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Our Ref:
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Queensland Rail's 2013 Draft Access Undertaking

New Hope Corporation submission

Thank you for the opportunity to provide this submission on Queensland Rail's Draft Access Undertaking of February 2013.

New Hope is the largest coal producer in Queensland Rail's West Moreton System. In addition, New Hope is developing the Colton project, which will rail coal to Gladstone using rail infrastructure which is predominantly managed by Queensland Rail. New Hope is pursuing growth opportunities across its portfolio and seeks regulatory arrangements which promote efficient supply chain performance, reasonable and predictable charges for use of the infrastructure, and a practical pathway to expansion.

New Hope notes that the draft undertaking proposes a relatively 'light handed' regulatory arrangement, with substantial discretions available to QR in a range of key areas. New Hope considers that this is generally acceptable, subject to reasonable protections, for the term of UT1, and should be reassessed for UT2 taking into account the extent to which QR has applied these discretions on a reasonable basis.

The comments provided in this document are additional to those set out in our submission of 12th of April.

Our further comments on the Draft Access Undertaking are provided below:

Part 1: Application and Scope

- 1.4: Extensions:

  QR proposes an investment framework in which QR will have no obligation to invest in the network (1.4.1(a)(ii)) and will face no limitations on the terms sought from expanding customers in return for QR offering to finance expansions. New Hope is prepared to accept a relatively 'light handed' regulatory arrangement for QR for the period of the first undertaking, and will seek more prescriptive arrangements in the event that this flexibility is used inappropriately, however, we do consider that there is a need, in UT1, for greater clarity regarding QR's obligation of offer a 'user funding'

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option. This option must represent a credible alternative to QR funding. In particular, the requirements to be met before QR will be obliged to construct an extension using user funding are unreasonable, and include:

- 1.4.1(a)(iii)(A): The Access Seeker agrees to provide funding 'in advance' to QR on terms and conditions 'satisfactory' to QR. We consider that funding should be provided progressively as QR makes financial commitments to the project, and that financial security should be provided (rather than cash) in respect of commitments which will not result in a cash outflow within the coming 1-2 months. In addition, we suggest that QR should be required to act reasonably when assessing whether it is 'satisfied' with the terms and conditions. The requirement to act reasonably applies when QR is considering its 'legitimate business interests' (1.4.1(a)(vii)(F)) and the same standard should apply.

- 1.4.1(a)(iv): The requirement that QR bears '*no cost or risk in relation to constructing, owning, operating and managing the extension*' is unlikely to ever be achievable. QR will be the operator and manager of most extensions, and will incur costs and receive revenue for this role. QR will also bear some (limited) risks under the terms of Access Agreements which use the relevant infrastructure (and will be compensated for doing so). We do accept that QR should not be required to bear any material, uncompensated cost or risk in relation to such an extension. This section should be revised, or alternatively deleted given that the principle is adequately dealt with in 1.4.1(a)(vii), which specifies that the extension not '*adversely affect QR's legitimate business interests*'.

- 1.4.1(a)(vii): While we are generally comfortable with this section following the insertion of a reasonableness test, we consider the test in part F (that the project does not adversely affect QR's legitimate business interests) should be clarified to ensure that the loss by QR of the opportunity to seek Access Conditions cannot be deemed to adversely affect QR's legitimate business interests. That is, the test of an adverse effect should be that QR is no worse off than had the project not been undertaken, rather than no worse off than had the Access Conditions been accepted.

- 1.4.1(a)(vii): We do not consider that it is necessary, in all cases, that Access Agreements be in place for all of the Additional Capacity. For example, if a user funds a project which creates a level of uncontracted capacity, but QR is not worse off as a result of this situation (eg. because the volume forecasts upon which reference tariffs are based exclude the spare capacity or because rebates to the user-funder are limited to the contracted tonnes), then the requirement in this section is not an appropriate basis on which QR should refuse to undertake the project. Also, the requirement that Access Agreements '*have been executed*

on terms and conditions satisfactory to QR' should be amended – if Access Agreements have been executed, the question of whether these were on terms satisfactory to QR is not relevant.

