

~~QCA-QRC resubmission draft~~ to the QCA
~~22 July~~ 30 August 2013

[Independent Trustee] as trustee for the [Name of Trust]

Aurizon Network Pty Ltd

User Funding – Extension Infrastructure Sub- Lease

*[insert Extension
name]*

Drafting Note: The parties will consider on a transaction-by-transaction basis whether changes to this Agreement are required for the purposes of the *Personal Property and Securities Act 2009 (Cth)*.

Drafting note: If the SUFA transaction will involve the construction of infrastructure which will form part of the Central Queensland Coal Network (other than the two sections of the

North Coast Line which form part of the Central Queensland Coal Network) then an Extension Infrastructure Head-Lease and Integrated Network Deed will be entered into with Queensland Treasury Holdings Pty Ltd (the infrastructure lessor in respect of the Central Queensland Coal Network (other than the two sections of the North Coast Line which form part of the Central Queensland Coal Network)). If the SUFA transaction will involve the construction of infrastructure which will form part of either of the two sections of the North Coast Line in respect of which Aurizon is railway manager, then an Extension Infrastructure Head-Lease and Integrated Network Deed will be entered into with Queensland Rail Limited (the infrastructure lessor in respect of those sections of the North Coast Line).

This template Extension Infrastructure Sub-Lease has been drafted on the basis that the infrastructure will form part of the Central Queensland Coal Network (other than the two sections of the North Coast Line which form part of the Central Queensland Coal Network) and will need to be amended if that is not the case.

QRC Industry Notes

This document contains a number of industry notes. These notes provide further explanation about certain (but not all) of the changes that the QRC submits should be made to the User Funding – Extension Infrastructure Sub-Lease (referred to as the EISL in all notes).

Contents

1	Interpretation	1
1.1	Definitions	1
1.2	Interpretation	1849
2	Term	2024
2.1	Term	2024
2.2	Total Extension Infrastructure has Zero Value	2024
3	Subleased Extension Infrastructure	2024
3.1	Sublease of Subleased Extension Infrastructure	2024
3.2	Extension Infrastructure Head-Lease	2122
3.3	Indemnity	2324
3.4	Termination of Sublease	2425
3.5	Compensation arrangement – Aurizon cause	2425
3.6	Compensation arrangement – other cause	2426
3.7	Payment of DA Monthly Instalment	2627
4	Aurizon responsible for Aurizon’s Associates	2830
5	Leased Extension Infrastructure	2830
5.1	Lease of Leased Extension Infrastructure	2830
5.2	Use only for Permitted Purposes	2934
5.3	Title	3032
5.4	Exclusive use and possession	3032
5.5	Obligation to operate and manage	3133
5.6	Obligation to Repair and maintain	3234
5.7	Modifications	3335
5.8	Trustee Additional Infrastructure	3436
5.9	Aurizon Additional Infrastructure	3436
5.10	Removed Infrastructure	3436
5.11	Termination of Project Management Agreement	3536
5.12	Insurance	3537
6	Total Extension Infrastructure	3739
6.1	Non-discrimination	3739
6.2	Provision of Records by Trustee	3739
6.3	Keeping of Records by Aurizon	3840
6.4	Lease continues	3840
6.5	Outgoings	3840
6.6	Replacement of Total Extension Infrastructure	3940
7	Rectification of Defects	3941
7.1	Rectification of Defects by Trustee	3944
7.2	Rectification of Defects by Aurizon	3944
8	Rail Corridor Agreement	3944
8.1	Appointment as agent	4042

8.2	Acting for benefit of Aurizon	<u>4043</u>
9	Rent and other payments	<u>4144</u>
9.1	Rent	<u>4144</u>
9.2	Supporting information	<u>4144</u>
9.3	Interest on overdue payments	<u>4144</u>
9.4	Disputes	<u>4144</u>
9.5	Correction of errors	<u>4246</u>
9.6	Set off	<u>4347</u>
9.7	Method of payment	<u>4347</u>
10	Direction to pay	<u>4348</u>
10.1	Direction to pay – Extension Access Agreement	<u>4348</u>
10.2	Direction to pay – Nominated Access Agreements	<u>4449</u>
10.3	Direction to Pay Account	<u>4660</u>
10.4	Notice of directions to pay	<u>4661</u>
10.5	Application of Total Direction to Pay Amount	<u>4762</u>
10.6	Rent Shortfall Adjustment Amount	<u>4762</u>
10.7	Late Payment Adjustment Amount	<u>4863</u>
11	Calculation of Rent	<u>5064</u>
11.1	Objective	<u>5064</u>
11.2	Rent Calculation Methodology	<u>5064</u>
11.3	Calculation of Rent	<u>5064</u>
11.4	Variations to Rent Calculation Methodology	<u>5065</u>
11.5	Good faith negotiations	<u>5066</u>
11.6	Determination of Rent Calculation Methodology Dispute	<u>5166</u>
12	Records and auditing	<u>5266</u>
12.1	Keeping of records	<u>5266</u>
12.2	Audit	<u>5267</u>
12.3	Audit of Direction to Pay Account	<u>5368</u>
13	Force majeure	<u>5468</u>
14	Termination	<u>5469</u>
14.1	Termination by Trustee for Insolvency Event	<u>5469</u>
14.2	Termination by Trustee for non-payment	<u>5469</u>
14.3	Suspension or termination by Trustee for material breach	<u>5469</u>
14.4	No other rights of termination	<u>5569</u>
14.5	No prejudice as to right to damages	<u>5569</u>
15	Limitation of liability	<u>5569</u>
15.1	Limitation of Aurizon's liability	<u>5569</u>
15.2	Trustee's limitation of liability	<u>5669</u>
15.3	Exclusion of Consequential Loss	<u>5669</u>
15.4	Scope of Claim, liability or loss	<u>5661</u>
16	Trustee's risks	<u>5761</u>
16.1	Acknowledgement	<u>5761</u>

16.2	No liability	<u>5762</u>
17	Disputes	<u>5762</u>
17.1	Notification of Disputes	<u>5762</u>
17.2	Discrimination Dispute	<u>5762</u>
17.3	Chief executive officer resolution	<u>5863</u>
17.4	Expert determination	<u>5863</u>
17.5	Parties to assist Expert	<u>6065</u>
17.6	Decision of Expert	<u>6065</u>
17.7	Costs	<u>6065</u>
17.8	Determination by court	<u>6166</u>
17.9	Discrimination Dispute	<u>6166</u>
17.10	Injunctive relief	<u>6267</u>
17.11	Disputes involving Unit Holders	<u>6267</u>
17.12	Time bar	<u>6267</u>
18	Confidentiality	<u>6368</u>
18.1	Confidentiality obligations	<u>6368</u>
18.2	Disclosure of Confidential Information	<u>6368</u>
18.3	Conditions of disclosure	<u>6570</u>
19	GST	<u>6570</u>
19.1	Construction	<u>6570</u>
19.2	Consideration GST exclusive	<u>6570</u>
19.3	Payment of GST	<u>6570</u>
19.4	Tax invoices	<u>6570</u>
19.5	Adjustment event	<u>6674</u>
19.6	Reimbursements	<u>6674</u>
20	Assignment	<u>6674</u>
20.1	Assignment	<u>6674</u>
20.2	Assignment by Aurizon	<u>6772</u>
20.3	Assignment by Trustee	<u>6772</u>
20.4	Charging	<u>6772</u>
21	Notices	<u>6873</u>
21.1	General	<u>6873</u>
21.2	How to give a Notice	<u>6873</u>
21.3	Particulars for giving of Notices	<u>6873</u>
21.4	Notices by post	<u>6873</u>
21.5	Notices by fax	<u>6974</u>
21.6	After hours Notices	<u>6974</u>
21.7	Process service	<u>6974</u>
21.8	Signature to Notice	<u>6974</u>
22	Warranties	<u>6974</u>
22.1	Warranties	<u>6974</u>
22.2	Trustee warranties	<u>7075</u>
22.3	Personal Property Securities Act	<u>7075</u>

22.4	Reliance	<u>7076</u>
23	General	<u>7176</u>
23.1	Survival	<u>7176</u>
23.2	Applicable law	<u>7176</u>
23.3	Subcontracting	<u>7176</u>
23.4	Waiver	<u>7176</u>
23.5	Duty	<u>7176</u>
23.6	Legal costs	<u>7277</u>
23.7	Amendments to be in writing	<u>7277</u>
23.8	Rights cumulative	<u>7277</u>
23.9	Consents	<u>7277</u>
23.10	Further assistance	<u>7277</u>
23.11	Counterparts	<u>7277</u>
23.12	Entire understanding	<u>7277</u>
23.13	Relationship of Parties	<u>7378</u>
23.14	Severability	<u>7378</u>
23.15	Survival of representations and warranties	<u>7378</u>
23.16	Enurement	<u>7378</u>
23.17	Merger	<u>7378</u>
23.18	Powers of attorney	<u>7378</u>
23.19	Indemnities	<u>7378</u>
Schedule 1 – Agreement details		<u>7580</u>
Schedule 2 – Objective		<u>7684</u>
Schedule 3 – Rent Calculation Methodology		<u>8288</u>
Schedule 4 – Calculation of Direction to Pay Amount		<u>8692</u>
Schedule 5 – Form of confidentiality agreement for engagement of Auditor		<u>8793</u>
Schedule 6 – Form of Direction to Pay Undertaking		<u>8894</u>

Date

Parties

[Independent Trustee] [ACN] as trustee for the **[Name of Trust]** of [insert]
(Trustee)

Aurizon Network Pty Ltd ABN 78 132 181 116 of Level 14, Railcentre 1, 305
Edward Street, Brisbane, Queensland (**Aurizon**)

Background

- A The Leased Extension Infrastructure (if any) will be owned by the Trustee.
 - B The Subleased Extension Infrastructure will be owned by the Extension Infrastructure Lessor and leased to the Trustee under the Extension Infrastructure Head-Lease.
 - C The Trustee agrees to lease the Leased Extension Infrastructure, and sublease the Subleased Extension Infrastructure, to Aurizon in accordance with the terms of this Agreement.
-

Agreed terms

1 Interpretation

1.1 Definitions

In this Agreement:

2010 Access Undertaking means the access undertaking prepared by Aurizon and approved by the Queensland Competition Authority pursuant to the *Queensland Competition Authority Act 1997* (Qld) which commenced on 1 October 2010, as at the date of this Agreement.

Access Charges for a Month means the access charges (however described) payable under an access agreement for the provision of access to Aurizon's Railway Network during that Month.

Access Legislation has the meaning given in the Unit Holders Deed.

Access Regulator has the meaning given in the Unit Holders Deed.

Access Undertaking has the meaning given in the Unit Holders Deed.

Agreement means this document, including the **schedules**.

Auditor has the meaning given in **clause 12.2(a)**.

Audits has the meaning given in **clause 12.2(a)**.

Aurizon Additional Infrastructure means any Infrastructure, part, accessory or equipment which is constructed, incorporated or installed in or attached to the Leased Extension Infrastructure or a Segment by or for:

- (a) Aurizon in the performance of its obligations under **clause 7.2**; or
- (b) Aurizon (or a third party authorised by Aurizon) in exercise of its rights under **clause 5.7**.

Aurizon Defect Rectification Costs has the meaning given in **clause 7.2(b)**.

Aurizon's Associates means any Personnel, licensee or invitee of Aurizon but does not include the Trustee or the Trustee's Associates, or any person other than those mentioned exercising any right of access to the Total Extension Infrastructure under any Law.

Authority means any government or any governmental, semi-governmental, regulatory, statutory or similar entity or authority.

Authority Approval means a consent, licence, permit, authorisation, lodgement, filing, agreement, certificate, permission, direction, declaration, authority, accreditation, approval or exemption issued by an Authority.

Available Date for a Segment means the "Available Date" for that Segment as defined in the Project Management Agreement.

Business Day means a day which is not a Saturday, Sunday or public holiday in Brisbane, [Queensland](#).

Change in Law means the occurrence of any of the following after the Commencement Date:

- (a) the introduction or commencement of, repeal of, or a change in, applicable Legislation or a change in the common law or law of equity;
- (a) a change in the terms and conditions imposed under an Authority Approval after it has been given or the imposition of any new terms or conditions under such Authority Approval, in each case other than if caused by the default of a party under that Authority Approval;
- (b) the revocation or cancellation of an Authority Approval, other than if caused by the default of a party under that Authority Approval; or
- (c) the non-renewal or failure of an Authority to re-issue an Authority Approval or its renewal or re-issue on new terms that are materially different from the terms of such Authority Approval as at the Commencement Date, in each case other than if caused by the default of a party under that Authority Approval.

Charge has the meaning given in **clause 20.4(a)**.

Chargee has the meaning given in **clause 20.4(a)**.

Claim includes any claim, demand, liability, cost, expense, damage, loss, proceeding, suit, litigation, ~~investigation, audit,~~ action or cause of action, whether judicial, ~~administrative, investigative~~ or otherwise and whether arising in contract, tort (including negligence), under statute or otherwise, of whatever nature, ~~known or unknown,~~ liquidated or unliquidated.

Commencement Date means the date of this Agreement.

Confidential Information of a Disclosing Party means:

- (a) the terms of this Agreement; and
- (b) information disclosed by, or on behalf of, the Disclosing Party to the Recipient, under or in connection with this Agreement, which:
 - (i) is by its nature confidential or commercially sensitive;
 - (ii) is identified by the Disclosing Party as confidential or commercially sensitive;
 - (iii) the Recipient knows, or ought reasonably to know, is confidential or commercially sensitive; or
 - (iv) relates to the business, operations or financial affairs of the Disclosing Party or a Related Body Corporate of it (and where the Disclosing Party is the Trustee, any Unit Holder or a Related Body Corporate of a Unit Holder),

but does not include those terms of this Agreement, or any other information, which:

- (c) are or become public knowledge other than by:
 - (i) breach of this Agreement or by a breach of confidentiality by the Recipient or any third party to whom the Recipient has disclosed the information; or
 - (ii) breach of confidentiality by a Preference Unit Holder, the "Independent Engineer" (as defined in the Project Management Agreement), the "PUH Engineer" (as defined in the Project Management Agreement) or an "Auditor" or "Expert" (as defined in each Transaction Document);
- (d) are in the possession of the Recipient or a Related Body Corporate of it (or, where the Recipient is the Trustee, any Preference Unit Holder or Related Body Corporate of a Preference Unit Holder) without restriction in relation to disclosure before the date of receipt; or
- (e) have been independently developed or acquired by the Recipient or a Related Body Corporate of it (or, where the Recipient is the Trustee, any Preference Unit Holder or Related Body Corporate of a Preference Unit Holder).

Consequential Loss means, ~~subject to paragraphs (e), (f) and (g) of this definition:~~

~~(a) any special, indirect or consequential loss;~~

~~(b) any economic loss in respect of any Claim in tort (including negligence);~~

~~(c) any loss of profits, loss of production, loss of revenue, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill or wasted overheads whatsoever; and~~

~~(d) any loss arising out of any Claim by a third party;~~

but does not include:

~~(e)~~(a) a loss (including a loss arising out of a Claim by a third party) in respect of:

(i) the cost of repairing, replacing or reinstating any real or personal property of any person (including a Party) that has been lost, damaged or destroyed; or

(ii) personal injury to or death of any person;

~~(f)~~(b) a loss in respect of any personal injury Claim, special loss or economic loss as those terms are used in the context of personal injury Claims; or

~~(g)~~(c) the payment by Aurizon to the Trustee of the Rent in accordance with the terms of this Agreement.

Consolidated Group has the meaning given to that expression in Part 3-90 of the Tax Act.

Construction Period has the meaning given in the Project Management Agreement.

Customer Confidential Information means any information about an access holder, or an access holder's customer, or its business, operations or financial affairs, which, if disclosed by Aurizon to the Trustee, would give rise to a breach of an obligation or duty of confidence by Aurizon.

Drafting Note: The definition of "Customer Confidential Information" and **clauses 11.2 and 16.4** are drafted on the assumption that Aurizon will be entitled to disclose Customer Confidential Information to an Auditor or an Expert. That definition and those clauses will need to be redrafted if that is not the case.

DA Monthly Instalment for a Month means the lesser of:

(a) the sum of all Detriment Amounts in respect of all Detriments, together with any interest accrued on the Detriment Amounts under **clause 3.6(f)**, which are payable by the Trustee to Aurizon as at the date that Aurizon gives the Trustee a Monthly Invoice during that Month; and

(b) the amount of the Rent specified in a Monthly Invoice given by Aurizon to the Trustee during that Month.

DA Monthly Invoice has the meaning given in **clause 3.7**.

Defect means any:

Formatted: Definition

Formatted: Outline numbered + Level: 2 + Numbering Style: a, b, c, ... + Aligned at: 1.5 cm + Tab after: 2.5 cm + Indent at: 2.5 cm

- (a) defect, shrinkage, movement, error, omission, deficiency or other imperfection in the Total Extension Infrastructure in respect of, or arising from, any cause including design, materials or workmanship;
- (b) aspect of the Works for the Extension which is not in accordance with any Works Contract;
- (c) physical damage to the Total Extension Infrastructure resulting from any of the matters referred to in **paragraphs (a) and (b)** of this definition; or
- (d) impact on the physical condition of, or ability to safely and efficiently use, the Railway Network (other than the Total Extension Infrastructure) resulting from any of the matters referred to in **paragraphs (a), (b) and (c)** of this definition.

Defects Rectification Period has the meaning given in the Project Management Agreement.

Defects Register has the meaning given in the Project Management Agreement.

Detriment means, if **clause 3.6** applies, the Group (or, if Aurizon is not a member of a Consolidated Group, Aurizon) being financially worse-off (taking into account the overall "Tax" (as defined in the Unit Holders Deed), any adjustments to cash flow timing and other adverse financial consequences for the Group (or, if applicable, Aurizon)) as a direct result or consequence of the SIL Extension Infrastructure ceasing to be Subleased Extension Infrastructure subleased to Aurizon under this Agreement and becoming "Infrastructure" (as defined in the State Infrastructure Lease) under the State Infrastructure Lease, including because the Group (or, if applicable, Aurizon) suffers or incurs:

- (a) additional ongoing or lump sum costs;
- (b) additional or accelerated tax imposts;
- (c) reduced or delayed revenues; or
- (d) accelerated costs,

that would not have been suffered or incurred by the Group (or, if applicable, Aurizon) if the SIL Extension Infrastructure had continued to be Subleased Extension Infrastructure subleased by the Trustee to Aurizon under this Agreement.

