

Aurizon Network 2013 Standard User Funding Agreement Draft Amending Access Undertaking

Response to the Queensland Competition Authority Draft Decision of October 2014



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1 Executive Summary

Aurizon Network provides this submission in response to the Queensland Competition Authority's (QCA) Draft Decision (DD) on Aurizon Network's 2013 Standard User Funding Agreement Draft Amending Access Undertaking (2013 SUFA DAAU).

The Standard User Funding Agreement (SUFA) framework represents an innovative approach to funding the expansion and growth of the CQCN, and will provide additional choice of project funding sources to access seekers. The development of a workable, bankable and credible SUFA template is of critical importance to both Aurizon Network and its coal supply chain customers, as that template will enable access seekers and/or third party financiers to invest in the expansion of the CQCN.

Aurizon Network is aligned with the QCA's goal of developing a framework that allows multiple financing options for, and a range of potential financiers of, a CQCN expansion project. A SUFA framework should provide a credible alternative for rail expansion investment when Aurizon Network chooses not to fund that transaction. That framework, however, should not adversely affect Aurizon Network's legitimate business interests.

Aurizon Network has responsibilities to its shareholder(s) to ensure that any capital commitment both meets threshold requirements in respect of risk and reward and constitutes the best allocation of its scarce capital. Accordingly Aurizon Network will assess on a project specific basis whether to finance a CQCN expansion. Notwithstanding this position, Aurizon Network is committed to the ongoing sustainable growth and development of the CQCN.

In this light, Aurizon Network considers the development of a SUFA framework to be important in enabling economically efficient investment by parties other than Aurizon Network in the CQCN.

The QCA states that its interim position in the DD is to refuse to approve the 2013 SUFA DAAU in its current form. Aurizon Network supports the majority of proposed changes in the DD, but it has a range of concerns, the most significant of which are:

- The proposed acceptance of cost or risk by Aurizon Network in addition to the costs and risks that it voluntarily accepts, as specified in this response
- The number of incomplete matters that are integral to a workable SUFA arrangement, including matters which the QCA has proposed to address through the 2014 Draft Access Undertaking (2014 DAU) process

Aurizon Network's ability to support a voluntary form of SUFA will be determined by the extent of risk it can commercially accept, noting that it is not obliged by the QCA Act to accept costs related to the extension of a facility. Nevertheless, Aurizon Network may choose to accept certain costs and risks in the SUFA template in order to facilitate the economically efficient development of the CQCN.

For each SUFA transaction Aurizon Network is prepared to negotiate with the relevant Access Seekers changes to the approved SUFA template's risk allocation to reflect the particular needs of those Access Seekers and/or project specific issues. Where the parties agree on a commercial basis mutually acceptable risk and reward changes to the approved SUFA template, Aurizon Network is prepared to accept those risk changes.

In the Draft Decision the QCA has proposed a number of thoughts or concepts that would need to be included in an Access Undertaking to support both SUFA projects and potentially Expansion projects more generally. The Draft Decision does not outline specific details of many of the required changes needed in the 2010 Access Undertaking (2010 AU) to support these concepts. These include:

- The expansion process
- Capacity guarantees
- Discrimination
- Preapproval process for prudence of scope, standard and cost

Aurizon Network understands that the QCA is seeking to engage with stakeholders throughout the 2014 DAU process to flesh out many of these details and to ensure that the 2014 DAU package provides a comprehensive investment framework including SUFA options.

There is a low probability that an expansion project would reach the stage of project development that would benefit from the SUFA option being available before the date (in 2015) by which the 2014 DAU is anticipated to be approved by the QCA. Aurizon Network believes it is not in any stakeholder's interest to divert time and resources from this 2014 DAU process in order to develop extensive drafting changes to the 2010 AU.

Aurizon Network proposes that changes to the 2010 AU be limited to:

- The inclusion of approved SUFA template documents; and
- The inclusion of a requirement that Aurizon Network submit further 2010 AU drafting changes by a 'sunset date' – for example 30 June 2016

This approach allows focus on the 2014 DAU process but addresses the contingency that the 2014 DAU is not approved by the sunset date.

Aurizon Network would be pleased to collaborate with both the QCA and other stakeholders in developing any simplification to the 2010 AU process.

In any case, given the impact on Aurizon Network of some of the changes proposed in the DD, Aurizon Network looks forward to an opportunity to consult with the QCA further following the QCA's consideration of this submission and those received from other respondents to the DD.

Aurizon Network's response

A table summarising Aurizon Network's response to each of the positions in the Draft Decision is included in Appendix 1. The following is a high level summary of Aurizon Network's response to key issues.

Aurizon Network supports the following proposals in the DD:

- Rental Method – Aurizon Network agrees with the QCA that the rental calculation methodology under current regulation is reasonable and simplified examples should be included in the SUFA documentation. Aurizon Network intends to submit proposed rental method examples to the QCA shortly.
- Construction – Aurizon Network agrees with the QCA on the adoption of a construction agreement, which is based on a standard form, that provides up-front commitments by Aurizon Network as contractor with respect to scope, standard, cost and time to undertake the construction works
- Security and financeability – Aurizon Network agrees to:

- the inclusion of a SSA
- direction to pay arrangements as outlined by the QCA
- Termination – Aurizon Network agrees, subject to the consent of the lessor, to disclose redacted copies of the Infrastructure Lease during negotiation of a SUFA transaction
- Preference Unit Transfers – Aurizon Network agrees to the removal of ‘stapling’ and the retention of its right to bid for preference units that are being disposed of
- Taxation – Aurizon Network agrees that:
 - The ability of the Trust to claim tax depreciation must be tested
 - Statutory severance is required
 - Efficiently incurred costs of seeking an ABA should be included in its operating costs
- Liability – Aurizon Network supports the proposed treatment of limitation of liability

Aurizon Network does not support the following proposals in the DD:

- Rental Method – Aurizon Network does not agree that access charges should be predetermined in the event that SUFA assets are no longer declared. Aurizon Network considers that the inclusion in the SUFA documentation of a specified rent determination approach that would be applied in a post-regulatory environment is the appropriate treatment of the risk of future deregulation. This approach is set out in section 2 of Schedule 1 of the EISL that forms part of Appendices 3 & 4.
- Capacity – Aurizon Network does not agree that it should provide a capacity guarantee of a SUFA project. Capacity guarantees are not provided in respect of expansions financed by Aurizon Network for regulated returns as the associated rate of return does not provide it with a reward for the assumption of capacity risk. Aurizon Network does not volunteer to assume the risk of providing a capacity guarantee. For each SUFA transaction Aurizon Network is prepared to negotiate with Access Seekers over the transfer of capacity risk, and, where mutually acceptable risk and reward terms are agreed on a commercial basis, Aurizon Network is prepared to accept capacity risk.
- Credit risk – Aurizon Network does not agree with the removal of set-off provisions for immaterial non-rental amounts and non-rental material liabilities as this would expose Aurizon Network to credit risk to a Trust and PUHs, each of which may be an entity of a low credit standing
- Termination – Aurizon Network does not agree to assume an uncapped liability in respect of its actions under the Infrastructure Lease as the assumption of this risk would result in SUFA investors having a more favourable risk/reward profile from the applicable SUFA project than is available to Aurizon Network from projects that it finances
- Taxation – Aurizon Network believes there is still a need for a tax indemnity as the proposal to seek an ABA in respect of the approved SUFA template and PBRs in respect of each SUFA transaction does not eliminate all of Aurizon Network’s tax risk
- Liability – Aurizon Network does not agree with the proposed treatment of consequential loss as it does not volunteer to accept this risk, which is potentially of great magnitude
- OPRA – Aurizon Network does not agree with the proposed exclusion of OPRA. Aurizon Network should, whenever it assumes risks in expanding its facility, be rewarded for risks associated with that expansion. OPRA is one mechanism which might be used to provide such

reward. Aurizon Network believes OPRA should be retained in the standard documents and set to zero for projects where it is not used.

2 Introduction

2.1 Structure of Aurizon Network's response

Aurizon Network's response to the DD comprises this submission, four Appendices and a glossary. This submission is comprised of the following Sections:

- Section 1 – Executive Summary
- Section 2 – Introduction
- Section 3 – Key Issues
- Section 4 – Rental Method
- Section 5 – Construction
- Section 6 – Security and Financeability
- Section 7 – Termination
- Section 8 – Discrimination
- Section 9 – Preference Unit Transfers
- Section 10 – Third Party Finance
- Section 11 – Taxation
- Section 12 – 2010 Access Undertaking Amendments
- Section 13 – Liability
- Section 14 – Other Issues

Sections 4 to 13 inclusive are structured so as to align closely with the corresponding sections of the body of the DD and address material issues for Aurizon Network that arise from either the body of the DD or the relevant provisions of the SUFA documents that form part of the DD. Section 14 addresses material issues that arise from the SUFA documents that form part of the DD and fall outside the scope of Sections 4 to 13 inclusive.

Section 3 addresses key issues that underpin both Aurizon Network's response to the DD in general and some of the responses set out in Sections 4 to 14 inclusive.

This submission provides Aurizon Network's detailed response to the QCA's positions in the body of the DD, and certain significant issues in the SUFA documents that form part of the DD.

Appendix 1 is a summary of Aurizon Network's responses in this submission.

Appendix 2 is a table that addresses all of the 'second order issues' that Aurizon Network has identified in the SUFA documents that form part of the DD, as distinct from the body of the DD itself. A 'second order' issue is an issue that is not sufficiently material to require consideration in this submission, but is more significant than a drafting error or a typo. The table in Appendix 2

- specifies each 'second order' issue
- provides a cross-reference to the applicable SUFA document
- states Aurizon Network's concern
- sets out Aurizon Network's proposed approach to that issue (without any redrafting, as it is given in Appendix 3)

Appendix 3 is a set of SUFA documents that reflect Aurizon Network's positions in this submission, its proposed approach to 'second order issues' as set out in Appendix 2 and minor

drafting issues, such as typos and cross-references.

Appendix 4 is the set of SUFA documents that constitute Appendix 3, but with 'track-changing' against the SUFA documents that form part of the DD.

The glossary sets out definitions of the defined terms used in this submission and Appendix 1.

3 Key Issues

3.1 Acceptance of Cost and Risk

At all times in the development of the SUFA arrangements and its engagement with industry participants and the QCA, Aurizon Network has expressed its willingness to accept voluntarily some costs and risks under the SUFA arrangements, provided it receives an appropriate reward for doing so.

For example, Aurizon Network has been and remains willing to deliver the works for each SUFA project on the basis that Aurizon Network will accept industry standard risks and associated costs under a design and construction contract consistent with the template CA. Examples of this industry standard approach are a lump sum price, a fixed date for completion and an appropriate liquidated damages regime for delays in completion. Aurizon Network is prepared to do this on the basis that the CA for each SUFA transaction will incorporate pricing terms in accordance with construction industry norms for comparable projects.

Consistent with the QCA Act, Aurizon Network may volunteer to accept risks and costs of expanding its network; however, it cannot be compelled to do so. Consequently, Aurizon Network's willingness to accept certain costs or risks is not an indication that it is willing to accept other costs or risks (even if it were proposed that it would receive a reward or be otherwise compensated for doing so).

In the DD the QCA states that its interim position is to refuse to approve the 2013 SUFA DAAU¹. In large part this proposed refusal appears to be because the QCA wishes Aurizon Network to assume a different risk and cost allocation to that which Aurizon Network is willing to assume in its 2013 SUFA DAAU.

For the purpose of advancing SUFA, Aurizon Network is willing to accept in the SUFA template documentation the costs and risks that are set out in this response.

For each SUFA transaction Aurizon Network is prepared to negotiate with the relevant Access Seekers changes to the approved SUFA template's risk allocation to reflect the particular needs of those Access Seekers and/or project specific issues. Where the parties agree on a commercial basis mutually acceptable risk and reward changes to the approved SUFA template, Aurizon Network is prepared to accept those risk changes. This approach toward the pricing of cost exposures and risks is consistent with standard business practice for commercial enterprises in a market economy.

3.2 Access Undertaking changes

The DD addresses both the requirements for the SUFA template documents and the AU provisions required to facilitate an effective user funding regime. Hence there are a number of significant proposals in the DD that can only take effect by means of changes to the relevant AU. They include:

- the Expansion Process
- a complex 'capacity guarantee'
- the availability of various capacity guarantee options
- an arrangement by which Aurizon Network is to accept a liability to pay costs to *'rectify/compensate for any capacity shortfall'*
- discrimination

¹DD, Executive Summary, Summary, page xiii

- a pre-approval process for prudence of scope, standard and cost of capital expenditure projects and the scope of the associated CA

These proposals are described in very high-level terms and without sufficient detail for Aurizon Network to gain a reasonable understanding of the QCA's vision for these matters. For example, the proposal that Aurizon Network accept liability to '*rectify/ compensate for any capacity shortfall*' gives no guidance on the nature or extent of the rectification obligation or the compensation obligation. Furthermore it does not make clear whether rectification and compensation are seen as alternative remedies, or cumulative remedies.

Accordingly Aurizon Network is not in a position to respond comprehensively in this submission to these proposals, although this submission does provide preliminary and partial comments on some of them. To provide a comprehensive response Aurizon Network would need materially more detail from the QCA as to the intent and the substance of these proposals.

Aurizon Network understands the QCA is looking to engage with stakeholders throughout the 2014 DAU process to flesh out, among other things, these proposals and to ensure the 2014 DAU package provides a comprehensive investment framework including the SUFA option. This intent is reflected in parts of the DD – for example sections 12.4.8 and 12.4.9 of the DD address issues that the QCA considers prudent to consider under the 2014 DAU process.

Aurizon Network considers that the 2014 DAU process should afford stakeholders appropriate opportunity to consider and comment on the detail of these proposals in advance of any final decision.

There is now a very low probability that prior to the anticipated 2014 DAU commencement in 2015 an expansion project would be developed to the point that it would benefit from the SUFA option being available. Aurizon Network therefore considers that it is not in any stakeholder's interest to divert time and resources to extensive drafting changes to the 2010 AU to implement SUFA while the 2014 DAU package is being finalised.

Aurizon Network however acknowledges that the 2013 SUFA DAAU should provide for an effective SUFA framework should the finalisation of the 2014 DAU package be delayed, as there would be an increased likelihood of an expansion project reaching the project commitment phase without the SUFA option being available.

In this light Aurizon Network proposes that this DAAU makes only two changes to the 2010 AU:

- (1) The inclusion of approved SUFA template documents as resolved through the 2013 SUFA DAAU process; and
- (2) The inclusion of an obligation on Aurizon Network to submit to the QCA further 2010 AU process provisions to address the AU issues identified in the QCA's final decision on the 2013 SUFA DAAU by a sunset date (being a date sometime after the currently expected approval date for the 2014 DAU) – for example 30 June 2016.

In the event that Aurizon Network fails to submit a further DAAU to the 2010 AU by the sunset date, or if the QCA fails to ultimately approve a DAAU reflecting the outstanding requirements of the QCA's final decision on the SUFA DAAU, the current provisions of the 2010 AU giving the QCA the ability to develop its own version of the SUFA and amendments to the AU which would otherwise no longer have relevance, would be re-enlivened.

This approach to changes to the 2010 AU allows for the risk that the 2014 DAU is not approved by the sunset date, in which case the 2010 AU would need to be modified to ensure SUFA is effective under the 2010 AU. It is anticipated that the 2014 DAU will come into effect before the sunset date, which would render unnecessary the submission of these 2010 AU process provisions. In the unlikely event that the 2014 DAU is delayed to the point that it will not be approved by the sunset date, Aurizon Network would seek to draw upon work undertaken in the development of the 2014 DAU investment framework when documenting the 2010 AU process provisions to be submitted by the sunset date.

The proposed 2010 AU clause to address the sunset date submission obligation (i.e. item (2) above) is:

- (a) "Aurizon Network agrees to submit a DAAU to this Undertaking by *[insert sunset date]* (**Sunset Date**) to reflect any outstanding changes to the 2010 AU required to comply with the QCA's final decision on Aurizon Network's SUFA Draft Amending Access Undertaking.
- (b) Clause 7.6 of this Undertaking ceases to apply unless:
- (i) Aurizon Network fails to submit a DAAU as contemplated by paragraph (a) by the Sunset Date; or
 - (ii) the QCA refuses to approve a DAAU addressing the requirements of the QCA's final decision on Aurizon Network's SUFA Draft Amending Access Undertaking.

(Appropriate defined terms would also be included)."

The adoption of this approach would allow the SUFA template documents to be locked down under the 2013 SUFA DAAU process and the associated AU provisions to be developed as part of the 2014 DAU process without the diversion of time and resources to the development of 2010 AU amendments that would be short-lived or redundant.

Aurizon Network would be pleased to collaborate with both the QCA and other stakeholders in developing the best approach for the development of AU provisions to facilitate the user funding regime.

