

QRC's Response to AN's partial update of Part 8

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The following table summarises and responds to the key items in Aurizon Network's revised draft of part of Part 8: Network Development and Expansions dated 5 November 2013.

Aurizon Network's revised drafting has been compared against the QRC's Mark-Up accompanying its Main Submission. In doing so, it appears Aurizon Network's revised drafting responds to an earlier draft of the QRC's Mark-Up and as a result, does not respond to the QRC's proposals with respect to:

- coal supply chain coordination including capacity review and assessment;
- the development of a 'Network Development Plan'; and
- the voting process in relation to the acceptance of capital expenditure projects by interested participants.

Those three items will not be dealt with in the following table. For those matters, regard should be had to the QRC's Main Submission.

2 Summary table

Item	Clause reference	Description	Summary of change	Comment
Obligation to fund, construct or permit an expansion				
1	Clauses 8.2.1(b), (c)	Obligation to <u>fund</u> expansion	<p>The QRC proposed that Aurizon Network must fund, construct or permit an expansion where listed criteria are met (eg SUFA, and appropriate funding obligation).</p> <p>Aurizon Network proposes that it is not obliged to fund an expansion unless it agrees to do so.</p>	<p>The QRC does not agree with Aurizon Network's proposal.</p> <p>The QRC's position on expansion funding is set out in Section 6.2 of Part 4 of the QRC's New Submission.</p>

2	Clause 8.2.1(d)	Definition of 'Asset Replacement Expenditure'	Aurizon Network has deleted the QRC's recommendation to broaden the definition of " <i>Asset Replacement Expenditure</i> " to include the costs of replacing assets which are lost as a result of force majeure.	<p>The QRC does not agree with Aurizon Network's proposal to make no change.</p> <p>Currently, the only funding obligation in UT4 is in relation to asset renewals and the definition of "<i>Asset Replacement Expenditure</i>" is very restricted.</p> <p>As reflected in the QRC's Mark-Up of Part 8, the QRC proposes that the definition of "<i>Asset Replacement Expenditure</i>" be expanded to include reconstruction of damaged, lost or destroyed parts of the rail infrastructure which are necessary for the continued operation of that rail infrastructure.</p>
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3	Clause 8.2.1(b), (d)	Obligation to <u>undertake</u> expansion	<p>Aurizon Network's position is that it is not required to undertake an expansion, unless:</p> <ul style="list-style-type: none"> • it agrees to do so; and • to the extent consistent with s 119 of the QCA Act (eg legitimate business interests). <p>Aurizon Network has also provided that any dispute determination in relation to its obligation to expand must not be inconsistent with s 119 of the QCA Act.</p>	<p>The QRC does not agree with Aurizon Network's position. Aurizon Network's proposed change in substance reverts to its original drafting.</p> <p>In its Mark-Up of Part 8, the QRC proposed that reference to Aurizon Network's legitimate business interests should be removed. In its place, Aurizon Network has included a reference to s 119 of the QCA Act. Section 119 lists Aurizon Network's legitimate business interests as a relevant consideration, effectively reverting to the original drafting (but through a different means).</p> <p>As discussed in Part 8 of the QRC's Main Submission and Section 6 of Part 4 of the QRC's New Submission, Aurizon Network's obligation to undertake an expansion should not be subject to broad and ambiguous tests – including references to legitimate business interests and commercial objectives. Aurizon Network's proposal to only undertake expansions where it agrees to do so, and where consistent with s 119, undermines the detailed and objective process outlined throughout the remainder of Part 8. This does not assist with developing an objective and mechanical process and fails to provide any check on Aurizon Network's monopoly power.</p>
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4	Clause 8.2.1(i)	Discretion for Aurizon Network to undertake expansion or customer specific branch line outside of the terms of Part 8	Aurizon Network has clarified that despite anything to the contrary in Part 8, it is able to enter into any arrangement with access seekers, or can itself choose to, undertake an expansion or customer specific branch line outside of the terms of Part 8.	<p>The QRC does not agree with Aurizon Network's proposal.</p> <p>Part of the reason for the detailed process set out in Part 8 is to ensure that there is a level playing field for all projects. Clause 8.2.1(i) allows Aurizon Network to preference one project over another. Where that is the case, it can maximise its monopoly power and better utilise the benefits of its integrated business.</p> <p>The QRC recommend that the ability for Aurizon Network to agree an agreement outside of the process provided for in Part 8 be removed.</p>
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Priority of sequence of expansions

