital expenditure valued at less than \$300 million needed to respond to a Capacity Shortfall resulting from either a change in System Operating Assumptions or an incorrect forecast of capacity delivered by Infrastructure Enhancements*". The Final Decision drafting of clause 8.9.4, without the proposed amendment, reflects the expectations of stakeholders based on the UT3 Investment Framework Principles, and reflects the contractual position accepted by Aurizon Network under Access Agreements.

Despite this, QRC will, under protest, accept the QCA's Final Decision and the amendment to Part 8.9.4 as proposed by Aurizon Network **if** the QCA confirms that this amendment is consistent with the Final Decision. Our understanding of the Final Decision is that the QCA did not seek to impose an obligation to fund Capacity Deficits under Part 7A.4 (Capacity Assessments). However, we are not clear as to whether the QCA also intended that Aurizon Network would have no obligation in regard to deficits arising from expansions completed during the term of UT4. The QCA's drafting of Part 8.9.4 clearly creates such an obligation.



In the event that QCA considers Aurizon Network's amendment to be consistent with the Final Decision, then QRC will revisit this issue during the UT5 process, taking into account the outcome of the Baseline Capacity Assessment. If the Baseline Capacity Assessment reveals a Capacity Deficit, and an Expansion is found to be the most appropriate solution (after consideration of alternative solutions), then we consider that UT5 should include a commitment by Aurizon Network to undertake and fund the relevant Expansions.

3. Determination of disputes by the QCA (11.1.5)

QRC has a number of concerns with the proposed new clause 11.1.5(c)(ii)(A). Our understanding of the intention of this change is that Aurizon Network does not wish to enter into a dispute resolution process unless the other parties to the dispute agree to be bound by the outcome. We do not have any concern with that position. Our concerns with the drafting of the clause are:

- If Aurizon Network chose not to agree to be bound by the determination of the dispute, the QCA would not be able to commence the determination.
- If there are a number of potential parties to a dispute (for example, Aurizon Network and a number of Access Seekers), we are concerned that the determination could be delayed or prevented by one party (such as one Access Seeker) failing to agree to be bound. In this case, we consider that the determination should proceed, with the outcome being binding on all parties which agreed to be bound.

QRC has discussed this issue in detail with Aurizon Network, and drafting has been agreed which addresses the concerns. The agreed drafting includes:

- Adding 11.1.1(h), which will provide that "*Section 122 of the Act will apply to all Disputes to which this Part 11 applies*".
- Replacing Aurizon Network's proposed clause 11.1.5(c)(ii)(A) with the following:

any determination of the Dispute by the QCA is subject to Section 122 of the Act and is binding on:

- (1) *any party which provides a Dispute notice;*
- (2) *Aurizon Network;*
- (3) *any party to which **Clause 4.3(b)** applies;*
- (4) *any party referred to in **Clause 8.2.2(a), (e), (f) and (g)**; and*
- (5) *any other party to the Dispute that has agreed (in a legally binding way) to be bound by the outcome of the Dispute;*

4. Schedule E, 4.1(a)

Aurizon Network's proposed change to this clause clarifies that clause 4 does not bind either Aurizon Network or the QCA to accept the views of Interested Participants regarding the prudence and efficiency of the scope, standard and costs of capital expenditure projects. While this is generally correct, a positive vote should create an obligation for Aurizon Network to seek approval of capital expenditure under clause 2.1(f) of Sch E. We understand that Aurizon Network did not intend for the



proposed amendment to affect its obligation under clause 2.1(f). The drafting which we propose to clarify this point is provided below:

“This clause 4 is for the purpose of informing Aurizon Network and the QCA of the views of a broad range of Interested Participants in relation to capital expenditure projects, but (other than as described in clause 2.1(f) of this Schedule E) it does not bind either Aurizon Network or the QCA to accept those views. ...”

Aurizon Network has confirmed that it supports this amendment.

5. Amendment to definition of consequential loss

In the QCA's January 2015 Draft Decision, the QCA amended the definition of Consequential Loss within the Standard Access Agreement by deleting “loss or damage arising out of any Claim by a Third Party”. Aurizon Network's proposed amendment extends the definition of consequential loss such that the definition includes losses incurred by third parties to the extent that those losses meet the definition of Consequential Loss under the Standard Access Agreement.

The change creates confusion as to the treatment of certain losses. For example, in the event that a coal producer (who is a Customer under an Access Interface Deed) is required to pay amounts to a supplier such as a contract miner while unable to rail coal, this should be considered a direct loss of the Customer. However, if the payment reflects the loss of revenue of the contract miner, the cost incurred by the miner may be considered ‘consequential’ under the proposed definition.

The QRC notes that the existing definition of consequential loss (that is, without Aurizon Network's additional change) is, by general standards, comprehensive. There does not appear to be a sufficient justification to expand the definition further. The proposed additional exclusion is, by general standards, an unusual provision. Inclusion of the additional paragraph serves only to make the consequential loss more ambiguous.

We are unable to find any indication within the QCA's Final Decision that the QCA intended to partially reinstate the inclusion of third party claims within the definition of Consequential Loss, as is now proposed by Aurizon Network. QRC considers that the proposed change should be deleted.

6. Part 3 of Access Interface Deed

QRC understands the purpose of the proposed new warranties in Part 3 of the Access Interface Deed. However, we are concerned that, in a significant number of cases, it will not be possible for the Customer to provide these warranties. For example:

- Where coal is sold ‘free on rail’ (i.e. where the purchaser of the coal takes responsibility for arranging rail services), it will not be possible for the customer to warrant that it owns the mine. Free on rail arrangements are not unusual for sales to domestic power stations and may also be arranged by coal traders in the future.
- There will be many cases where the Customer (i.e. the party which enters into the rail haulage agreement with an operator) does not own the mine. For example, the participants in a joint venture may own a mine, and may also own the shares of an entity which operates the mine. In



this case, if the mine operator is the Customer, the Customer will not own the mine, and therefore cannot provide the warranty.

Our understanding is that Aurizon Network intends to operate this provision on a flexible basis, and to accept warranties from the party which is able to give them, rather than necessarily from the Customer. This is acceptable to QRC. For the Access Interface Deed, we propose the insertion of a drafting note (rather than amending the drafting of the clause) to reflect this intention. The proposed drafting note is provided below. Aurizon Network has confirmed that it supports this drafting note.

“Where the Customer is unable to give each of the following warranties, (because the Customer does not own the mine, does not own the coal, or is not entitled to the proceeds of sale) Aurizon Network intends to enter into individual deeds with relevant parties which can give these warranties, where each deed will include clauses from the Access Interface Deed relevant to that party”.

7. Conclusion and approval of the undertaking

QRC's preference is that the changes suggested in this submission be reflected in the final approved version of the undertaking. If the QCA agrees that final amendments are required, and if these amendments require consultation, we would accept that a very short period for preparation of submissions would be sufficient. In the event that the QCA considers that substantial delay will arise from making final adjustments, then:

- If the adjustments which the QCA is seeking are limited to those discussed in Sections 3, 4 and 6 of this submission), we would accept approval of the current DAU, and will request that Aurizon Network seek approval of the agreed changes via a DAAU.
- If the adjustments sought by the QCA include rejection of Aurizon Network's proposed changes regarding clause 8.9.4 (Capacity Deficits) and/or the definition of Consequential Loss, we would prefer that the final approved undertaking include these amendments, despite possible delays.