Detriment Amount means, in respect of a Detriment, any amount required to be paid by, or suffered or incurred by, the Group (or, if Aurizon is not a member of a Consolidated Group, Aurizon), as a direct consequence or result of the Detriment suffered or incurred by the Group (or, if applicable, Aurizon) excluding any part of that amount ~~which where the Detriment~~ could have been avoided if the Group (or, if Aurizon is not a member of a Consolidated Group, Aurizon) had used reasonable endeavours to mitigate the direct consequences or result of the Detriment. The Detriment Amount for a Detriment which includes delayed revenue or accelerated outgoings includes interest on such delayed revenue or accelerated outgoings.

Detriment Notice has the meaning given in **clause 3.6(c)**.

Direction to Pay Account has the meaning given in **clause 10.3(a)**.

Direction to Pay Amount for:

- (a) an Extension Access Agreement for a Month means:
 - (i) the portion of the Access Charges for that Month payable under the Extension Access Agreement calculated in accordance with **schedule 4**; or
 - (ii) if **clause 10.1(b)**~~10.1(b)~~ applies, the whole of the Access Charges for that Month payable under the Extension Access Agreement; and
- (b) a Nominated Access Agreement for a Month means the portion of the Access Charges for that Month payable under the Nominated Access Agreement which Aurizon directs the Nominated Access Agreement Customer to pay into the Direction to Pay Account under **clause 10.2**.

Direction to Pay Undertaking means an undertaking, in the form set out in **schedule 6**, given by the party to an access agreement that is required to pay access charges to Aurizon under the access agreement under which that party undertakes to Aurizon to pay the access charges payable under that access agreement to Aurizon by, if directed by Aurizon, paying the whole or part of those access charges into the Direction to Pay Account as directed by Aurizon.

Disclosee has the meaning given in **clause 18.3**.

Disclosing Party has the meaning given in **clause 18.1(a)**.

Discrimination Dispute has the meaning given in **clause 17.2(a)**.

Dispute has the meaning given in **clause 17.1(a)** and includes:

- (a) a matter referred to an Expert for determination under this Agreement; and
- (b) a "Dispute" (as defined in the Unit Holders Deed) if the Trustee joins Aurizon to the dispute resolution process under the Unit Holders Deed in accordance with **clause 17.11**.

Dispute Notice has the meaning given in **clause 17.1(a)**.

Dispute Resolution Process means:

- (a) the dispute resolution process under **clause 17.9**; and
- (b) if the Trustee joins Aurizon to the dispute resolution process under the Unit Holders Deed in accordance with **clause 17.11**, the dispute resolution process under the Unit Holders Deed.

DTP Audit has the meaning given in **clause 12.3(a)**.

DTP Auditor has the meaning given in **clause 12.3(a)**.

DTP Date for a Month means the date on which Aurizon is required to give Extension Access Agreement Customers and Nominated Access Agreement Customers directions to pay under **clause 10.1** and **10.2** for the Month.

End Date means the earlier of:

- (a) the date on which the State Infrastructure Lease terminates (for any reason) or expires; and
- (b) the date which is 12 months after the Zero Value Date.

Excluded Extension Infrastructure has the meaning given in the Integrated Network Deed.

Expected Rent for a Month means the amount which Aurizon calculates, within five Business Days after the end of that Month, would be the Rent for that Month, applying the Rent Calculation Methodology, assuming for the purpose of such calculation that all applicable Access Charges for that Month are paid by the due date for payment:

- (a) **less**, if the Total Direction to Pay Amount for the previous Month exceeds the Expected Rent for the previous Month, the amount of the difference between the Total Direction to Pay Amount for the previous Month and the Expected Rent for the previous Month;
- (b) **plus** the amount of any Rent Shortfall Adjustment Amount which Aurizon calculated under **clause 10.6(a)** after Aurizon calculated the Expected Rent for the immediately preceding Month; and
- (c) **less** the amount of any Late Payment Adjustment Amount which Aurizon calculated under **clause 10.7(a)** after Aurizon calculated the Expected Rent for the immediately preceding Month.

Expert has the meaning given in **clause 17.3(b)**.

Extension has the meaning given in the Unit Holders Deed.

Extension Access Agreement means:

- (a) an access agreement entered into (or deemed to be entered into) under clause **[3]** of an Umbrella Agreement; and
- (b) any access agreement entered into as a consequence of:
 - (i) the renewal, replacement, transfer, assignment or novation, in whole or in part, of an access agreement referred to in **paragraph (a)** or this **paragraph (b)** of this definition; and
 - (ii) the transfer, in whole or in part, of the access rights under an access agreement referred to in **paragraph (a)** or this **paragraph (b)** of this definition,

despite the identity of the parties to such access agreement being different to the parties to an access agreement referred to in **paragraph (a)** or **paragraph (b)** of this definition.

Extension Access Agreement Customer means the party to an Extension Access Agreement that is required to pay access charges under the Extension Access Agreement to Aurizon.

Extension Access Agreement Invoice for a Month means a tax invoice issued by Aurizon to an Extension Access Agreement Customer for the payment of Access Charges for that Month by the Extension Access Agreement Customer under the Extension Access Agreement.

Extension Infrastructure Head-Lease means the Agreement entitled "*User Funding – Extension Infrastructure Head-Lease: [insert Extension name]*" between *[insert name of Trustee]* as trustee of the *[insert name of Trust]*, Aurizon Network Pty Ltd (ABN 78 132 181 116) and Queensland Treasury Holdings Pty Ltd (ACN 011 027 295) entered into on or about the date of this Agreement.

Extension Infrastructure Lessor means the person that is the "Lessor" under the Extension Infrastructure Head-Lease.

Extension Land has the meaning given in the Rail Corridor Agreement.

Formatted: Font: Not Bold

Force Majeure Event in respect of Aurizon means any event or circumstance:

- (a) which is beyond the reasonable control of Aurizon; and
- (b) the effects of which could not, by the exercise of reasonable diligence by Aurizon, have been avoided;

and (to the extent it meets the above criteria) includes any of the following :

- (a) act of God;
- (b) law, rule, regulation or order of any government or governmental authority;
- (c) executive or administrative orders or acts of either general or particular application of any government or of any official acting under the authority of such government;
- (d) act of war (declared or undeclared);
- (e) public disorder;
- (f) riot, insurrection, rebellion, sabotage or act of terrorists;
- (g) fire, earthquake, tidal wave or other natural calamity;
- (h) drought, flood, storm, hail, lightning, inclement weather or other severe weather conditions;
- (i) explosion, breakdown or injury to or expropriation, confiscation or requisitioning of production, manufacturing, selling, transportation or delivery facilities;
- (j) quarantine or customs restrictions;
- (k) strike, boycott, lockout or other labour disturbance (whether national, state-wide or otherwise);

- (l) act (including a delay in performing an act) or omission of any Authority;
- (m) a Change in Law;
- (n) act or omission of the Trustee or any of the Trustee's officers, employees, agents or contractors; and
- (o) any of the above events delaying a supplier or contractor to Aurizon in performing its obligations; ~~and,~~
- ~~(p) other failure by a third party to perform its obligations, or a delay by a third party in performing its obligations.~~

Industry Note: Force Majeure
The last limb of the proposed definition of Force Majeure is unacceptably broad. It would permit Aurizon to avoid its contractual obligations where their default was caused by a third party's omission – irrespective of the cause of that third party's omission.

Formatted: Font: Not Bold

Good Operating Practice means the exercise of that degree of skill, diligence, prudence and foresight that reasonably would be expected from a prudent, efficient and experienced railway network operator in Australia under conditions comparable to those applicable to the railway network of which the Leased Extension Infrastructure forms a part and having regard to the Permitted Purpose (for the avoidance of doubt, and if consistent with the foregoing, Good Operating Practice may entail part of the Leased Extension Infrastructure being put into care and maintenance).

Formatted: Font: Not Bold

Governmental Agency means any government, whether Federal, State or Territory, municipal or local, and any agency, authority, commission, department, instrumentality, regulator or tribunal thereof, including the Commissioner of Taxation and Australian Taxation Office.

Gross Negligence means ~~any negligence committed by Aurizon in connection with this Agreement involving such wanton and reckless conduct as constitutes an utter disregard for the harmful, foreseeable and avoidable consequences which result from such conduct~~ which contributes a significant departure from reasonable consent.

Industry Note: Gross Negligence
The definition of "Gross Negligence" has been amended to ensure that it encompasses negligent acts of omissions which constitute a significant departure from that which would be reasonably consented to in the context of this Agreement. This is a more appropriate threshold to incorporate into the Agreement, given the nature of the underlying transaction.

Formatted: Font: Bold

Formatted: Font: Bold

Group means the Consolidated Group of which Aurizon is a member.

Infrastructure means "Railway Transport Infrastructure" (as defined in the Extension Infrastructure Head-Lease as at the Commencement Date).

Initial Rent Month means the Month during which Aurizon first earns access charges attributable to any part of the Total Extension Infrastructure.

Insolvency Event in respect of Aurizon means:

- (a) it stops or suspends payment of all or a class of its debts (other than in accordance with a right of it to do so);
- (b) it is insolvent within the meaning of section 95A of the Corporations Act 2001 (Cth);
- (c) a court is required by reason of section 459C(2) of the Corporations Act 2001 (Cth) to presume that Aurizon is insolvent;
- (d) an administrator is appointed over all or any of Aurizon's material assets or undertaking;
- (e) a controller within the meaning of section 9 of the Corporations Act 2001 (Cth) or similar officer is appointed to all or any of Aurizon's material assets or undertaking;
- (f) an application or order is made (and, in the case of an application, is not stayed, withdrawn or dismissed within 30 Business Days), proceedings are commenced (and are not stayed, withdrawn or dismissed within 30 Business Days), a resolution is passed or proposed in a notice of meeting or an application to a court or other steps are taken (other than frivolous or vexatious applications, proceedings, notices or steps) for Aurizon's winding up or dissolution or for Aurizon to enter into an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them (in each case other than to carry out a reconstruction or amalgamation while Aurizon is solvent);
- ~~(g)~~ a liquidator is appointed to Aurizon and is not removed or withdrawn within 20 Business Days; ~~or~~
- ~~(h)~~ Aurizon is deregistered under the *Corporations Act 2001* (Cth); ~~or~~
- (i) any event occurs which, under the laws of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above.

Industry Note: Insolvency Event

The definition currently included is too limited. It is not consistent with market-standard definitions of insolvency. The amendments proposed make this definition consistent with the standard of insolvency sought to be imposed on the Trustee in the EIHL.

Integrated Network Deed means the deed entitled “*User Funding – Integrated Network Deed: [insert Extension name]*” between *[insert name of Trustee]* as trustee of the *[insert name of Trust]*, Aurizon Network Pty Ltd (ABN 78 132 181 116), the State of Queensland (represented by the Department administering the *Transport Infrastructure Act 1994* (Qld)) and Queensland Treasury Holdings Pty Ltd (ACN 011 027 295) entered into on or about the date of this Agreement.

Intellectual Property Rights includes both in Australia and throughout the world and for the duration of the rights:

Formatted: Font: Not Bold

Formatted: Def (a), No bullets or numbering

Formatted: Font: Bold

- (a) any patents, utility models, copyrights, eligible layout rights, designs and other like rights;
- (b) any invention, discovery, trade secret, know-how, computer software and confidential information; and
- (c) any business, scientific, technical and product information, including proprietary information relating to the development of new products, whether registered, registrable or unregistered.

Interest Rate means, for any day in a Month, the annual interest rate that is the sum of:

- (a) 2%; and
- (b) the Commonwealth Bank of Australia's reference rate being the "Corporate Overdraft Reference Rate" (monthly charging cycle) quoted by the Commonwealth Bank of Australia on its public website for the last trading day of the previous Month (or in the event that such a rate is not so quoted at or in respect of any relevant date, such other similar rate as is quoted by a major commercial bank as agreed by the Parties or, failing agreement, as determined by an Expert under **clause 17.4**).

Landholder Infrastructure has the meaning given in the Rail Corridor Agreement.

Formatted: Font: Not Bold

Land Lease has the meaning given in the Extension Infrastructure Head-Lease.

Late Payment Adjustment Amount means an amount calculated in accordance with **clause 10.7(a)**.

Law has the meaning given in the Extension Infrastructure Head-Lease as at the Commencement Date.

Leased Extension Infrastructure means:

- (a) any:
 - (i) Infrastructure, part, accessory or equipment which is deemed to be Leased Extension Infrastructure under **clause 5.0**;
 - (ii) Excluded Extension Infrastructure which is deemed to be Leased Extension Infrastructure under **clause 5.1(c)**;
 - (iii) Trustee Additional Infrastructure,but does not include any:
 - (iv) Removed Infrastructure;
 - (v) Aurizon Additional Infrastructure;
 - (vi) Redundant Extension Infrastructure (from the date that Aurizon gives the Trustee a Notice under **clause 5.11(a)**);

- (vii) "Extension Infrastructure" (as defined under the Extension Infrastructure Head-Lease) leased to the Trustee under the Extension Infrastructure Head-Lease; or
 - (viii) "Infrastructure" (as defined in the State Infrastructure Lease) leased to Aurizon under the State Infrastructure Lease.
- (b) in respect of a Segment, any Leased Extension Infrastructure (as defined in **paragraph (a)** of this definition) which is constructed, incorporated, installed in or attached to the Segment.

Legislation means statutes, ordinances, regulations, by-laws, proclamations and subordinate legislation of the Commonwealth, the State or an Authority.

Modifications mean, in respect of the Leased Extension Infrastructure, any removal or replacement of, or modifications, alterations, additions or changes to, all or any part of the Leased Extension Infrastructure (other than by or for Aurizon in the performance of its obligations under **clause 5.6 or 8.2 or by the Trustee in the performance of its obligations under clause 7.1**).

Field Code Changed

Month means a calendar month.

Monthly Invoice has the meaning given under **clause 9.1(a)**.

Monthly Invoice Date for a Month means the date on which the last of the Relevant Access Charges for that Month are due and payable to Aurizon.

Moral Rights means the moral rights granted under the *Copyright Act 1968* (Cth), and any similar rights existing under foreign laws.

Moral Rights Consent means a waiver of Moral Rights to the extent permitted by law and an unconditional consent to any act or omission in relation to the Records by or on behalf of Aurizon, any person authorised by Aurizon or any licensee of copyright in the Records.

Nominated Access Agreement means:

- (a) an access agreement which is the subject of a Direction to Pay Undertaking; or
- (b) an access agreement which expressly requires the party to the access agreement that is required to pay the access charges under the access agreement to pay the whole or any part of any access charges payable under the access agreement to Aurizon and/or any other entities nominated by Aurizon, in the manner nominated by Aurizon, from time to time,

but does not include an Extension Access Agreement.

Nominated Access Agreement Customer means:

- (a) in respect of a Nominated Access Agreement referred to in **paragraph (a)** of the definition of "Nominated Access Agreement", the party to a Nominated Access Agreement that gives a Direction to Pay Undertaking; and

- (b) in respect of a Nominated Access Agreement referred to in **paragraph (b)** of the definition of “Nominated Access Agreement”, the party to the Nominated Access Agreement that is required to pay the access charges under the Nominated Access Agreement.

Nominated Access Agreement Invoice for a Month means a tax invoice issued by Aurizon to a Nominated Access Agreement Customer for the payment of Access Charges for that Month by the Nominated Access Agreement Customer under the Nominated Access Agreement.

Non-Discrimination Provision means each of **clauses 5.5(b)(iii), 5.6(b)(v), 5.6(e), 5.7(d), and 5.12 and 6.1(c)**.

Notice has the meaning given in **clause 21.1**.

Objective has the meaning given in **clause 11.1**.

Obsolete Part means any part of the Leased Extension Infrastructure that is no longer required for the effective, safe and efficient operation of the Leased Extension Infrastructure as part of a fully functioning Railway Network.

Overpayment has the meaning given in **clause 10.5(b)(i)**.

Parties means collectively Aurizon and the Trustee, and **Party** means one of them.

Permitted Lien means:

(a) a charge or lien arising in favour of a Governmental Agency by operation of statute;

~~(a)~~(b) a repairer’s lien arising in the ordinary course of business; or

~~(b)~~(c) a lien or charge which arises by operation of Law for unpaid taxes,

which, in either case, relates to a payment obligation that is:

~~(c)~~(d) not yet due for payment; or

~~(d)~~(e) due for payment but being contested in good faith and by appropriate proceedings that are being conducted diligently and do not involve a material risk of the foreclosure, sale, forfeiture or loss of, or material interference with, the Total Extension Infrastructure or any title to, use of or interest in the Total Extension Infrastructure (or any part of it).

Permitted Purpose means use of the Leased Extension Infrastructure:

(a) for the purpose of Aurizon managing and operating a railway;

(b) for purposes ancillary to Aurizon managing and operating a railway; and

(c) for other lawful purposes (including, to the extent the Leased Extension Infrastructure is located on Rail Corridor Land, purposes that are consistent with the permitted use of that Rail Corridor Land under the Land Lease) provided that such use would not preclude or materially impede the Leased Extension Infrastructure being used to manage and

Formatted: Font: Not Bold, (none)

operate a railway that forms part of the Central Queensland Coal Network and generates Access Charges in relation to the Extension.

Industry Note: Permitted Purpose

It needs to be made clearer that, whilst the Leased Extension Infrastructure can be used for broader purposes, its fundamental purpose is to operate as an integrated part of the Railway Network and, whether during the regulated period or subsequently, to (for so long as the term of the lease continues) generate Rent.

Permitted Security Interest means:

- (a) any Security Interest arising by operation of this Agreement;
- (b) a Security Interest which has been consented to by Aurizon; and
- (c) a Permitted Lien.

Personnel means, in respect of an entity, any officer, employee, agent or contractor of that entity and includes any officer, employee, subcontractor or agent of a contractor or subcontractor of that entity.

Preference Unit Holder has the meaning given in the Unit Holders Deed.

Proceedings has the meaning given in **clause 17.8(b)**.

Project Manager means the party which is the "Project Manager" under the Project Management Agreement.

Project Management Agreement has the meaning given in the Unit Holders Deed.

Rail Corridor Agreement has the meaning given in the Unit Holders Deed.

Rail Corridor Land has the meaning given in the Extension Infrastructure Head-Lease.

Railway Network has the meaning given in the Unit Holders Deed.

RCTI has the meaning given in **clause 19.4(a)(i)**.

Recipient has the meaning given in **clause 18.1**.

Records means all present or future documents, drawings, specifications, reports, manuals, data and other information in any media whatsoever:

- (a) in the possession, or under the control, of the Trustee relating to the design, procurement, construction, testing, commissioning, defects rectification, operation, maintenance and repair of the Total Extension Infrastructure;
- (b) created by or for a "Replacement Project Manager" (as defined in the Project Management Agreement) relating to the design, procurement, construction, testing, commissioning and defects rectification of the Extension or the "Replacement Services" (as defined in the Project Management Agreement); or
- (c) in the possession, or under the control, of the Trustee in connection with any "Major Works Contract Dispute" (as defined under the Project

Formatted: Font: Bold

Formatted: Font: Not Bold

Formatted: Def (a)

Formatted: Font: Not Bold, (none)

Management Agreement) in respect of which the Trustee elects to assume responsibility for the conduct of under clause **8** of the Project Management Agreement.