We have similar concerns with the drafting regarding Funding Agreements, including:

- 1.4.2(e): The test of 'no cost or risk' is unlikely to be practical, for the reasons set out above, and makes all of QR's remaining obligations in this section meaningless. Again, we accept the principle that QR must be reasonably compensated for any cost or risk which it bears.
- 1.4.3: The principle stated in part (a) regarding rebates is reasonable. Unfortunately the more detailed drafting in part (b) cuts across this principle and this will not be appropriate in all cases. For example, the effect of 1.4.3(b)(i) is that no rebate will apply, despite a user- funded asset going into a RAB and resulting in a return on and of capital to QR, if another user uses the extension but did not need the extension – even if that user is paying Access Charges which include elements of cost relating to the user-funded assets. Also, the requirement that QR not be 'adversely affected' requires redrafting, as paying a rebate will always 'adversely affect' QR, when compared to the alternative of retaining this revenue. We understand that this is not the intention.
- 1.4.4: The words in the last line of this paragraph after the word "agreed" do not, in our opinion, clearly state what we believe to be QR's intention; that it have the right to appoint another operator to any potential extension. This right should only occur in the circumstance that QR appoint another operator for the entire line to which the extension is a part.

Part 3: Pricing Principles

New Hope relies on the QCA to assess the reasonableness of the pricing principles proposed by QR.

Part 4: Network Management Principles and Operating Requirements Manual

Section 4.2 is about the process for making changes to the Operating Requirement Manual ("ORM"). New Hope will separately provide comments on the current draft of the ORM. In regard to Part 4:

- The requirements to consult (4.2.2(c) to 4.2.2(e)) are not particularly onerous on QR, and do not result (regardless of the result of the consultation) in QR being prevented from implementing any amendment to the ORM. Despite this, these requirements do not apply when the ORM is being amended on safety grounds or in response to a Material Change. We accept that there may be a need to amend the ORM urgently in some limited cases, most likely relating to safety or a change in law, but we do not

consider that a Material Change which is an Impost Change or a Change to Credit is likely to require an urgent amendment to the ORM. A preferred approach is that:

- Where practical (in QR's reasonable opinion and taking into account the urgency of the change to the ORM), the consultation will occur prior to implementation.
- In all other cases, the consultation will still occur, but QR may implement the change immediately on an interim basis, then consult.

- There is no requirement that QR act reasonably when amending the ORM, other than in the case where the change Unfairly Differentiates. This requirement should be inserted. Where QR considers that a change to the ORM must be made urgently, then the change could be made on an interim basis, however there should still be a right to dispute the change and the criteria should not be limited to unfair differentiation, nor be limited to the consideration of the impacts on the Access Holder, as changes to the ORM may also have significant impacts on the Customer of the Access Holder. Any change to the ORM which has a material negative impact on an Access Holder or its Customers should be capable of being disputed to assess whether the change and the negative impact were reasonable.

- The protections against unfair differentiation (4.2.3) do not apply in the cases listed in 4.2.3(a)(i)(ii) or (iii). It is not clear to us why, in these cases, QR needs to be able to differentiate unfairly. For example, where there is a change in any tax, this by definition is a Material Change (regardless of the materiality of the change) and this then provides QR with a right to amend the ORM free of any of the provisions relating to unfair differentiation.

- The definition of Unfair Differentiation is only satisfied if the change to the ORM "unfairly differentiates" and has a "material adverse effect on the ability of one or more of the Access Holders to compete with other Access Holders". We do not consider that the second test is appropriate. For example, if a case of unfair differentiation impacts on the ability of an operator to service a particular mine (or on the cost), the second test may not be met even if the first test is satisfied. We would suggest that an action should meet the definition if the action "unfairly differentiates and has a material adverse impact on the Access Holder or its Customer".

- Changes to documents prepared by QR which are referred to in the ORM should be subject to the same consultation and dispute resolution requirements as apply to changes to the ORM itself.