3.3 Unresolved issues

The DD is described throughout as representing the QCA's 'interim position' and leaves several material matters (in addition to AU matters discussed in Section 3.2) unresolved, and pending further submissions and deliberations. These matters relate to DD positions that are not reflected in the SUFA documents that form part of the DD, and include:

- any proposed changes to address certainty over rental cashflows following deregulation
- the examples of rent calculations to be included in the EISL and how will they be included in it
- the mechanism by which tax indemnity amounts are to be included in the RAB

This is of some concern to Aurizon Network given the subject matter of the DD, its importance to Aurizon Network's business and the number and significance of the matters referred to in the DD that are unresolved. Aurizon Network considers that it should have a reasonable opportunity to review any new or varied QCA positions and make submissions to the QCA on those matters prior to the QCA making a final decision.

4 Rental Method

4.1 The QCA's position

The QCA has stated that:

- a) it proposes to accept that the objective and underlying philosophy of the rental calculation methodology under current regulation practices are reasonable²;
- b) 'the rental calculation is complex, and we consider simple examples should be provided with the SUFA agreements in order to assist SUFA funders to assess the future revenue streams from user funded assets'³;
- c) 'Aurizon Network's proposed post-regulatory rent objective does not provide certainty over rental cash flows should the declared service/infrastructure cease to be regulated'⁴;
- d) SUFA should allow for parties to remain, following deregulation, under the 'regulated contract'⁵, and
- e) SUFA should allow for linked access agreements 'to include a schedule setting out access charges in the event that an asset is no longer declared'⁶.

4.2 Aurizon Network's response

- a) ***The acceptance of the rental calculation methodology under current regulation practices as reasonable***

Aurizon Network supports this position.

- b) ***The inclusion of simple examples of rental calculation in the SUFA documentation***

Aurizon Network supports this position with a qualification.

The qualification is that the worked examples to be included in the template SUFA documentation are to be for illustrative purposes only and are not to govern the legal interpretation of a SUFA transaction based on the template documentation.

Aurizon Network is ready to engage with the QCA on the development of these examples, and intends to submit proposed rental method examples to the QCA shortly..

- c) ***Aurizon Network's proposed post-regulatory rent objective does not provide certainty over rental cash flows following deregulation***

Aurizon Network does not support this position, as its proposed post-regulatory rent objective provides as much certainty as is possible to address an uncertain future environment. The reality is that certainty over rental cash flows following deregulation

²DD, section 4.5.1, item 4.1 in box, page 20

³DD, section 4.5.1, item 4.2 in box, page 20

⁴DD, section 4.5.3, page 21

⁵DD, section 4.5.3, page 22

⁶DD, section 4.5.3, page 22

cannot be documented now since the economic and commercial environment at the time when deregulation occurs will inevitably be different from today's economic and commercial environment, or else deregulation would not have occurred. Aurizon Network considers that the inclusion in the SUFA documentation of a specified approach that would be applied in a post-regulatory environment to determine rental is the appropriate treatment of the risk of future deregulation.

Neither the QCA nor any other stakeholder has proposed to Aurizon Network a post-regulatory rent objective that provides greater certainty.

d) *SUFA should allow for parties to remain, following deregulation, under the 'regulated contract'*

Aurizon Network supports this position.

Aurizon Network notes that its existing approved forms of access agreements under the 2010 AU already allow for their continued existence following deregulation.

e) *SUFA should allow for linked access agreements to include a schedule setting out access charges in the event that an asset is no longer declared*

Aurizon Network does not support this position.

The following issues are relevant to this position:

- The EISL already contains protection for the Trust
- The role of the QCA in prescribing arrangements for an unregulated service
- The appropriateness of predetermining access pricing substantially in advance

(1) Protection of the Trust already exists

Item 2 of Schedule 1 of the EISL contains provisions that specify the objective for the determination of the Trust's rent in the post-regulatory environment. If, following deregulation, either party to the EISL considers that the rental method then used to determine the rent does not achieve the post-regulatory objective, that party may initiate negotiations with the other party, and, if the negotiations are unsuccessful, the rent calculation methodology in the post-regulation environment is subject to an expert determination process.

The QCA's proposal to regulate access charges in a post-regulation period goes beyond protecting the Trust and adversely affects Aurizon Network's rights to set and receive access charges.

There is no justification for the QCA's proposal to set specific access charges in linked access agreements that apply in the post-regulatory environment.

(2) Role of QCA in prescribing arrangements for an unregulated service

The QCA's role in regulating access ceases once the relevant service ceases to be declared under the QCA Act.

In the absence of an access regime (i.e. where a service is unregulated) an Access Seeker would have no statutory rights either to obtain access or to require the owner to extend the facility.

The QCA Act expressly allows an access provider and an Access Seeker to negotiate the terms of access, including access charges. Unless those terms are inconsistent with the QCA Act, the parties are free to agree any terms, including ones that are inconsistent with an approved access undertaking, as provided in sections 99 and 168 of the QCA Act.

In light of these matters Aurizon Network does not see how the QCA can seek to regulate access charges in an unregulated environment.

(3) The appropriateness of predetermining access pricing substantially in advance

The QCA has suggested that the linked access agreements should include a schedule that 'hardwires' access charges in the event that an asset is no longer declared. In forming this view the QCA has noted that a range of unregulated infrastructure providers employ a building blocks approach for determining access charges.

The QCA's approach is unworkable and has material adverse impacts on Aurizon Network for the following reasons:

- Determining access charges substantially in advance or for long periods of time increases the likelihood that they will not be appropriate for the period to which they will apply. Setting them too high will result in Aurizon Network being uncompetitive. Setting the price too low will result in Aurizon Network and the Trust recovering inadequate returns. Determining access charges substantially in advance would adversely affect Aurizon Network and the Trust; their business interests are best served through determination of an appropriate access charge in response to the competitive and economic environment at the time.
- The QCA Act does not allow the QCA to make an access determination now that has the effect of setting long term access charges that differ from the reference tariff, or that are intended to apply for a period where the service is unregulated.
- The 'regulated contract' does not include the prescription of future access charges within a schedule to an access agreement. The relevant current regulated contracts are based on an approved standard access agreement and with adjustments to access charges over time by reference to amended or new reference tariffs approved by the QCA from time to time. It does not involve the specification of fixed long term access charges.
- In the event of adverse market conditions the predetermination of access charges may have significant implications for competition in downstream markets and/or the profitability and commercial viability of above rail operators.
- In most circumstances the access charges under linked access agreements will not relate exclusively to the SUFA assets, and the access charges for the use of some SUFA assets will be made under access agreements that are not linked access agreements. The predetermination of access charges as is proposed by the QCA could:
 - have significant implications on Aurizon Network where operating, maintenance costs and other risk events differ from the assumptions relied

on for determining those access charges (at a time substantially in advance of the application of the access charges)

- adversely affect the unregulated return Aurizon Network is able to earn on its non-SUFA assets.

For all of these reasons, Aurizon Network does not support the QCA's position on the inclusion of a schedule setting out access charges in the event that a SUFA asset is no longer declared.

4.3 Summary

	QCA Position	Aurizon Network Response
a	The acceptance of the rental calculation methodology under current regulation practices as reasonable	Aurizon Network supports this position
b	The development of worked examples of rental calculation and their inclusion in the SUFA documentation	Aurizon Network supports this position with a qualification
c	Aurizon Network's proposed post-regulatory rent objective does not provide certainty over rental cash flows following deregulation	Aurizon Network does not support this position
d	SUFA should allow for parties to remain, following deregulation, under the 'regulated contract'	Aurizon Network supports this position
e	SUFA should allow for linked access agreements to include a schedule setting out access charges in the event that an asset is no longer declared	Aurizon Network does not support this position

5 Construction of SUFA Infrastructure

5.1 The QCA's position

The QCA has stated that:

- a) The construction process should be based on the principles that SUFA is a financing tool and control of that process for SUFA projects should reside with Aurizon Network⁷;
- b) As a consequence of these principles, Aurizon Network should provide up-front commitments with respect to scope, standard, cost, time to complete and capacity outcomes⁸;
- c) Project delivery should be addressed not under the PMA but under a CA, the template of which is a modified version of AS4902 that is part of the DD, and the RCA should take the form of the RCA that is part of the DD⁹;
- d) The CA should adopt a lump-sum price for the delivery of a set of commitments in relation to scope, standard and time-to-complete¹⁰;
- e) The CA should provide for specified variations and adjustment events as detailed by the QCA¹¹;
- f) The Independent Certifier under the CA should undertake many, but not all, of the functions of the superintendent under the pro forma construction contract¹²;
- g) A liquidated damages regime should apply in respect of delay in reaching practical completion by the date for practical completion¹³;
- h) The independent certifier should notify Aurizon Network of non-compliances with the CA and Aurizon Network must record these defects on a register and rectify them at its cost¹⁴;
- i) The pro forma construction contract should not define the level of scope specificity¹⁵;
- j) Issues regarding the development of an expansion process that ensures SUFA is workable, bankable and credible will be developed as part of the 2014 DAU¹⁶;
- k) Capacity guarantees and shortfalls are proposed to be addressed as set out in section 5.4.5 of the DD¹⁷; and
- l) Pre-approval is proposed to be addressed as set out in section 5.4.6 of the DD¹⁸.

⁷DD, section 5.4.1, item 5.1 in box, page 30

⁸DD, section 5.4.1, item 5.2 in box, page 30

⁹DD, section 5.4.2, item 5.3 in box, page 32

¹⁰DD, section 5.4.3, item 5.4 in box, page 33

¹¹DD, section 5.4.3, item 5.5 in box, pages 34 - 35

¹²DD, section 5.4.3, item 5.6 in box, page 35

¹³DD, section 5.4.3, item 5.7 in box, page 36

¹⁴DD, section 5.4.3, item 5.8 in box, page 37

¹⁵DD, section 5.4.3, item 5.9 in box, page 38

¹⁶DD, section 5.4.4, item 5.10 in box, page 38

¹⁷DD, section 5.4.5, pages 38 - 42

¹⁸DD, section 5.4.6, pages 42 - 46

5.2 Aurizon Network's Response

- a) *The construction process should be based on the principles that SUFA is a financing tool and control of that process for SUFA projects should reside with Aurizon Network*

Aurizon Network supports this position.

- b) *As a consequence of these principles, Aurizon Network should provide up-front commitments with respect to scope, standard, cost, time to complete and capacity outcomes*

Aurizon Network supports this position in respect of scope, standard, cost and time to complete, subject to the CA providing for specified variations and adjustment events as detailed by the QCA (see Section 5.2(e)).

Aurizon Network does not support this position in respect of capacity outcomes. Further details of Aurizon Network's position on capacity outcomes is set out in Section 5.2(k).

- c) *Project delivery should be addressed not under the PMA but under a CA, the template of which is a modified version of AS4902 that is part of the DD, and the RCA should take the form of the RCA that is part of the DD*

Aurizon Network supports this position, subject to three important qualifications about:

- (1) the payment terms;
- (2) the fit for purpose warranty; and
- (3) the availability of 'pricing information' under the CA to PUHs and Access Seekers,

as set out in the form of the CA that forms part of the DD.

(1) CA payment terms

Aurizon Network does not support the QCA's position that the contractor is to be paid on an 'in arrears' basis, and without a 'front end payment mechanism', such as a mobilisation payment or an advance payment¹⁹, because those payment terms would require Aurizon Network to provide the working capital required for the project delivery process.

Aurizon Network notes that it is not uncommon practice for design and construction contracts for large projects in the Australian infrastructure sector to adopt a 'front end payment mechanism' to keep the contractor approximately 'cashflow neutral' on a prospective basis over the construction period.

Aurizon Network notes that the proposed insertion of a 'front end payment mechanism' addresses one financial consequence of SUFA for Aurizon Network, namely the contractor's need for working capital. The financial security provided to the contractor under the CA addresses another financial consequence of SUFA for Aurizon Network, namely its credit exposure to the Trust. These two financial consequences are quite different in nature, and accordingly Aurizon Network considers that two separate contractual provisions, namely the 'front end payment mechanism' and the financial security, are required to address them.

¹⁹CA that forms part of the DD, clause 36

For the avoidance of doubt, the adoption of a 'front end payment mechanism' would not result in Aurizon Network having a 'double dip' for the same financial consequence of SUFA. The amount of financial security needed by the contractor under the CA would, though, be lower where there is a 'front end payment mechanism' than would otherwise be the case.

Aurizon Network accordingly proposes the adoption of CA payment terms so that an advance payment is paid shortly after the CA becomes unconditional, with the balance of payments under the CA being made on an 'in arrears basis'.

Aurizon Network also proposes that the principle of the CA being approximately 'cashflow neutral' on a prospective basis should be reflected in any access undertaking dispute resolution procedures that govern the setting of the CA's commercial terms where Aurizon Network and Access Seekers do not reach agreement on them.

(2) Fit for purpose warranty in respect of scope imposed on Aurizon Network

Aurizon Network does not support the QCA's position that it should provide a warranty in respect of scope that is imposed upon Aurizon Network under the Expansion Process²⁰, as distinct from scope that Aurizon Network proposes or agrees to during its negotiations with Access Seekers.

The CA requires Aurizon Network as the contractor to provide a fit for purpose warranty in respect of all scope delivered by Aurizon Network under the CA.

Aurizon Network is prepared to provide such a warranty for all CA scope that Aurizon Network has proposed or otherwise agreed during the development, in accordance with the Expansion Process, of project specific SUFA document schedules.

If and to the extent that Aurizon Network is compelled to adopt scope under a dispute resolution process and that 'imposed scope' is, in Aurizon Network's opinion, not fit for purpose, Aurizon Network considers that the fit for purpose warranty provided by Aurizon Network should expressly exclude that imposed scope.

The imposition of a fit for purpose warranty in respect of imposed scope considered not fit for purpose by Aurizon Network could give rise to reputational and public interest issues. Aurizon Network considers that it would be subject to reputational risk should it knowingly make a false, misleading and/or deceptive warranty. Also, Aurizon Network does not consider that it is in the public interest for the QCA to be able to compel Aurizon Network to make a false, misleading and/or deceptive warranty.

Aurizon Network proposes that the fit for purpose warranty in the CA should expressly exclude any 'imposed scope'.

(3) Availability of 'pricing information' under the CA to PUHs and Access Seekers

Aurizon Network does not support the QCA's position that the Trustee may disclose 'pricing information' to PUHs or Access Seekers where it is reasonable to do so²¹.

'Pricing information' is commercially sensitive pricing or cost information in respect of

²⁰CA that forms part of the DD, clause 2.2(a)(iv)(A)

²¹CA that forms part of the DD, clause 8.7(b)(ii)

Aurizon Network itself and its CA sub-contractors or suppliers. The QCA has stated that the CA is based on the principle that SUFA is a financing tool. Given this principle, it is not apparent why investors in the financing tool, and customers of capacity created by that financing tool, would need to have access to commercially sensitive construction contract information

The 'pricing information' will be made available to the Independent Certifier, the Trustee and the QCA, which are the parties that have a 'need to know' for the purpose of a SUFA transaction. Broader dissemination of such information is significantly out of line with normal practice in the Australian construction sector.

The availability of commercially sensitive contract information proposed by the QCA in the CA could, given the potential number of PUHs and Access Seekers, result in this information becoming widely known by competing players in the Australian market for project delivery services and supplies.

For construction contracts between private sector principals and contractors this sort of information is almost never available to other parties. Also commercially sensitive contract information is customarily withheld from any public disclosure of construction contracts between public sector principals and contractors.

The PUHs and Access Seekers are likely to include many potential customers of design, construction and supply services of Aurizon Network, its sub-contractors and suppliers.

Aurizon Network, its sub-contractors and suppliers are active players in the Queensland market for construction services and supplies for projects unrelated to SUFA and outside the regulatory scope of the QCA.

Accordingly the availability of 'pricing information' to PUHs and Access Seekers may prejudice the ability of Aurizon Network, its sub-contractors and suppliers to price their services to those PUHs and Access Seekers in respect of other business opportunities (unrelated to SUFA). Such an outcome would be prejudicial to Aurizon Network's legitimate business interests in being able to provide project delivery services to principals on non-SUFA assignments outside the regulatory scope of the QCA, as those principals would have detailed knowledge of Aurizon Network's pricing and costing practices.

(d) *The CA should adopt a lump-sum price for the delivery of a set of commitments in relation to scope, standard and time-to-complete*

Aurizon Network supports this position.

(e) *The CA should provide for specified variations and adjustment events as detailed by the QCA*

Aurizon Network supports this position.

(f) *The Independent Certifier under the CA should undertake many, but not all, of the functions of the superintendent under the pro forma construction contract*

Aurizon Network supports this position.

(g) *A liquidated damages regime should apply in respect of delay in reaching practical completion by the date for practical completion*

Aurizon Network supports this position, subject to the liquidated damages rates and caps

being set in accordance with construction industry market norms.

By way of background, in its response to the Position Paper Aurizon Network stated that:

*'the template construction contract should be consistent with normal contracting practice for private sector principals undertaking comparable projects. When the template is converted into a construction contract for a particular SUFA project, that contract's risk/reward profile should reflect industry-standard risks and rewards for similar projects.'*²²

Aurizon Network continues to hold the view that the CA for each SUFA transaction should be priced in line with construction industry norms as the time of entry of that CA, and believes that this 'consistent with market practice' principle should be incorporated into the Expansion Process appropriately to govern the formulation of the CA for each SUFA transaction.