Redundant Extension Infrastructure has the meaning given in **clause 5.11(c)(i)**.

Reference Infrastructure means:

~~(a) — if there is a section of the Railway Network that is similar to the applicable part of the Leased Extension Infrastructure, that section of the Railway Network; or~~

~~(b) — if paragraph (a) of this definition does apply, a notional section of the Railway Network which is similar to the applicable part of the Leased Extension Infrastructure;~~

~~in each case, where the construction of such section was, or was notionally, funded by Aurizon.~~

Industry Note: Reference Infrastructure

The Non-Discrimination Provisions are of particular importance to Industry and, in light of this, QRC is of the opinion that the concept of "Reference Infrastructure" should be deleted. The starting premise is that all parts of the Railway Network, irrespective of where they are located, how they are funded and, for example, their relative value, should be treated in the same manner. QRC is concerned that the concept of Reference Infrastructure could enable Aurizon to treat discrete parts of the network – including the SUFA assets (and other Aurizon-funded assets) – differently and in a way that would, on balance, benefit Aurizon. Instead, QRC have included an acknowledgement (in appropriate clauses) that legitimate technical or operational constraints specific to the Leased Extension Infrastructure could warrant different treatment.

Regulatory Asset Base has the meaning given in the Access Undertaking.

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Relevant Access Charges for a Month means the Access Charges for that Month which are relevant to the calculation of the Rent for that Month.

~~**Relevant DTP Customer** has the meaning given in **clause 8.6(b)(ii)**.~~

Removed Infrastructure means any part of the Leased Extension Infrastructure, ~~including any Removed Part and any Obsolete Part~~ which is permanently removed from the Leased Extension Infrastructure or a Segment by or for:

- (a) the Trustee in the performance of its obligations under **clause 7.1**;
- (b) Aurizon in the performance of its obligations under **clause 7.2** or **5.6**; or
- (c) Aurizon (or a third party authorised by Aurizon) in the exercise of its rights under **clause 5.7**.

Removed Obsolete Part has the meaning given in the Extension Infrastructure Head-Lease.

Removed Part means any part, accessory or other equipment that is:

Formatted: Font: Not Bold

(a) permanently removed from the Leased Extension Infrastructure; and

Formatted: Def (a)

(b) replaced with another part, accessory or other equipment which restores the condition of the Leased Extension Infrastructure to at least the condition it was in immediately prior to the replacement (assuming that the Leased Extension Infrastructure was in the condition required to be maintained under this Agreement at that time).

Formatted: Font: Not Bold

Rent for a Month means the amount calculated in accordance with the Rent Calculation Methodology for that Month:

- (a) **less**, if Aurizon adds any Rent Shortfall Adjustment Amount to the Expected Rent for that Month under paragraph (b) of the definition of Expected Rent, the Rent Reduction Amount which Aurizon calculated under **clause 10.6(b)** at the time it calculated such Rent Shortfall Adjustment Amount; and
- (b) **plus**, if Aurizon deducts any Late Payment Adjustment Amount from the Expected Rent for that Month under paragraph (c) of the definition of Expected Rent, the Rent Increase Amount which Aurizon calculated under **clause 10.7(b)** at the time it calculated such Late Payment Adjustment Amount.

Rent Calculation Methodology means the methodology set out in **schedule 3** as varied from time to time.

Rent Calculation Methodology Dispute has the meaning given in **clause 11.6(a)(i)**.

Rent Increase Amount means the amount calculated in accordance with **clause 10.7(b)**.

Rent Reduction Amount means the amount calculated in accordance with **clause 10.6(b)**.

Rent Shortfall Adjustment Amount means an amount calculated in accordance with **clause 10.6(a)**.

Repair means a repair for the purposes of the Tax Act.

Replaced Part has the meaning given in the Extension Infrastructure Head-Lease.

Security Interest means any mortgage, pledge, lien, charge, encumbrance or any security or preferential interest or arrangement of any kind. Security Interest includes:

- (a) any thing which gives a creditor priority to other creditors with respect to any asset; and
- (b) retention of title other than in the ordinary course of day-to-day trading and a deposit of money by way of security,

but it excludes a ~~charge or lien arising in favour of a Governmental Agency by operation of statute unless there is default in payment of money secured by that charge or lien~~ Permitted Security Interest.

Segment has the meaning given in the Unit Holders Deed.

~~**Set-off Amount** has the meaning given in clause 8.6(b).~~

~~**Share of Set-off Amount** for a Relevant DTP Customer for a Month means the amount calculated in accordance with the following formula:~~

$$\text{Set-off Amount} = \frac{\text{DTP Amount}}{\text{Total DTP Amount}}$$

where:

- ~~Set-off Amount = The Set-off Amount as at the DTP Date for the relevant Month~~
- ~~DTP Amount = The amount which Aurizon would, but for clause 8.6(b), otherwise be required to direct the Relevant DTP Customer to pay under clause 9.1 or 9.2 (as applicable) for the relevant Month~~
- ~~Total DTP Amount = The total amount which Aurizon would, but for clause 8.6(b), otherwise be required to direct all Extension Access Agreement Customers and Nominated Access Agreement Customers to pay under clauses 9.1 and 9.2 for the relevant Month~~

SIL Extension Infrastructure means "Extension Infrastructure" (as defined in the Extension Infrastructure Head-Lease) which:

- (a) is leased to the Trustee under the Extension Infrastructure Head-Lease immediately prior to the termination of the Extension Infrastructure Head-Lease; and
- (b) under clause [11.6] of the Extension Infrastructure Head-Lease, is deemed to be "Infrastructure" (as defined in the State Infrastructure Lease) for the purpose of the State Infrastructure Lease,

but, for the avoidance of doubt, does not include:

- (c) any Excluded Extension Infrastructure; and
- (d) any "Extension Infrastructure" (as defined in the Extension Infrastructure Head-Lease) which the Trustee and the State agree may be removed by the Trustee under clause [12.1] of the Extension Infrastructure Head-Lease.

State means the State of Queensland.

State Infrastructure Lease means the lease entitled "*Infrastructure Lease*" between Queensland Treasury Holdings Pty Ltd (ACN 011 027 295) and Aurizon Network Pty Ltd (ABN 78 132 181 116) dated 30 June 2010.

Sublease means the sublease of the Subleased Extension Infrastructure by the Trustee to Aurizon under **clause 3.1(a)**.

Subleased Extension Infrastructure means the “Extension Infrastructure” (as defined in the Extension Infrastructure Head-Lease) that is leased, but only for so long as it is leased, by the Extension Infrastructure Lessor to the Trustee under the Extension Infrastructure Head-Lease.

Supplier has the meaning given in **clause 19.3**.

Tax Act means the *Income Tax Assessment Act 1936* (Cth) (**1936 Act**), the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) or both the 1936 Act and the 1997 Act, as appropriate, and, to the extent applicable, the *Taxation Administration Act 1953* (Cth) and includes tax laws having a similar or corresponding object or effect in any jurisdiction.

Term means the period commencing on the Commencement Date and ending on the End Date.

Total Direction to Pay Amount for a Month means the sum of the amounts which Aurizon has directed (or is taken to have directed) an Extension Access Agreement Customer or a Nominated Access Agreement Customer (if applicable) to pay into the Direction to Pay Account under **clauses 10.1** and **10.2** for that Month, as specified in the Notice given by Aurizon to the Trustee under **clause 10.4** for that Month.

Total Extension Infrastructure means:

- (a) Subleased Extension Infrastructure (from time to time); and
- (b) Leased Extension Infrastructure (from time to time).

Transaction Documents has the meaning given in the Unit Holders Deed.

Trust has the meaning given in the Trust Deed.

Trust Deed means the trust deed made by the Trustee entitled “*User Funding – Trust Deed of [Name of Trust]*”, as amended from time to time.

Trustee Additional Infrastructure means any Infrastructure, part, accessory or equipment which is constructed, incorporated, installed in or attached to the Leased Extension Infrastructure or a Segment by or for:

- (a) the Trustee in the performance of its obligations under **clause 7.1**; or
- (b) Aurizon in the performance of its obligations under **clause 5.6**.

Trustee Supplies has the meaning given in **clause 19.4(a)(i)**.

Trustee’s Associates means any Personnel, consultant, adviser, licensee or invitee of the Trustee but does not include Aurizon or Aurizon’s Associates or any person other than those mentioned exercising any right of access to the Total Extension Infrastructure under any Law.

Umbrella Agreement has the meaning given in the Unit Holders Deed.

Unit Holder has the meaning given in the Trust Deed.

Unit Holders Deed has the meaning given in the Trust Deed.

Variation Notice has the meaning given in **clause 11.4**.

Wilful Default means an intentional breach by Aurizon of the terms of this Agreement.

Works has the meaning given in the Project Management Agreement.

Works Contract has the meaning given in the Project Management Agreement.

Zero Value means, in respect of the Total Extension Infrastructure:

- (a) if the Total Extension Infrastructure is then regulated, the Total Extension Infrastructure has no value in the Regulatory Asset Base and there are no Adjustment Charges, Revenue Adjustment Amounts, bad debts or other applicable adjustments that have yet to be accounted for in accordance with the Rent Calculation Methodology; and
- (b) if the Total Extension Infrastructure is not then regulated, zero Rent has been payable to the Trustee for ~~three~~six consecutive Months and there are no Adjustment Charges, Revenue Adjustment Amount, bad debts or other applicable adjustments that have yet to be accounted for in accordance with the Rent Calculation Methodology.

Industry Note: Zero Value

The rent calculation methodology is complex and includes adjustments up to two years after the relevant period. In addition, Preference Unit Holders retain exposure to access holders' late payment defaults for an unspecified period of time so additional protection is required in this definition.

Zero Value Date means:

- (a) if the Trustee does not give Aurizon a Dispute Notice referred to in **clause 2.2(c)**, the date which is 60 Business Days after the date that Aurizon gives the Trustee the Notice under **clause 2.2(b)**; or
- (b) if the Trustee gives Aurizon a Dispute Notice referred to in **clause 2.2(c)**, the date on which it is agreed or determined under the Dispute Resolution Process that the Total Extension Infrastructure has Zero Value.

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) where the day on or by which any thing is to be done is not a Business Day, it must be done on or by the preceding Business Day;
- (c) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;

- (d) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (e) "includes" means includes without limitation;
- (f) no rule of construction will apply to the disadvantage of one Party on the basis that that Party put forward the documents comprising this Agreement;
- (g) if the documents comprising this Agreement contain any ambiguity, discrepancy or inconsistency, then the following order of precedence will apply to resolve that ambiguity, discrepancy or inconsistency:
 - (i) this Agreement excluding the schedules; and
 - (ii) the schedules;
- (h) words in the singular include the plural and vice versa;
- (i) words importing one gender will include every gender;
- (j) references to clauses and schedules are references to clauses of, and schedules to, this Agreement;
- (k) a requirement for a Party to obtain the consent or approval of the other Party requires the first Party to obtain the consent or approval in writing; and
- (l) a reference to:
 - (i) a person includes any company, partnership, joint venture, unincorporated association, corporation or other body corporate and a government or statutory body or authority;
 - (ii) any Legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified, consolidated, re-enacted or replaced;
 - (iii) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
 - (iv) a right includes a benefit, remedy, discretion and power;
 - (v) time is to local time in Brisbane, Queensland;
 - (vi) \$ or dollars is a reference to Australian currency;
 - (vii) this Agreement or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;
 - (viii) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmission; and

- (ix) a Party includes that Party's successors according to law and permitted assigns and any person to whom it novates its rights and obligations.

2 Term

2.1 Term

This Agreement commences on the Commencement Date and, unless earlier terminated in accordance with this Agreement, continues until the End Date.

2.2 Total Extension Infrastructure has Zero Value

- (a) Not more than seven months, but not less than six months, prior to the date that Aurizon estimates, acting reasonably, that the Total Extension Infrastructure will have Zero Value, Aurizon must give the Trustee a Notice specifying the date on which Aurizon estimates, acting reasonably, that the Total Extension Infrastructure will have Zero Value.
- (b) Promptly after Aurizon determines, acting reasonably, that the Total Extension Infrastructure has Zero Value, Aurizon must give the Trustee a Notice specifying that the Total Extension Infrastructure has Zero Value.
- (c) Within 60 Business Days after Aurizon gives the Trustee the Notice under **clause 2.2(b)**, the Trustee may give Aurizon a Dispute Notice which Disputes that the Total Extension Infrastructure has Zero Value.
- (d) If:
 - (i) the Trustee gives Aurizon a Dispute Notice referred to in **clause 2.2(c)**; and
 - (ii) the Dispute is not resolved in accordance with **clause 17.2**,the Dispute must be referred to an Expert to determine whether or not the Total Extension Infrastructure has Zero Value.
- (e) If the Trustee does not give Aurizon a Dispute Notice referred to in **clause 2.2(c)** within the time referred to in **clause 2.2(c)**, then:
 - (i) the Trustee must not give Aurizon a Dispute Notice Disputing that the Total Extension Infrastructure has Zero Value; and
 - (ii) any such Dispute Notice which is given by the Trustee will be of no force or effect.

3 Subleased Extension Infrastructure

3.1 Sublease of Subleased Extension Infrastructure

- (a) In consideration for the grant of the sublease under this **clause 3**, Aurizon must pay the Trustee the sum of \$1.00 but only if demanded in writing by the Trustee.
- (b) The Trustee subleases each part of the Subleased Extension Infrastructure to Aurizon immediately upon the leasing of that part of the

Subleased Extension Infrastructure to the Trustee under the Extension Infrastructure Head-Lease for so long as that part of the Subleased Extension Infrastructure is leased to the Trustee under the Extension Infrastructure Head-Lease.

- (c) The Trustee and Aurizon acknowledge:
 - (i) the rights of the Extension Infrastructure Lessor under the Extension Infrastructure Head-Lease and the Integrated Network Deed; and
 - (ii) that their rights under the Sublease are subject and subordinate to the rights of the Extension Infrastructure Lessor under the Extension Infrastructure Head-Lease and the Integrated Network Deed.

3.2 Extension Infrastructure Head-Lease

- (a) The Trustee must comply with its obligations under the Extension Infrastructure Head-Lease.

(b) Aurizon must comply with its obligations as Sublessee under the Extension Infrastructure Head-Lease.

(c) Aurizon must, at all times when accessing and using the Subleased Extension Infrastructure for the purpose of exercising its rights and performing its obligations under this Agreement:

- (i) comply with the terms of the lease granted to the Trustee under the Extension Infrastructure Head-Lease as if Aurizon were the Lessee under that agreement;
- (ii) not act or omit to act or permit, cause or contribute to any act or omission which causes a breach of the Extension Infrastructure Head-Lease by either Aurizon or the Trustee (as the case requires); and
- (iii) indemnify the Trustee against any Claim made against the Trustee by the Extension Infrastructure Lessor in respect of or arising from or in any way connected with any matter arising from breach of the Extension Infrastructure Head-Lease to the extent that the relevant Claim was caused, or contributed to (to the extent of the contribution), by any breach of the Extension Infrastructure Head-Lease by Aurizon or an Aurizon Associate.

Industry Note: Clause 3.2

It is entirely standard for a sublease to expressly require the sublessee to comply with the terms of the primary lease for the duration of the sublease. This is particularly relevant here where the sublessee is holding exclusive possession and it is acceptable given that Aurizon is fully aware of all of the terms of the lease.

~~(b)~~(d) The Trustee:

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s, 1.1.1.1.1, Level 3 - (i), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-sub para, L5, Sub4Para, 5, 15, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 Appendix A to X, Appendix A to X1, Com

~~(i)~~ irrevocably nominates Aurizon as the Trustee's nominee for the purpose of clause **[6.5(a)]** of the Extension Infrastructure Head-Lease during the term of this Agreement;

~~(ii)~~ withdraws its nomination of Aurizon as the Trustee's nominee for the purpose of clause [6.5(a)] of the Extension Infrastructure Head-Lease if, at any time, it has notified Aurizon that Aurizon has breached this Agreement and Aurizon has not rectified such breach to the reasonable satisfaction of the Trustee within 20 Business Days; and

~~(iii)~~ must promptly notify the Extension Infrastructure Lessor that the Trustee has nominated Aurizon as the Trustee's nominee, or if the Trustee withdraws its nomination in accordance with clause 3.2(d)(ii) for the purpose of clause [6.5(a)] of the Extension Infrastructure Head-Lease during the term of this Agreement.

Formatted: Font: Bold

Formatted: Font: Bold

~~(e)~~ During the period of any nomination under clause 3.2(d), the Trustee must not exercise its right under clause [6.5(b)] of the Extension Infrastructure Head-Lease without the prior written consent of Aurizon.

~~(f)~~ The Trustee:

~~(i)~~ irrevocably nominates Aurizon as the Trustee's nominee for the purpose of clause **[6.5(c)]** of the Extension Infrastructure Head-Lease during the term of this Agreement;

~~(ii)~~ withdraws its nomination of Aurizon as the Trustee's nominee for the purpose of clause [6.5(a)] of the Extension Infrastructure Head-Lease if, at any time, it has notified Aurizon that Aurizon has breached this Agreement and Aurizon has not rectified such breach to the reasonable satisfaction of the Trustee within 20 Business Days; and

~~(iii)~~ must promptly notify the Extension Infrastructure Lessor that the Trustee has nominated Aurizon as the Trustee's nominee, or if the Trustee withdraws its nomination in accordance with clause 3.2(f)(ii),

~~(iii)~~ for the purpose of clause [6.5(c)] of the Extension Infrastructure Head-Lease during the term of this Agreement.

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Not Bold

Formatted: Indent: Left: 2.5 cm, No bullets or numbering

~~(e)~~ The Trustee must pay Aurizon's costs and expenses of permanently removing any Removed Obsolete Part promptly upon demand.

Industry Note: Clause 3.2(e)

As Aurizon bears all operating costs in the post-construction phase, decides whether parts are Obsolete and is seeking to (subject to any amendments accepted above) take ownership of the Removed Obsolete Part it seems unreasonable to pass the costs to the Trustee.

~~(g)~~ The Trustee must promptly notify Aurizon in writing upon becoming aware of any matter which Aurizon is required to notify to the Extension

Infrastructure Lessor under clause [7.5] of the Extension Infrastructure Head-Lease.