5	Clause 8.2.2	Interdependent and sequential nature of expansions	<p>Aurizon Network has proposed that it should have the ability to reallocate capacity where an “<i>Expansion Re-Sequence Event</i>” occurs.</p> <p>An “<i>Expansion Re-Sequence Event</i>” is where an access seeker later in the sequence is likely to be able to enter into an access agreement prior to an access seeker earlier in sequence.</p> <p>This allows Aurizon Network to allocate capacity to an access seeker later in the expansion sequence in preference to an access seeker earlier in an expansion sequence.</p> <p>The QRC had previously proposed a reprioritisation of expansions should only be permitted with QCA approval.</p>	<p>The QRC does not agree with Aurizon Network’s proposal to afford itself unrestricted control over the prioritisation of expansions.</p> <p>The QRC considers the reprioritisation of capacity should require QCA approval. Allowing Aurizon Network to itself determine whether a reprioritisation should take place does not adequately protect the interests of access seekers and fails to provide for a transparent and objective system.</p>
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Determining whether to undertake an expansion – studies and assessments

Demand assessment

6	Clause 8.2.3(a)	Obligation to undertake a demand assessment	<p>Aurizon Network has restricted the circumstances in which it is required to commence a demand assessment for an expansion.</p> <p>Where an access seeker submits an application for access that requires an expansion and the access seeker requests a concept study, Aurizon Network is only required to commence an assessment if the expansion required would have a value of more than \$300 million.</p> <p>Aurizon Network also requires at least three access seekers to make a written request for it to conduct a demand assessment rather than merely one as proposed by the QRC.</p>	<p>The QRC does not agree with Aurizon Network's proposal. Restricting Aurizon Network's obligations to projects valued at more than \$300 million will cause smaller projects to be aggregated and deferred until a project of a greater value is required.</p> <p>The QRC considers that the funding obligations proposed by Aurizon Network need to be further developed. The QRC's position on expansion funding is set out in Section 6.2 of Part 4 of the QRC's New Submission.</p>
7	Clauses 8.2.3(b), (c)	Factors relevant to how Aurizon Network undertakes demand assessment	<p>Aurizon Network has added "<i>its own market intelligence</i>" as an additional factor it may consider in undertaking a demand assessment.</p>	<p>The QRC accepts Aurizon Network's revised drafting.</p>

8	Clause 8.2.3(b)	Expression of interest process	Aurizon Network has deleted but not responded to the QRC's comment that it should set out in detail what can be requested in an expression of interest process.	<p>The QRC does not agree with Aurizon Network's proposal to make no change.</p> <p>The expression of interest process should be more mechanical, objective and prescriptive. Aurizon Network should detail the information that can be requested through the expression of interest process. The QRC considers providing more clarity will better align the industry's view with the understanding of Aurizon Network. For example, the information which was requested by Aurizon Network in the last expression of interest process was considered unacceptable by the industry and excessive.</p>
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Concept study

9	Clause 8.3	Concept studies	<p>Aurizon Network has deleted the requirements to:</p> <ul style="list-style-type: none"> • provide access seekers with details of a concept study on completion; and • fund all concept studies. 	<p>The QRC does not agree with Aurizon Network. Aurizon Network should be required to fund the cost of undertaking a concept study. Parties that are considering entering into a pre-feasibility study should be entitled to a reasonable level of detail about the concept study.</p>
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Pre-feasibility study