Aurizon Network considers that this principle should also apply to the formulation of LD rates and caps. The DD states that LD rates are to be *'based on the parties' genuine pre-estimate of the damages that would be incurred'* by PUHs and Access Seekers²³.

In this regard Aurizon Network notes that it is common practice for a principal of a major infrastructure contract to set daily LD rates at levels that may be lower than the principal's pre-estimated daily loss in the event of delayed completion. In developing a suitable LD regime, a principal needs to strike a suitable balance within a range bounded

- at the upper end by the full amount of pre-estimated loss, and
- at the lower end by an LD regime that results in a minimal risk allowance by the contractor in its pricing proposal to the principal.

Principals have several reasons for setting LDs on this balanced basis, rather than automatically adopting a LD regime that imposes on the contractor the full amount of pre-estimated loss. Firstly, doing so results in lower risk allowances being made by the contractor in pricing its contract, and therefore the principal has the benefit of a lower construction contract price than otherwise. Secondly, a contractor may do everything practicable to mitigate delay when it faces an LD rate of \$X,000/day, so there is minimal incremental value to the principal in adopting an LD rate of \$X0,000/day. Thirdly, a high LD rate may result in the LD cap being reached before completion has been achieved, and thereafter the contractor would have a reduced financial incentive under the construction contract to mitigate delay.

- (h) ***The independent certifier should notify Aurizon Network of non-compliances with the CA and Aurizon Network must record these defects on a register and rectify them at its cost***

Aurizon Network supports this position.

- (i) ***The pro forma construction contract should not define the level of scope specificity***

Aurizon Network supports this position.

Aurizon Network notes that Australian Standard template AS4902-2000-General

²²Aurizon Network's 2 July 2014 response to the Position Paper, section 4.2(a), Table 1, page 10

²³DD, section 5.4.3, Liquidated damages, page 35

Conditions of Contract for Design and Construction, which is the form of construction contract adopted as the base document for the CA, is premised on the contractor having design responsibilities, and full design not being in place as at execution.

- (j) ***Issues regarding the development of an expansion process that ensures SUFA is workable, bankable and credible will be developed as part of the 2014 DAU***

Aurizon Network supports this position.

- (k) ***Capacity guarantees and shortfalls are proposed to be addressed as set out in section 5.4.5 of the DD***

As stated in Section 3.2, Aurizon Network will respond in detail to the QCA's development of capacity guarantees and shortfalls as part of the 2014 DAU process.

However Aurizon Network acknowledges that the QCA has set out in the DD the framework of its approach to capacity, and requested comments as to whether it is worth pursuing. Consequently Aurizon Network provides preliminary and partial comments on:

- (1) capacity guarantees and shortfalls; and
- (2) scope choice and certainty over capacity outcomes.

(1) Capacity guarantees and shortfalls

Aurizon Network queries why the QCA has determined that a capacity guarantee is required to be adopted for SUFA projects, given the QCA's view that the primary objective of SUFA is to be a financing tool²⁴.

In its 2014 report to the QCA, Grant Samuel states that Access Seekers have expectations about capacity outcomes and the remedy of capacity shortfalls, whereas third-party funders (whether equity or debt) will have a different perspective. The third-party funders' primary concern, in Grant Samuel's view, will be that capital expenditure

- is included in the RAB and therefore results in the earning of regulated returns; and
- remains within reasonable limits (i.e. the size of the third-party funding requirement does not change materially)²⁵.

Capacity outcomes are not relevant to either of these concerns.

Investors in a SUFA project will receive the same return from their investment whether or not the expected capacity is delivered, since their return is dependent on the amount of RAB inclusion, which will not be affected by capacity outcomes. The introduction of a capacity guarantee is therefore not aligned with the primary objective of SUFA.

Aurizon Network notes the QCA's observation in the DD that Grant Samuel's advice has highlighted that:

*“the more certainty there is surrounding construction and **capacity delivered**, the more attractive SUFA will become to **third party financiers**”²⁶ (emphasis added).*

²⁴DD, section 5, introductory text, page 23

²⁵Grant Samuel discussion paper for the QCA, 4 March 2014, section 3.1, principle (v), pages 3 - 4

²⁶DD, section 5, introductory text, page 23

Since the capacity outcome is unrelated to investment return, it is unclear why a rational third party financier would take this view.

Aurizon Network would welcome an opportunity to gain a deeper understanding of the QCA's thinking as to:

- why greater certainty over capacity outcomes would make SUFA more attractive to third party financiers; and
- how a capacity guarantee is consistent with the primary objective of SUFA.

Aurizon Network notes that the capacity treatment would impose risk on Aurizon Network, as it would be required to fund capacity shortfalls and/or pay an ongoing shortfall rebate to Access Seekers affected by the shortfall. Aurizon Network is not yet clear how it is proposed that Aurizon Network would be provided with an appropriate reward for the assumption of this risk. Pricing of capacity shortfall risk falls outside the scope of the CA, since it expressly excludes a capacity guarantee.

Fundamentally, and irrespective of whatever capacity risk pricing mechanism may be proposed, Aurizon Network does not volunteer to take capacity risk as proposed by the QCA. On a project-by-project basis Aurizon Network is prepared to negotiate with Access Seekers over the transfer of capacity risk, and, where mutually acceptable risk and reward terms are agreed on a commercial basis, Aurizon Network is prepared to accept capacity risk.

(2) Scope choice & certainty over capacity outcomes

Section 5.4.5 of the DD includes a proposal for Access Seekers to have a choice of several infrastructure scopes with different outcomes of 'expected capacity' (to use the QCA's terminology). Aurizon Network believes such a proposal is achievable and would be prepared to develop it into a detailed arrangement for inclusion in the Expansion Process should stakeholders support that inclusion. The following issues should be considered as a part of this development:

- (i) There will be additional time and cost required in conducting prefeasibility and feasibility studies to prepare the information required to facilitate this scope choice;
- (ii) The approach that a scope which is 90% likely to deliver 100Mtpa would be 100% likely to deliver 90Mtpa (as set out in the QCA's example²⁷) is oversimplified and not necessarily correct;
- (iii) Aurizon Network is prepared to deliver under the CA the scope chosen by Access Seekers, but does not volunteer to provide the capacity guarantee. The Access Seekers would be able to choose their preferred scope on the basis of the capacity analysis conducted during the prefeasibility and feasibility studies and their risk appetites;
- (iv) There will need to be a single scope choice by all Access Seekers participating in any expansion, even though they may have different risk appetites;

²⁷DD, section 5.4.5, Figure 5, page 41

- (v) Aurizon Network should not be contractually obliged at the time of project closure to deliver more access than the 'expected capacity' linked to the Access Seekers' scope choice. If the delivered scope turned out to provide greater capacity than the 'expected capacity', the difference should be offered in the first instance (i.e preferentially) to the Access Seekers on a pro rata basis up to the aggregate amount of 'desired capacity' (to use the QCA's terminology). Hence the aggregate contracted access capacity of Access Seekers once the delivered capacity is known should be the sum of:
- a. the aggregate 'expected capacity'; and
 - b. the amount, if any, by which actual capacity delivered exceeds the aggregate 'expected capacity',

but subject to a cap of the aggregate 'desired capacity'.

This approach is illustrated by the following example:

Capacity allocation approach

Assumptions:

- 3 Access Seekers:
 - Access Seeker A (ASA) is seeking 60 paths;
 - Access Seeker B (ASB) is seeking 40 paths; and
 - Access Seeker C (ASC) is seeking 100 paths
- Expansions are offered which are expected to deliver 200, 175 and 150 paths;
- The Access Seekers agree to contract for the expected 150 paths expansion

Hence the aggregate desired capacity is 200 paths, while the aggregate expected capacity is 150 paths.

The Access Agreements for each Access Seeker will be contracted as follows:

- ASA – 45 paths with preferential treatment for a further 15 paths;
- ASB – 30 paths with preferential treatment for a further 10 paths; and
- ASC – 75 paths with preferential treatment for a further 25 paths

Let's consider 2 scenarios. In *Scenario (1)* the expansion delivers 180 paths and in *Scenario (2)* the expansion delivers 210 paths:

Scenario (1):

At the time the expansion has been assessed and the delivered capacity is known, each Access Seeker would be preferentially (i.e. ahead of any other party seeking access) provided with additional paths and their contracted capacity increased as shown below:

- ASA – 54 paths with no further preferential treatment;

- ASB – 36 paths with no further preferential treatment; and
- ASC – 90 paths with no further preferential treatment.

To the extent they still seek further capacity that would be pursued through a further access request (and expansion if required).

Scenario (2):

At the time the expansion has been assessed and the delivered capacity is known, each Access Seeker would be preferentially (i.e. ahead of any other party seeking access) provided with additional paths and their contracted capacity increased as shown below:

- ASA – 60 paths with no further preferential treatment;
- ASB – 40 paths with no further preferential treatment; and
- ASC – 100 paths with no further preferential treatment.

The 10 additional paths would be treated as available capacity and allocated in accordance with the AU.

- (vi) To the extent the chosen scope does not deliver the aggregate 'desired capacity', the normal compression arrangements should apply. This should provide sufficient protection for the existing capacity holders and reduce the need for any baseline capacity test component in any preapproval process;
- (vii) Should Access Seekers wish to overcome this compression, the associated shortfall rectification project should be addressed as set out in Aurizon Network's proposed Expansion Process under the 2014 DAU; and
- (viii) As the Access Seekers are free to select their preferred scope and gain the benefit of a 'lean' scope option due to lower RAB inclusion and consequently lower access charges than would apply for an ample scope option, it is reasonable that the Access Seekers should fund any shortfall rectification project that they require should the 'lean' scope option deliver insufficient capacity.

(I) *Pre-approval is proposed to be addressed as set out in section 5.4.6 of the DD*

As stated in Section 3.2, Aurizon Network will respond in detail to the QCA's development of pre-approval as part of the 2014 DAU process.

However Aurizon Network acknowledges that the QCA has set out in the DD the framework of its approach to pre-approval, and requested stakeholder comments. Consequently Aurizon Network provides preliminary and partial comments on:

- (1) the need for a capacity commitment;
- (2) independent engineer endorsement;
- (3) confirmation of capacity impact; and
- (4) contingency fund.

(1) *The need for a capacity commitment*

Aurizon Network disagrees with the QCA's view that '*an up-front capacity commitment...is essential for the QCA to be able to commit to*' pre-approval²⁸. A capacity guarantee would provide comfort that the scope and standard chosen is sufficient to deliver capacity (i.e. the scope is not inadequate).

Pre-approval is testing the opposite concern, namely that the scope and standard is prudent and not greater than what is required (i.e. the scope is not excessive).

The inclusion of a capacity guarantee would make pre-approval harder, not easier, to achieve as the pre-approval would need to ensure the scope included as a result of the capacity guarantee is prudent in the light of that guarantee. The inclusion of a capacity guarantee in a SUFA transaction, and substantial financial consequences for the capacity guarantor should the guaranteed capacity not be delivered, should be considered in determining whether the project scope is prudent. Aurizon Network expects that this determination would support the inclusion of more scope than would apply for the same project in the absence of a capacity guarantee.

(2) Independent engineer endorsement

Aurizon Network agrees with the clarification that the independent engineer's endorsement of the Trust's capital expenditure entailed by the proposed CA should not automatically result in pre-approval of that expenditure²⁹. Aurizon Network also agrees that RAB inclusion is a matter for the QCA to decide on the basis of the independent engineer's recommendation³⁰.

However it is unclear what would happen if the QCA chose not to pre-approve the Trust's proposed capital expenditure entailed by the proposed CA after that proposed expenditure has been endorsed by the independent engineer. In this situation all SUFA parties including the independent engineer would be aligned in agreeing the prudence of the proposed project and the adequacy of the scope, and (by assumption) the QCA would not pre-approve all of the Trust's capital expenditure entailed by the proposed CA. The two alternative courses of action in this situation would be:

- (i) for the project to proceed with the chosen scope with partial (or no) pre-approval of the capital expenditure entailed by the proposed CA, an outcome that would not be attractive to potential PUHs; or
- (ii) for the project to go ahead with a lesser scope. This would result in delays in renegotiating the SUFA CA scope and obtaining pre-approval of the capital expenditure entailed by the lesser scope. Access Seekers would be exposed to compression risks due to insufficient scope.

(3) Confirmation of capacity impact

Aurizon Network believes there is no reason for it to provide further commitment, confirmation or evidence around capacity impact than what is currently included³¹. The proposed Expansion Process for the 2014 DAU will require Aurizon Network to provide extensive project development information, including capacity assessments, to Access Seekers under the prefeasibility and feasibility studies. The 2010 AU currently includes,

²⁸DD, section 5.4.6, Pre-approval submissions, page 43

²⁹DD, section 5.4.6, Inclusion of capital costs into the RAB, page 44

³⁰DD, section 5.4.6, Inclusion of capital costs into the RAB, page 44

³¹DD, section 5.4.6, System test, page 46

and the 2014 DAU is proposed to include, a compression mechanism in respect of expansion access customers should the incremental capacity required from an expansion project not be delivered.

The work currently being undertaken in the 2014 DAU process is likely to provide greater certainty around socialisation. Where a project is projected to result in an aggregate tariff for the affected coal system being

- reduced, a socialised tariff is expected to apply;
- increased by up to a defined margin, a socialised tariff is also expected to apply; and
- increased by at least that defined margin, an unsocialised tariff is expected to apply to the expansion's access contracts for up to 10 years.

The tariff test proposed by the QCA in respect of SUFA projects should be considered in the light of this proposed tariff socialisation mechanism in respect of all expansion projects.

If the QCA believes the arrangements set out above are inadequate, Aurizon Network does not object to a further test that is appropriate to address the inadequacy being included as a part of the QCA-proposed pre-approval process.

(4) Contingency fund

Aurizon Network notes that the amount payable under the CA that forms part of the DD is governed by its contractual terms, which make no reference to the size of the contingency fund³². The amount payable under the CA should, as is standard for design and construction contracts, be the sum of the lump sum price and amounts determined under the CA in respect of adjustment events and variations.

5.3 Summary

QCA Position		Aurizon Network Response
a	The construction process should be based on the principles that SUFA is a financing tool and Aurizon Network should control that process	Aurizon Network supports this position
b	As a consequence of these principles, Aurizon Network should provide up-front commitments with respect to scope, standard, cost, time to complete and capacity outcomes	Aurizon Network supports this position in respect of scope, standard, cost and time to complete, and does not support it in respect of capacity outcomes
c	Project delivery should be addressed not under the PMA but under the CA and the RCA in the forms that are part of the DD	Aurizon Network supports this position, subject to three CA qualifications
d	The CA should adopt a lump-sum price for the delivery of commitments in relation to scope, standard and time-to-complete	Aurizon Network supports this position
e	The CA should provide for specified	Aurizon Network supports this position

³²DD, section 5.4.6, Treatment of contingency funding for adjustment and variation events, pages 44 - 45

QCA Position		Aurizon Network Response
	variations and adjustment events as detailed by the QCA	
f	The Independent Certifier under the CA should undertake many, but not all, of the functions of the superintendent under the pro forma construction contract	Aurizon Network supports this position
g	A liquidated damages regime should apply in respect of delay in reaching practical completion by the date for practical completion	Aurizon Network supports this position, subject to the liquidated damages rates and caps being set in accordance with construction industry market norms
h	The independent certifier should notify Aurizon Network of non-compliances with the CA and Aurizon Network must record these defects on a register and rectify them at its cost	Aurizon Network supports this position
i	The pro forma construction contract should not define the level of scope specificity	Aurizon Network supports this position
j	Issues regarding the development of an expansion process that ensures SUFA is workable, bankable and credible will be developed as part of the 2014 DAU	Aurizon Network supports this position
k	Capacity guarantees and shortfalls are proposed to be addressed as set out in section 5.4.5 of the DD	Aurizon Network will provide a full response as part of the 2014 DAU process, and has provided some preliminary comments
l	Pre-approval is proposed to be addressed as set out in section 5.4.6 of the DD	Aurizon Network will provide a full response as part of the 2014 DAU process, and has provided some preliminary comments

6 Security and Financeability

6.1 The QCA's position

The QCA has stated that:

- a) The 2013 SUFA DAAU documents should be amended to include the Specific Security Agreement to allow for security to be taken over the cash flows³³;
- b) The Specific Security Agreement acceptable to it is the form included in the DD³⁴;
- c) The 2013 SUFA DAAU EISL should be amended to address three specified direction to pay matters³⁵;
- d) The direction to pay arrangements acceptable to the QCA are included in the SUFA documents that form part of the DD³⁶;
- e) The Trustee's obligation to withhold distributions if so required by the ordinary unit holder should be removed from the 2013 SUFA DAAU documents³⁷;
- f) The rent adjustment mechanism is an acceptable set-off arrangement in relation to rental streams³⁸;
- g) Set-off for immaterial non-rental amounts should be excluded from the SUFA documents³⁹;
- h) The EISL should be amended so that there is no set-off for non-rent material liabilities, with PUHs responsible for 'funding the SUFA infrastructure's share of any material liability, such as a tax liability'⁴⁰; and
- i) The EISL should be amended to place an obligation on Aurizon Network to seek a change to the regulatory tariff to account for the amount of 'liability attributable to the SUFA infrastructure'⁴¹.

