

Dr Malcolm Roberts
Chairman
Queensland Competition Authority
Level 27, 145 Ann Street
BRISBANE QLD 4000

Dear Malcolm,

The process for determining the 2013 Draft Access Undertaking (2013DAU) by 30 June 2014

Thank you for our discussion on the 27 August 2012. I am writing to elaborate for your consideration our discussion on possible steps the Authority could consider implementing in order to help ensure that the agreed finalisation target of 30 June 2014 is met.

As you are aware, since the lodgement of the 2013DAU, Aurizon Network has been actively consulting with Queensland coal producers, rail operators and QCA staff in relation to a significant number of issues identified by stakeholders as important to them. As advised in my letter of 22 August 2013, Aurizon Network and the Queensland Resources Council have agreed to continue that consultation process, as well as form Technical Working Groups on specific issues, comprised of Aurizon Network and relevant stakeholders (including operators where relevant). We remain very mindful of the importance of the processes involved with the 2013DAU for the reputation of all stakeholders.


Noting the ongoing consultation, I am conscious that the Authority needs to have confidence in its overall process. Aurizon Network would like to offer suggestions to help ensure that the QCA is able to meet its obligations under the *Queensland Competition Authority Act* in a timely and effective way. In making these suggestions, Aurizon Network has drawn from experience in other jurisdictions, together with the overriding obligation of procedural fairness.

In general, it is suggested that there would be value in bringing greater structure and planning to interactions between the QCA and Aurizon Network, so that we can most effectively identify and resolve issues prior to the Authority making its decision. In making this suggestion, I acknowledge that the task for the QCA is not to mediate the relationship between ourselves and stakeholders, or ratify agreed positions, but rather be satisfied that our regulatory proposal promotes the public interest in competitive markets. While the possible steps in this letter would be of greatest relevance for matters where Aurizon Network and relevant stakeholders do not have an agreed position, or are unlikely to reach an agreed position, we understand that the QCA has an obligation to the public and to future access seekers, and will review all aspects of the 2013DAU for consistency with its overarching purpose.

1. A structured, scheduled and managed negotiation between Aurizon Network and the QCA

I believe that one of our key, shared objectives for the 2013DAU is beginning a process for simplifying the regulatory framework by removing unnecessary complexity, revising duplicative or redundant terms, and reducing administrative and compliance costs. I also believe the 2013DAU is a significant improvement over its predecessor. However the 2013DAU still reflects many years of accumulated complexity, reflected in nearly 2,000 pages of legal documentation. As a result, it will necessarily require a comprehensive process for review and approval.

I am very aware of the substantial number of technical issues that will need to be addressed as part of this process. In this context I recognise that it will be challenging for these issues to be considered by industry in consultation with Aurizon Network and achieve our agreed aim of finalising the 2013DAU by 30 June 2014. I therefore anticipate that it may be appropriate for the Authority to adopt specific processes for considering, and deciding on some of these technical issues.



It is our considered view that the timeliness of the process could be enhanced by the QCA Secretariat having greater access to relevant Aurizon staff and advisors (including legal drafting resources), to help ensure that various aspects of our 2013DAU materials can be more fully explained, substantiated and, if necessary, appropriately amended, in response to QCA requests. I believe that this sort of proactive interrogation of the 2013DAU by the QCA would be in-keeping with best practice, having regard to the active management of the decision-making process that is frequently employed by regulators like the ACCC and the NCC.

In this regard, I would like to suggest an appropriately resourced, structured negotiation process between Aurizon and the Authority designed to help ensure a timely resolution to any issues/aspects of the 2013DAU the QCA would propose to approach this way. I would envisage that such a process could run in parallel to any engagement between ourselves and stakeholders, or between the QCA and stakeholders.

Against this background, I would raise the following inter-related proposals for consideration by the Authority:

- Our respective staff commence a series of weekly sessions, largely focused on an agreed program of detailed, technical issues, with the objective of substantially reducing the number of issues that the QCA would need to address in a Draft Decision. I would anticipate this could be accommodated through both Aurizon Network's consent to changes to the documentation, together with further explanation and substantiation of our positions ahead of the Board being required to take a decision. The QCA's *Issues Paper* on the 2013DAU could be the basis of this discussion from a project planning and management perspective.
- I would make available the relevant managers in the Aurizon Group, together with their staff and others as appropriate, to support that process. This would include my making of an appropriate delegated authority to negotiate.
- I would also commit to make available our independent experts who prepared relevant supporting materials, in the event the QCA seeks to interrogate that material.
- Further, I would commit sufficient legal resources as required to make changes to the text of the 2013DAU in a timely manner so as to support an active negotiation process.