10	Clause 8.4	Pre-feasibility studies definition	Aurizon Network has responded to the QRC's proposal to define pre-feasibility studies by inserting a placeholder for a definition. Aurizon Network has not yet attempted to define pre-feasibility study.	<p>The QRC appreciates Aurizon Network's willingness to include a definition of pre-feasibility study, but is unable to comment substantively until the proposed definition is communicated.</p> <p>The QRC considers that a pre-feasibility study should be defined to deliver a specified output to a specified level of detail.</p>
11	Clause 8.4	Standard Study Funding Agreement (SSFA)	Aurizon Network has not responded to the QRC's SSFA.	<p>The QRC is unable to move forward on this issue until Aurizon Network outlines its position on the SSFA. The QRC considers that a SSFA is important, and that the draft proposed by Aurizon Network is out of market.</p>
12	Clause 8.4(a)	Funding a pre-feasibility study	<p>Aurizon Network has reinstated the option for it to fund a pre-feasibility study where agreed by the access seekers or where there is no Studies Funding Agreement (SFA) in effect. The QRC had removed these funding options so that a pre-feasibility study could only be funded by an access seeker under an SFA.</p> <p>Aurizon Network has also inserted the ability for it to continue to undertake and complete a pre-feasibility study where all SFAs have terminated prior to completion of the study.</p>	<p>The QRC disagrees with Aurizon Network's revised drafting.</p> <p>Aurizon Network has reverted to its previous position by allowing itself to fund studies where agreed with access seekers, or where access seekers fail to finalise funding agreements within a reasonable timeframe.</p> <p>The QRC considers that only access seekers or their customers should be permitted to fund pre-feasibility studies. The reasons for this are set out in Section 6.1 of Part 4 of the QRC's New Submission.</p>

13	Clause 8.4(c)	Requirement for bank guarantee	Aurizon Network has reinstated the requirement for an access seeker to provide a bank guarantee where it requests to enter into an SFA in relation to a pre-feasibility study.	The QRC disagrees with Aurizon Network's proposal to revert to the original drafting and make no change. Bank guarantees should not be required from investment grade companies or where a company guarantee is provided by an investment grade company. Bank guarantees in those circumstances are unnecessary. The QRC proposes that the requirement for an access seeker to provide a bank guarantee should be deleted.
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Feasibility study

14	Clause 8.5	Target capacity for feasibility study	After completion of a pre-feasibility study, Aurizon Network has included a requirement for it to notify relevant access seekers that it is proposing a feasibility study. This notice must provide details of the target capacity. An access seeker can choose to dispute the target capacity, and if disputed, the target capacity is to be determined by an expert.	The QRC does not agree with Aurizon Network's revised drafting. The process to move between pre-feasibility to feasibility is now wholly controlled by Aurizon Network. There should be an ability for access seekers to request Aurizon Network to move to a feasibility study and a process to refer the matter to dispute where Aurizon Network is unwilling to do so (and for that determination to be binding).
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15	Clause 8.6(a)	Feasibility study	Aurizon Network has deleted and not responded to the QRC's proposal to define a feasibility study more prescriptively.	The QRC does not agree with Aurizon Network's proposal to make no change. Aurizon Network should develop a definition which provides for the study to deliver a specified output to a specified level of detail. Defining a feasibility study in more detail will allow for a more objective and prescriptive process.
16	Clause 8.6(a)	Funding of feasibility study	Aurizon Network has made the same changes to the funding of feasibility studies as discussed above at Item 12 in relation to pre-feasibility studies.	Please see the comments at Item 12 above and the further explanation in Section 6.1 of Part 4 of the QRC's New Submission.
17	Clause 8.6(c)	Requirement for bank guarantee	Aurizon Network has reinstated the requirement for an access seeker to provide a bank guarantee where it requests to enter into an SFA in relation to a feasibility study.	Please see the comments at Item 13 above.
Other				

