

15 September 2017

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**RE: Draft Decision on Aurizon Network's Standard User Funding Agreement**

The Queensland Resources Council (**QRC**) provides this submission on behalf of its members in response to the QCA's draft decision made on 10 August 2017 in respect of the UT4 SUFA DAAU and associated draft agreements (**QCA Draft SUFA**).

Capitalised terms used in this submission have the meaning given to them in the SUFA documents.

**About the QRC**

The QRC is the peak representative organisation of the Queensland minerals and energy sector. The QRC's membership encompasses minerals and energy exploration, production, and processing companies and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively and in a socially and environmentally sustainable way.

All operating Queensland coal producers are members of the QRC. A number of coal mining companies in development and operating phase are also members of the QRC.

**QRC's position on the QCA Draft SUFA documents**

The QRC agrees with the QCA that Aurizon Network's proposed SUFA DAAU would have the effect of unreasonably shifting the allocation and management of risk of a SUFA-funded project in Aurizon Network's favour. The QRC's previous submissions on Aurizon Network's proposed SUFA DAAU highlight that the QRC does not agree with a number of matters that were proposed by Aurizon Network for these very reasons.

As such the QRC is relieved that the QCA Draft SUFA decision has proposed rejecting a substantial portion of Aurizon Network's proposed amendments to the SUFA documents. The QRC is also relieved that the QCA's Draft SUFA decision largely reinforces the UT3 SUFA final decision in regard to most matters.

As was stated in the QRC's previous submissions on Aurizon Network's proposed SUFA DAUU, the QRC was particularly concerned with the following matters:

- the deletion of the capacity warranty in respect of the Extension and related clauses in the construction agreement and the corresponding amendments across the other SUFA documents;
- Aurizon Network's proposal that it be entitled to set off against rental payments made to the trust;
- the inclusion of an operating and performance risk allowance to be retained by Aurizon Network;
- the requirement of the Trust to provide security under the construction agreement;
- how the SUFA rental streams would be set in the event that the CQCN becomes undeclared; and
- that many of Aurizon Network's proposed amendments to the construction agreements were not consistent with standard market practice for projects of this nature in terms of appropriate risk allocation.

The QRC notes that many of these issues have been dealt with in the QCA Draft SUFA decision and the majority of Aurizon Network's proposed amendments in relation to such matters have been rejected. In terms of the QCA Draft SUFA documents the QRC agrees with the QCA's draft decision in respect of the following SUFA documents:

- 2014 Undertaking;
- User Funding – Extension Infrastructure Head-Lease;
- Rail Corridor Agreement;
- User Funding – Trust Deed;
- User Funding – Extension Project Agreement;
- Integrated Network Deed;
- User Funding – Access Agreement Specific Terms Deed; and
- User Funding – Specific Security Agreement.

### **Concerns the QRC has in respect of certain QCA Draft SUFA documents**

The QCA has accepted a number of Aurizon Network's amendments to the SUFA documents or made further amendments in response to the Aurizon Network amendments that the QRC has some concerns with. Specifically:

- **Aurizon Network obligation to deliver capacity in construction agreement:** In order for a SUFA project to be bankable it is fundamentally important that Aurizon Network as constructor has a clear obligation to deliver the contracted capacity. We understood from the QCA's Draft SUFA decision that it was supportive of the need to include a clear obligation to deliver capacity. However, the amendments to the construction agreement do not align with the QCA's comments. In particular, the proposed capacity related amendments to the construction agreement remove any clear obligation to deliver capacity.

In the QRC's view, the construction agreement should be modified as follows:

- To include a warranty that the works will deliver the capacity. Capacity should be defined in such a way as to present real capacity, but to exclude matters outside of Aurizon Network's control after execution (for example, a degradation of the system that occurs after the construction agreement is not entered into – although Aurizon Network should have an obligation to notify the Trustee if it becomes aware of any matter which will affect it being able to deliver the capacity).
- To require the capacity assessment to be undertaken by an independent party and not by Aurizon Network and for all information relating to the capacity assessment to be made available to the parties.
- To include liquidated damages where the capacity has not been delivered by a long-stop date (which long-stop date gives Aurizon Network a reasonable period after practical completion to undertake any rectification work).
- To acknowledge that in all cases, Aurizon Network is required to rectify defects, including a defect which is a failure to meet the capacity requirements. Payment of liquidated damages provide relief against the delay in rectifying capacity shortfalls, but is not an alternative to rectifying capacity shortfalls.

The QRC notes that it is entirely market standard for a construction contractor to warrant the capacity of the work it has designed and constructed. This is usually done as part of a practical completion test. However, in circumstances where capacity can only be assessed after practical completion a regime similar to the regime outlined above is usual.

- **Security from trustee for construction agreement:** it is proposed that the Trust be required to provide security under the construction agreement. The QRC maintains that it is in no way standard market practice for a principal to be required to provide security. That is even the case when contracting with a Special Purpose Vehicle. The detailed security arrangements in the Subscription and Unit Holders Deed are sufficient to protect Aurizon Network during the construction phase and it is

unnecessary for additional security requirements to be placed upon the Trust under the construction agreement.

- **Other construction agreement changes:** the QRC maintains that Aurizon Network's amendments to clause 25A (Contamination), clause 33.9 (Delay damages) and clause 36.1(b) (Progress claims) of the construction agreement should be rejected. Please refer to section 9 of the QRC's submission on Aurizon Network's draft SUFA dated 12 April 2017 for further information.
- **Termination of trust:** the QRC maintains that Aurizon Network's amendments to clause 2.5 (Termination of the Trust other than in accordance with Transaction Documents) and clause 18.1(c) (Stamp Duty) of the Subscription and Unit Holders Deed should be rejected. Please refer to section 7 of the QRC's submission on Aurizon Network's draft SUFA dated 12 April 2017 for further information.

### **Typographical errors – clauses 43.1(b)(iv)(A) and 43.2(a)(vii) of the Construction Agreement**

In the draft decision, the QCA has said that it does not accept Aurizon Network's amendments to clauses 43.1(b)(iv)(A) and 43.2(a)(vii) of the Construction Agreement (other than in respect of the carve-out for the work under the construction agreement). The QRC agrees with the QCA's draft decision in this respect, but notes that the mark-up of the Construction Agreement provided by the QCA does not re-instate the relevant parts of these clauses. In particular:

- clause 43.1(b)(iv)(A)(1) should be reinstated in the mark-up, being "a Wilful Default (as defined in the Extension Project Agreement) of the Contractor;";
- clause 43.1(b)(iv)(A)(2) should be reinstated in the mark-up, being "Gross Negligence (as defined in the Extension Project Agreement) of the Contractor;";
- clause 43.2(a)(vii) should be reinstated as follows:
  - (A) a Wilful Default (as defined in the Extension Project Agreement);
  - (B) Gross Negligence (as defined in the Extension Project Agreement); or
  - (C) fraud (as defined by civil common law of Queensland); and
- the numbering of these subclauses to be reverted to the previous numbering.

### **Proposed joint collaborative submission**

Aurizon Network has suggested that promptly after the close of submissions Aurizon Network and the QRC meet to determine whether the parties can agree on any of the matters being considered by the QCA. While the SUFA standard documents have already been the subject of significant and protracted negotiation, collaboration, submission and consideration already, the QRC is willing to again engage productively with Aurizon Network to understand whether there is any common ground. The QRC would propose to keep the QCA advised of any such engagement. It would be the

QRC's desire to engage efficiently and to ensure that there is no delay to the QCA's decision.

Thank you for the opportunity to provide this submission.

Yours sincerely

Ian Macfarlane  
**Chief Executive**