6.2 Aurizon Network's response

- a) *The 2013 SUFA DAAU documents should be amended to include the Specific Security Agreement to allow for security to be taken over the cash flows*

Aurizon Network supports this position.

- b) *The Specific Security Agreement acceptable to it is the form of that agreement included in the DD*

Aurizon Network does not support this position.

The inclusion of the SSA as a SUFA document was proposed by the QCA to address the

³³DD, section 6.4.1, item 6.1 in box, page 51

³⁴DD, section 6.4.1, item 6.2 in box, page 51

³⁵DD, section 6.4.2, item 6.3 in box, page 52

³⁶DD, section 6.4.2, item 6.4 in box, page 52

³⁷DD, section 6.4.3, item 6.5 in box, page 52

³⁸DD, section 6.4.4, item 6.6 in box, page 55

³⁹DD, section 6.4.4, item 6.7 in box, page 55

⁴⁰DD, section 6.4.4, item 6.8 in box, page 57

⁴¹DD, section 6.4.4, item 6.9 in box, page 57

concern that the direction to pay mechanism included in the EISL may not be effective in the event of Aurizon Network's insolvency.

Aurizon Network agreed to the inclusion of a SSA, and continues to support its inclusion, on the basis that:

- the security is limited to the additional access charge revenues due to the RAB value of the Extension Infrastructure (i.e. the Direction to Pay Amounts); and
- the security does not give rise to any other detrimental impacts for Aurizon Network.

Aurizon Network and the QCA have liaised on the development of the SSA and Aurizon Network's requirements have been met with the exception of the two matters below.

(1) Definition of event of default

Earlier drafts of the SSA included a definition of event of default which was limited to an Aurizon Network insolvency event, which was consistent with the original proposal for the SSA's inclusion in the SUFA documentation suite. The version of the SSA that forms part of the DD has a much wider event of default definition.

Given the purpose of the SSA is to address security in the event of Aurizon Network insolvency, the event of default definition should not be broadened.

Under the SUFA arrangements the party(ies) raising debt are the Trust or the PUHs, and Aurizon Network is only a contractual service provider and lessee. There should be no requirement or expectation for the SSA to contain provisions which would normally be seen in a security agreement that governs the party raising debt finance.

The SSA should be in a form that does not:

- adversely affect Aurizon Network's cost or ability to raise debt; or
- increase risks associated with Aurizon Network's debt raising.

It is standard practice for debt facilities of parties such as Aurizon Network to contain 'cross default' clauses that may result in default under one financing arrangement constituting a default under other financing arrangements. Hence any broadening of the event of default definition in the SSA has the potential to impact adversely Aurizon Network's wider financing arrangements, even though Aurizon Network is not the party raising debt finance for a SUFA transaction.

Aurizon Network is willing to accept an event of default definition in the SSA that is limited to Aurizon Network's insolvency. The definition as currently proposed by the QCA is unreasonable and would result in Aurizon Network bearing unacceptable risks.

(2) Acceleration concept

The SSA that forms part of the DD includes positions (in clauses 6.1(a) and 8.4(c)) which could result in Aurizon Network being obliged to pay all future rent (i.e. for future years) upon an event of default. This is contrary to the purpose of the SSA, which is to provide a back up to the direction to pay mechanism to secure the obligation to pay rent **as and when it falls due**.

There has been no justification provided for the proposed acceleration of rent payments, and no discussion of this concept in the DD. The QCA should modify the SSA's drafting to remove the acceleration concept.

- c) ***The 2013 SUFA DAAU EISL should be amended to address three specified direction to pay matters***

Aurizon Network supports this position.

- d) ***The direction to pay arrangements acceptable to the QCA is included in the SUFA documents that form part of the DD***

Aurizon Network supports this position.

- e) ***The Trustee's obligation to withhold distributions if so required by the ordinary unit holder should be removed from the 2013 SUFA DAAU documents***

Aurizon Network supports this position.

- f) ***The rent adjustment mechanism is an acceptable set-off arrangement in relation to rental streams***

Aurizon Network supports this position.

- g) ***Set-off for immaterial non-rental amounts should be excluded from the SUFA documents***

Aurizon Network does not support this position.

During the operational phase of a SUFA project, Aurizon Network has credit exposure to the Trust, which is an entity without any financial substance, and the proposed set-off mechanism is the only form of credit support available to Aurizon Network.

There are various Trust liabilities that Aurizon Network considers should fall within the scope of the set-off mechanism that are not covered under the QCA's proposed documentation. These include:

- interest payable under EISL clause 3.7(e)(ii); and
- correction of errors in accordance with EISL clause 3.7(h)(ii).

Aurizon Network considers that it should have the benefit of a suitable credit support mechanism in respect of each and every liability of the Trust to Aurizon Network. This is particularly true as Aurizon Network's counterparty is a party that limits liability to the assets of the Trust, which will be modest as the Trust will distribute all of its net revenue each month.

Aurizon Network continues to consider that an EISL set-off arrangement between the Trustee and Aurizon Network in respect of all EISL amounts represents a practical credit

support mechanism without any ongoing leakage or imposition of additional cost on the Trustee (as would result from, for example, the provision of bank guarantees to Aurizon Network). The set-off mechanism proposed by Aurizon Network would result in the set-off from Trust rent payments only applying to amounts which the Trust owes to Aurizon Network and to which the Trust has no economic entitlement. Accordingly the proposed set-off mechanism should be in a form that can be readily explained to any debt financier of the Trust and it should be reasonably acceptable to them.

In explaining to its debt financiers why it is reasonable to allow a SSA to operate over some of its access revenues, Aurizon Network will justify the arrangement on the basis that the SSA relates to cash to which Aurizon Network has no economic entitlement. Aurizon Network considers that if it is required by the SUFA template to make this justification to its debt financiers, each Trust should be prepared to make an analogous justification of the set-off mechanism to its debt financiers, as that mechanism would permit Aurizon Network to receive cash to which it has an economic entitlement.

Aurizon Network would be prepared to consider the adoption of any alternative effective credit support mechanism for the Trust's financial obligations to Aurizon Network. Aurizon Network does not support any arrangement whereby it does not have credit support of all liabilities of the Trustee to it under the EISL.

- h) The EISL should be amended so that there is no set-off for non-rent material liabilities, with PUHs responsible for 'funding the SUFA infrastructure's share of any material liability, such as a tax liability'***

Aurizon Network does not support this position.

Aurizon Network does not consider that it should be required to provide as part of a SUFA transaction a large, uncapped, long-term and uncompensated underwriting of the 'material liability' funding risk of a SUFA transaction without a full set-off. There is no reasonable basis for the allocation of this funding risk, which arises from a SUFA transaction, to Aurizon Network. If a Trust wishes to arrange 'Trust-level' debt financing, it should adopt

- a capital structure (i.e. a suitable balance of equity and debt); and
- debt financing terms

that are consistent with Aurizon Network being able to protect itself from defaults by the tax indemnifying parties by set-off against rent payable to the Trust.

The QCA states that PUHs

'...will be responsible for funding [their share of material liabilities] as the Trust does not have assets or sufficient cash flow to finance this type of unplanned expense'⁴².

However the PUHs also may not have the assets or cashflow to finance such expense. The SUFA documents that form part of the DD place no restriction on the creditworthiness of a PUH throughout the SUFA lifecycle, although PUHs that do not meet a credit rating threshold are required (during the construction period only) to provide credit support of their funding obligations. Aurizon Network expects that some, if not all, PUHs following the completion of the project delivery process will be holding entities with no other business

⁴²DD, section 6.4.4, Set-off for non-rental material amounts, page 56

activities or interests. The holding of project interests in such holding entities without any financial substance is a common structuring practice, particularly where there are financial obligations attached to the holding of a project interest.

The financial structuring proposed by the QCA would severely impair the effectiveness of the PUHs' tax indemnities as a mitigant of Aurizon's residual tax risk. This is because any PUH could either

- initially hold its PUs in; or
- subsequently transfer its PUs to

an entity in that PUH's corporate group that has only nominal capital. Such an entity would not be financially capable of meeting its tax indemnity obligation and would not pay the amount due under its tax indemnity. Aurizon Network would therefore ultimately bear part or all of the economic burden of any realised residual tax risk (to the extent that it relates to that PUH), even though it would still be obliged to pay rent without set-off to the Trust to the benefit of PUHs, including the defaulting PUH.

In the interests of facilitating SUFA, Aurizon Network has already indicated its preparedness to fund its tax payments to taxation authorities without reliance on any third party credit support (such as a bank guarantee) of the obligations of its SUFA counterparties (each of which potentially has no financial substance) to reimburse those payments. However, Aurizon Network's willingness to do so is contingent on a full set-off arrangement being in place, so that Aurizon Network can recover the amounts due to it by set-off against EISL rental in the event of any PUH defaulting on its tax indemnity payment obligation. It is not in Aurizon Network's legitimate business interests to underwrite the 'material liability' funding risk without a full set-off.

- i) ***The EISL should be amended to place an obligation on Aurizon Network to seek a change to the regulatory tariff to account for the amount of 'liability attributable to the SUFA infrastructure'***

Aurizon Network supports this position on the condition that this regulatory obligation is framed in terms of RAB inclusion, rather than regulatory tariff change. Aurizon Network considers that RAB inclusion and the associated obligation to pay rent are, unlike the determination of the reference tariff, of fundamental importance to PUHs. This reframing would align this regulatory obligation with the regulatory obligation for the inclusion of the project's construction-related costs (see clause 3.1 of the EPA that forms part of the DD).

The issues of RAB inclusion and change in regulatory tariff are analytically separate. For example, an access holder not involved with a SUFA transaction may have no concerns about RAB inclusion of tax indemnity amounts but may consider that the tariff implications of that RAB inclusion should be borne solely by the Access Seekers for that transaction. Also Aurizon Network does not consider that it should be required to assume this further regulatory obligation for RAB inclusion unless and to the extent that it has received the tax indemnity payments due to it.

Aurizon Network is also unclear how the tax indemnity payments

'...would then be refunded back through time to preference unit holders as increased

rent⁴³.

Aurizon Network is only liable to pay rent to the Trustee, not the PUHs. This is an important difference for the Trust, but not Aurizon Network. A PUH that fails to make its tax indemnity payment would, in the absence of a suitable commercial mechanism, be entitled to receive its share of increased rents as a result of other PUHs making such tax indemnity payments. However, if Aurizon Network's position on set-off in Section 6.2(h) is accepted, then any default by a PUH in meeting its tax indemnity payment would be remedied over a period of time by the set-off arrangements.

For the additional RAB inclusion mechanism to be effective the provisions of clause 7.7 of the EISL would need to reflect that the payments by the PUHs to Aurizon Network would be deemed to constitute additional costs that relate to the Extension Infrastructure. These additional costs should be allocated by pro-rating across the then RAB asset values for those assets. The requested RAB inclusion, if approved by the QCA, would then increase the rent paid to the Trust in accordance with the formula in Schedule 2 of the EISL. PUHs would benefit from receiving higher distributions from the Trust as a result of its increased rent receipts.

6.3 Summary

	QCA Position	Aurizon Network Response
a	The 2013 SUFA DAAU documents should be amended to include the Specific Security Agreement to allow for security to be taken over the cash flows	Aurizon Network supports this position
b	The Specific Security Agreement acceptable to it is the form of that agreement included in the DD	Aurizon Network does not support this position
c	The 2013 SUFA DAAU EISL should be amended to address three specified direction to pay matters	Aurizon Network supports this position
d	The direction to pay arrangements acceptable to the QCA is included in the SUFA documents that form part of the DD	Aurizon Network supports this position
e	The Trustee's obligation to withhold distributions if so required by the ordinary unit holder should be removed from the 2013 SUFA DAAU documents	Aurizon Network supports this position
f	The rent adjustment mechanism is an acceptable set-off arrangement in relation to rental streams	Aurizon Network supports this position
g	Set-off for immaterial non-rental amounts should be excluded from the SUFA documents	Aurizon Network does not support this position
h	The EISL should be amended so that there is no set-off for non-rent material liabilities, with PUHs responsible for 'funding the SUFA infrastructure's share of any material liability, such as a tax liability'	Aurizon Network does not support this position
i	The EISL should be amended to place an obligation on Aurizon Network to seek a change to the regulatory tariff to account for the amount of 'liability attributable to the SUFA infrastructure'	Aurizon Network conditionally supports this position

⁴³DD, section 6.4.4, Set-off for non-rental material amounts, 5th paragraph

7 Termination

7.1 The QCA's position

The QCA has stated that:

- a) The 2013 SUFA DAAU should reflect Aurizon Network's disclosure of the redacted Infrastructure Lease during negotiation of the SUFA agreements to relevant Access Seekers and financiers subject to their entry into a confidentiality agreement and the lessor's consent⁴⁴;
- b) The 2013 SUFA DAAU documents should extend the security (i.e. the SSA) to compensation cashflows and any detriment amounts due to the Trustee⁴⁵;
- c) Aurizon Network should have uncapped liability for actions in respect of the Infrastructure Lease⁴⁶ and the Trustee's liability is to be limited as detailed by the QCA⁴⁷; and
- d) 'for breach of the EISL or the EIHL (Infrastructure Lease remains), the party that caused the breach must pay the detriment amount to the other party', subject to two exceptions⁴⁸.

7.2 Aurizon Network's response

- a) *The 2013 SUFA DAAU should reflect Aurizon Network's provision of the redacted Infrastructure Lease during negotiation of the SUFA agreements subject to entry into a confidentiality agreement and the lessor's consent*

Aurizon Network supports this position for inclusion in the undertaking. As proposed in Section 3.2 this is proposed to be addressed under the 2014 DAU process.

- b) *The 2013 SUFA DAAU documents should extend the security (ie the SSA) to compensation cashflows and any detriment amounts due to the Trustee*

Aurizon Network supports this position.

- c) *Aurizon Network should have uncapped liability for actions in respect of the Infrastructure Lease and the Trustee's liability is to be limited as detailed by the QCA*

Aurizon Network does not support this position.

Aurizon Network does not volunteer to provide any underwriting of the financial returns achieved by a Trust, or have an uncapped liability to the Trustee, in the event of termination of the Infrastructure Lease.

As stated in its response to the Position Paper, if Aurizon Network were to assume this obligation as proposed by the QCA, the Trust would face a lower risk profile on its investment than Aurizon Network would face on a comparable investment, even though

⁴⁴DD, section 7.4.1, item 7.1 in box, page 61

⁴⁵DD, section 7.4.2, item 7.2 in box, page 62

⁴⁶DD, section 7.4.4, item 7.3(a) in box, page 61

⁴⁷DD, section 7.4.4, item 7.3(b) in box, page 61

⁴⁸DD, section 7.4.4, item 7.3(c) in box, page 61

the two investments would earn the same regulated WACC. The Trust would gain the benefit of an advantage that is not available to Aurizon Network. This is demonstrated by the example below.

Equity Return Example:

Consider the comparison of Equity NPV with and without Aurizon Network uncapped liability. For the ease of this example both the Trust and Aurizon Network are funding equal values.

1. For both the Trust and Aurizon Network without Aurizon Network uncapped Liability:

$$\text{Equity NPV} = -\text{equity invested} + \left[\frac{CFe_1}{(1 + ROE)^1} + \frac{CFe_2}{(1 + ROE)^2} + \dots + \frac{CFe_n}{(1 + ROE)^n} + \frac{TV_n}{(1 + ROE)^n} \right]$$

Where:

<i>CFe</i>	means the equity cash flow in the relevant period;
<i>ROE</i>	means the return on equity (consistent with WACC derivation);
<i>TV</i>	means the Terminal Value (proceeds from sale); and
<i>n</i>	means the period in which the cashflow for lease termination is received

As both Aurizon Network and the Trust are funding regulated asset which earn a regulated WACC, their cash flows received each year will be equal. If the terminal value cash flow received equals RAB at that time, the equity NPV will be zero, consistent with QCA's "Zero NPV" principle. That is, both the Trust and Aurizon Network are earning the regulated equity return.

However, in the event that the terminal value is less than RAB, then both parties are having negative NPVs (i.e., equity return is lower than the allowed return specified in WACC). Nevertheless, both parties are taking the same risk and earning the same reward regardless of the terminal value. Neither party is disadvantaged in this case relative to the other.