18	Clause 8.6(q)	Withdrawal of provisional capacity allocation	<p>Aurizon Network has deleted the QRC's comment that the time period in which a funding agreement must be finalised (i.e. six months) needs to be reconsidered.</p> <p>Aurizon Network has reinstated the original drafting which provided that where a funding agreement is not entered into within six months, all of the provisional capacity allocation can be withdrawn.</p>	<p>The QRC does not agree with Aurizon Network's proposal to revert to the original drafting.</p> <p>The appropriate time period of finalising a funding agreement depends on the expansion obligation, whether user funding applies or whether there is a dispute in the negotiation of the access agreement. Simply providing for a static time period of six months is insufficient to deal with such variables.</p>
19	Clause 8.6(t)	Reallocating capacity where withdrawal of provisional capacity allocation	<p>Aurizon Network has adjusted the requirement for it to reallocate provisional capacity allocation where previously withdrawn.</p> <p>Aurizon Network has adjusted this requirement from an absolute obligation to reallocate the capacity (to the extent feasible), to a reasonable endeavours obligation to seek a replacement access seeker or customer. This is subject to the replacement access seeker or customer, and any other funders, agreeing with Aurizon Network on any amendments to scope, timing and cost of the feasibility study.</p>	The QRC agrees with Aurizon Network's revised drafting.

20	Clause 8.6(w)(i)	User funding agreement	<p>Aurizon Network has reinstated part of clause 8.6 which provides that where there is a User Funding Agreement (UFA), the funding users are required to include in their funding an amount equal to the aggregate amount required to be repaid/reimbursed by Aurizon Network where feasibility funders later become the users of the access rights created by an expansion.</p> <p>Aurizon Network has also deleted the requirement for it to repay to, or reimburse, a feasibility funder where funding is included in the Regulatory Asset Base (RAB).</p>	The QRC agrees with Aurizon Network's revised drafting.
21	Deleted clause 8.6	Funding of studies by Aurizon Network or a train operator	<p>As discussed above at Items 12 and 16, Aurizon Network has rejected the QRC's proposal that pre-feasibility and feasibility studies should only be funded by access seekers.</p> <p>Accordingly, Aurizon Network has deleted the prohibition on pre-feasibility and feasibility studies being funded by Aurizon Network or a train operator (other than where on behalf of an identified customer).</p>	The QRC does not agree with Aurizon Network's proposal to revert to its original position. This is not acceptable for the reasons discussed at Item 12 and Section 6.1 of Part 4 of the QRC's New Submission.

22	Clause 8.7	Step-in where Aurizon Network fails to enter SFA or delays doing so	<p>Aurizon Network have rejected the QRC's proposal to allow a nominee to step-in and undertake a relevant study where an expert determines that Aurizon Network has failed unreasonably, or unreasonably delayed, doing so.</p> <p>Instead Aurizon Network has amended the provision so that where an expert determines Aurizon Network has delayed or failed to enter into a SFA, it can direct Aurizon Network to enter into that SFA within 10 business days. There is no step-in right.</p>	<p>The QRC does not agree with Aurizon Network's proposal.</p> <p>The QRC considers that where Aurizon Network has an obligation to enter into a SFA and fails to do so, a remedy of determining that Aurizon Network should enter into the SFA is of no utility.</p> <p>Rather, there should be a greater incentive for Aurizon Network to comply with its obligation to enter into a SFA. The QRC proposes either a step-in right or liquidated damages as appropriate incentives.</p>
23	Clause 8.8(b)	Funding an expansion – general	Aurizon Network has included an additional provision providing that it is not obliged to construct or permit an expansion that is not fully funded.	The QRC does not agree with Aurizon Network's funding proposal. More effective funding mechanisms need to be developed. The QRC's position on expansion funding is set out in Section 6.2 of Part 4 of the QRC's New Submission.