~~(g)~~(h) If Aurizon gives a Notice to the Extension Infrastructure Lessor under clause [7.5] of the Extension Infrastructure Head-Lease, Aurizon must, at the same time as it gives that Notice to the Extension Infrastructure Lessor, give a copy of that Notice to the Trustee.

~~(i)~~ At least 60 Business Days before Aurizon gives the asset register to the Extension Infrastructure Lessor under clause [7.6] of the Extension Infrastructure Head-Lease, Aurizon must, ~~at the same time as it gives a copy of the proposed asset register to the Extension Infrastructure Lessor, give a copy of the asset register to the Trustee. Within 20 Business Days of receipt of the asset register, the Trustee must provide any comments that it has on the content of the asset register to Aurizon. Before providing the asset register to the Extension Infrastructure Lessor, Aurizon must, diligently and in good faith, consult with the Trustee on any comments that it has provided.~~

~~(j)~~ At least 60 Business Days before Aurizon gives the Defects Register to the Extension Infrastructure Lessor under clause [7.7] of the Extension Infrastructure Head-Lease, Aurizon must, give a copy of the proposed Defects Register to the Trustee. Within 20 Business Days of receipt of the Defects Register, the Trustee must provide any comments that it has on the content of the Defects Register to Aurizon. Before providing the Defects Register to the Extension Infrastructure Lessor, Aurizon must, diligently and in good faith, consult with the Trustee on any comments that it has provided.

~~(h)~~(k) The Trustee must immediately notify Aurizon in writing upon becoming aware of any matter which Aurizon is required to notify to the Extension Infrastructure Lessor under clauses [9.3] and [9.6] of the Extension Infrastructure Head-Lease.

~~(i)~~(l) The Trustee, as between the Parties, is liable for and must pay all amounts payable by the Parties under:

- (i) clause 16(a) of the Extension Infrastructure Head-Lease; or
- (ii) clause 21 of the Integrated Network Deed.

~~(j)~~(m) If Aurizon pays any amount referred to in **clause 3.2(l)**, the Trustee must pay that amount to Aurizon promptly on demand.

3.3 Indemnity

- (a) The Trustee indemnifies Aurizon against any amounts which are paid or payable by Aurizon to the Extension Infrastructure Lessor under clause [10.2] of the Extension Infrastructure Head-Lease in respect of any "Losses" (as defined in the Extension Infrastructure Head-Lease) of every kind that may be incurred or sustained, whether directly or indirectly, by the Extension Infrastructure Lessor in respect of or arising from or in any way connected with any matter referred to in clauses

[10.2(a)(i)] to [(vii)] of the Extension Infrastructure Head-Lease to the extent that the relevant matter was caused, or contributed to (to the extent of the contribution), by any act, omission, negligence or failure on the part of the Trustee or a Trustee's Associate.

- (b) It is not necessary for Aurizon to incur any expense or make any payment before enforcing a right of indemnity under this **clause 3.3**.
- (c) The indemnity under this **clause 3.3** is a continuing obligation separate and independent of the Trustee's other obligations.
- (d) For the avoidance of doubt, the indemnity under this **clause 3.3** continues to apply despite **clause 3.5** or **3.6** also applying.

~~(e)~~ The indemnity under this **clause 3.3** does not apply to the extent that the Loss is caused or contributed to by Aurizon's breach of this Agreement, the Extension Infrastructure Head-Lease or the Rail Corridor Agreement or any act or omission of Aurizon or any of Aurizon's Associates.

Industry Note: Indemnity

This carve out is necessary to make it clear, for the avoidance of doubt, that the Trustee is not liable under this indemnity for any Loss arising from the grant of the Sublease or Aurizon's conduct under the Sublease that the Trustee granted.

Formatted: Font: Bold

3.4 Termination of Sublease

~~(a)~~ The Sublease automatically terminates, without the need for either Party to notify the other Party, at the same time as the Extension Infrastructure Head-Lease terminates (for any reason).

~~(b)~~ For the avoidance of doubt, the terms of this Agreement, other than **clause 3.1(a)**, continue in full force and effect despite the termination of the Sublease under this **clause 3.4**.

Formatted: Normal Indent,Para,bold,h -12.25, Hang.Indent1.25, Hang Ind 1.5, ni, Normal Indent Char1, Normal Indent Char Char1, Normal Indent Char2 Char Char, Normal Indent Char Char1 Char Char, Normal Indent Char Char Char Char, Normal Indent Char1 Char1 Char Char

3.5 Compensation arrangement – Aurizon cause

This **clause 3.5** applies if:

- (a) the Extension Infrastructure Lessor exercises its right to terminate the Extension Infrastructure Head-Lease under clause:
 - (i) ~~clause~~ [11.4] of the Extension Infrastructure Head-Lease due to the occurrence of any event or circumstance specified in clause [11.4] of the Extension Infrastructure Head-Lease which was caused by an act or omission of Aurizon; or
 - (ii) clause [11.5] of the Extension Infrastructure Head-Lease due to the Trustee exercising its right of termination under **clause 14.1** or **14.2** of this Agreement.

Formatted: Indent: Left: 1.5 cm, No bullets or numbering

Industry Note: Termination

It is unacceptable that, where the EIH, has been terminated because this Agreement was terminated by the Trustee under clause 14.1 or 14.2 (i.e. Aurizon Insolvency or prolonged payment default) all clauses of the Agreement effectively continue to apply and the Trustee is required to wait and bear the risk of continued

Formatted: Font: Not Bold

Formatted: Font: Not Bold

~~payment default. The Trustee should be entitled to recover the investment that has been sunk and not recouped in Rent paid under the EIH.~~

Formatted: Font: Not Bold

~~(b) If this **clause 3.5** applies:~~

~~(i) despite the SIL Extension Infrastructure ceasing to be Subleased Extension Infrastructure subleased to Aurizon under this **clause 3**, all of the terms of this Agreement (other than this **clause 3**) will continue to apply as if the SIL Extension Infrastructure was Subleased Extension Infrastructure subleased by the Trustee to Aurizon under this **clause 3**; and~~

~~(e)(b) the Parties acknowledge and agree that the amount of the Rent payable each Month to the Trustee by operation of **clause 3.6(b)(i)** will not be rent payable for the sublease of the SIL Extension Infrastructure but, rather, will be a compensation amount payable by Aurizon to the Trustee as a consequence of the early termination of the Extension Infrastructure Head Lease due to Aurizon's cause; the Trustee terminates this Agreement under **clauses 14.1, 14.2 or 14.3**; then despite **clause 15** the Trustee will be entitled to common law damages.~~

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

3.6 Compensation arrangement – other cause

- (a) This **clause 3.6** applies if the Extension Infrastructure Lessor exercises its right to terminate the Extension Infrastructure Head-Lease under:
- (i) clause **[11.1]** of the Extension Infrastructure Head-Lease; or
 - (ii) clause **[11.4]** of the Extension Infrastructure Head-Lease (other than for a reason specified in **clause 3.5(a)(i)**).
- (b) If this **clause 3.6** applies, then despite the SIL Extension Infrastructure ceasing to be Subleased Extension Infrastructure subleased by the Trustee to Aurizon under this **clause 3**, all of the terms of this Agreement (other than this **clause 3**) (including Aurizon's obligation to pay Rent under **clause 9** in respect of the SIL Extension Infrastructure) will continue to apply as if the SIL Extension Infrastructure continued to be Subleased Extension Infrastructure subleased by the Trustee to Aurizon under this **clause 3**, on the basis that in consideration of such agreement, Aurizon must pay the Trustee the sum of \$1.00 but only if demanded in writing by the Trustee.
- (c) If the Group (or, if Aurizon is not a member of a Consolidated Group, Aurizon) suffers or incurs any Detriment, then:
- (i) Aurizon must promptly give the Trustee a notice specifying reasonable details of the Detriment and the Detriment Amount (including reasonable details of the calculation of the Detriment Amount and reasonable supporting evidence of the Detriment and the Detriment Amount) (**Detriment Notice**); and
 - (ii) within 28 days of receipt of the Detriment Notice, the Trustee must give Aurizon either:

- (A) a notice specifying that it agrees with the Detriment Amount in respect of the Detriment specified in the Detriment Notice; or
 - (B) a Dispute Notice under **clause 17.1** which Disputes the Detriment Amount specified in the Detriment Notice.
- (d) If a Dispute referred to in **clause 3.6(c)(ii)(B)** is not resolved in accordance with **clause 17.3**, then the Dispute must be referred to an Expert to determine the Detriment Amount in respect of the relevant Detriment.
- (e) If **clause 3.6(c)(ii)** applies and the Trustee does not give Aurizon a Dispute Notice referred to in **clause 3.6(c)(ii)(B)** within the time referred to in **clause 3.6(c)(ii)(B)**, then:
- (i) the Trustee must not give Aurizon a Dispute Notice under **clause 17.1** Disputing the Detriment Amount specified in the Detriment Notice; and
 - (ii) any such Dispute Notice which is given by the Trustee will be taken to be of no effect.
- (f) Interest (calculated at the Interest Rate) will accrue on the unpaid portion of the Detriment Amount in respect of a Detriment from the date that Aurizon gives the Trustee a Detriment Notice in respect of the Detriment until the Detriment Amount has been fully paid by the Trustee and any interest accrued on the Detriment Amount but not paid by the Trustee at the end of each Month will itself bear interest under this **clause 3.6(f)**.
- (g) If:
- (i) the Trustee gives Aurizon a notice specifying that it agrees with the Detriment Amount in respect of a Detriment specified in the Detriment Notice; or
 - (ii) the Detriment Amount in respect of a Detriment is determined by an Expert,
- the Detriment Amount (as agreed or determined) is payable to Aurizon by the Trustee but only in accordance with **clause 3.7**.

3.7 Payment of DA Monthly Instalment

- (a) If, at the time that Aurizon gives the Trustee a Monthly Invoice under **clause 9.1**, any Detriment Amount (or portion of a Detriment Amount) is payable to Aurizon, then, at the same time that it gives the Trustee the Monthly Invoice under **clause 9.1**, Aurizon must provide the Trustee with a tax invoice setting out the DA Monthly Instalment for the Month in which the Monthly Invoice is given, including comprehensive details of the calculation of that amount (**DA Monthly Invoice**).
- (b) Within 10 Business Days after Aurizon gives the Trustee the DA Monthly Invoice, the Trustee must pay the DA Monthly Instalment specified in the DA Monthly Invoice.

- (c) If the Trustee Disputes the DA Monthly Instalment specified in a DA Monthly Invoice:
 - (i) the Trustee may give Aurizon a Dispute Notice under **clause 17.1**; and
 - (ii) if the Dispute is not resolved in accordance with **clause 17.3**, then either Party may refer the Dispute to an Expert.
- (d) Notwithstanding **clause 3.7(b)**, if the DA Monthly Instalment specified in a DA Monthly Invoice given by Aurizon under this **clause 3.7(a)** is Disputed, the Trustee must pay the portion of the DA Monthly Instalment that is not in Dispute within the time specified in **clause 3.7(b)**.
- (e) Upon resolution of any Dispute about the DA Monthly Instalment specified in a DA Monthly Invoice, if the DA Monthly Instalment specified in the DA Monthly Invoice as agreed or determined under the Dispute Resolution Process is:
 - (i) more than the amount that was paid by the Trustee under **clause 3.7(d)** in respect of the DA Monthly Invoice, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount in Dispute would have been due and payable but for the Dispute), must be paid by the Trustee to Aurizon within ten Business Days after:
 - (A) if the DA Monthly Instalment as agreed or determined under the Dispute Resolution Process is the same as the DA Monthly Instalment specified in the DA Monthly Invoice, the date of resolution of the Dispute Resolution Process; or
 - (B) if **clause 3.7(e)(i)(A)** does not apply, Aurizon gives the Trustee an adjustment note or further tax invoice (as applicable) under **clause 3.7(f)**; or
 - (ii) less than the amount that was paid by the Trustee under **clause 3.7(d)** in respect of the DA Monthly Invoice, then the amount of the difference, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount was paid by the Trustee), must be paid by Aurizon to the Trustee within ten Business Days after Aurizon gives the Trustee an adjustment note or further tax invoice (as applicable) under **clause 3.7(f)**.
- (f) If, upon resolution of any Dispute about the DA Monthly Instalment specified in a DA Monthly Invoice given by Aurizon under **clause 3.7(a)**, the DA Monthly Instalment as agreed or determined under the Dispute Resolution Process differs from the amount of the DA Monthly Instalment specified in the DA Monthly Invoice, Aurizon must, within five Business

Days after resolution of the Dispute, give the Trustee an adjustment note or further tax invoice (as applicable) in respect of the difference.

- (g) If, at any time:
- (i) the Trustee discovers an error in a DA Monthly Invoice resulting in an underpayment or overpayment, then the Trustee must promptly notify Aurizon of this error; and
 - (ii) Aurizon discovers an error in a DA Monthly Invoice resulting in an underpayment or overpayment, then Aurizon must promptly notify the Trustee of this error.
- (h) Despite the Trustee's payment of a DA Monthly Invoice, if, at any time, an error (resulting in an underpayment or overpayment) is discovered and notified to the other Party in accordance with **clause 3.7(g)**, then:
- (i) if the error results in an underpayment:
 - (A) Aurizon must, within five Business Days after the date the error is verified by Aurizon, give the Trustee an adjustment note or further tax invoice (as applicable) for the amount of the underpayment, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the date when the amount of the underpayment would have been due and payable but for the error); and
 - (B) within ten Business Days of receipt of the adjustment note or further tax invoice (as applicable) under **clause 3.7(h)(i)(A)**, the Trustee must pay the amount referred to in **clause 3.7(h)(i)(A)** to Aurizon; or
 - (ii) if the error results in an overpayment:
 - (A) within five Business Days after the date the error is verified by Aurizon, Aurizon may give the Trustee an adjustment note for the amount of the overpayment to Aurizon, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the amount of the overpayment will be deemed to be a payment due and payable by Aurizon to the Trustee and the due date for payment will be deemed to be the date when the overpayment was paid by the Trustee); and
 - (B) within ten Business Days after receipt of the adjustment note or further tax invoice (as applicable) from Aurizon under **clause 3.7(h)(ii)(A)**, Aurizon must pay the amount referred to in **clause 3.7(h)(ii)(A)** to the Trustee.

4 Aurizon responsible for Aurizon's Associates

(a) Aurizon:

- (i) must ensure that Aurizon's Associates comply with the provisions of this Agreement; and
- (ii) is responsible for the acts and omissions of its Associates as if those acts and omissions were the acts and omissions of Aurizon itself; and

~~(B)~~(b) the exercise of rights, or discharge of obligations, of Aurizon under this Agreement by any of Aurizon's Associates will be treated as an exercise of those rights, or the discharge of those obligations, by Aurizon.

Industry Note: Aurizon's Associates

Aurizon has a broad ability to give its Associates access to the Total Extension Infrastructure and it has broad rights/obligations to modify and maintain the Infrastructure (see the EIH, and clause 5 in relation to the Leased Extension Infrastructure) and rectify defects (see clause 6 in relation to Total Extension Infrastructure). It is imperative that Aurizon be fully responsible for the acts and omissions of its Associates and requires its Associates to comply with the terms of the Sublease and the Lease.

45 Leased Extension Infrastructure

4-15.1 Lease of Leased Extension Infrastructure

- (a) The Trustee must ensure that, during the Construction Period, each part of the Infrastructure which is constructed, and each part, accessory and equipment that is incorporated or installed in, or attached to, the Infrastructure, comprising the Extension, is owned wholly by the Trustee free from all Security Interests (~~other than Permitted Liens~~) from the time on which that part of the Infrastructure, part, accessory or equipment is constructed, incorporated, installed or attached.

Industry Note: Clause 5.1(a)

After the Construction Period, Aurizon can add "Aurizon Additional Infrastructure", making the above undertaking appropriate only during the Construction Period.

- (b) With effect upon the date on which a part of the Infrastructure, part, accessory or equipment referred to in **clause 5.1(a)** is constructed, incorporated, installed or attached, such Infrastructure, part, accessory or equipment is deemed to be Leased Extension Infrastructure and is leased by the Trustee to Aurizon under this Agreement until:
 - (i) the time at which such Infrastructure, part, accessory or equipment is transferred by the Trustee to the Extension Infrastructure Lessor under clause **[3.1(b)]** of the Extension Infrastructure Head-Lease (at which time, such Infrastructure, part, accessory or equipment will cease to be Leased Extension Infrastructure and will ceased to be leased to Aurizon under this Agreement); or
 - (ii) otherwise, the end of the Term.

Formatted: Heading 2, 1.1, Reset numbering, h2, h2 main heading, H2, Section, 2m, h2, body, h2, H2, UNDERUBRIK 1-2, H-2, delete style, Sub-heading, test, Attribute Heading 2, sub-para, Heading 2 Para2, B Sub/Bold, B Sub/Bold1, B Sub/Bold2, B Sub/Bold11, Para2, 2, 1.1 Char, p, B Sub/Bold3, h, Tab stops: 0 cm, List tab

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Formatted: Indent: Left: 0 cm

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Formatted: Font: Not Bold

- (c) With effect upon the date on which the Extension Infrastructure Lessor transfers ownership of any Excluded Extension Infrastructure to the Trustee under the Integrated Network Deed, the Excluded Extension Infrastructure is deemed to be Leased Extension Infrastructure and is leased by the Trustee to Aurizon under this Agreement until the end of the Term.
- (d) The Parties acknowledge and agree that:
 - (i) as between the Parties, the Leased Extension Infrastructure is owned by the Trustee;
 - (ii) the Leased Extension Infrastructure is leased under this Agreement separately from the land on, under or above which it is situated;
 - (iii) nothing in this Agreement grants to Aurizon any right or interest in or to the land on, under or above which the Leased Extension Infrastructure is situated regardless of whether or not any part of it is affixed to the land; and
 - (iv) nothing in this Agreement grants to the owner of the land on, under or above which the Leased Extension Infrastructure is situated any right or interest in the Leased Extension Infrastructure regardless of whether or not any part of it is affixed to the land.

4.25.2 Use only for Permitted Purposes

- (a) Aurizon must only use the Leased Extension Infrastructure for a Permitted Purpose.
- (b) For the avoidance of doubt, Aurizon may authorise other persons to access and use all or part of the Leased Extension Infrastructure for a Permitted Purpose and otherwise in accordance with this Agreement.
- (c) Aurizon must:
 - (i) obtain, maintain and comply with all Authority Approvals; and
 - (ii) otherwise comply with all Legislation,that are required to be obtained, maintained or complied with (as applicable) in order for Aurizon to lawfully use the Leased Extension Infrastructure for any Permitted Purpose for which Aurizon uses the Leased Extension Infrastructure.
- (d) The Trustee must:
 - (i) not unreasonably withhold or delay the giving of, and must not impose any unreasonable conditions upon, any consent that is required from the Trustee for Aurizon to comply with its obligations under **clause 5.2(c)**; and
 - (ii) promptly, upon written request by Aurizon, do all things reasonably required by Aurizon (including executing documents) to enable Aurizon to comply with its obligations under **clause 5.2(c)**.