2. (a) For the Trust with Aurizon Network uncapped Liability:

$$\text{Equity NPV} = -\text{equity invested} + \left[\frac{CFe_1}{(1 + ROE)^1} + \frac{CFe_2}{(1 + ROE)^2} + \dots + \frac{CFe_n}{(1 + ROE)^n} + \frac{TV_n + ANP}{(1 + ROE)^n} \right]$$

Where:

<i>CFe</i>	means the equity cash flow in the relevant period;
<i>ROE</i>	means the return on equity (consistent with WACC derivation);
<i>TV</i>	means the Terminal Value (proceeds from sale);
<i>n</i>	means the period in which the cashflow for lease termination is received; and
<i>ANP</i>	means the payment to the Trust from Aurizon Network

2. (b) For Aurizon Network with Aurizon Network uncapped Liability:

$$\text{Equity NPV} = -\text{equity invested} + \left[\frac{CF_{e1}}{(1 + ROE)^1} + \frac{CF_{e2}}{(1 + ROE)^2} + \dots + \frac{CF_{en}}{(1 + ROE)^n} + \frac{TV_n - ANP}{(1 + ROE)^n} \right]$$

Where:

<i>CF_e</i>	means the equity cash flow in the relevant period;
<i>ROE</i>	means the return on equity (consistent with WACC derivation);
<i>TV</i>	means the Terminal Value (proceeds from sale); and
<i>n</i>	means the period in which the cashflow for lease termination is received
<i>ANP</i>	means the payment to the Trust from Aurizon Network

In example 2, if the terminal value is the same as RAB at that time, then no payment is made to the Trust by Aurizon Network. In such case, QCA's "Zero NPV" is satisfied, and both parties are earning the regulated equity return.

However, in the event that terminal value is less than RAB at that time, it is proposed the Aurizon Network pays the Trust an amount equal to the difference between the terminal value and RAB. In this case, the Trust is guaranteed a terminal cash flow of RAB, and essentially a return which equals the regulated equity return (zero equity NPV). However, it is clear that the last cash flow received by Aurizon Network, net of the payment to the Trust, will be much less than RAB. As such, Aurizon Network's equity NPV will be less than zero, which means a return much lower than the regulated equity return.

Note - RAB is used for simplicity in this example. It should really refer to the expected value to the Trust of the transaction continuing rather than terminating – which is likely to be close to RAB but may differ from RAB.

To address this issue of lack of parity brought about by the requirement for Aurizon Network to make this payment, some cash flows must be received by Aurizon Network from the Trust to reward Aurizon Network for the risk being taken. This concept is similar to insurance, where the Trust pays Aurizon Network a premium (cash flows), in exchange of the guaranteed terminal cash flow. Without such compensation, the Trust clearly has an investment advantage over Aurizon Network.

Aurizon Network wishes to limit its liability to the Trustee in respect of the Infrastructure Lease's termination so that the Trustee is entitled only to its share of the disposal proceeds received from QTH under the IND following that termination. Aurizon Network notes that its uncapped liability for another party's investment loss would not arise in the absence of a SUFA transaction, and the inclusion of that uncapped liability in the SUFA template would increase Aurizon Network's risk profile against its will and without any compensation for assumption of that risk.

- d) ***'for breach of the EISL or the EIHL (infrastructure Lease remains), the party that caused the breach must pay the detriment amount to the other party', subject to two exceptions***

Aurizon Network supports this position, subject to clarification of the QCA's intent.

Aurizon Network supports the principle that, where the EIHL is terminated under clause 11.1, 11.4 or 11.5 of the EIHL and the Infrastructure Lease remains on foot,

- Aurizon Network should be liable to pay a detriment amount stream in respect of an 'Aurizon Network cause' termination of the EIHL (as provided in clause 3.5 of the EISL); and

- the Trustee should be liable to pay a detriment amount stream in respect of an ‘Trustee cause’ termination of the EIHL (as provided in clause 3.6 of the EISL).

Aurizon Network notes that the drafting of the EISL that forms part of the DD:

- is consistent with this principle; and
- provides that a detriment amount stream is only payable following EIHL **termination**, rather than **breach** of the EISL or the EIHL.

The first exception proposed by the QCA is that where no party is at fault, neither party receives a detriment amount. Aurizon Network does not consider that this exception is necessary – the identity of the payor of detriment amounts is Aurizon Network or the Trustee in respect of each applicable reason for the termination of the EIHL under clause 11.1, 11.4 or 11.5 of the EIHL.

The second exception is that where Aurizon Network does not take action and as a result the EIHL is terminated, Aurizon Network is liable for the detriment amount. Aurizon Network does not consider this exception is necessary, since failure to take action by Aurizon Network could give rise to an ‘Aurizon Network cause’ termination under clause 11.4 or 11.5 of the EIHL just as a positive action by Aurizon Network could do so.

Aurizon Network notes that neither of these exceptions has been addressed in the form of the EISL that is part of the DD.

7.3 Summary

	QCA Position	Aurizon Network Response
a	The redacted Infrastructure Lease should be disclosed during negotiation of the SUFA agreements subject to conditions	Aurizon Network supports this position
b	The security should apply to compensation cashflows and detriment amounts due to the Trustee	Aurizon Network supports this position
c	Aurizon Network should have uncapped liability for actions in respect of the Infrastructure Lease and the Trustee’s liability is to be limited as detailed by the QCA	Aurizon Network does not support this position
d	‘for breach of the EISL or the EIHL (Infrastructure Lease remains), the party that caused the breach must pay the detriment amount to the other party’, subject to two exceptions	Aurizon Network supports this position, subject to clarification of the QCA’s intent

8 Discrimination

8.1 The QCA's position

The QCA has stated:

- a) The potential for discrimination in respect of asset maintenance (is) to be considered as part of the broader condition based assessment approach under the 2014 DAU process⁴⁹;
- b) The 2013 SUFA DAAU should not place restrictions on who can participate in funding a SUFA arrangement⁵⁰; and
- c) Potential issues of cost-shifting and other discriminatory behaviour (are) to be considered as part of the 2014 DAU process⁵¹.

8.2 Aurizon Network's response

- a) *The potential for discrimination in respect of asset maintenance (is) to be considered as part of the broader condition based assessment approach under the 2014 DAU process*

Aurizon Network supports this position.

- b) *The 2013 SUFA DAAU should not place restrictions on who can participate in funding a SUFA arrangement*

Aurizon Network supports this position being included in the 2014 DAU process, subject to the following.

If full set-off, as discussed in Sections 6.2(g) and (h), is adopted, then Aurizon Network is willing to accept the QCA's position.

However, if full set-off is not adopted, Aurizon Network considers that the only acceptable means of mitigating its credit risk from a SUFA transaction is the adoption of a requirement that each PUH must at all times be creditworthy. In this regard Aurizon Network notes that the QCA's position is that each PUH should be creditworthy (see section 10.4 of the Position Paper, Eligibility to Fund and section 8.4.2 of the DD). Aurizon Network also notes that the QCA has made no changes to the SUFA documentation that forms part of the DD to give effect to its position on the need for PUH creditworthiness.

Aurizon Network is prepared to accept voluntarily the increased credit risk entailed by the absence of full set-off if all of the following requirements apply:

- each PUH must either hold an investment grade credit rating or have the benefit of an unconditional guarantee from a guarantor with that rating throughout the SUFA transaction;

⁴⁹DD, section 8.4.1, item 8.1 in box, page 69

⁵⁰DD, section 8.4.2, item 8.2 in box, page 69

⁵¹DD, section 8.4.3, item 8.3 in box, page 69

- if a PUH or, as applicable, its guarantor fails to hold that rating, the PUH must promptly obtain one or procure a replacement guarantee of all of that PUH's obligations from a guarantor with such a rating;
- failure by the PUH to obtain a suitable rating or procure the provision of a replacement guarantee within a specified (and short) timeframe should result in suspension of distributions to that PUH and the compulsory sale by the Trustee of all of the PUH's SUFA interests;
- only a PUH with an investment grade credit rating itself or with the support of an unconditional guarantee from a party with an investment grade credit rating would be eligible to be a buyer of the SUFA interests subject to the compulsory sale process; and
- Aurizon Network receives a suitable reward for assuming the increased credit risk.

c) *Potential issues of cost-shifting and other discriminatory behaviour (are) to be considered as part of the 2014 DAU process*

Aurizon Network supports this position.

8.3 Summary

QCA Position		Aurizon Network Response
a	Consideration for discrimination in respect of asset maintenance (is) to be considered as part of the 2014 DAU process	Aurizon Network supports this position.
b	The 2013 SUFA DAAU should not place restrictions on who can participate in funding a SUFA arrangement	Aurizon Network supports this position, subject to full set-off being adopted
c	Cost-shifting and other discriminatory behaviour (are) to be considered as part of the 2014 DAU process	Aurizon Network supports this position.

9 Preference Unit Transfers

9.1 The QCA's position

The QCA has stated that the 2013 SUFA DAAU SUHD should be amended so that:

- a) there is no requirement for stapling⁵²; and
- b) Aurizon Network will be permitted to bid for preference units but should not have a first right of refusal⁵³.

9.2 Aurizon Network's response

- a) *The 2013 SUFA DAAU SUHD should be amended so that there is no requirement for stapling*

Aurizon Network supports this position.

- b) *The 2013 SUFA DAAU SUHD should be amended so Aurizon Network will be permitted to bid for preference units but should not have a first right of refusal*

Aurizon Network supports this position.

9.3 Summary

QCA Position		Aurizon Network Response
a	Stapling is not required	Aurizon Network supports this position
b	Aurizon Network will be permitted to bid for preference units but should not have a first right of refusal	Aurizon Network supports this position

⁵²DD, section 9.4, item 9.1(a) in box, page 71

⁵³DD, section 9.4, item 9.1(b) in box, page 71

10 Third Party Finance

10.1 The QCA's position

The QCA has stated:

- a) The form of the template TD and the SUHD should be able to be amended to permit third-party finance by negotiation between the parties to a SUFA transaction⁵⁴;
- b) The form of the template TD and the SUHD should be able to be amended to permit third-party finance by binding dispute resolution should the negotiation prove unsuccessful⁵⁵;
- c) The 2013 SUFA DAAU arrangements should allow for third party financing⁵⁶; and
- d) A Financing Side Deed should be included as one of the SUFA documents⁵⁷.

10.2 Aurizon Network's response

- a) *The form of the template TD and the SUHD should be able to be amended to permit third-party finance by negotiation between the parties to a SUFA transaction*

Aurizon Network supports this position.

- b) *The form of the template TD and the SUHD should be able to be amended to permit third-party finance by binding dispute resolution should the negotiation prove unsuccessful*

Aurizon Network does not support this position.

Aurizon Network does not accept the concept that a SUFA template document can be modified for the purpose of a SUFA transaction (or otherwise) without its agreement. The purpose of a template document is to provide certainty to parties as to the rights and obligations of the parties to that document. The QCA's approach would provide counterparties with

- the template's risk profile as a floor; and
- the potential for a significant uncompensated transfer of risk to Aurizon Network on the basis of a favourable outcome to a dispute resolution process.

By contrast Aurizon Network would have no ability to re-open the terms of SUFA template documents as required to permit its own preferred business positions.

On a transaction specific basis Aurizon Network is, however, prepared to negotiate SUFA transaction documents, including the TD and the SUHD, that differ from the corresponding template documents.

Any such negotiations should be conducted on a commercial basis, and without reference to a binding dispute resolution process should agreement not be reached.

⁵⁴DD, section 10.4, page 74

⁵⁵DD, section 10.4, page 74

⁵⁶DD, section 10.4, item10.1 in box, page 75

⁵⁷DD, section 10.4, item10.1 in box, page 75

c) *The 2013 SUFA DAAU arrangements should allow for third party financing*

Aurizon Network supports this position being included under the 2014 DAU process, subject to a condition.

The condition is that any such financing is undertaken on the basis of either the SUFA template or a modified version of that template that is agreed between the parties to the SUFA transaction on a commercial basis, and without reference to a binding dispute resolution process.

This is consistent with the QCA's statement that

*'...should parties to the SUFA agreements choose to pursue debt financing through the Trust, the parties can agree the necessary amendments at that time.'*⁵⁸

d) *A Financing Side Deed should be included as one of the SUFA documents*

Aurizon Network supports this position.

10.3 Summary

	QCA Position	Aurizon Network Response
a	The form of the template TD and the SUHD should be able to be amended to permit third-party finance by negotiation	Aurizon Network supports this position
b	The form of the template TD and the SUHD should be able to be amended to permit third-party finance by binding dispute resolution	Aurizon Network does not support this position
c	The 2013 SUFA DAAU arrangements should allow for third party financing	Aurizon Network conditionally supports this position
d	A Financing Side Deed should be included as one of the SUFA documents	Aurizon Network supports this position

⁵⁸DD, section 11.4.2, pages 80 - 81

11 Taxation

11.1 The QCA's position

The QCA has stated:

- a) The effectiveness or otherwise of the SUFA documents to enable the Trust to claim tax depreciation must be tested with the ATO – through an ABA, and a PBR when an actual SUFA transaction arises⁵⁹;
- b) An appropriate form of statutory severance for the SUFA assets is still required⁶⁰;
- c) Aurizon Network, the QCA and interested parties (such as the QRC) (are) to work on a joint submission to the ATO for an ABA⁶¹;
- d) Efficiently incurred costs by Aurizon Network in seeking an ABA will be included in its operating costs⁶²;
- e) Each party to the SUFA agreements (is to) be responsible for pursuing a PBR for (its) respective tax position⁶³; and
- f) The need for a tax indemnity of Aurizon Network is queried⁶⁴.

11.2 Aurizon Network's response

- a) *The effectiveness or otherwise of the SUFA documents to enable the Trust to claim tax depreciation must be tested with the ATO – through an ABA, and a PBR when an actual SUFA transaction arises*

Aurizon Network supports this position.

- b) *An appropriate form of statutory severance for the SUFA assets is still required*

Aurizon Network supports this position.

- c) *Aurizon Network, the QCA and interested parties (such as the QRC) (are) to work on a joint submission to the ATO for an ABA*

Aurizon Network supports this position, subject to Aurizon Network not being required to share commercially sensitive information with the QCA or any interested party.

- d) *Efficiently incurred costs by Aurizon Network in seeking an ABA will be included in its operating costs*

Aurizon Network supports this position.

- e) *Each party to the SUFA agreements (is to) be responsible for pursuing a PBR for*

⁵⁹DD, section 11.4.1, item 11.1 in box, page 80

⁶⁰DD, section 11.4.3, item 11.2 in box, page 81

⁶¹DD, section 11.4.4, item 11.3(a) in box, page 82

⁶²DD, section 11.4.4, item 11.3(b) in box, page 82

⁶³DD, section 11.4.4, item 11.3(c) in box, page 82

⁶⁴DD, section 11.4.5, page 82

(its) respective tax position

Aurizon Network supports this position, subject to its efficiently incurred costs in pursuing its PBR being refunded by the Trust, but only to the extent that they are not separately refunded under a study funding agreement for the applicable project.

f) *The need for a tax indemnity of Aurizon Network is queried*

Aurizon Network considers the tax indemnity in the UHD that forms part of the DD is needed to address Aurizon Network's residual tax risks.

Aurizon Network acknowledges that a satisfactory PBR would substantially address Aurizon Network's significant income tax risks associated with the SUFA transaction.

However Aurizon Network considers it would bear residual tax risks on a SUFA transaction that cannot be mitigated by the PBR. For example, the PBR will

- only cover the Federal income tax matters which are specified in the PBR application, and will not cover other income tax risks;
- not cover any non-income tax risks (for example, duty, land tax etc);
- not cover other costs in relation to SUFA tax issues (for example, costs incurred by the indemnified parties in respect of a dispute with the ATO);
- be based on the tax law enacted at the time the PBR is sought. Accordingly, it is possible that a change in tax law could arise and have effect before Aurizon Network and the PUHs have an opportunity to amend the SUFA arrangements to ensure its continued tax effectiveness;
- only apply for a specific term which, based on current ATO practice, is likely to be materially shorter than the expected term of the SUFA transaction. After the PBR's specific term has expired, it would not afford Aurizon Network legal protection in respect of its tax affairs over the balance of the term of the SUFA transaction. Although Aurizon Network may be able to renew the PBR at the end of its initial term to extend the duration of this legal protection, Aurizon Network would face the risk that such a renewal is not achievable; and
- only apply where the facts and circumstances of the transaction are consistent with those outlined in the PBR application. Accordingly, the PBR would have no application if the Trustee or PUHs act inconsistently with the facts and circumstances outlined in the PBR application.

Although Aurizon Network acknowledges there is a low probability that any of the above tax risks would result in a tax loss, such a tax loss could be very large. Aurizon Network considers the tax indemnity is an important mechanism for ensuring Aurizon Network does not ultimately bear any tax risk in relation to any proposed SUFA transaction.