Part 7

- WACC: The definition of WACC which applies after the approval date locks in a defined Margin, and may therefore differ from the WACC which is approved by the QCA in any later pricing decisions (for example, in the setting of reference tariffs for the

West Moreton System). We suggest that, in respect of the West Moreton System, WACC should mean the rate approved by the QCA in its most recent pricing decision from time to time.

Schedule C: Access Agreement Principles

- **Clause 9** allows QR to pass on costs relating to noise mitigation measures on the network. In the case of the West Moreton System, we would expect that these costs are reflected in the building block components (as capital or operating expenses) and are therefore recovered through reference tariffs.

- **Clause 19.2** requires that an Access Agreement provides for Relinquishment Fees equal to the present value of take or pay charges for the period of relinquishment. New Hope considers that, to the extent that QR collects any Relinquishment Fees, this should be taken into account in setting future tariffs. Where tariffs are derived by reference to a building block methodology (as we expect will occur for the West Moreton System), relinquishment fees should either be deducted from the allowable revenue in the regulatory period following collection, or should be deducted from the RAB. Without such an adjustment, Relinquishment Fees represent a windfall gain for QR.

- **Clause 20: Assignment.** This clause provides that QR may assign an Access Agreement without the consent of the Access Holder, while the Access Holder may assign only with the consent of QR. New Hope suggests that this should be amended to restore some balance, as follows:

    - QR's right to assign without consent should apply only where the assignment is to a party which is to become the owner/manager of the relevant railway infrastructure.

    - An Access Holder's right to assign should be subject to consent by QR, but with consent not to be unreasonably withheld.

Comments on Standard Access Agreement:

Clause 5

- 5.1(a) provides that QR will '*maintain the Network in a condition such that the Operator can operate Train Services in accordance with this agreement*'. Given the many limitations which may apply to the rights of the Access Holder to operate Train Services, this maintenance obligation is insufficient. New Hope suggests that, at a minimum, QR should be required to maintain the Network to a prudent standard taking into account the contracted Train Services.

- 5.1(b): QR should be required to use reasonable endeavours to provide notice prior to undertaking Rail Infrastructure Operations.

- 5.1(c): QR should be required to use reasonable endeavours to obtain indemnities from parties carrying out Third Party Works for costs, expenses, losses or damages incurred by Operators in relation to the works, and should pass the benefit of claims under such indemnities to the Operator where available.

Clause 6

- 6.2(b)(v): The requirement "not to cause or allow any rubbish, substance or thing to be deposited or released on or about the Network" is problematic when read in the context of coal and coal dust. The requirement set out in the draft Undertaking (Schedule A, 2.1(c)(xiv)) is more reasonable and achievable: i.e. "*utilise measures to minimise coal spillage and/or leakage en route that are reasonable, having regard to practices existing at the Approval Date*".

- 6.8: We refer to our comments on part 4 of the Undertaking.

Clause 11

The complete exclusion of liability in relation to the matters listed in 11.2 is unreasonable. For example, it would appear from the drafting that QR will not be liable if any "thing carried by a train service" is lost regardless of the nature of QR's contribution to this event. This would include, for example, where QR was negligent, grossly negligent, or in breach of an agreement including where QR wilfully breached an agreement.

New Hope also has more general concerns regarding the proposed risk allocations reflected in Clause 11. Substantial changes are proposed to indemnities, claim thresholds and exclusions compared to the provisions of the existing standard Access Agreement. New Hope considers that the previous provisions and risk allocation remain appropriate. These provisions have been reviewed by the Authority and approved following previous consultation, and New Hope does not consider that there is a need to amend the approach under the new Undertaking.

Conclusion:

Thank you for your consideration of this submission.

Please contact Mr Sam Fisher on [redacted] if you would like to discuss any of the matters raised in the submission or in regard to the Draft Undertaking generally.

Yours faithfully
NEW HOPE CORPORATION LIMITED

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Shane Stephan
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