4.35.3 Title

- (a) Aurizon acknowledges that it has no rights in relation to the Leased Extension Infrastructure other than its rights as lessee under this Agreement.
- (b) The Trustee must promptly, upon written request by Aurizon, exercise any of its rights and entitlements in, or in relation to, the Leased Extension Infrastructure to assist Aurizon to the extent **reasonably** necessary to enable Aurizon to use the Leased Extension Infrastructure for any Permitted Purpose where Aurizon (**or an Aurizon Associate**) is unable to act itself by reason of the Trustee's interest in, or in relation to, the Leased Extension Infrastructure.

4.45.4 Exclusive use and possession

- (a) Subject to **clause 5.4(b)**, Aurizon will have exclusive use and possession of the Leased Extension Infrastructure and may peaceably possess and enjoy the Leased Extension Infrastructure for the Term without any interruption or disturbance from the Trustee (or any other person lawfully claiming by, from or under the Trustee) subject only to any interruption or disturbance which results from the exercise by the Trustee of its rights under this Agreement, **any Transaction Document** or any rights conferred on the Trustee by Legislation.

Industry Note: Clause 5.4

Provided access is in accordance with a Transaction Document – e.g. assessing the performance of Aurizon as Project Manager or where Aurizon has been replaced as Project Manager – access should be permitted.

Formatted: Font: Not Bold

- (b) Subject to **clause 5.4(c)**, Aurizon permits the Trustee and the Trustee's Associates to access and use the Leased Extension Infrastructure for the purpose of:
 - (i) carrying out the Works for the Extension;
 - ~~(ii)~~ **exercising any right or performing any of the Trustee's obligations under the Project Management Agreement;** and
 - ~~(iii)~~ performing the Trustee's obligations under **clause 7.1**.
- (c) The Trustee must, and must ensure the Trustee's Associates:
 - (i) only access and use the Leased Extension Infrastructure **at times permitted by Aurizon in accordance with the Project Management Agreement** and only for the purposes referred to in **clause 5.4(b)**; and
 - (ii) comply with all reasonable requirements of Aurizon in connection with the Trustee and the Trustee's Associates accessing and using the Leased Extension Infrastructure in connection with the purpose referred to in **clause 5.4(b)**.
- (d) Subject to **clause 5.4(e)**, Aurizon permits the Trustee and the Trustee's Associates, at reasonable times and having given Aurizon reasonable

notice, access to any Leased Extension Infrastructure for purpose of inspecting the Leased Extension Infrastructure.

- (e) When exercising its rights under **clause 5.4(c)**, the Trustee and the Trustee's Associates:
- (i) must not unreasonably interfere with Aurizon's operations or business;
 - (ii) will be subject to the same limitations upon and conditions of access as apply to any third party visitor to the place where the relevant Leased Extension Infrastructure is located; and
 - (iii) must comply with all safety requirements and other reasonable directions of Aurizon in relation to such access.
- (f) The Trustee must, and must ensure that the Trustee's Associates, only access and use the Leased Extension Infrastructure for the purposes referred to in **clauses 5.4(b) and 5.4(d)**.
- (g) The Trustee must promptly upon demand pay all costs and expenses reasonably incurred by Aurizon in facilitating and supervising access to and use of the Total Extension Infrastructure for the purposes referred to in **clause 5.4(b) and 5.4(d)**.
- (h) The Trustee must ensure that the Trustee's Associates do not do anything in relation to the Leased Extension Infrastructure which, if done by the Trustee, would be a breach of this Agreement by the Trustee.

4.55.5 Obligation to operate and manage

Industry Note: Clause 5.5

As drafted, this clause is limited in scope (compare, for example, the scope of the comparable clauses in the EIA) and it also gives significant discretion to Aurizon. It needs to be expanded to adequately protect the rights of the Trustee. Currently, Aurizon has an obligation to repair and maintain (but not necessarily replace) the Leased Extension Infrastructure. This is coupled with a broad right to operate, remove and replace Leased Extension Infrastructure as desired.

The only restrictions on the Extension Lessee in exercising these rights/performing these obligations are that:

- repair/maintenance must be at a standard which does not discriminate between self-funded assets and other comparable assets; and
- generally, Aurizon must not take action that is for the sole (and no other) purpose of reducing the Rent payable.

There are no other restrictions on Aurizon's rights as Extension Lessee. In particular, there are no:

- general non-discrimination provisions requiring non-discrimination in the modifications made to the Leased Extension Infrastructure (when compared to modifications made to reference assets); or
- similar provisions detailing when infrastructure can be removed.

Formatted: Font: Not Bold

Formatted: Indent: Left: 0 cm, Hanging: 0.75 cm

Formatted: Indent: Left: 0 cm, Hanging: 0.75 cm

(a) This **clause 5.5** does not apply in respect of any Leased Extension Infrastructure for a Segment until the Available Date for that Segment.

(b) Aurizon must operate and manage the Leased Extension Infrastructure:

(i) in accordance with all applicable Legislation;

(ii) in a manner and to the extent necessary to comply in all material respects with the requirements specified in any insurance policy required to be maintained under this Agreement;

(iii) in the same manner that it operates and maintains the balance of the Railway Network, having regard to legitimate operational and technical constraints that are specific to the Leased Extension Infrastructure; and

~~(b)(iv)~~ (iv) in accordance with the requirements of all relevant Authority Approvals (including the Access Undertaking).

(c) Aurizon must ensure that Aurizon's Associates do not do anything in respect of the Leased Extension Infrastructure which, if done by Aurizon, would be a breach of this Agreement by Aurizon.

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s. 1.1.1.1.1, Level 3 - (i), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-sub para, L5, Sub4Para, 5, I5, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 Appendix A to X, Appendix A to X1, Com

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s. 1.1.1.1.1, Level 3 - (i), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-sub para, L5, Sub4Para, 5, I5, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 Appendix A to X, Appendix A to X1, Com

4.65.6 **Obligation to Repair and maintain**

(a) This **clause 5.6** does not apply in respect of any Leased Extension Infrastructure for a Segment until the Available Date for that Segment.

(b) Subject to **clauses 7** and **1.1**, Aurizon must, at its cost, Repair and maintain the Leased Extension Infrastructure:

~~(b)(i)~~ (i) in accordance with Good Operating Practice;

(ii) in accordance with all applicable Legislation;

~~(b)(iii)~~ (iii) in accordance with all notices, orders and directions lawfully given by any Governmental Agency (including in so far as they impose obligations on the Trustee and the performance of those obligations by Aurizon is not prohibited by Law);

~~(b)(iv)~~ (iv) in accordance with the requirements of all relevant Authority Approvals (including the Access Undertaking); and

~~(b)(v)~~ (v) to a standard that is not materially lower than the standard to which Aurizon ~~would~~ Repairs and maintains ~~the Reference~~ other Infrastructure in the ~~same or similar circumstances~~ Railway Network.

(c) If any part of the Leased Extension Infrastructure is lost, damaged, destroyed or expired and is necessary for the continued operation of the Leased Extension Infrastructure as part of the fully functioning Railway Network, Aurizon must, at its cost, ~~replace any~~ remove such part of the Leased Extension Infrastructure ~~that is lost or destroyed~~ (Removed Part) and provide any replacement necessary to restore the condition of the Extension Infrastructure to at least the condition it was in immediately prior to the replacement.

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s. 1.1.1.1.1, Level 3 - (i), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-sub para, L5, Sub4Para, 5, I5, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 Appendix A to X, Appendix A to X1, Com

~~(d)~~ If any part of the Leased Extension Infrastructure is no longer required for the effective, safe and efficient operation of the Leased Extension Infrastructure as part of the fully functioning Railway Network (**Obsolete Part**), Aurizon may, at its cost, remove such part of the Leased Extension Infrastructure.

Formatted: Font: Bold

~~(e)~~(e) In exercising its rights and performing its obligations under this **clause 5.6**, Aurizon must exercise its rights and perform its obligations in the same way as it would have exercised such rights or performed such obligations if the relevant rights or obligations were to be performed in respect of another part of the Railway Network in the same or substantially similar circumstances, having regard to legitimate operational or technical constraints specific to the Leased Extension Infrastructure.

Formatted: Font: Bold

4.7 — No obligation to replace

~~Except as required under **clause 4.6(c)**, nothing in this Agreement requires Aurizon to replace any part of the Leased Extension Infrastructure (including, for the avoidance of doubt, any part of the Leased Extension Infrastructure which is obsolete or life-expired).~~

4.85.7 Modifications

- (a) This **clause 5.7** does not apply in respect of any Leased Extension Infrastructure for a Segment until the earlier of:
- (i) the Available Date for that Segment; or
 - (ii) the date of termination of the Project Management Agreement (for any reason).
- (b) Aurizon may:
- (i) make any Modifications to the Leased Extension Infrastructure; or
 - ~~(ii)~~ authorise third parties to make any Modifications to the Leased Extension Infrastructure.

~~(ii)~~ to the extent that such Modifications are considered by Aurizon, acting reasonably, to be necessary for the use of the Leased Extension Infrastructure for a Permitted Purpose.

Formatted: Normal Indent,Para,bold,h
-i2.25, Hang. Indent 1.25, Hang Ind
1.5, ni, Normal Indent Char 1, Normal
Indent Char Char 1, Normal Indent
Char 2 Char Char, Normal Indent Char
Char 1 Char Char, Normal Indent Char
Char Char Char Char, Normal Indent
Char 1 Char 1 Char Char, Indent: Left:
2.5 cm

Formatted: Font: Bold

Industry Note: Modifications

A broader right of Modification is not required as this clause is limited to Modifications of the Leased Extension Infrastructure as approved in the Scope of Works. Once commissioned, Leased Extension Infrastructure becomes a part of the Extension and this clause ceases to apply.

~~(c)~~ Aurizon must maintain reasonable details of all Modifications made, or authorised to be made, to the Leased Extension Infrastructure under **clause 5.7(b)**.

~~(e)~~(d) In exercising its rights under this **clause 5.7**, Aurizon must exercise its rights in the same way as it would have exercised such rights if the

Formatted: Font: Bold

relevant rights were to be performed in respect of another part of the Railway Network, having regard to legitimate operational or technical constraints specific to the Leased Extension Infrastructure.

4.95.8 Trustee Additional Infrastructure

- (a) The Trustee and Aurizon (as applicable) must ensure that any Trustee Additional Infrastructure is owned wholly by the Trustee free from all Security Interests (~~other than Permitted Liens~~) from the time on which it is constructed, incorporated, installed or attached.
- (b) With effect upon the date on which any Trustee Additional Infrastructure is constructed, incorporated, installed or attached, the Trustee Additional Infrastructure is deemed to form part of the Leased Extension Infrastructure and is leased by the Trustee to Aurizon under this Agreement.
- (c) As between the Trustee and Aurizon, title to the Trustee Additional Infrastructure remains with the Trustee.

4.105.9 Aurizon Additional Infrastructure

Despite any Aurizon Additional Infrastructure being constructed, incorporated or installed in or attached to the Leased Extension Infrastructure or a Segment:

- (a) Aurizon Additional Infrastructure does not form part of the Leased Extension Infrastructure; and
- (b) as between the Trustee and Aurizon, title to Aurizon Additional Infrastructure remains with Aurizon.

4.115.10 Removed Infrastructure

- (a) Removed Infrastructure will cease being part of the Leased Extension Infrastructure from the time it is permanently removed from the Leased Extension Infrastructure or a Segment.
- (b) Subject to clause 5.10(c), ~~T~~the Trustee must transfer title to Removed Infrastructure to Aurizon or its nominee for nil consideration and free from all Security Interests (other than Permitted Liens) except in the case of any Removed Infrastructure which is:
 - (i) removed by or for the Trustee in the performance of its obligations under **clause 7.1**; or
 - (ii) removed by or for Aurizon and not replaced.

~~(ii)(c)~~ The Trustee is not required to transfer title to Removed Infrastructure if, at any time, it has notified Aurizon that Aurizon has breached this Agreement and Aurizon has not rectified such breach to the reasonable satisfaction of the Trustee within for 30 Business Days.

4.125.11 Termination of Project Management Agreement

- (a) If the Project Management Agreement terminates during the Construction Period, then within 20 Business Days after the termination of the Project Management Agreement, Aurizon may notify the Trustee

Formatted: Font: Bold

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, j

that it no longer wishes the whole, or particular parts, of the Leased Extension Infrastructure to be subject to the lease under this **clause 5**.

- (b) A Notice given under **clause 5.11(a)** must specify:
 - (i) that Aurizon no longer wishes the whole of the Leased Extension Infrastructure to be subject to the lease under this **clause 5**; or
 - (ii) the particular parts of the Leased Extension Infrastructure which Aurizon no longer wishes to be subject to the lease under this **clause 5**.
- (c) On the date that Aurizon gives the Trustee a Notice under **clause 5.11(a)**:
 - (i) the Leased Extension Infrastructure specified in the Notice given under **clause 5.11(a) (Redundant Extension Infrastructure)** will immediately cease being subject to the lease under this **clause 5**;
 - ~~(ii)~~ for the avoidance of doubt, the Redundant Extension Infrastructure will remain the property of the Trustee; and
 - ~~(ii)~~(iii) for the avoidance of doubt, the Leased Extension Infrastructure (other than the Redundant Extension Infrastructure) will continue to be subject to the lease under this **clause 5**.

4.135.12 Insurance

- (a) Aurizon must effect and maintain insurance policies and/or adopt internal 'self-insurance strategies' in respect of:
 - (i) the replacement and reinstatement of the Leased Extension Infrastructure;
 - ~~(a)~~(ii) workers' compensation insurance covering any liability, loss, claim or proceeding, whether arising by virtue of any statute relating to workers' compensation insurance, accident compensation legislation, employers' liability, or at common law, by any person employed by Aurizon for the Permitted Purpose, and unless otherwise limited by statute, the liability provided by this insurance must be for an unlimited amount; and
 - ~~(b)~~(iii) public liability risks in connection with the Leased Extension Infrastructure,
- which provide a level of cover that is not materially lower than the level of cover provided under the insurance policies and/or internal 'self-insurance strategies' that Aurizon would effect, maintain and/or adopt in respect of:
- ~~(e)~~(iv) the replacement and reinstatement of **Reference**-Infrastructure; and
 - (v) public liability risks in connection with **Reference**-Infrastructure.

Formatted: Heading 4,(i),Level 2 - a,h4,H4,2nd sub-clause,D Sub-Sub/Plain,h4 sub sub heading,4,a,h41,h42,h411,h43,h412,h44,h413,h45,h414,h46,h415,h47,h416,h48,h417,h49,h418,h421,h4111,h431,h4121,h441,h4131,h451,h4141,h461,h4151,h422,h4112,h432,h4122,h442,h4132,H-4,i

Formatted: Indent: Left: 2.5 cm

Formatted: Heading 5,(A),Level 3 - i,H5,Block Label,s,1.1.1.1,Level 3 - (i),Para5,Para51,Heading 5(unused),h5,h51,h52,sub-sub-sub-sub para,L5,Sub4Para,5,I5,A,Heading 5 StGeorge,Lev 5,Body Text (R),Appendix A to X,Heading 5 Appendix A to X,Appendix A to X1,Com

- (b) Each of the policies of insurance effected in accordance with this Agreement must, to the extent permitted by Law:
 - (i) ensure that the Trustee is noted (or dealt with in such manner as may be equivalent to noting) on each policy as an insured party;
 - (ii) ensure, where legally possible, that each policy provides that all insuring agreements and endorsements shall operate in the same manner as if there were a separate policy of insurance covering each insured party; and
 - (iii) ensure, where legally possible, that each policy provides that the insurer waives all rights, remedies or relief which it might become entitled to by subrogation against any insured parties, and that failure by any insured party to observe and fulfil the terms of the policy shall not prejudice the insurance in respect of any other insured party.

(c) Aurizon must:

- (i) upon request by the Trustee (such requests not to be made more than once in any 12 month period) produce to the Trustee annual certificates of currency of policies taken out pursuant to this clause 5.12 within 20 Business Days of request;
- (ii) at all times comply with the terms and conditions of all insurance policies effected pursuant to this clause 5.12;
- (iii) in addition to any other obligation on Aurizon pursuant to this Agreement, notify the Trustee as soon as practicable after the occurrence of any claim under any insurance policy required by this Agreement, notify the Trustee of that event in reasonable detail and thereafter keep Aurizon informed of subsequent developments concerning any claim; and
- (iv) in respect of any claims by it or any other insured for which it is responsible, pay and bear all excesses/deductibles provided for in any insurances effected in accordance with this clause 5.12.

- (d) If Aurizon, whenever required to do so under this Agreement, fails to produce to the Trustee evidence to the reasonable satisfaction of the Trustee of insurances that have been effected or maintained by it, the Trustee may effect and maintain the relevant insurance and pay the premiums and any amount so paid will be a debt due from Aurizon to the Trustee.

Industry Note: Insurance

The relevant matters set out above are not captured by the NDP included in Aurizon's draft insurance clause and are important to ensure that the Leased Extension Infrastructure is adequately insured and the interests of the Trustee/Preference Unit Holders are adequately protected.

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Formatted: Font: Bold

Formatted: Font: Not Bold

56 Total Extension Infrastructure

5-16.1 Non-discrimination

- (a) Aurizon must not take any action in respect of the Total Extension Infrastructure where such action is for ~~the a sole purpose~~ ~~(and no other purpose)~~ of reducing the Rent payable by it under this Agreement.
- (b) Nothing in this **clause 6.1** imposes any restriction or limitation on the making of any submissions or representations by Aurizon to the Access Regulator and the content of such submissions or representations.
- (c) In exercising its rights under this Agreement in relation to the Total Extension Infrastructure, Aurizon must exercise its rights in the same way as it would have exercised such rights if the relevant rights were to be performed in respect of Infrastructure in the Railway Network in the same or substantially similar circumstances, having regard to legitimate operational or technical constraints specific to the Total Extension Infrastructure.

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Industry Note: Non-Discrimination Provision (NDP)

The drafting of the "general" NDP in paragraph (a) above gives an unacceptable degree of discretion to Aurizon as Extension Lessee/Sublessee. It would be extremely difficult from the Trustee to prove that action was taken for the "sole" purpose of reducing the rent. At various points throughout the Agreement (and in this clause 6.1) we have sought to broaden the scope of the NDP and ensure that it cannot be circumvented and can be easily enforced by the Trustee.