11.3 Summary

QCA Position		Aurizon Network Response
a	The effectiveness of the SUFA documents to enable the Trust to claim tax	Aurizon Network supports this position

QCA Position		Aurizon Network Response
	depreciation must be tested	
b	Statutory severance is required	Aurizon Network supports this position
c	Aurizon Network, the QCA and interested parties (are) to work on a joint submission for an ABA	Aurizon Network supports this position, subject to it not being required to share commercially sensitive information
d	Efficiently incurred costs by Aurizon Network in seeking an ABA will be included in its operating costs	Aurizon Network supports this position
e	Each party to the SUFA agreements (is to) seek its own PBR	Aurizon Network supports this position, subject to its efficiently incurred costs in obtaining its PBR being refunded by the Trust
f	Need for tax indemnity of Aurizon Network is queried	Aurizon Network considers a tax indemnity is needed to address its residual tax risks

12 2010 Access Undertaking Amendments

12.1 The QCA's position

The QCA has stated:

- a) Aurizon Network's obligation to fund is not a 2013 SUFA DAAU matter⁶⁵;
- b) Aurizon Network should submit a DAAU and related reference tariff at a time to be determined by the SUFA parties on a case-by-case basis⁶⁶;
- c) Capacity shortfalls are to be addressed as set out elsewhere in the DD⁶⁷;
- d) Potential PUHs should decide whether a project is too small for SUFA⁶⁸;
- e) The QCA should retain its power to develop its own SUFA and Investment Framework Amendments until there is a developed, workable and usable SUFA framework and it is effective in practice⁶⁹;
- f) The recovery of SUFA development costs should be considered if and when Aurizon Network seeks to recover them⁷⁰;
- g) If an Access Seeker and Aurizon Network are in dispute regarding the proposed terms of a user funding agreement, either party may pursue the dispute under UT3⁷¹;
- h) If an Access Seeker and Aurizon Network are in dispute regarding issues arising under an existing user funding agreement, either party may pursue the dispute under UT3⁷²;
- i) The QCA is open to discussing ways of improving the dispute resolution process⁷³;
- j) The QCA considers it prudent to focus on the Expansion Process under the 2014 DAU process⁷⁴; and
- k) The inclusion of a 'direction to pay' feature in the standard access agreement should be considered as part of the 2014 DAU process⁷⁵.

12.2 Aurizon Network's response

As Aurizon Network proposes in Section 3.2, AU changes to provide a comprehensive SUFA framework should be addressed as part of the 2014 DAU process.

- a) ***Aurizon Network's obligation to fund is not a 2013 SUFA DAAU matter***

Aurizon Network supports this position.

- b) ***Aurizon Network should submit a DAAU and related reference tariff at a time to be determined by the SUFA parties on a case-by-case basis***

⁶⁵DD, section 12.4.1, page 85

⁶⁶DD, section 12.4.2, page 85

⁶⁷DD, section 12.4.3, page 86

⁶⁸DD, section 12.4.4, page 86

⁶⁹DD, section 12.4.5, page 86

⁷⁰DD, section 12.4.6, page 86

⁷¹DD, section 12.4.7, page 86

⁷²DD, section 12.4.7, page 86

⁷³DD, section 12.4.7, page 86

⁷⁴DD, section 12.4.8, page 87

⁷⁵DD, section 12.4.9, page 87

Aurizon Network supports this position in respect of a DAAU, but not in respect of the related reference tariff.

In order to provide SUFA investors with greater certainty than is proposed by the QCA, Aurizon Network proposes that the SUFA template should specify a 'fallback' timeframe for making a RAB inclusion submission. This timeframe would be expressed in relation to the point in time at which the Trustee and/or Aurizon Network have

- certainty over the project's capital costs, and
- any other information required to submit a RAB inclusion submission.

That 'fallback' timeframe should apply for Aurizon Network's submission of the DAAU unless the Trustee and Aurizon Network agree a different timeframe, in which case that agreed timeframe should apply instead.

Aurizon Network considers that the submission of reference tariffs should not be addressed as part of the SUFA template documentation. This is because Aurizon Network considers that RAB inclusion and the associated obligation to pay rent are, unlike the determination of the reference tariff, of fundamental importance to PUHs.

c) *Capacity shortfalls are to be addressed as set out elsewhere in the DD*

Aurizon Network's position on capacity is set out in Section 5.2(k).

d) *Potential PUHs should decide whether a project is of a size suitable for SUFA*

Aurizon Network supports this position.

e) *The QCA should retain its power to develop its own SUFA and Investment Framework Amendments until there is a developed, workable and usable SUFA framework and it is effective in practice*

Aurizon Network does not support this position.

Aurizon Network does not consider it reasonable for the QCA to retain this power on an open-ended basis, given the magnitude of Aurizon Network's commitment to developing SUFA in recent years and the fact that it was a power voluntarily granted by Aurizon Network for the 2010 AU.

Aurizon Network considers that the QCA should retain its power to develop its own SUFA until its approval of a SUFA template, and not thereafter. The initial test of whether that SUFA template turns out to be effective in practice may not occur for some years, if ever, as a necessary, but not sufficient, condition of meeting that test is a SUFA transaction reaching financial closure and becoming conditional. Furthermore, there is scope for alternative views about what degree of effectiveness is necessary for the subjective 'effective in practice' test to be met.

Aurizon Network has already offered to commit to conduct a process to review the SUFA template following the execution of the first SUFA transaction. This offer was set out in section 8.9.9 of the form of the Expansion Process that is Appendix 1 of Aurizon Network's response to the Position Paper. Aurizon Network stands by this offer.

f) *The recovery of SUFA development costs should be considered if and when Aurizon Network seeks to recover them*

Aurizon Network supports this position.

As of January 2015, Aurizon Network has incurred over \$7 million of external costs since work commenced on SUFA's development in 2010. These costs relate to:

- the provision of legal, tax, financing and commercial advice to Aurizon Network by external advisers with expertise in their respective fields, and
- the provision of legal advice on SUFA to QTH by its legal adviser.

To date Aurizon Network has not sought to recover any of these external costs under UT3 or UT4 whether

- by means of any specific claim(s) for SUFA-related costs, or
- as part of Aurizon Network's cost base in its AU submissions to the QCA.

Aurizon Network intends at the appropriate time during the 2014 DAU process to make a submission to the QCA for recovery of these external costs as efficiently incurred costs in SUFA's development. Consistent with the QCA's proposal to allow the inclusion of Aurizon Network's efficiently incurred costs for obtaining an ABA as operating costs⁷⁶, Aurizon Network intends to seek recovery of these SUFA costs as operating costs.

Aurizon Network notes that it has also incurred two other categories of costs in respect of SUFA. One category comprises internal costs, i.e. the employment costs of Aurizon Network personnel who have worked on SUFA and the associated 'on-costs' for those personnel (e.g. IT and office space), to the extent that those costs have not already been recovered through reference tariffs. The other category is comprised of the payment by Aurizon Network in 2014 of \$500,000 to the QCA as partial reimbursement of the QCA's costs of working on SUFA.

Aurizon Network does not intend as part of the 2014 DAU process or otherwise to seek any recovery of either of these two cost categories. Aurizon Network considers that its willingness to bear these particular costs is a tangible and material demonstration of its commitment to SUFA's development.

g) *If an Access Seeker and Aurizon Network are in dispute regarding the proposed terms of a user funding agreement, either party may pursue the dispute under UT3*

Aurizon Network partially supports this position.

Aurizon Network does not accept the QCA's proposal to allow either party to dispute any of the terms of the approved SUFA template under UT3. The approved template will cease to be a "standard form user funding agreement" and an appropriate alternative for the funding of expansions to the network if all of its terms are open to alteration through a dispute resolution process.

Aurizon Network does support a party being able to pursue disputes about "project specific

⁷⁶DD, section 11.4.4, item 11.3(b) in box, page 82

matters” to be incorporated into the approved SUFA template documents to create transaction documents. Such project specific matters should be restricted to elements of the template documents which are left blank in the SUFA template for completion during the negotiation of the transaction documents. An example of a project specific matter is project scope.

In this regard Aurizon Network notes that any dispute should occur under the then applicable AU.

h) If an Access Seeker and Aurizon Network are in dispute regarding issues arising under an existing user funding agreement, either party may pursue the dispute under UT3

Aurizon Network does not support this position.

Aurizon Network considers that dispute resolution under user funding agreements following execution should be addressed under the applicable contractual dispute resolution mechanism rather than the applicable AU. Aurizon Network notes that this approach to dispute resolution in respect of existing user funding agreements has been adopted in the forms of the SUFA documents that form part of the DD.

i) The QCA is open to discussing ways of improving the dispute resolution process

Aurizon Network supports this position.

Aurizon Network proposes a change to the dispute resolution process in respect of the phase of the Expansion Process that relates to the development of proposed SUFA transaction documentation. The proposed change is that the party to be responsible for determining disputes would be an external independent expert, rather than the QCA. For example, if there is no agreement on the CA’s pricing, such an expert could determine the matter. This proposal is based on the premise that

- the Expansion Process would detail specific parameters to be applied by the expert (for example, in relation to CA pricing, one of the parameters should state that the pricing should be in accordance with market norms for comparable Australian infrastructure design and construction contracts in competitive settings); and
- the independent expert would owe a duty of care to the QCA, as well as the SUFA parties that engaged the expert.

For the avoidance of doubt, Aurizon Network considers that the QCA should be the party responsible for resolving disputes for the Expansion Process prior to the phase that relates to the development of proposed SUFA transaction documentation.

j) The QCA considers it prudent to focus on the Expansion Process under the 2014 DAU process

Aurizon Network supports this position.

k) The inclusion of a ‘direction to pay’ feature in the standard access agreement should be considered as part of the 2014 DAU process

Aurizon Network supports this position.

12.3 Summary

QCA Position		Aurizon Network Response
a	Aurizon Network's obligation to fund is not a 2013 SUFA DAAU matter	Aurizon Network supports this position
b	Aurizon Network should submit a DAAU and related reference tariff at a time to be determined	Aurizon Network partially supports this position
c	Capacity shortfalls are to be addressed as set out elsewhere in the DD	See Section 5.2(k)
d	Potential PUHs should decide whether a project is of a size suitable for SUFA	Aurizon Network supports this position
e	The QCA should retain its power to develop its own SUFA and Investment Framework Amendments	Aurizon Network does not support this position
f	The recovery of SUFA development costs should be considered if and when Aurizon Network seeks to recover them	Aurizon Network supports this position
g	If an Access Seeker and Aurizon Network are in dispute regarding the proposed terms of a user funding agreement, either party may pursue the dispute under UT3	Aurizon Network partially supports this position
h	If an Access Seeker and Aurizon Network are in dispute regarding issues arising under an existing user funding agreement, either party may pursue the dispute under UT3	Aurizon Network does not support this position
i	The QCA is open to discussing ways of improving the dispute resolution process	Aurizon Network supports this position
j	The QCA considers it prudent to focus on the expansion process under the 2014 DAU process	Aurizon Network supports this position
k	The inclusion of a 'direction to pay' feature in the standard access agreement should be considered as part of the 2014 DAU process	Aurizon Network supports this position

13 Liability

13.1 The QCA's position

The QCA has stated:

- a) its risk allocation approach⁷⁷;
- b) its treatment of limitation of liability⁷⁸;
- c) its treatment of consequential loss⁷⁹; and
- d) its view that OPRA should be excluded from the rent calculation methodology⁸⁰.

13.2 Aurizon Network's response

(a) QCA's risk allocation approach

Aurizon Network notes the risk allocation principles that have been adopted by the QCA, and makes the following observations on them:

- Aurizon Network considers that these principles should not apply to the CA, since the allocation of risk under the CA is to be consistent with construction industry norms;
- the general principle that *'the party that controls the risk should generally carry that risk'*⁸¹ is frequently adopted for the development of contractual arrangements within a commercial setting. However, SUFA is being developed within a regulatory setting. As set out in Section 3.1, Aurizon Network is prepared to accept risks arising from a SUFA transaction where it volunteers to do so, and not otherwise;
- this general principle, when used in commercial settings, has the implicit corollary that the risk-bearing party includes the pricing of that risk within its charges to its contractual counterparty(ies). There is no reference to risk pricing in section 13.4.1 of the DD or in other sections of the DD where the QCA considers that Aurizon Network should bear greater risk (eg a capacity guarantee or unlimited liability under the EISL). Aurizon Network does not understand this omission as the ability to accept risk is not a free resource, and it is standard business practice for commercial enterprises in a market economy to charge for the acceptance of risk; and
- Aurizon Network does not understand the justification for the QCA's view that *'it is not appropriate to limit liability where the risk is wholly within a party's capability to manage its exposure'*⁸². Substantially all of the commercial contracts entered into between significant Australian enterprises for the provision of goods and services limit the liability of the service provider in respect of a risk (e.g. late delivery or defective design) even if it is the only party capable of managing the relevant exposure. The limitation of liability is all but universally

⁷⁷DD, section 13.4.1, page 91

⁷⁸DD, section 13.4.2, pages 91 - 2

⁷⁹DD, section 13.4.3, page 92

⁸⁰DD, section 13.4.4, page 92

⁸¹DD, section 13.4, introductory text, page 91

⁸²DD, section 13.4, introductory text, page 91

adopted by significant enterprises in construction, operation & management, supply and professional services contracts.

(b) Treatment of limitation of liability

Aurizon Network supports this position, subject to the comments in Sections 7.2(c), 13.2(c) and 13.2(d).

In particular Aurizon Network supports the limitation of Aurizon Network's liability to,

- each PUH, as set out in the SUHD (clause 21.9) and the EPA (clauses 7.1, 7.2 – subject to the comments in Section 13.2(c) – and 8) that form part of the DD;
- each Access Seeker, as set out in the AASTD (clause 5.2) and the EPA (clauses 7.1 and 7.2, subject to the comments in Section 13.2(c)) that form part of the DD; and
- the Trustee, as set out in the EPA (clauses 7.1, 7.2 – subject to the comments in Sections 7.2(c) and 13.2(c) – and 8) and the EIHL (clause 3.5(h)) that form part of the DD,

since those limitations eliminate what Aurizon Network considers to be unintended risks that would otherwise arise from the complex set of SUFA documents.

(c) Treatment of consequential loss

Aurizon Network partially supports the QCA's position.

Aurizon Network agrees with the principle enunciated by the QCA that:

“Aside from consequential losses that arise from third party claims of damage to people and property, neither party should bear consequential losses of an economic nature. For example: loss of coal, loss of profit or loss of a deal. We acknowledge that neither party should be underwriting the profits of the other party. As the SUFA arrangement is intended to be a funding solution, we consider the loss of the Trust (and the Preference Unit Holders) should be limited to recovery of the value of its investment and should not extend to recovery of the value of an investment in an associated coal mine”⁸³.

Aurizon Network does not volunteer to assume the risks and costs which arise from the QCA's proposed changes to the consequential loss definition. Such changes would result in Aurizon Network bearing risk that is inconsistent with the principle stated above.

(d) Exclusion of OPRA from the rental calculation methodology

Aurizon Network does not support this position.

Aurizon Network should, whenever it volunteers to assume risks in expanding its facility, be appropriately, adequately and efficiently compensated for any additional commercial or regulatory risks associated with that expansion. This is the primary purpose of the proposed operating and performance risk allowance (i.e. OPRA).

The QCA has stated that the inclusion of OPRA is not required to meet Aurizon Network's legitimate business interests as the SUFA assets attract an operating and maintenance cost allowance in the determination of the regulatory revenues.⁸⁴

Aurizon Network does not support the QCA's view that it is 'compensated' for all of those risks and costs. In determining the allowable revenues the QCA provides an estimate of those costs and actual costs may differ considerably (as would be expected to occur in incentive based regulation). Aurizon

⁸³DD, section 13.4.3, page 92

⁸⁴DD, section 13.4.4, page 92

Network considers:

- the QCA's position is contradictory to its own research on the split cost of capital which concluded:

*'Consideration of the regulated firm's risk profile in this context leads to the natural demarcation of risk between the firm's existing regulatory asset base on the one hand and the risk of its **operating and capital expenditure** activities on the other. The split cost of capital concept recognises this demarcation, specifically that a firm's regulatory asset base is associated with a significantly lower risk than its other activities, the latter of which **involve some equity risk**.*⁸⁵ (emphasis added)

- the QCA's position assumes the provision of operations and maintenance is a riskless business activity;
- the QCA has not identified where and how Aurizon Network is compensated for the risks associated with the maintenance and operations associated with providing the declared service including any costs and risks specific to a SUFA arrangement as embodied in SUFA agreements;
- the QCA does not recognise or address the significant working capital implications associated with increasing the scale of operating and maintenance costs on Aurizon Network's return on assets; and
- the QCA has not identified what incremental compensation is provided for the incremental expansion of the O&M costs.

In forming its view on OPRA the QCA considers:

*'In our view, choosing to finance an expansion via SUFA is causally related to Aurizon Network's funding proposal. If this results in SUFA being adopted, this should not be interpreted as subsequently triggering some form of operational service agreement with Aurizon Network.'*⁸⁶

Aurizon Network considers its own funding proposal should be irrelevant to the consideration of whether or not Aurizon Network obtains appropriate compensation commensurate with the commercial and regulatory costs and risks associated with operating and maintaining an expansion and complying with SUFA documents. The QCA's position would also appear to harm commercially Aurizon Network where it chooses to exercise its statutory rights and not fund an expansion on the basis that:

- in Aurizon Network's view the investment offers inadequate returns given the risks and rewards available from it;
- the business does not have sufficient financial capacity to fund an expansion; or
- the expansion does not represent the best use of the business's scarce capital.

These conditions have no causal relationship with a funding proposal. Aurizon Network maintains that there are commercial and regulatory costs and risks associated with maintaining and operating an expansion and complying with SUFA agreements and those risks must be adequately compensated in order for SUFA to be consistent with Aurizon Network's legitimate business interests.