In making these commitments, we would encourage the Authority to use the time to fully and comprehensively interrogate the proposal and request our respective staff to work constructively to achieve an appropriate and timely outcome.

2. A series of public hearings on major points of contention

As you will be aware, the QCA Act gives the Authority the power to hold public hearings in relation to the 2013DAU. This is not a power that has been used on prior occasions. However we believe that this can represent a best practice approach to resolving major points of difference prior to a decision being taken. As you will also be aware, the public hearing process has been successfully used by the Productivity Commission in a number of major areas (eg, the review of the National Access Regime) and is regularly used by a number of other regulators, including the ACCC, the UK Competition Commission, and the US Surface Transportation Board.

We suggest that the advantage of using hearings to assist in the resolution of some aspects of the 2013DAU is that this would be a very effective way for the Board to gauge the reasonableness of contrary points of view, particularly on major issues where there are competing viewpoints. The greater public scrutiny, and interrogation, of arguments would, we believe, help ensure that the highest possible quality of arguments would be presented to the Board, while also allowing the Board to fully and directly test the veracity and reasonableness of those arguments.

I believe this suggestion would facilitate a level of substantive engagement between the Board and stakeholders as regards major points of disagreement which has otherwise not typically occurred in the administration of the regulatory framework. I believe that the resultant level of engagement would be of significant benefit to the Board in fully informing its decision on the 2013DAU.

I also suggest that public hearings on the 2013DAU would be of benefit both prior to a Draft Decision, as the Board looks to inform itself on issues in a preliminary and initial way, and subsequent to a Draft Decision. In either case, for the QCA to indicate that this is something it is actively considering, may be a way to elicit moderated and reasonable responses from all parties. It would also provide stakeholders with another forum through which to update the Authority with the status of negotiations, including matters on which where there is mutual agreement to redraft the undertaking.

3. Commitment by the QCA to case management principles

The decision by the QCA to allow Aurizon Network, the coal industry and other relevant stakeholders to seek to resolve key issues commercially is commendable; I am therefore committed to continuing this process until the 2013DAU is resolved in its entirety.

Equally, in the context of meeting the 30 June 2014 finalisation target for the 2013DAU, we would support the QCA at this juncture taking an active management approach to the regulatory process in accordance with well developed project management principles. We would consider that the active management of the process is consistent with the practice of other Australian regulators, and will help ensure that all parties remain focused on what is of most importance to the decision-maker.

More specifically, we would raise the following procedural suggestions for the Authority's consideration:

- Detailed and regular directions to stakeholders on the form the QCA would prefer submissions to be in, together with an indication of content that the QCA would not likely consider probative or persuasive (e.g. submissions identifying problems should also identify preferred remedies, submissions should be referenced to the terms of the QCA Act, major re-drafting likely to be unhelpful to the task at hand, etc).
- The appropriate use of technology, particularly, the establishment of an Aurizon Network data room to manage RFIs and other information requests (with access to both the QCA and industry), together with designated data room officers and confidentiality protocols.
- A structured protocol for the management of a single revenue and tariff model, including if possible, agreement as to audit processes and document control.
- A pre-determined best-practice process for the management of confidential information provided by Aurizon Network to the QCA and stakeholders, particularly to avoid the continuation of resource-intensive assessments under s 187.
- The conferencing of experts to test the probity of their submissions.

4. Conclusion

The suggestions presented are designed to assist the Authority, Aurizon Network and the Queensland coal industry achieve our common goal of resolving the 2013DAU by 30 June 2014. They are presented in a spirit of constructive engagement designed to assist you and the other members of the Board achieve your objectives, in terms of both the current 2013DAU deliberations and the Authority's broader objective of achieving regulatory best practice.

I therefore trust the Authority will find them to be of value and of assistance.

Yours faithfully,



Michael Carter
CEO Aurizon Network Pty Ltd

28 August 2013