Formatted: Font: Not Bold

5-26.2 Provision of Records by Trustee

- (a) The Trustee must, promptly upon written request by Aurizon from time to time, deliver to Aurizon, in the format reasonably required by Aurizon, a copy of any Records requested by Aurizon.
- (b) The Trustee must grant to Aurizon, or procure that Aurizon is granted, a non-exclusive licence to exercise the Intellectual Property Rights in any Records (including the right to sub-licence) delivered to Aurizon under **clause 6.2(a)**.
- (c) To the extent that the Trustee has Moral Rights in any Records delivered to Aurizon under **clause 6.2(a)**, the Trustee must give a Moral Rights Consent.
- (d) To the extent that a person other than the Trustee or Aurizon has Moral Rights in any Records delivered to Aurizon under **clause 6.2(a)**, the Trustee must:
 - (i) use reasonable endeavours to obtain a Moral Rights Consent from that person on request from Aurizon; and
 - (ii) once obtained, promptly deliver the Moral Rights Consent to Aurizon.
- (e) The Trustee warrants that:

- (i) it has the right to grant the rights granted to Aurizon under this **clause 6.1(c)**; and
- (ii) the Records delivered to Aurizon under **clause 6.2(a)**, and the acts of Aurizon or any person authorised by Aurizon in relation to those Records, do not infringe the Intellectual Property Rights or Moral Rights of any person.

5-36.3 Keeping of Records by Aurizon

- (a) Aurizon must keep and maintain reasonable records relating to the operation, management, repair, maintenance, Modification and use and condition of the Total Extension Infrastructure.
- (b) Aurizon must, promptly upon written request by the Trustee from time to time, deliver to the Trustee, in the format Aurizon generally keeps records of that nature, a copy of any record kept and maintained by Aurizon under **clause 6.3(a)**.

5-46.4 Lease continues

For the avoidance of doubt, unless this Agreement is earlier terminated in accordance with the terms of this Agreement, this Agreement, including the obligation to pay Rent, will continue for the Term despite there ceasing to be any Total Extension Infrastructure subleased or leased (as applicable) under this Agreement prior to the end of the Term.

5-56.5 Outgoings

- (a) Despite the Extension Infrastructure Head-Lease:
 - (i) during the Construction Period, the Trustee must pay all charges, taxes and rates which are payable in respect of the Total Extension Infrastructure or services provided for the Total Extension Infrastructure (except to the extent caused by a negligent act or omission of Aurizon or Aurizon's Associates).
 - (ii) after the end of the Construction Period, Aurizon must pay all charges, taxes and rates which are payable in respect of the Total Extension Infrastructure or services provided for the Total Extension Infrastructure, except for taxes on the revenues or capital gains of the Trustee.
- (b) For the avoidance of doubt, Aurizon is not responsible under this Agreement to pay any charges, taxes and rates which are payable in respect of land.

5-66.6 Replacement of Total Extension Infrastructure

If Aurizon replaces any part of the Total Extension Infrastructure which is a "depreciating asset" (as defined in the Tax Act) (the **original depreciating asset**) that is "lost or destroyed" (as referred to in item 8 of section 40-300(2) of the Tax Act), the Trustee must choose under section 40-365 of the Tax Act to exclude all of any amount that would otherwise be included in the Trustee's assessable income as a result of a "balancing adjustment event" (as defined in

the Tax Act) occurring because the original depreciating asset is “lost or destroyed” (as referred to in item 8 of section 40-300(2) of the Tax Act).

67 Rectification of Defects

6-17.1 Rectification of Defects by Trustee

(a) The Trustee must, at its cost, procure the rectification of any Defects during the Defects Rectification Period, promptly after they are recorded (or required to be recorded) in the Defects Register, in accordance with the Project Management Agreement.

(b) Aurizon acknowledges that the Trustee has appointed the Project Manager under the Project Management Agreement as the Trustee's disclosed agent to perform the Trustee's obligations under this **clause 7.1**.

~~(b)~~(c) If Aurizon becomes aware of a Defect it will promptly give the Trustee a written notice, including reasonable details of the Defect.

6-27.2 Rectification of Defects by Aurizon

- (a) After the end of the Defects Rectification Period, Aurizon must rectify, or procure the rectification of, all Defects other than Defects which are recorded (or required to be recorded) in the Defects Register.
- (b) As between the Trustee and Aurizon, Aurizon will be responsible for the costs of rectifying, or procuring the rectification of, Defects under **clause 7.2(a) (Aurizon Defect Rectification Costs)**.
- (c) The Trustee acknowledges that Aurizon may seek to include Aurizon Defect Rectification Costs in the Regulatory Asset Base as part of the capital cost of the Total Extension Infrastructure.
- (d) The Trustee acknowledges that Aurizon may procure the rectification of Defects under **clause 7.2(a)** by exercising any rights which Aurizon has in relation to the rectification of such Defects under Works Contracts.

Drafting note: Works Contracts may contain provisions which give Aurizon direct rights against Works Contractors in relation to the rectification of Defects.

Formatted: Indent: Left: 2.5 cm

78 Rail Corridor Agreement

Industry Note: Agency and responsibility for breach under the RCA

Agency

These amendments are consistent with the amendments made to the RCA. It is unacceptable that the Trustee be required to appoint Aurizon as agent “for all purposes” under the RCA. This would preclude the Trustee from exercising substantially all of its rights under the RCA licence. It would also enable Aurizon to significantly control the scope of the licence – through the negotiation of variations to Extension Land and the agreement of Interface Management Plans. The Trustee agrees to procure Aurizon (as Project Manager and Extension Lessee, as appropriate) to exercise appropriate rights and obligations under

Formatted: Font: Not Bold

the RCA that are linked to the management of construction works/operations but it does not agree to abdicate all of its rights as licensee.

Responsibility for breach under the RCA

A significant number of the rights and obligations under the RCA will be exercised by Aurizon as Project Manager/Extension Lessee – Aurizon will be the party on-site accessing the Extension Land, operating the Railway Network and (potentially) Modifying the Landholder Infrastructure. It is therefore imperative that Aurizon be required to comply with the terms of the licence when accessing the Extension Land and Landholder Infrastructure.

Formatted: Font: Not Bold

Formatted: Indent: Left: 0 cm

7.18.1 Appointment as agent

On and from the date on which the Project Management Agreement terminates in accordance with its terms, and provided the Rail Corridor Agreement has not terminated in accordance with its terms, ~~the Trustee:~~

- (a) ~~the Trustee~~ appoints Aurizon as the disclosed agent of the Trustee for the purpose of performing the Trustee's obligations, and exercising the Trustee's rights under clauses [3.7], [5], [6.1(a)(i)], [6.1(b)(i)], [6.3], [7] and [12] (other than the Trustee's rights under clauses [3.1] and [3.2] of the Rail Corridor Agreement and its rights in respect of "Disputes" (as defined in the Rail Corridor Agreement) under clause [20] of the Rail Corridor Agreement), ~~under the Rail Corridor Agreement, other than to the extent such obligations and rights must, by operation of law, be personally performed or exercised by the Trustee; and~~
- (b) ~~Aurizon must not, other than through Aurizon acting as the Trustee's disclosed agent under this Agreement, perform the Trustee's obligations, or exercise the Trustee's rights (other than the Trustee's rights under clauses [3.1] and [3.2] of the Rail Corridor Agreement and its rights in respect of "Disputes" (as defined in the Rail Corridor Agreement) under clause [20] of the Rail Corridor Agreement), under the Rail Corridor Agreement, unless at all times when accessing the Extension Land or accessing and using the Landholder Infrastructure for the purpose of exercising its rights and performing its obligations under this Agreement:~~
 - ~~(i) such obligations and rights must, by operation of law, be personally performed or exercised by the Trustee~~ comply with the terms of the licence granted to the Trustee under clause [3] of the Rail Corridor Agreement as if Aurizon were the licensee under that agreement;
 - ~~(ii) comply with all reasonable directions of the Trustee; and~~
 - ~~(iii) not act or omit to act or permit, cause or contribute to any act or omission which causes a breach of the Rail Corridor Agreement.~~
 - ~~(ii) requested to do so in writing by Aurizon; or~~
 - ~~(iii) expressly required or permitted to do so under this Agreement.~~

7-28.2 Acting for benefit of Aurizon

Despite any fiduciary obligations which would, but for the operation of this Agreement, arise as a consequence of Aurizon acting as disclosed agent for the Trustee under the Rail Corridor Agreement, the Trustee:

- (a) irrevocably consents to Aurizon, when acting as disclosed agent for the Trustee under the Rail Corridor Agreement, doing acts and making omissions which ~~may~~*are required under Legislation (including the Transport (Rail Safety) Act 2010 (Qld) and the Work Health and Safety Act 2011 (Qld)).*

Formatted: Normal, Indent: Left: 1.5 cm

Formatted: Font: Italic

Formatted: Font: Italic

Industry Note: Clause 8

~~There is nothing in the obligations imposed in clause 8.1, or generally in compliance with the terms of the RCA, which would interfere with Aurizon's key OH&S or other obligations imposed on it as operator and manager of the Railway Network. The scope of the proposed clause 8.2 was unacceptably broad and significantly undermined the very concept of Aurizon acting as the Trustee's agent. For Aurizon to be able to act in its own interest, undisclosed, whenever this is not expressly prohibited could provide significant scope for actions that would otherwise not be allowed in a typical agency relationship.~~

- (i) ~~be in the interest of, or advantage, Aurizon or any Related Body Corporate of it; and~~
- (ii) ~~not be in the interest of, or disadvantage, the Trustee; and~~
- (b) ~~agrees Aurizon will have no obligation to fully disclose to it the interest, advantage or disadvantage prior to the relevant act or omission, provided that:~~
- (c) ~~Aurizon is not expressly prohibited from doing the relevant act or making the relevant omission under this Agreement; and~~
- (d) ~~the relevant act is done or relevant omission is made by Aurizon acting in good faith having regard to Aurizon's (or any of its Related Body Corporate's):~~
- (i) ~~legitimate interests as:~~
- (A) ~~"Aurizon" under this Agreement;~~
- (B) ~~"Project Manager" under the Project Management Agreement;~~
- (C) ~~"Landholder" under the Rail Corridor Agreement;~~
- (D) ~~lessee or sublessee under a land or infrastructure lease or sublease in respect of the Railway Network (or any part of it);~~
- (E) ~~operator and manager of the Railway Network;~~
- (F) ~~access provider under access agreements in respect of the Railway Network; and~~
- (G) ~~the accredited railway manager of the Railway Network; and~~

~~(ii) rights and obligations under Legislation (including the *Transport (Rail Safety) Act 2010 (Qld)* and the *Work Health and Safety Act 2011 (Qld)*).~~

~~89~~ Rent and other payments

~~8-19.1~~ Rent

- (a) Within seven Business Days after the Monthly Invoice Date for the Initial Rent Month and each subsequent Month during the Term, Aurizon must give the Trustee a RCTI (**Monthly Invoice**) specifying the Rent for that Month.
- (b) Within ten Business Days after Aurizon gives the Trustee a Monthly Invoice for a Month, Aurizon must pay the total invoice amount specified in the Monthly Invoice for that Month to the Trustee.

~~8-29.2~~ Supporting information

- (a) Subject to **clause 9.2(b)**, each Monthly Invoice given by Aurizon to the Trustee under **clause 9.1** must be accompanied by ~~reasonable~~ reasonable comprehensive details of the calculation of the Rent for the Month, including details of the Total Direction to Pay Amount for the Month, specified in the Monthly Invoice.
- (b) Nothing in this Agreement obliges Aurizon to disclose any Customer Confidential Information to the Trustee.

~~8-39.3~~ Interest on overdue payments

- (a) If, for any reason, a Party does not pay an amount payable under this Agreement on or before the due date for payment, it must pay interest to the other Party.
- (b) Interest will accrue on the outstanding amount from the due date for payment until that amount, together with the interest on that amount, has been paid.
- (c) Interest will be calculated at the Interest Rate, and any interest accrued but unpaid at the end of each Month will be capitalised and will thereafter itself bear interest.

~~8-49.4~~ Disputes

- (a) If the Trustee Disputes the amount of the Rent for a Month specified in a Monthly Invoice, the Trustee may give Aurizon a Dispute Notice under **clause 17.1(a)**.
- (b) Upon resolution of a Dispute referred to in **clause 9.4(a)**, if the amount of the Rent payable under the relevant Monthly Invoice as agreed or determined under the Dispute Resolution Process is:
 - (i) more than the amount that was paid by Aurizon under the Monthly Invoice, then, within five Business Days after the date of the resolution of the Dispute, Aurizon must:

- (A) give the Trustee a further RCTI or adjustment note (as applicable) for the amount of the difference, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the due date for payment is deemed to be the due date for payment of the Monthly Invoice under **clause 9.1(b)** had such Monthly Invoice been issued in accordance with this Agreement and for the correct amount); and
- (B) pay the amount referred to in **clause 9.4(b)(i)(A)** to the Trustee; or
- (ii) less than the amount that was paid by Aurizon under the Monthly Invoice, then:
 - (A) within five Business Days after the date of the resolution of the Dispute, Aurizon must give the Trustee an adjustment note for the amount of the difference, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the amount of the difference will be deemed to be a payment due and payable by the Trustee to Aurizon and the due date for payment will be deemed to be the date when the amount payable under the Monthly Invoice was paid by Aurizon); and
 - (B) within ten Business Days after receipt of the adjustment note from Aurizon under **clause 9.4(b)(ii)(A)**, the Trustee must pay the amount referred to in **clause 9.4(b)(ii)(A)** to Aurizon.

Formatted: Font: Not Bold

8.59.5 Correction of errors

- (a) If, at any time:
 - (i) the Trustee discovers an error in the Monthly Invoice resulting in an underpayment or overpayment, then the Trustee must promptly notify Aurizon of this error; and
 - (ii) Aurizon discovers an error in the Monthly Invoice resulting in an underpayment or overpayment, then Aurizon must promptly notify the Trustee of this error.
- (b) Despite Aurizon's payment of a Monthly Invoice, if, at any time, an error (resulting in an underpayment or overpayment) is discovered and notified to the other Party in accordance with **clause 9.5(a)**, then:
 - (i) if the error results in an underpayment, Aurizon must, within five Business Days after the date the error is verified by Aurizon:
 - (A) give the Trustee a further RCTI or adjustment note (as applicable) for the amount of the underpayment, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that

- interest, the due date for payment is deemed to be the date when the amount of the underpayment would have been due and payable but for the error); and
- (B) pay the amount referred to in **clause 9.5(b)(i)(A)** to the Trustee; or
- (ii) if the error results in an overpayment:
- (A) within five Business Days after the date the error is verified by Aurizon, Aurizon may give the Trustee an adjustment note for the amount of the overpayment to Aurizon, together with interest on that amount calculated in accordance with **clause 9.3** (provided that, for the purpose of calculating that interest, the amount of the overpayment will be deemed to be a payment due and payable by the Trustee to Aurizon and the due date for payment will be deemed to be the date when the overpayment was paid by Aurizon); and
 - (B) within ten Business Days after receipt of the adjustment note from Aurizon under **clause 9.5(b)(ii)(A)**, the Trustee must pay the amount referred to in **clause 9.5(b)(ii)(A)** to Aurizon.

8.6 — Aurizon's right of set-off

~~(a) — Aurizon may deduct from any amounts which are due and payable by Aurizon to the Trustee under this Agreement any amounts which are due and payable by the Trustee to Aurizon under this Agreement or any other Transaction Document.~~

Formatted: Normal Indent,Para,bold,h
-i2.25, Hang.Indent1.25, Hang Ind
1.5,ni,Normal Indent Char1,Normal
Indent Char Char1,Normal Indent
Char2 Char Char,Normal Indent Char
Char1 Char Char,Normal Indent Char1
Char Char Char Char,Normal Indent
Char1 Char1 Char Char

Industry Note: Set-off

A third party investor will not accept Aurizon having a right to set-off against payments owing to the Trustee under this Agreement (particularly in respect of the Rent).

~~(b) — If:~~

- ~~(i) — Aurizon wishes to deduct from any Rent for a Month (**relevant Month**) that will become due and payable any amount which is due and payable by the Trustee to Aurizon as at the DTP Date for the relevant Month under this Agreement (**Set-off Amount**); and~~
- ~~(ii) — Aurizon is required to give a direction to pay to an Extension Access Agreement Customer or a Nominated Access Agreement Customer (**Relevant DTP Customer**) for the relevant Month under **clause 9.1** or **9.2** (as applicable);~~

~~then, despite **clauses 9.1** and **9.2**, Aurizon will reduce the amount that it would, but for this **clause 8.6(b)**, otherwise be required to direct the Relevant DTP Customer to pay under **clause 9.1** or **9.2** (as applicable) for the relevant Month by:~~

- ~~(iii) — if the amount which Aurizon would, but for this **clause 8.6(b)**, otherwise be required to direct the relevant DTP Customer to pay under **clause 9.1** or **9.2** (as applicable) for the relevant Month is~~

~~less than or equal to the Relevant DTP Customer's Share of Set-off Amount for the relevant Month—the full amount which Aurizon would, but for this **clause 8.6(b)**, otherwise be required to direct the Relevant DTP Customer to pay for the relevant Month; or~~

~~(iv) if the amount which Aurizon would, but for this **clause 8.6(b)**, be required to direct the Relevant DTP Customer to pay for the relevant Month under **clause 9.1** or **9.2** (as applicable) is more than the Relevant DTP Customer's Share of Set-off Amount for the relevant Month—the Relevant DTP Customer's Share of Set-off Amount for the relevant Month;~~

~~so that, despite **clauses 9.1** and **9.2**, the amount which Aurizon is required to direct the relevant DTP Customer to pay under **clause 9.1** or **9.2** (as applicable) for the relevant Month is the reduced amount after the deduction under this **clause 8.6(b)**.~~

~~(c) Any amount that is deducted under **clause 8.6(b)** from an amount that Aurizon would, but for **clause 8.6(b)**, otherwise be required to direct an Extension Access Agreement Customer or a Nominated Access Agreement Customer to pay under **clause 9.1** or **9.2** (as applicable) for a Month is taken to have been paid by the Trustee to Aurizon on the date that the Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) pays that amount to Aurizon under **clause 9.1(a)(ii)** or **9.2(d)(iv)** (as applicable).~~

~~(d) If the total of the amounts that are deducted under **clause 8.6(b)** from amounts that Aurizon would, but for **clause 8.6(b)**, otherwise be required to direct Extension Access Agreement Customers and Nominated Access Agreement Customers to pay under **clause 9.1** and **9.2** for a Month are less than the Set-off Amount as at the DTP Date for the Month, then, for the avoidance of doubt, the amount of the difference continues to be due and payable by the Trustee to Aurizon.~~

~~(e) Any amounts that are deducted under **clause 8.6(b)** from amounts that Aurizon would, but for **clause 8.6(b)**, otherwise be required to direct Extension Access Agreement Customers and Nominated Access Agreement Customers to pay under **clause 9.1** and **9.2** for a Month are taken to have been paid, for the purposes of **clause 8.1(b)**, by Aurizon to the Trustee by the due date under **clause 8.1(b)** for payment of the Monthly Invoice for the that Month.~~

9.6 Set off

Neither party may set off any amounts under this Agreement.