It is also relevant to consider that under section 168A(a) of the QCA Act the price for access to a service is required to 'generate expected revenue' for the service that is 'at least enough' to:

- meet the efficient costs of providing access to the service; and

⁸⁵QCA Information Paper: The Split Cost of Capital Concept, February 2014, page 53

⁸⁶DD, section 13.4.4, page 92

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

It is Aurizon Network’s submission that the requirement for an OPRA is consistent with this provision of the QCA Act, particularly as Aurizon Network is prepared to assume some cost and risk associated with any SUFA transaction that it is not required to assume under the QCA Act.

13.3 Summary

QCA Position		Aurizon Network Response
a	QCA’s risk allocation approach	Aurizon Network notes this position
b	Treatment of limitation of liability	Aurizon Network supports this position
c	Treatment of consequential loss	Aurizon Network partially supports the QCA’s position
d	Exclusion of OPRA from rental calculation methodology	Aurizon Network does not support this position

14 Other Issues

This Section 14 addresses issues that arise from the SUFA documents that form part of the DD and fall outside the scope of Sections 4 to 13 inclusive.

14.1 The QCA's position

The QCA has proposed:

- a) the form of Aurizon Network's obligations for the inclusion of the Trust's capital costs in the RAB⁸⁷;
- b) that Aurizon Network must maintain insurance and/or adopt self-insurance in respect of the replacement and reinstatement of, and public liability risks in connection with, 'Landholder Infrastructure'⁸⁸; and
- c) that, where a SUFA transaction terminates early and other than in accordance with the transaction documents, Aurizon Network is required to agree a process with the other parties to address early termination of a SUFA transaction, even if that process would result in a 'non-material' disadvantage to Aurizon Network⁸⁹.

14.2 Aurizon Network's response

(a) Form of Aurizon Network's obligations for the inclusion of the Trust's capital costs in the RAB

Aurizon Network does not support this position.

Aurizon Network considers that RAB inclusion should be addressed in the SUFA documentation in accordance with the following principles:

- (1) The party responsible for preparing information for inclusion in the initial RAB inclusion submission should be the party with the best access to that information;
- (2) The responsibility for the substantive content in the initial RAB inclusion submission should lie with the party that takes regulatory risk in respect of costs set out in that submission;
- (3) Aurizon Network is prepared to submit on a timely basis the required initial RAB inclusion submission to the QCA for its consideration of inclusion in Aurizon Network's RAB; and
- (4) Any party should be free at any time to make a submission to the QCA in respect of the amount of RAB inclusion.

On the basis of principles (1) and (2), the Trustee should prepare all information for inclusion in the initial RAB inclusion submission in respect of 'Trust Capital Costs' and 'Construction Interest on the Capital Costs'. This is because the relevant amounts will include 'Trust-level' costs about which Aurizon Network has no information, and the Trustee is taking regulatory risk on the RAB inclusion of these amounts. Aurizon Network should prepare all information for inclusion in the initial RAB inclusion submission in respect of 'Aurizon Network Land Acquisition Costs' since Aurizon Network controls the land acquisition process and is taking regulatory risk on RAB inclusion of these land costs.

⁸⁷EPA that forms part of the DD, clause 3.1

⁸⁸EISL that forms part of the DD, clause 4.12

⁸⁹SUHD that forms part of the DD, clause 2.5(a)(iv)

On the basis of principle (2), Aurizon Network should not be required to endorse or support the part of initial RAB inclusion submission that has been prepared by the Trustee. Similarly the Trustee should not be required to endorse or support the part of initial RAB inclusion submission that has been prepared by Aurizon Network. Aurizon Network's initial RAB inclusion submission would therefore request the QCA to consider RAB inclusion in respect of all parts of that submission, but in that submission Aurizon Network would only 'stand behind' the part that relates to land costs. Also on the basis of principle (2), Aurizon Network's initial RAB inclusion submission should include without modification the part of initial RAB inclusion submission that has been prepared by the Trustee, who would therefore 'stand behind' that part.

On the basis of principle (4), Aurizon Network would be free, as is the case for any stakeholder, to make submissions to the QCA about the RAB value of SUFA assets, whether at the time of initial RAB inclusion or subsequently. Similarly the Trustee would be free to do the same in respect of, for example, the land acquisition costs for that SUFA transaction or the RAB value on Aurizon Network funded assets on the coal system upgraded by that SUFA transaction.

Appendix 3 includes a redraft of the RAB inclusion provisions of the EPA to give effect to the above principles.

Aurizon Network offers the following brief observations on the treatment of RAB inclusion in the EPA that forms part of the DD:

- an obligation to act in 'the best interests of the Trustee' in respect of RAB inclusion would restrict Aurizon Network's ability to pursue its business interests as it sees fit in respect of the RAB value of the coal system upgraded by the SUFA transaction for the life of that transaction. The QCA's imposition of this restriction on Aurizon Network would adversely affect its right to procedural fairness when the QCA makes regulatory decisions;
- the same applies in respect of the obligation on Aurizon Network to do all things reasonable to ensure ongoing RAB inclusion and not to do anything which would have the effect of removing costs from the RAB. In this respect, it should also be noted that any inclusion of costs in, or removal of costs from, the RAB is subject to the approval of the QCA, which should be mindful of the views of all stakeholders, including any Trust and any PUHs; and
- the contractual fetter on Aurizon Network's regulatory stance is imposed on an asymmetric basis. The Trustee is not contractually barred at any point from making any submission to the QCA on the RAB value of Aurizon Network's land acquisition costs or Aurizon Network funded assets of the coal system upgraded by the SUFA transaction. The Trustee is not subject to the requirement to act in Aurizon Network's best interests or to the RAB inclusion and removal obligations referred to in the previous bullet point.

Furthermore, the adoption of contractual fettering of Aurizon Network in respect of its dealings with its economic regulator could result in adverse effects on the QCA's decision-making due to the withholding of relevant information from it. In Aurizon Network's view the QCA, as an economic regulator, should be in a position to receive submissions from any stakeholder as that party sees fit, so that the QCA is as well informed as possible.

Aurizon Network does not understand from a policy perspective why the QCA is seeking to ensure that Aurizon Network, which is subject to the QCA's regulation and has expertise in all aspects of the access provision business, should be contractually fettered from providing information to the QCA over the life of a SUFA transaction, which will amount to several decades. The QCA's treatment of RAB inclusion in the EPA that forms part of the DD would, for example, prevent Aurizon Network from answering the QCA's request for information about the SUFA project if Aurizon Network considered that doing so

would be likely to result in costs not being included in the RAB. This treatment could also prevent Aurizon Network from pointing out errors or misleading statements in the initial RAB inclusion submission.

Aurizon Network notes also that the 2010 AU expressly prohibits it from seeking to impose any

*'...Access Condition that restricts Access Seekers or their Customers from raising disputes with the QCA or disclosing proposed Access Conditions or other contract terms to the QCA'*⁹⁰.

There is a similar provision in the 2014 DAU⁹¹.

Aurizon Network does not understand the policy consistency between:

- the QCA's prohibition on Aurizon Network under the 2010 AU from contractually restricting parties' dealings with the QCA; and
- the QCA's proposal in the DD that Aurizon Network should be contractually restricted in its dealings with the QCA.

Aurizon Network considers that its assumption of contractual fetters on its regulatory stance and an obligation to act in the best interests of the Trustee would be against both Aurizon Network's legitimate business interests and the public interest more generally.

(b) Aurizon Network must maintain insurance and/or adopt self-insurance in respect of the replacement and reinstatement of, and public liability risks in connection with, 'Landholder Infrastructure'

Aurizon Network does not support this position.

Under the EISL that forms part of the DD, Aurizon Network is obliged to maintain insurance and/or self-insurance in respect of 'Landholder Infrastructure'⁹². 'Landholder Infrastructure' is defined as rail infrastructure owned, leased or licensed by Aurizon Network (other than infrastructure provided under the applicable SUFA project)⁹³ that is located on the 'Extension Land', which is the area of land on which the Trustee is licensed to keep its SUFA infrastructure⁹⁴. This EISL obligation therefore imposes insurance obligations on Aurizon Network in respect of its infrastructure assets (other than those funded by the SUFA transaction in question) on that land.

Aurizon Network considers that the insurance of 'Landholder Infrastructure' assets is a matter for Aurizon Network and any party that has a tenure interest in those assets, such as QTH, but not for the Trust. The Trust has no financial or insurable interest in the 'Landholder Infrastructure' – any losses that may arise in respect of 'Landholder Infrastructure' are for Aurizon Network's account only.

Accordingly the EISL should not require Aurizon Network to maintain insurance and/or self-insurance in respect of 'Landholder Infrastructure'.

(c) Aurizon Network is required to agree a process to address early termination of a SUFA transaction, even if that process would result in a 'non-material' disadvantage to Aurizon Network

Aurizon Network does not support this position.

⁹⁰2010 AU, section 6.5.5(a), page 60

⁹¹2014 DAU, section 6.9(b)(i), page 72

⁹²EISL that forms part of the DD, clause 4.12(a)

⁹³RCA that forms part of the DD, clause 1.2

⁹⁴RCA that forms part of the DD, clauses 1.2 & 3.1(b)(i)

Aurizon Network takes this view because it considers that the QCA's limit on disadvantage, namely that the process must not result in material disadvantage to Aurizon Network, does not go far enough. Aurizon Network considers that, in the circumstances of the early termination contemplated, a replacement arrangement should not cause **any** disadvantage to Aurizon Network. (This position is based on the view that disadvantage is assessed on a net basis, so that compensation may be paid by parties to Aurizon Network to offset the adverse effects of the replacement arrangement upon it.)

Aurizon Network does not understand the grounds for the QCA's view that Aurizon Network could be required to suffer a 'non-material' disadvantage on a net basis, and notes that no compensation is proposed to be payable to it for its assumption of the risk of this layer of (net) disadvantage. Aurizon Network considers that the Trust should take all of the risk of disadvantage in the event of the contemplated early termination of a SUFA transaction, and should be required to 'keep whole' Aurizon Network if the Trust wishes to put in place a replacement arrangement for that SUFA transaction.

Aurizon Network considers that the proposed contractual provision could pose material risks to it.

14.3 Summary

QCA Position		Aurizon Network Response
a	Form of Aurizon Network's obligations for the inclusion of the Trust's capital costs in the RAB	Aurizon Network does not support this position
b	Aurizon Network's insurance obligation for 'Landholder Infrastructure'	Aurizon Network does not support this position
c	Aurizon Network required to negotiate a process to address early termination of a SUFA transaction, even if that process would result in a 'non-material' disadvantage to Aurizon Network	Aurizon Network does not support this position

Appendix 1: Summary Response Table

	QCA proposal	Aurizon Network response
Rental Method	The acceptance of the rental calculation methodology under current regulation practices as reasonable	Aurizon Network supports this position
	The development of worked examples of rental calculation and their inclusion in the SUFA documentation	Aurizon Network supports this position with a qualification
	Aurizon Network's proposed post-regulatory rent objective does not provide certainty over rental cash flows following deregulation	Aurizon Network does not support this position
	SUFA should allow for parties to remain, following deregulation, under the 'regulated contract'	Aurizon Network supports this position
	SUFA should allow for linked access agreements to include a schedule setting out access charges in the event that an asset is no longer declared	Aurizon Network does not support this position
Construction of SUFA Infrastructure	The construction process should be based on the principles that SUFA is a financing tool and Aurizon Network should control that process	Aurizon Network supports this position
	As a consequence of these principles, Aurizon Network should provide up-front commitments with respect to scope, standard, cost, time to complete and capacity outcomes	Aurizon Network supports this position in respect of scope, standard, cost and time to complete, and does not support it in respect of capacity outcomes
	Project delivery should be addressed not under the PMA but under the CA and the RCA in the forms that are part of the DD	Aurizon Network supports this position, subject to three CA qualifications
	The CA should adopt a lump-sum price for the delivery of commitments in relation to scope, standard and time-to-complete	Aurizon Network supports this position
	The CA should provide for specified variations and adjustment events as detailed by the QCA	Aurizon Network supports this position
	The Independent Certifier under the CA should undertake many, but not all, of the functions of the superintendent under the pro forma construction contract	Aurizon Network supports this position
	A liquidated damages regime should apply	Aurizon Network supports this position,

	QCA proposal	Aurizon Network response
	in respect of delay in reaching practical completion by the date for practical completion	subject to the liquidated damages rates and caps being set in accordance with construction industry market norms
	The independent certifier should notify Aurizon Network of non-compliances with the CA and Aurizon Network must record these defects on a register and rectify them at its cost	Aurizon Network supports this position
	The pro forma construction contract should not define the level of scope specificity	Aurizon Network supports this position
	Issues regarding the development of an expansion process that ensures SUFA is workable, bankable and credible will be developed as part of the 2014 DAU	Aurizon Network supports this position
	Capacity guarantees and shortfalls are proposed to be addressed as set out in section 5.4.5 of the DD	Aurizon Network will provide a full response as part of the 2014 DAU process, and has provided some preliminary comments
	Pre-approval is proposed to be addressed as set out in section 5.4.6 of the DD	Aurizon Network will provide a full response as part of the 2014 DAU process, and has provided some preliminary comments
Security and Financeability	The 2013 SUFA DAAU documents should be amended to include the Specific Security Agreement to allow for security to be taken over the cash flows	Aurizon Network supports this position
	The Specific Security Agreement acceptable to it is the form of that agreement included in the DD	Aurizon Network does not support this position
	The 2013 SUFA DAAU EISL should be amended to address three specified direction to pay matters	Aurizon Network supports this position
	The direction to pay arrangements acceptable to the QCA is included in the SUFA documents that form part of the DD	Aurizon Network supports this position
	The Trustee's obligation to withhold distributions if so required by the ordinary unit holder should be removed from the 2013 SUFA DAAU documents	Aurizon Network supports this position
	The rent adjustment mechanism is an acceptable set-off arrangement in relation to rental streams	Aurizon Network supports this position
	Set-off for immaterial non-rental amounts should be excluded from the SUFA documents	Aurizon Network does not support this position
	The EISL should be amended so that there is no set-off for non-rent material liabilities, with PUHs responsible for 'funding the SUFA infrastructure's share of any material liability, such as a tax liability'	Aurizon Network does not support this position
	The EISL should be amended to place an obligation on Aurizon Network to seek a change to the regulatory tariff to account for the amount of 'liability attributable to the SUFA infrastructure'	Aurizon Network conditionally supports this position
Termination	The redacted Infrastructure Lease should be disclosed during negotiation of the SUFA agreements subject to conditions	Aurizon Network supports this position

	QCA proposal	Aurizon Network response
	The security should apply to compensation cashflows and detriment amounts due to the Trustee	Aurizon Network supports this position
	Aurizon Network should have uncapped liability for actions in respect of the Infrastructure Lease and the Trustee's liability is to be limited as detailed by the QCA	Aurizon Network does not support this position
	'for breach of the EISL or the EIHL (Infrastructure Lease remains), the party that caused the breach must pay the detriment amount to the other party', subject to two exceptions	Aurizon Network supports this position, subject to clarification of the QCA's intent
Discrimination	Consideration for discrimination in respect of asset maintenance (is) to be considered as part of the 2014 DAU process	Aurizon Network supports this position
	The 2013 SUFA DAAU should not place restrictions on who can participate in funding a SUFA arrangement	Aurizon Network supports this position, subject to full set-off being adopted
	Cost-shifting and other discriminatory behaviour (are) to be considered as part of the 2014 DAU process	Aurizon Network supports this position
Preference Unit Transfers	Stapling is not required	Aurizon Network supports this position
	Aurizon Network will be permitted to bid for preference units but should not have a first right of refusal	Aurizon Network supports this position
Third Party Finance	The form of the template TD and the SUHD should be able to be amended to permit third-party finance by negotiation	Aurizon Network supports this position
	The form of the template TD and the SUHD should be able to be amended to permit third-party finance by binding dispute resolution	Aurizon Network does not support this position
	The 2013 SUFA DAAU arrangements should allow for third party financing	Aurizon Network conditionally supports this position
	A Financing Side Deed should be included as one of the SUFA documents	Aurizon Network supports this position
Taxation	The effectiveness of the SUFA documents to enable the Trust to claim tax depreciation must be tested	Aurizon Network supports this position
	Statutory severance is required	Aurizon Network supports this position
	Aurizon Network, the QCA and interested parties (are) to work on a joint submission for an ABA	Aurizon Network supports this position, subject to it not being required to share commercially sensitive information
	Efficiently incurred costs by Aurizon Network in seeking an ABA will be included in its operating costs	Aurizon Network supports this position
	Each party to the SUFA agreements (is to) seek its own PBR	Aurizon Network supports this position, subject to its efficiently incurred costs in obtaining its PBR being refunded by the Trust
	Need for tax indemnity of Aurizon Network is queried	Aurizon Network considers a tax indemnity is needed to address its residual tax risks
2010 Access Undertaking Amendments	Aurizon Network's obligation to fund is not a 2013 SUFA DAAU matter	Aurizon Network supports this position
	Aurizon Network should submit a DAAU and related reference tariff at a time to be determined	Aurizon Network partially supports this position
	Capacity shortfalls are to be addressed as	See Section 5.2(k)

	QCA proposal	Aurizon Network response
	set out elsewhere in the DD	
	Potential PUHs should decide whether a project is of a size suitable for SUFA	Aurizon Network supports this position
	The QCA should retain its power to develop its own SUFA and Investment Framework Amendments	Aurizon Network does not support this position
	The recovery of SUFA development costs should be considered if and when Aurizon Network seeks to recover them	Aurizon Network supports this position
	If an Access Seeker and Aurizon Network are in dispute regarding the proposed terms of a user funding agreement, either party may pursue the dispute under UT3	Aurizon Network partially supports this position
	If an Access Seeker and Aurizon Network are in dispute regarding issues arising under an existing user funding agreement, either party may pursue the dispute under UT3	Aurizon Network does not support this position
	The QCA is open to discussing ways of improving the dispute resolution process	Aurizon Network supports this position
	The QCA considers it prudent to focus on the expansion process under the 2014 DAU process	Aurizon Network supports this position
	The inclusion of a 'direction to pay' feature in the standard access agreement should be considered as part of the 2014 DAU process	Aurizon Network supports this position
Liability	QCA's risk allocation approach	Aurizon Network notes this position
	Treatment of limitation of liability	Aurizon Network supports this position
	Treatment of consequential loss	Aurizon Network partially supports the QCA's position
	Exclusion of OPRA from rental calculation methodology	Aurizon Network does not support this position
Other Issues	Form of Aurizon Network's obligations for the inclusion of the Trust's capital costs in the RAB	Aurizon Network does not support this position
	Aurizon Network's insurance obligation for 'Landholder Infrastructure'	Aurizon Network does not support this position
	Aurizon Network required to negotiate a process to address early termination of a SUFA transaction, even if that process would result in a 'non-material' disadvantage to Aurizon Network	Aurizon Network does not support this position

Appendix 2: Second Order Issues Table

Any defined term that is used in this table and is not defined in the DD or the glossary has the meaning given to it in the applicable SUFA document.