24	Clause 8.8(c)	Notification requirement	<p>Aurizon Network has reinstated its previous drafting which provided that Aurizon Network would notify, where an expansion is subject to a feasibility study:</p> <ul style="list-style-type: none"> • that it has been funded under a SFA, within 60 business days (rather than 20 as proposed by QRC) of the SFA becoming unconditional; or • that it has not been funded by a SFA, within 40 business days of Aurizon Network deciding to fund the expansion itself (without specifying whether or not this will be done on “<i>Commercial Terms</i>” as proposed by the QRC). 	<p>The QRC does not agree with the timeframe proposed by Aurizon Network. Those timeframes are excessive and are likely to cause unnecessary delays. Rather, the QRC considers 20 business days is enough time for Aurizon Network to advise the relevant users about the SFA.</p> <p>Aurizon Network should also be required to give notice to access seekers as to whether it requires “<i>Commercial Terms</i>” to be agreed and if so what those “<i>Commercial Terms</i>” are.</p>
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User Funded Expansions

25	Clause 8.9.2(a)	Disputes about completion of SUFA schedules	<p>Where there is a dispute about the completion of a SUFA schedule, Aurizon Network has proposed that the dispute be referred to the QCA rather than an expert.</p>	<p>The QRC agrees with Aurizon Network’s proposal.</p>
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26	Clause 8.9.3	Capital indicator allocation	<p>Aurizon Network has deleted the QRC's comments regarding the capital indicator and revenue smoothing. In its Response to Industry, Aurizon Network has identified that it is reconsidering the pricing of expansions so that:</p> <ul style="list-style-type: none"> • <i>“existing customers are protected from being made materially worse off by an expansion;</i> • <i>the access prices for similar services should be aligned in the long run;</i> • <i>to the extent that an expansion results in benefits accruing to existing customers, it is reasonable to allocate some of the costs of the expansion to those customers; and</i> • <i>the QCA's ability to assess any application in accordance with the Act cannot be limited.”</i> 	<p>The QRC appreciates Aurizon Network's willingness to engage with stakeholders on this issue.</p> <p>The QRC's comments on the expansion pricing principles are set out in the QRC's Main Submission. The QRC is committed to continuing to work with Aurizon Network to develop a resolution of this issue.</p>
27	Clause 8.9.6	Regulatory pre-approval of scope	<p>Aurizon Network has accepted the QRC's proposal to require pre-approval from the QCA in relation to the scope and standard of work. However, it has also included the ability for Aurizon Network to, in the alternative, seek pre-approval by way of a vote of interested participants.</p>	<p>The QRC appreciates Aurizon Network's preparedness to adopt the QRC's proposal and agrees with Aurizon Network's revised drafting.</p>

28	Clause 8.9.7	Obligation to seek inclusion of expansion cost in RAB (has already been defined above)	<p>Aurizon Network has deleted the QRC's proposal which required Aurizon Network to seek to include the costs of user funded expansions in the RAB.</p> <p>Aurizon Network has commented that its obligations in relation to seeking to have the capital expenditure for a user funded expansion included in the RAB are set out in the SUFA.</p>	<p>The QRC does not agree with Aurizon Network's position. The obligations set out in SUFA are insufficient. The QRC considers that UT4 should incorporate an obligation for Aurizon Network to seek inclusion of expansion costs in the RAB.</p>
29	Clause 8.9.7	Tax rulings	<p>Aurizon Network has provided draft tax provisions. Aurizon Network's tax provisions are a lot less detailed than those submitted by the QRC in Part 8.3 of its Mark-Up. Aurizon Network's tax proposal provides for:</p> <ul style="list-style-type: none"> • Aurizon Network to prepare and submit an application to the tax commission for a private tax ruling, and use reasonable endeavours to obtain a favourable tax ruling; and • Aurizon Network to consult with funding users regarding the application for a private tax ruling. <p>Aurizon Network is not required to submit an application where the tax commissioner has indicated that a favourable private tax ruling is unlikely to be provided, or where it has received such advice from a qualified tax adviser.</p>	<p>It does not appear that Aurizon Network has had regard to the separate tax provisions submitted on behalf of the QRC in Part 8.3 of its Mark-Up. The QRC awaits Aurizon Network's response to those provisions.</p> <p>Nevertheless the QRC does not agree with Aurizon Network's tax provisions. The QRC's proposed tax provisions are more detailed and better address all the relevant tax issues involved.</p>