8.79.7 Method of payment

All payments to be made under or in connection with this Agreement must be paid in Australian currency, without set-off or deduction ~~(subject to **clause 8.6**)~~, by:

Formatted: Normal Indent,Para,bold,h
-i2.25, Hang.Indent1.25, Hang Ind
1.5,ni,Normal Indent Char1,Normal
Indent Char Char1,Normal Indent
Char2 Char Char,Normal Indent Char
Char1 Char Char,Normal Indent Char1
Char Char Char Char,Normal Indent
Char1 Char1 Char Char

- (a) electronic payment to an account nominated by the Party entitled to receive the payment; or
- (b) such other method as the Party entitled to receive the payment may reasonably require from time to time.

910 Direction to pay

9-110.1 Direction to pay – Extension Access Agreement

- (a) At the time that Aurizon gives an Extension Access Agreement Customer an Extension Access Agreement Invoice for a Month, Aurizon must, by notice to the Extension Access Agreement Customer (such notice to be copied to the Trustee), direct the Extension Access Agreement Customer to pay by the due date for payment under the Extension Access Agreement:
 - (i) into the Direction to Pay Account – the Direction to Pay Amount for the Extension Access Agreement for that Month; and
 - (ii) to Aurizon (in the manner required under the Extension Access Agreement) – the remaining amount of the Access Charges, if any, which are payable under the Extension Access Agreement Invoice for the Month after subtracting the amount referred to in **clause 10.1(a)(i)**.

~~(b) If:~~

~~(c) at the time that Aurizon gives an Extension Access Agreement Customer an Extension Access Agreement Invoice for a Month, Aurizon does not give the Extension Access Agreement Customer a direction to pay under **clause 10.1(a)**;~~

~~(i) within five Business Days after receiving the Extension Access Agreement Invoice, the Extension Access Agreement Customer notifies Aurizon that it has not been given a direction to pay under **clause 9.1(a)**; and~~

~~(ii) within five Business Days after the Extension Access Agreement Customer gives Aurizon a Notice referred to in **clause 9.1(b)(ii)**, Aurizon does not give the Extension Access Agreement Customer a direction to pay under **clause 9.1(a)**;~~

Industry Note: Direction to Pay

Paragraphs (ii) and (iii) have been deleted because there should not be an onus on the Customer to notify the Lessee that it has failed to give a direction to pay. As drafted, (ii) and (iii) transferred the onus to the Lessor.

~~(d)(b)~~ then, despite the Extension Access Agreement Customer not being given a direction to pay under **clause 10.1(a)**:

Field Code Changed

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Field Code Changed

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i, Indent: Left: 2.5 cm

- (i) the Direction to Pay Amount for the Extension Access Agreement for that Month will be taken to be the whole of the amount of the Access Charges payable under the Extension Access Agreement Invoice for that Month; and
- (ii) the Extension Access Agreement Customer will be taken to have been given a direction to pay the Direction to Pay Amount for that Month into the Direction to Pay Account under **clause 10.1(a)**.

~~(e) For the avoidance of doubt, if:~~

- ~~(i) the Direction to Pay Amount for an Extension Access Agreement for a Month is zero; or~~
- ~~(ii) the Direction to Pay Amount for an Extension Access Agreement for a Month less the amount that Aurizon is permitted to deduct from a direction to pay given to the Extension Access Agreement Customer for that Extension Access Agreement under **clause 0** for that Month is zero;~~
- ~~(iii) then Aurizon may give the Extension Access Agreement Customer for that Extension Access Agreement a direction to pay for that Month for zero dollars.~~

9.210.2 Direction to pay – Nominated Access Agreements

- (a) The Trustee may procure access agreement customers to give Aurizon a Direction to Pay Undertaking.
- (b) The Parties acknowledge and agree that Aurizon will treat a Direction to Pay Undertaking as being in force and binding upon the Nominated Access Agreement Customer unless and until the Nominated Access Agreement Customer notifies Aurizon that it revokes the Direction to Pay Undertaking.
- (c) If:
 - (i) the sum of the Direction to Pay Amounts for all Extension Access Agreements for a Month is less than the Expected Rent for the Month; and
 - (ii) the difference between the sum of the Direction to Pay Amounts for all Extension Access Agreements for the Month and the Expected Rent for the Month is greater than the sum of the amount of the Access Charges payable under Nominated Access Agreement Invoices for the Month,

then, at the time that Aurizon gives each Nominated Access Agreement Customer its Nominated Access Agreement Invoice for the Month, Aurizon must, by notice to each Nominated Access Agreement Customer, direct each Nominated Access Agreement Customer to pay the whole of the amount of the Access Charges payable under its Nominated Access Agreement Invoice for the Month into the Direction to

Pay Account by the due date for payment under the Nominated Access Agreement.

- (d) If:
- (i) the sum of the Direction to Pay Amounts for all Extension Access Agreements for a Month is less than the Expected Rent for the Month; and
 - (ii) the difference between sum of the Direction to Pay Amounts for all Extension Access Agreements for that Month and the Expected Rent for the Month is less than the sum of the amounts of the Access Charges payable under Nominated Access Agreement Invoices for that Month,

then, at the time that Aurizon gives the Nominated Access Agreement Customers their Nominated Access Agreement Invoices for that Month, Aurizon must, by notice to one or more Nominated Access Agreement Customers, direct one or more Nominated Access Agreement Customers to pay by the due date for payment under the applicable Nominated Access Agreement:

- (iii) into the Direction to Pay Account – the whole or part of the amount of the Access Charges payable under the Nominated Access Agreement Customer's Nominated Access Agreement Invoice for that Month; and
- (iv) to Aurizon (in the manner required under the Nominated Extension Access Agreement) – the remaining amount of the Access Charges, if any, which are payable under the Nominated Access Agreement Invoice for that Month after subtracting the amount referred to in **clause 10.2(d)(iii)**,

so that, in total, Aurizon has directed one or more Nominated Access Agreement Customers to pay into the Direction to Pay Account the difference between the sum of the Direction to Pay Amounts for all Extension Access Agreements for that Month and the Expected Rent for that Month.

- (e) Despite this **clause 10**, Aurizon is not required to give a direction to pay to a Nominated Access Agreement Customer under this **clause 10** if, and to the extent that, Aurizon is under an obligation to direct the Nominated Access Agreement Customer to pay the access charges payable under the Nominated Access Agreement to a third party where such obligation existed prior to the date of this Agreement.

9-310.3 Direction to Pay Account

- (a) Prior to the Initial Rent Month, the Trustee must establish, and maintain during the remainder of the Term, a separate bank account (**Direction to Pay Account**), in the name of the Trustee, for the purpose of receiving payments which Aurizon directs Extension Access Agreement

Customers and Nominated Access Agreement Customers to pay under this **clause 10**.

- (b) The Trustee must:
 - (i) not deposit funds into the Direction to Pay Account; and
 - (ii) use reasonable endeavours to ensure that the only funds (excluding interest earned on funds in the Direction to Pay Account) deposited into the Direction to Pay Account are amounts which Aurizon directs Extension Access Agreement Customers and Nominated Access Agreement Customers to pay into the Direction to Pay Account under this **clause 10**.
- (c) Promptly after:
 - (i) the due date for payment of a Direction to Pay Amount for a Month for an Extension Access Agreement or Nominated Access Agreement (as notified by Aurizon to the Trustee under **clause 10.4**); and
 - (ii) if the Direction to Pay Amount referred to in **clause 10.3(c)(i)** is not paid (in whole or in part) into the Direction to Pay Account by the due date for payment but is subsequently paid (in whole or in part) into the Direction to Pay Account – the date of such late payment, the Trustee must give Aurizon a Notice specifying:
 - (iii) the amount (if any) paid into the Direction to Pay Account by the Extension Access Agreement Customer or Nominated Access Agreement Customer for that Extension Access Agreement or Nominated Access Agreement; and
 - (iv) if applicable, the date of payment of that amount into the Direction to Pay Account.

9-410.4 Notice of directions to pay

Promptly after Aurizon gives all of the directions to pay for a Month to Extension Access Agreement Customers and Nominated Access Agreement Customers (if applicable) under **clauses 10.1** and **10.2**, Aurizon must give the Trustee a Notice specifying:

- (a) the Total Direction to Pay Amount for the Month;
- (b) each of the Extension Access Agreement Customers and Nominated Access Agreement Customers (if applicable) to which Aurizon has given a direction to pay;
- (c) the Direction to Pay Amounts that Aurizon directed such Extension Access Agreement Customer and Nominated Access Agreement Customer (if applicable) to pay into the Direction to Pay Account for that Month; and
- (d) the due date for payment of such Direction to Pay Amounts for that Month.

Field Code Changed

9.510.5 Application of Total Direction to Pay Amount

- (a) The Total Direction to Pay Amount for a Month will be taken to have been paid by Aurizon to the Trustee by the due date for payment of the Monthly Invoice for that Month for the purpose of **clause 9.1(b)** (regardless of whether or not an Extension Access Agreement Customer or Nominated Access Agreement Customer actually paid the applicable Direction to Pay Amount for that Month into the Direction to Pay Account as directed by Aurizon by the due date for payment).
- (b) If the Expected Rent for a Month exceeds the Rent for the Month, then the Trustee must:
 - (i) issue a credit note to Aurizon for the amount by which the Expected Rent for the Month exceeds the Rent for the Month (**Overpayment**); and
 - (ii) apply the Overpayment, plus interest on the Overpayment calculated in accordance with **clause 9.3** as if the Overpayment was an outstanding amount for the period from the due date of the Monthly Invoice for the Month until the date that the Overpayment (or relevant part of it) is credited against Rent payable under a further Monthly Invoice, as a credit in favour of Aurizon against Rent payable under the Monthly Invoice for the next Month (and, if necessary, under Monthly Invoices for subsequent Months until the Overpayment plus interest has been fully credited in favour of Aurizon against Rent payable by Aurizon).

9.610.6 Rent Shortfall Adjustment Amount

If an Extension Access Agreement Customer or Nominated Access Agreement Customer does not pay the whole or part of the Direction to Pay Amount for a Month (**relevant Month**) into the Direction to Pay Account as directed under **clause 10.1** and **10.2** within ~~three-one~~ months after the due date for payment of such Direction to Pay Amount, then, promptly after the end of that ~~three-one~~ month period, Aurizon must calculate:

- (a) the Rent Shortfall Adjustment Amount in accordance with the following formula:

$$RSAA = R_i - (R_o - S)$$

where:

- RSAA = The Rent Shortfall Adjustment Amount
- R_i = The Rent for the relevant Month (calculated in accordance with the Rent Calculation Methodology using the same inputs as originally used to calculate the Rent for the relevant Month subject only to the non-payment of "S" (as defined in the formula in this **clause 10.6(a)**) being taken into account for the purpose of such recalculation)

Field Code Changed

- R₀ = The Rent for the relevant Month as invoiced in the Monthly Invoice for the relevant Month
- S = The amount of the Direction to Pay Amount which the relevant Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) did not pay into the Direction to Pay Account within ~~three-one~~ months after the due date for the payment of such Direction to Pay Amount into the Direction to Pay Account

- (b) the Rent Reduction Amount in accordance with the following formula:

$$RRA = S - RSAA$$

where:

- RRA = The Rent Reduction Amount
- S = The amount of "S" (as defined in the formula in **clause 10.6(a)**)
- RSAA = The Rent Shortfall Adjustment Amount calculated in accordance with **clause 10.6(a)** as a consequence of the non-payment of "S" (as defined in the formula in **clause 10.6(a)**)

9.710.7 Late Payment Adjustment Amount

If Aurizon is required to calculate a Rent Shortfall Adjustment Amount under **clause 10.6** and, after the end of the ~~three-one~~ month period referred to in **clause 10.6**, the relevant Extension Access Agreement Customer or Nominated Access Agreement Customer pays the whole or part of the Direction to Pay Amount for the relevant Month referred to in **clause 10.6** into the Direction to Pay Account, then, promptly after such payment, Aurizon must calculate:

- (a) the Late Payment Adjustment Amount in accordance with the following formula:

$$LPAA = LPA/S \times RSAA$$

where:

- LPAA = The Late Payment Adjustment Amount
- LPA = The amount of the Direction to Pay Amount which the relevant Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) paid into the Direction to Pay Account later than ~~three-one~~ months after the due date for the payment of such Direction to Pay Amount into the Direction to Pay Account
- S = The amount of the Direction to Pay Amount which the

relevant Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) did not pay into the Direction to Pay Account within ~~three~~one months after the due date for the payment of such Direction to Pay Amount into the Direction to Pay Account

RSAA = The Rent Shortfall Adjustment Amount calculated in accordance with **clause 10.6(a)** as a consequence of the non-payment of "S" (as defined in the formula in this **clause 10.7(a)**)

(b) the Rent Increase Amount in accordance with the following formula:

$$\text{RIA} = \text{LPA}/\text{S} \times \text{RRA}$$

where:

RIA = The Rent Increase Amount

LPA = The amount of the Direction to Pay Amount which the relevant Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) paid into the Direction to Pay Account later than three months after the due date for the payment of such Direction to Pay Amount into the Direction to Pay Account

S = The amount of "S" (as defined in the formula in **clause 10.7(a)**)

RRA = The Rent Reduction Amount calculated in accordance with **clause 10.6(b)** as a consequence of the non-payment of "S" (as defined in the formula in **clause 10.7(a)**)

~~40~~11 Calculation of Rent

~~40.111.1~~ Objective

The Parties agree that the amount of the Rent for a Month payable by Aurizon to the Trustee under this Agreement is intended to be calculated so as to achieve the objective set out in **schedule 2 (Objective)**.

~~40.211.2~~ Rent Calculation Methodology

The Parties acknowledge and agree that the Rent Calculation Methodology as at the Commencement Date achieves the Objective as at the Commencement Date.

~~40.311.3~~ Calculation of Rent

(a) The Rent for a Month will be the amount calculated in accordance with the Rent Calculation Methodology (as varied from time to time under this **clause 11**).

- (b) For the purpose of calculating the Rent for a Month, any Direction to Pay Amount for the Month which Aurizon has directed an Extension Access Agreement Customer or Nominated Access Agreement Customer to pay into the Direction to Pay Account under **clause 10.1** and **10.2** will be taken to have been paid by the Extension Access Agreement Customer or Nominated Access Agreement Customer (as applicable) into the Direction to Pay Account by the due date for payment (regardless of whether or not the amount was actually paid into the Direction to Pay Account as directed by the due date for payment).

Field Code Changed

~~10.411.4~~ **Variations to Rent Calculation Methodology**

If, at any time, a Party considers, acting reasonably, that the Rent Calculation Methodology at that time fails, or will in the future fail, to achieve the Objective for any reason, then that Party may give a Notice (**Variation Notice**) to the other Party:

- (a) specifying how the Rent Calculation Methodology fails, or will in the future fail, to achieve the Objective;
- (b) requesting that the Rent Calculation Methodology be varied, to the extent necessary, so that the Rent Calculation Methodology achieves, or will in the future achieve, the Objective; and
- (c) setting out the Party's proposed variations to the Rent Calculation Methodology.

~~10.511.5~~ **Good faith negotiations**

- (a) If a Party gives a Variation Notice, the Parties must promptly (and in any event within ten Business Days) negotiate in good faith to endeavour to agree in writing the variations to the Rent Calculation Methodology, to the extent necessary, so that the Rent Calculation Methodology achieves, or will in the future achieve, the Objective.
- (b) For the purposes of the negotiations referred to in **clause 11.5(a)**, the Parties must:
 - (i) act fairly, reasonably and honestly;
 - (ii) work together and cooperate with each other; and
 - (iii) meet regularly with each other or as otherwise reasonably required by either of them.

~~10.611.6~~ **Determination of Rent Calculation Methodology Dispute**

- (a) If, within one month after a Party gives a Variation Notice to the other Party, the Parties have not agreed on variations to the Rent Calculation Methodology:
 - (i) a Dispute (**Rent Calculation Methodology Dispute**) will be taken to exist between the Parties; and
 - (ii) either Party may refer the Rent Calculation Methodology Dispute to an Expert for determination under **clause 17.4**.

- (b) If a Party refers the Rent Calculation Methodology Dispute to an Expert for determination under **clause 17.4** then, subject to **clause 11.6(c)**, the Parties must jointly appoint the Access Regulator as the Expert to determine the Rent Calculation Methodology Dispute.
- (c) If:
 - (i) the Access Regulator does not accept the appointment as the Expert to determine the Rent Calculation Methodology Dispute; or
 - (ii) the Parties agree to have the Rent Calculation Methodology Dispute determined by an Expert other than the Access Regulator,
 then the Rent Calculation Methodology Dispute will be determined by another Expert appointed in accordance with **clause 17.4**.
- (d) If a Rent Calculation Methodology Dispute is referred to an Expert other than the Access Regulator for determination, the Expert must apply the principles which it considers, acting reasonably, would be applied by the Access Regulator if it were appointed as the Expert to determine the Rent Calculation Methodology Dispute.
- (e) Unless otherwise agreed between the Parties, in determining a Rent Calculation Methodology Dispute, the Expert (whether or not the Access Regulator) must determine:
 - (i) the extent to which the Rent Calculation Methodology fails, or will in the future fail, to achieve the Objective; and
 - (ii) the variations to the Rent Calculation Methodology (if any) required so that the Rent Calculation Methodology (once varied) will achieve the Objective.
- (f) If the Expert determines any variations to the Rent Calculation Methodology in accordance with **clause 11.6(e)**, the Rent Calculation Methodology will be taken to be varied as determined by the Expert:
 - (i) if the Rent Calculation Methodology Dispute is about the Rent Calculation Methodology failing to achieve the Objective in the future – on the date that the Rent Calculation Methodology would, but for the variations, fail to achieve the Objective in the future; or
 - (ii) otherwise – on the date that the Expert notifies in the Expert's determination that the variation to the Rent Calculation Methodology takes effect.

4.12 Records and auditing

4.12.1 Keeping of records

- (a) Aurizon must maintain full and complete records of all information which may be reasonably required by the Trustee to verify the determination of the Rent (including the regulatory value of the Total Extension Infrastructure in its Regulatory Asset Base by asset type and by location

on a basis that shows the Total Extension Infrastructure separately from other assets of the same asset type and location).