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
A	SUHD clause 17	The tax indemnity provision does not require the tax indemnifying party to pay interest to compensate the indemnified party for any delay in receiving the amount due to the indemnified party.	<p>If Aurizon Network does not receive promptly the amount due to it in respect of its tax loss, it will incur additional (finance) holding costs in respect of that delay. However Aurizon Network has no means of being compensated for these holding costs as there is no 'interest on overdue payments' provision that applies in the SUHD to the tax indemnity obligation.</p> <p>However the superseded UA, which contained the tax indemnity as part of the July 2013 suite of SUFA documents, included an 'interest on overdue payments' provision. The relocation of the tax indemnity obligation from the UA to the SUHD has not transferred that provision into clause 17 of the SUHD.</p>	Clause 17 has been modified to include an 'interest on overdue payments' provision.
B	SUHD clause 17.1(f)(xii)	This exclusion from the scope of the tax indemnity includes compensation to which Aurizon Network is entitled.	Aurizon Network may never receive compensation to which it is entitled under another Transaction Document, so such an entitlement should not form part of this exclusion.	The reference to entitlement to compensation has been deleted from this exclusion.
C	SUHD clause 17.1(f)(xiv)	This exclusion from the scope of the indemnity relates to the failure to comply with or satisfy the facts and circumstances within a Ruling.	Aurizon Network has no control over the content of, or responsibility for compliance with, Rulings other than its own Ruling. For example, if Aurizon Network does not act in accordance with, or satisfy the facts and circumstances of, the Trustee's Ruling, this tax indemnity exclusion should not apply as the Trustee's Ruling may have been flawed in the first place.	This exclusion has been modified so that it will only apply where Aurizon Network has failed to comply with or satisfy the facts and circumstances of its Ruling.

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
			<p>Aurizon Network should only take risk against its own Ruling.</p> <p>As a corollary, compliance with, and the satisfaction of the facts and circumstances of, Rulings other than Aurizon Network's Ruling is not relevant to this exclusion, which should only apply when Aurizon Network has failed to comply with or satisfy the facts and circumstances of its Ruling.</p>	
D	EPA clause 1.1 definition of Financing Side Deed	This definition does not reflect the fact that a Financing Side Deed may be executed contemporaneously with the IND or after the IND has been executed.	A deed under clause 16.6(b) (not 15.6(b)) of the IND can only come into existence after the IND itself has been executed, and the EPA's definition of Financing Side Deed (see Background D(c) for example) is used to refer to a deed that will be executed contemporaneously with the IND. Also all uses of the definition in the EPA itself appear to apply to the particular form of the Financing Side Deed entered into at the time of closure of the initial transaction, on the assumption that such a deed will be in place then, whereas the current EPA definition applies to the various forms of Financing Side Deeds that may apply from time to time over the life of the SUFA transaction.	<p>This definition has been modified to address two types of deed, namely</p> <p>(1) where a deed is in place at closure of the initial transaction, that deed, and</p> <p>(2) any financing side deed that comes into existence after closure of the initial transaction.</p> <p>In respect of type (1), the modification follows the treatment of the EPA definitions of other SUFA documents by referring to a specific form of a document that is attached to the EPA.</p> <p>In respect of type (2), the definition follows the current drafting by referring to a deed under clause 16.6(b) of the IND.</p>
E	EPA clause 6, opening paragraph	Establishment of Aurizon Network's liability for substantially all contamination on the Extension Land.	The statement that 'Aurizon Network is liable' in line 2 of the opening paragraph is not limited to liability as between Aurizon Network and the Trustee. A third party, such as a train operator or a pipeline operator, may have liability for the relevant contamination.	The amendment clarifies that the clause only operates in relation to liability as between Aurizon Network and the Trustee.

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
F	EPA clause 6 paragraph between (b) and (c)	Defines the necessary nexus to actions of the Trustee for the exclusion of Aurizon Network's liability to operate.	The Trustee's actions may not cause contamination, but they may contribute to it. A proportionate concept of responsibility is appropriate.	A proportionate concept of responsibility has been inserted in the paragraph between (b) and (c).
G	EPA clause 6(c) & (d)	Exclusion of Aurizon Network's liability as a consequence for contamination due to Trustee actions	The Trustee is not responsible for contamination arising from all of its acts, whereas Aurizon Network is responsible for all of its acts. The basis for the Trustee not being responsible for contamination due to its mistakes, incompetence and mishaps is not understood. Also Aurizon Network does not receive compensation for taking this risk.	Items (c) and (d) have been modified to refer to any action of the Trustee.
H	EISL clause 3.3	The basis on which the Trustee's indemnity applies in respect of the Guarantor.	The Trustee's indemnity applies in respect of Aurizon Network for amounts paid or payable by it, whereas the Trustee's indemnity in respect of the Guarantor, Aurizon Holdings, only applies in respect of amounts paid. Aurizon Network considers that the 'paid or payable' provision should also apply in respect of the Guarantor. Aurizon Network considers that, in circumstances where an amount is payable by the Guarantor to QTH as a result of an action of the Trustee under the EIHL, the Guarantor should be able to use the indemnity at that point, rather than making the payment to QTH and then recovering that amount from the Trustee. Aurizon Network does not consider it appropriate for the SUFA arrangements to be structured on the basis that the Guarantor should be required to use its working capital as a pre-condition for the operation of this indemnity.	The Trustee's indemnity in respect of the Guarantor has been modified so that it applies for amounts payable as well as amounts paid.
I	EISL clause 15.1(b)	Aurizon Network provides a reasonable endeavours obligation to be accredited during the life of the EISL as rail	Aurizon Network considers that the accreditation of all of its infrastructure other than the SUFA infrastructure is not a matter	The reasonable endeavours obligation to be accredited has been modified so that it does not

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
		infrastructure manager of the SUFA infrastructure and all infrastructure under the Infrastructure Lease.	in respect of which it should have an obligation to the Trustee. The assets concerned are not SUFA assets.	apply to Aurizon Network's infrastructure under the Infrastructure Lease.
J	RCA clause 10	As per item F (which addresses EPA clauses 6(c) & (d))	As per item F	As per item F
K	IND clause 9.1(a) & (b)	This provision sets out the process of nomination of Excluded Extension Infrastructure in the context of an imminent expiry of the Infrastructure Lease.	In lines 2 & 3 of clause 9.1(a) reference is made to two potential transferees (Aurizon Network & the Trustee), whereas there is only one potential transferee (the Trustee), given that the Excluded Extension Infrastructure concept will only apply in the context of an imminent expiry of the Infrastructure Lease and the envisaged transferee of Excluded Extension Infrastructure will be (only) the Trustee (see clause 8.5(a) of the IND). The consequential inclusion of Aurizon Network in clause 9.1(b) is incorrect.	Clause 9.1(a) has been modified so that the Trustee is the only transferee and clause 9.1(b) has been modified by the removal of the references to Aurizon Network.
L	EIHL clause 3.3(d)(ii)	This provision obliges Aurizon Network to provide to the Trustee copies of the Lessee Authorisations that Aurizon Network is required to obtain.	This 'provision of copies' obligation on Aurizon Network is unconditional, whereas Aurizon Network is only required (see clause 3.3(d)(i)) to use reasonable endeavours to obtain Lessee Authorisations that Aurizon Network is required to obtain.	The provision has been modified so that the 'provision of copies' obligation only applies in respect of the Lessee Authorisations that Aurizon Network has actually obtained.
M	EIHL clause 7.5(a)(ii)(A)	This provision obliged Aurizon Network to notify the Trustee and QTH in the event of any change in the status of an Authorisation that is required to be held by Aurizon Network or the Trustee.	Aurizon Network will not be aware of any such change in respect of an Authorisation that is required to be held by the Trustee and is obtained & maintained by the Trustee (for the purpose of this table 'Directly Held Authorisations'). Accordingly the Trustee should notify QTH and Aurizon Network in respect of any change in the status of any Directly Held Authorisation.	This provision has been modified so that the Trustee, rather than Aurizon Network, is required to notify the other two parties to the EISL in respect of any change to the status of any Directly Held Authorisation.
N	EPA clause 2.3(a)	This provision requires notification of conditions precedent being met.	There is no requirement for a corresponding notification in respect of a waiver (in	The notification provision has been modified so that it requires

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
			accordance with clause 2.4) of a condition precedent.	notification of waiver of conditions precedent.
O	EISL clause 4.12(e)	The Trustee may take out insurance at the expense of Aurizon Network in certain circumstances	<p>The Trustee's right to effect and maintain insurance is correctly documented in clause 4.12(e)(v), as that right should only arise after a dispute has been resolved under clause 4.12(e)(iii)(B). Therefore the additional right to effect and maintain insurance under clause 4.12(e)(iii)(A) is not accepted, as it would arise before a dispute process has even commenced. Aurizon Network notes that it would have an adverse effect on its standing in insurance markets for the Trustee to seek to place insurance in respect of some of the infrastructure assets that Aurizon Network controls, and considers that such a placement should not occur until it is beyond dispute that Aurizon Network has failed to comply with its insurance obligation.</p> <p>There is a consequential change required in clause 4.12(e)(v) in respect of the amounts paid for insurance under clause 4.12(e)(iii)(A).</p>	The right to effect and maintain insurance under clause 4.12(e)(iii)(A) has been deleted.
P	EISL clause 4.12(e)(v)	The right of the Trustee to take out insurance in certain circumstances	<p>The Trustee may take out insurance in an imprudent manner as it will be able to pass on all of the costs to Aurizon Network.</p> <p>The Trustee, when seeking to take out insurance under this clause, should be required to</p> <ul style="list-style-type: none"> - act prudently; - liaise with Aurizon Network on a reasonable basis; and - liaise with QTH and any other SUFA trustee(s) on a reasonable basis in 	This provision has been modified by the addition of the four requirements in the column to the left.

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
			<p>respect of similar insurance requirements that they may have; and</p> <ul style="list-style-type: none"> - cease to seek insurance upon notification by Aurizon Network (with suitable evidence) that it has arranged such cover. 	
Q	EISL clause 8.6	This provision requires the Trustee to repay 'Overpayment Amounts'.	The obligation does not require interest to be payable on those amounts.	This provision has been modified by the insertion of an obligation to pay interest.
R	CA general	The security provision obligation is triggered by reference to the date of contract (of the CA).	The various conditions precedent in the EPA may not have been met (or waived) by the date on which security is due to be provided.	The security provision obligation is triggered by reference to the date on which the various conditions precedent in the EPA have been met (or waived). The same applies to the 'advance payment', i.e. the front end payment mechanism as discussed in Section 5.2(c)(1).
S	CA clause 43.2	This provision excludes liability for consequential loss, subject to certain exceptions.	The exception under clause 43.2(vii) does not take into account the proportionate concept. For example, say Aurizon Network commits gross negligence and that action, taken together with other acts by third parties, results in consequential loss of \$10m, and say that the act of gross negligence accounts for 10% of that loss. Clause 43.2(a) appears to establish that Aurizon Network is liable for all \$10m, since the consequential loss exclusion does not apply because Aurizon Network has contributed to that loss.	This provision has been modified to establish a proportionate concept in the exception under clause 43.2(vii) to the consequential loss exclusion.
T	SSA clause 9.5(a)	This provision establishes the liability of Aurizon Network to pay for the costs of the Secured Party.	The provision states that all costs are for Aurizon Network's account unless the Secured Party, the Receiver or the Attorney commits gross negligence, willful default or fraud. Aurizon Network is therefore liable for costs that arise due to incompetence or mismanagement of these parties.	This provisions has been modified so that Aurizon Network is also not liable in the event of breach by the Secured Party, the Receiver or the Attorney.

#	Document and clause	Provision	Aurizon Network's concern	Aurizon Network's modification, as incorporated in Appendix 3
			<p>Aurizon Network does not see why it should be required to assume this risk – it is not a borrowing party under the SUFA arrangements and this risk is not appropriate for it to bear. This risk allocation is inconsistent with the QCA's principle that <i>'the party that controls the risk should generally bear that risk'</i>. No compensation is offered to Aurizon Network for the assumption of this risk.</p>	

Appendix 3: SUFA Template Documents

A version of each SUFA template document, as modified by Aurizon Network, is incorporated by reference into this Appendix 3. The modifications give effect to Aurizon Network's positions as set out in both this submission and the Second Order Issues Table (Appendix 2). In addition to these modifications which relate to commercial substance, there are a number of modifications that address typos, erroneous cross-references and other minor drafting issues.

Appendix 4: SUFA Template Documents

A version of each SUFA template document, as modified by Aurizon Network, is incorporated by reference into this Appendix 4. Each SUFA document in Appendix 4 is identical to the equivalent SUFA document in Appendix 3, except for the inclusion of 'track-changing' against the equivalent SUFA document that forms part of the DD.

Glossary

Defined terms in the DD have the same meaning when used in this submission.

Any defined term that is used in Appendix 2 and is not defined in the DD or this glossary has the meaning given to it in the applicable SUFA document.

Any reference in this submission to a Section or an Appendix is, unless otherwise indicated, a reference to a Section of this submission or an Appendix of this response.

Term	Definition
Access Condition	A condition for the provision of access in addition to the conditions in the standard access agreement, as further defined in the 2010 AU
AASTD	Access Agreement Specific Terms Deed
AS4902	The pro forma contract AS4902-2000 General conditions of contract for design and construct, as published by Standards Australia
Access Seeker	Prior to entry into a SUFA transaction, each party that negotiates project specific SUFA transaction documentation with Aurizon Network under the Expansion Process. Upon entry into a SUFA transaction, each party that gains rights in respect of access for the capacity to be created by that transaction.
CA	Construction Agreement
DD	The SUFA Draft Decision published on the QCA's website on 31 October 2014
Direction to Pay Amounts	The amounts of access charges due to Aurizon Network that it directs, or is deemed to direct, applicable access customers to pay to the Trust
EPA	Extension Project Agreement
Excluded Extension Infrastructure	The part of the Extension Infrastructure in respect of which, prior to the expiry of the Infrastructure Lease, QTH elects to transfer ownership to the Trustee upon that expiry
Expansion Process	A process, which is to form part of an AU, that: <ul style="list-style-type: none"> i. governs how Aurizon Network manages the study stages of proposed network expansions, ii. enters into project development agreements for network expansions; and iii. addresses other expansion issues
Extension Infrastructure	The assets created by a SUFA transaction that are leased or sub-leased to Aurizon Network
Independent Certifier	The party engaged under the CA to provide independent certifier services in respect of the CA
Infrastructure Lease	The infrastructure lease by QTH to Aurizon Network of most of the CQCN rail infrastructure
LDs	Liquidated damages under the CA
Position Paper	The SUFA Position Paper published on the QCA's website on 22 May 2014
PUHs	Preference Unit Holders
SSA	Specific Security Agreement
Trust	A unit trust for a SUFA transaction
Trustee	A trustee of a Trust

Term	Definition
2010 AU	The 2010 Access Undertaking approved by the QCA on 1 October 2010, as amended from time to time
2013 SUFA DAAU	The Standard User Funding Agreement Draft Amending Access Undertaking submitted by Aurizon Network to the QCA on 22 July 2013
2014 DAU	The Draft Access Undertaking submitted by Aurizon Network to the QCA on 11 August 2014