30	Clause 8.9.8	General principles contained in SUFA	Aurizon Network has deleted and not responded to the QRC's comment that for the purpose of reviewing SUFA, the principles underlying SUFA should be set out in the body of UT4.	The QRC considers that the principles underlying SUFA should be incorporated into the body of UT4.
31	Clause 8.9.8	Review of SUFA	Aurizon Network has accepted the QRC's proposal to review SUFA after the first UFA is entered. However, Aurizon Network has made some changes to the QRC's proposed drafting, including removing the requirement for it to provide reasons where it decides no changes are necessary.	The QRC appreciates Aurizon Network's willingness to incorporate an obligation to review the SUFA suite. However, the QRC considers that where, following a review, Aurizon Network decides that no changes are required, Aurizon Network should be obliged to make a submission to the QCA giving reasons for that conclusion.

Contracting for capacity

Scope of work

32	Clause 8.10.1	Scope of work to be agreed by relevant access seekers	<p>Aurizon Network has rejected the QRC’s proposal that the scope of work for expansions should be agreed by relevant access seekers, and that the agreed scope should not be changed without access seeker approval.</p> <p>Aurizon Network has commented that it believes this is already adequately dealt with under the standard access agreements (SAA). This is because the SAAs contain provision for the inclusion of a description of an expansion that is a condition precedent to train services commencing.</p>	<p>The QRC disagrees with Aurizon Network’s position. The fact that Aurizon Network bears little risk in the delivery of expansions means it is crucial that users have meaningful input into studies and the scope of studies.</p> <p>Aurizon Network has proposed that the scope of expansions be agreed through user funding schedules or the negotiation of access agreements. This would mean only the scope for user funded projects would require the agreement of access seekers. This is insufficient. There should be an obligation in UT4 itself for Aurizon Network to agree the scope of an expansion with access seekers and that obligation should apply to all expansions (whether user funded or not). Failing agreement, the matter should be determined by an expert.</p>
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Capacity shortfalls

33	Clause 8.10.2(c)	Expert determination in relation to capacity shortfalls	Aurizon Network has deleted the QRC's mark-up which provided that any expert determinations, in relation to disputes concerning an assessment of capacity following an expansion, are binding.	The QRC appreciates Aurizon Network's willingness to adopt the QRC's proposed drafting which allows an access holder to refer a dispute concerning an assessment to an expert. However, the QRC does not agree with Aurizon Network's decision to remove the express statement that any expert determinations are binding. The QRC considers all expert determinations should be binding on the parties. Any uncertainty as to the binding nature of expert determinations would destroy the utility of those determinations.
34	Clause 8.10.2(d)	Definition of capacity shortfalls	Aurizon Network has deleted and not responded to the QRC's comment that the definition of " <i>capacity shortfall</i> " needs to be refined and simplified.	The QRC does not agree with Aurizon Network's decision to make no change. The QRC considers that " <i>capacity shortfall</i> " needs to be more precisely defined.
35	Clause 8.10.2(f)	Aurizon Network's commercial objectives and discretion	Aurizon Network have reinstated the provision which provides that its obligations in relation to capacity shortfalls are subject to: <ul style="list-style-type: none"> • Aurizon Network's commercial objectives; and • not inhibiting, restricting, fettering or adversely affecting Aurizon Network's ability to exercise its discretion. 	The QRC does not accept Aurizon Network's proposal in reverting to its previous position. This is not acceptable. It is unreasonable that Aurizon Network could avoid its capacity shortfall obligations on the basis of its commercial objectives or its ability to exercise discretion. These broad and subjective considerations undermine the obligations placed on Aurizon Network in respect of capacity shortfalls.

36	Clause 8.10.2(g)	Obligation to undertake shortfall expansion	Aurizon Network has rejected the QRC's proposal that Aurizon Network should be required to promptly undertake a shortfall expansion.	<p>The QRC does not agree with Aurizon Network's decision.</p> <p>Aurizon Network should be required to promptly undertake a shortfall expansion to make up any shortfall in capacity resulting from an earlier expansion.</p>
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