- (b) Aurizon must preserve and maintain the records referred to in **clause 12.1(a)** for a period of not less than five years following the end of the year in which the records ceased being necessary to enable calculation of the amounts payable to the Trustee under this Agreement.

11.212.2 Audit

- (a) The Trustee may appoint an independent auditor nominated by it and approved by Aurizon (**Auditor**) to carry out audits in order to verify the amounts included in Monthly Invoices, the advised Monthly Direction to Pay Amounts and, the determination of Rent under this Agreement and other matters relating to the records provided under or the administration of clauses 9, 10, 11, and 12 of this Agreement (Audits).
- (b) Aurizon must approve any Auditor proposed by the Trustee unless Aurizon is of the opinion that the proposed Auditor has previously breached the terms of any confidentiality undertaking which has previously been given by the proposed Auditor to Aurizon.
- (c) The costs and expenses of an Auditor must be borne solely by the Trustee.
- (d) Prior to the Auditor undertaking its first Audit, the Trustee must ensure that the Auditor provides Aurizon with a signed confidentiality undertaking from the Auditor in favour of Aurizon in the form shown in **schedule 5** or in a form otherwise acceptable to Aurizon (acting reasonably).
- (e) Upon at least ten Business Days prior written request given by the Trustee (not more than once each year of this Agreement), Aurizon must:
 - (i) give the Auditor reasonable access during normal business hours to the books, accounts and records of Aurizon relevant to an Audit; and
 - (ii) otherwise provide reasonable assistance and co-operation to the Auditor in relation to the conduct of the Audit.
- (f) The Parties acknowledge and agree that, except to the extent otherwise provided in the confidentiality undertaking referred to in **clause 12.2(d)**, the Auditor will only be entitled to disclose to the Trustee:
 - (i) whether or not the Auditor verified the amounts included in Monthly Invoices and the determination of Rent under this Agreement; and
 - (ii) if the Auditor is unable to verify any amount included in a Monthly Invoice and/or the determination of Rent under this Agreement, the nature and extent of the Auditor's inability to verify the amount included in the Monthly Invoice and/or the determination of Rent under this Agreement.

Formatted: Font: Bold

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Formatted: Font: Not Bold

- (g) The Parties acknowledge and agree that the confidentiality undertaking referred to in **clause 12.2(d)** will:
 - (i) not prevent the Auditor from disclosing the result of its Audit (other than Customer Confidential Information) to the Trustee;
 - (ii) subject to **clause 12.2(g)(iii)**, require the Auditor to keep all Customer Confidential Information confidential (including from the Trustee); and
 - (iii) permit the Auditor to disclose Customer Confidential Information to an Expert (but not the Trustee) to the extent that the Expert requires access to the Customer Confidential Information for the purpose of resolving a Dispute under the Dispute Resolution Process about any amount included in a Monthly Invoice and/or the determination of Rent under this Agreement provided that the Expert has first signed a confidentiality undertaking in favour of Aurizon under which the Expert undertakes to keep the Customer Confidential Information confidential (including from the Trustee).

41.312.3 Audit of Direction to Pay Account

- (a) Aurizon may appoint an independent auditor nominated by it and approved by the Trustee (such approval not to be unreasonably withheld or delayed) (**DTP Auditor**) to carry out audits in order to verify amounts paid into the Direction to Pay Account (**DTP Audits**).
- (b) The costs and expenses of a DTP Auditor will be borne solely by the Trustee and the Trustee must reimburse Aurizon for any such costs and expenses incurred by Aurizon.
- (c) Upon at least ten Business Days prior written request given by Aurizon (not more than once each year of this Agreement), the Trustee must:
 - (i) give the DTP Auditor reasonable access during normal business hours to the books, accounts, bank statements and records of the Trustee relevant to a DTP Audit; and
 - (ii) otherwise provide reasonable assistance and cooperation to the DTP Auditor in relation to the conduct of the DTP Audit.

4213 Force majeure

- (a) If Aurizon is prevented or hindered by a Force Majeure Event from fully or partly performing any obligation (except for the payment of money) under this Agreement, then Aurizon will be excused from performing that obligation for the period that Aurizon is so prevented or hindered.
- (b) Upon the occurrence of any Force Majeure Event which prevents or hinders Aurizon from fully or partly performing any obligation under this Agreement, Aurizon must:
 - (i) give notice of the event to the Trustee as soon as reasonably practicable;

- (ii) use all reasonable endeavors to mitigate the effect of the Force Majeure Event upon the performance of its obligations under this Agreement; and
- (iii) resume full performance of its obligations under this Agreement as soon as reasonably practicable, and notify the Trustee when it does so.

~~13~~14 Termination

~~13.1~~14.1 Termination by Trustee for Insolvency Event

The Trustee may immediately terminate this Agreement by notice to Aurizon if an Insolvency Event occurs in respect of Aurizon.

~~13.2~~14.2 Termination by Trustee for non-payment

The Trustee may immediately terminate this Agreement by notice to Aurizon if Aurizon does not pay any money which is due for payment to the Trustee under a Monthly Invoice by the due date for payment and Aurizon does not pay that money, together with interest under **clause 9.3**, within a further period of ~~42-3~~ months after the Trustee gives a Notice to Aurizon requesting payment of that money.

14.3 Suspension or termination by Trustee for material breach

- (a) If Aurizon is in breach of a material clause of this Agreement, then the Trustee may give written notice to Aurizon specifying the breach.
- (b) If, within 20 Business Days of receipt of the notice referred to in **clause 14.3(a)**, Aurizon has failed to remedy the breach, the Trustee may either:
 - (i) by giving the Trustee notice in writing, immediately suspend the performance of all rights and obligations under this Agreement until the breach is remedied (or the Trustee revokes the suspension). Aurizon Network must bear any costs it incurs as a result of such suspension; or
 - (ii) by providing a further 5 Business Days written notice, terminate this Agreement.

~~13.3~~14.4 No other rights of termination

- (a) Except as provided in **clause 14.1** and **14.2** and despite any rule of law or equity to the contrary:
 - (i) neither Party may terminate, rescind or treat as repudiated, or obtain any order with the effect of terminating or rescinding, this Agreement; and
 - (ii) this Agreement will not terminate, be frustrated (whether at common law, by equity or by statute), be repudiated or taken to have been repudiated for any reason.
- (b) Neither the Trustee nor Aurizon may surrender any part of its interest in this Agreement.

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Formatted: Font: Bold

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s, 1.1.1.1.1, Level 3 - (j), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-sub para, L5, Sub4Para, 5, 15, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 Appendix A to X, Appendix A to X1, Com

43.414.5 No prejudice as to right to damages

Subject to **clause 15**, nothing in this **clause 14** prejudices in any way a Party's right to Claim and recover damages for any breach of this Agreement by the other Party.

44.15 Limitation of liability

44.115.1 Limitation of Aurizon's liability

Except to the extent:

- (a) that Aurizon has committed fraud, Gross Negligence, a breach of a Non-Discrimination Provision or Wilful Default; ~~or~~
- (b) otherwise prohibited by law; or
- ~~(b)(c)~~ this Agreement is terminated under clause 14 or the Extension Infrastructure Head-Lease is terminated due to an act or omission of Aurizon.

Aurizon's liability in respect of a Claim arising out of, or in any way related to, this Agreement (excluding a Claim in respect of the non-payment by Aurizon of an amount that it is expressly required to pay under the terms of this Agreement) is limited to, and will in no event exceed, the total amount of ~~\$1.00~~ the OPRA (as defined in Schedule 2) received by Aurizon in respect of the Total Extension Infrastructure.

44.215.2 Trustee's limitation of liability

- (a) Aurizon acknowledges that the Trustee enters into this Agreement only as trustee of the Trust, and in no other capacity (other than in respect of the warranties in relation to trustee capacity in **clause 22.2** which are given by the Trustee in its personal capacity).
- (b) A liability of the Trustee arising under or in connection with this Agreement is limited to and can be enforced against the Trustee only to the extent to which the Trustee is entitled to be indemnified out of the Trust for the liability and the liability can be satisfied out of property of the Trust.
- (c) The limitation of liability in this **clause 15.2** will not apply to any liability of the Trustee to the extent that the liability is not satisfied out of the property of the Trust because there is a reduction in the Trustee's right of indemnity as a result of the Trustee committing fraud, "Gross Negligence" or "Wilful Default" (each as defined in the Trust Deed).

44.315.3 Exclusion of Consequential Loss

- (a) Subject to **clause 15.3(b)**, despite any other provision of this Agreement, neither Party will be liable to the other for any Consequential Loss suffered by or Claimed against that other Party.
- (b) **Clause 15.3(a)** does not apply to the indemnity in **clause 3.3** or the indemnity in clause 3.2(c)(iii) or to a Claim for Gross Negligence, Wilful

Formatted: Font: Not Bold

Field Code Changed

Formatted: Font: Not Bold

Field Code Changed

Formatted: Font: Not Bold

Default or breach by Aurizon of a Non-Discrimination Provision, or the termination of this Agreement under clause 14 or termination of the Extension Infrastructure Head-Lease due to an act or omission of Aurizon.

44.415.4 Scope of Claim, liability or loss

For the avoidance of doubt, references in this **clause 15** to a Claim, liability or loss include:

- (a) a Claim for, or liability or loss arising from, breach of contract, tort (including negligence), breach of equitable duty, breach of statutory duty, breach of the *Competition and Consumer Act 2010* (Cth) or otherwise; and
- (b) a Claim, liability or loss arising out of the performance or non-performance of any obligation under this Agreement, or arising out of a termination of this Agreement for any reason (including breach, repudiation or otherwise).

14.5 — Claims against Aurizon

~~The Trustee will not have, and must not make, any Claim against Aurizon in relation to or arising out of the entry into or the performance or non-performance of this Agreement, or give a Dispute Notice to Aurizon in respect of such a Claim under **clause 16**, unless the Trustee first provides Aurizon with a Notice of the purported Claim and allows Aurizon a reasonable period to rectify the relevant default and Aurizon fails to rectify that default within that reasonable period.~~

Industry Note: Deletion of clause 15.5

This clause 15.5 is unnecessary as the dispute resolution procedure already includes a notice requirement. It is unacceptable that the Trustee be required to twice notify Aurizon of a dispute and allow Aurizon an additional rectification period that the Trustee is not itself entitled to.

1516 Trustee's risks

15.116.1 Acknowledgement

The Trustee acknowledges and accepts, each as a material term of this Agreement and to induce Aurizon to enter this Agreement, that:

- (a) its right to the payment of Rent under this Agreement and the quantum of the Rent payable under this Agreement is determined (in part) by Aurizon's revenue from each mainline system of which the Total Extension Infrastructure forms part;
- (b) Aurizon's revenue from each of those systems is dependent on various known and unknown risks, uncertainties and other factors (some of which are within, and some of which are beyond, Aurizon's control); and

- (c) those risks, uncertainties and other factors may cause Aurizon’s actual revenue, and the actual payments to the Trustee under this Agreement, to differ from that expected by Aurizon or the Trustee.

15.216.2 No liability

- (a) Aurizon will have no liability to the Trustee, and the Trustee will not make any Claim against Aurizon, arising out of or in connection with the size, timing or nature of Aurizon’s revenue from each mainline system of which the Total Extension Infrastructure forms part or the size or timing of the Rent payments to the Trustee under this Agreement.

- ~~(a)(b)~~ For the avoidance of doubt, the limitation in this clause 16.2(a) does not operate to limit any Claim for breach of clauses 9, 10, 11 and 12 of this Agreement.

Industry Note: A breach of this Agreement – ie. a failure to invoice – could result in a claim that goes to the “size or timing” of the Rent payments. This is not intended to be captured.

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, i

Formatted: Font: Bold

16.17 Disputes

16.117.1 Notification of Disputes

- (a) If any Claim, dispute or question (**Dispute**) arises between the Parties under this Agreement, any Party may give to the other Party a Notice in writing (**Dispute Notice**) specifying reasonable details of the Dispute and referring it for resolution in accordance with this **clause 17**.
- (b) Unless otherwise expressly provided to the contrary in this Agreement, a Dispute must be resolved in accordance with this **clause 17**.

16.217.2 Discrimination Dispute

- (a) This **clause 17.2** applies if the Trustee Disputes that Aurizon has complied with a Non-Discrimination Provision when exercising a right, power or discretion under this Agreement (**Discrimination Dispute**).

- ~~(b)~~ Within ten Business Days after the giving of a Dispute Notice in respect of a Discrimination Dispute, Aurizon must give to the Trustee a Notice specifying whether or not Aurizon considers that it has complied with the relevant Non-Discrimination Provision providing reasonable details of the ~~Landholder's~~ Aurizon's reasons for forming that opinion.

- ~~(b)(c)~~ In the event of a Discrimination Dispute, Aurizon must provide the Trustee with all information relevant to determining whether there has been a breach of the Non-Discrimination Provision.

- ~~(c)~~ If Aurizon specifies in a Notice given under clause 16.2(b) that it considers that it has not complied with the relevant Non-Discrimination Provision, Aurizon must, within ten Business Days after the giving of that Notice, re-exercise the relevant right, power or discretion in a manner that complies with the relevant Non-Discrimination Provision (in which case, the relevant Discrimination Dispute will be taken to be resolved).

Formatted: Not Expanded by / Condensed by

Industry Note: Deletion of 17.2(c)

Formatted: Font: Bold

Depending upon the subject matter of the Discrimination Dispute (and the way in which Aurizon re-exercises the relevant right, power or discretion), the Trustee may still be of the opinion that there is a Dispute. Even if the right is re-exercised in a non-discriminatory matter, the previous action taken by Aurizon could have caused the Trustee additional unnecessary expense – resulting in a continuing Dispute.

- (d) ~~If Aurizon specifies in a Notice given under **clause 16.2(b)** that it considers that it has complied with the relevant Non-Discrimination Provision~~ If Aurizon fails to provide the Notice referred to in **clause 17.2(b)** ~~17.2(b)~~ or if the Trustee is of the opinion that, following receipt of the Notice under **clause 17.2(b)**, there is still a Dispute, then within ten Business Days after the giving of that Notice, the Trustee may refer the Discrimination Dispute to the chief executive officer of Aurizon (or his or her nominee) and the chief executive officer of the Trustee (or his or her nominee) for the purposes of this **clause 17.2** for resolution.

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

~~16.3~~17.3 Chief executive officer resolution

- (a) Within ten Business Days after the giving of a Dispute Notice ~~(or in the case of a Discrimination Dispute, if the Discrimination Dispute is not resolved within ten Business Days after referral under **clause 16.2(d)**;~~ any Dispute ~~(other than a Discrimination Dispute)~~ must be referred in the first instance to the chief executive officer of Aurizon (or his or her nominee) and the chief executive officer of the Trustee (or his or her nominee) for the purposes of this **clause 17.3** for resolution.
- (b) If the Dispute is not resolved within ten Business Days after the referral under **clause 17.3(a)** ~~16.2(a)~~ or in the event that either chief executive officer appoints a nominee that is unacceptable to the other Party, then the relevant Dispute:
- (i) must, where this Agreement expressly requires referral to an expert; and
 - (ii) may, by agreement of the Parties in any other case, be referred for resolution by an expert (**Expert**) in accordance with **clause 17.4**.

~~16.4~~17.4 Expert determination

Where any matter is referred to an Expert under **clause 17.3**, **clause 17.9** or otherwise in accordance with the terms of this Agreement, then the following provisions of this **clause 17.4** will apply:

Formatted: Font: Not Bold

- (a) an Expert must be appointed by agreement between the Parties, or in default of such appointment within ten Business Days of the requirement or right (as applicable) to refer the matter to an Expert, then that person is to be nominated at either Party's request by:
- (i) where the Parties agree the Dispute is purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division;

- (ii) where the Parties agree the Dispute is purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and
 - (iii) in any other case, the President (for the time being) of the Queensland Law Society, Inc;
- (b) if the Expert is to be nominated by a person referred to in **clause 17.4(a)** and that person declines to nominate a person as the Expert but provides a list of people that could be appointed as the Expert:
 - (i) the first person specified in that list will be taken to be nominated as the Expert;
 - (ii) if the first person specified in that list does not accept the appointment as the Expert, the next person specified in that list will be taken to be the first person specified in that list and will be nominated as the Expert; and
 - (iii) the process specified in **clause 17.4(b)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the Expert accepts the appointment as the Expert;
- (c) subject to **clause 17.4(b)**, if the Expert is to be nominated by a person referred to in **clause 17.4(a)** and the person nominated as the Expert does not accept the appointment as the Expert, then an alternative person is to be nominated as the Expert at either Party's request by the same person referred to in **clause 17.4(a)**;
- (d) if the Expert is to be nominated by a person referred to in **clause 17.4(a)** the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person agreeing to nominate an Expert;
- (e) the Parties must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated Expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne equally by the Parties)) that must be satisfied or complied with as a condition of that person accepting the appointment as an Expert; and
- (f) the Expert must:
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as Expert, he or she being required to fully disclose

any such interest or duty by notice to the Parties before his or her appointment;

- (iii) not be, or have been in the last five years, an employee of the Trustee, Aurizon or a Preference Unit Holder or a Related Body Corporate of the Trustee, Aurizon or a Preference Unit Holder;
- (iv) not be permitted to act until he or she has given notice to the Parties that he or she is willing and able to accept the appointment;
- (v) have regard to the provisions of this Agreement and consider all submissions (including oral submissions by either Party provided that such oral submissions are made in the presence of the other Party), supporting documentation, information and data with respect to the matter submitted by the Parties;
- (vi) provide both Parties with a copy of his or her determination in the form of a report setting out reasonable details of the reasons for the Expert's determination within a reasonable time after his or her appointment;
- (vii) be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties (including, if required by a Party, by entering into a confidentiality agreement in favour of the Parties); and
- (viii) be deemed to be and act as an expert and not an arbitrator and the law relating to arbitration (including, without limitation, the *Commercial Arbitration Act 1990* (Qld)) will not apply to him or her or the determination or the procedures by which he or she may reach a determination.

~~46.5~~17.5 Parties to assist Expert

The Parties must do everything reasonably requested by the Expert to assist the Expert in determining the Dispute, including producing information and materials requested by the Expert and attending any hearing convened by the Expert.

~~46.6~~17.6 Decision of Expert

In the absence of manifest error, the decision of the Expert is final and binding upon the Parties.

~~46.7~~17.7 Costs

- (a) The costs of the Expert and any advisers engaged by the Expert will be borne equally by the Parties to the Dispute.
- (b) Each Party to the Dispute will bear its own legal costs and the costs of any advisers to it in respect of the Dispute Resolution Process under this **clause 17**.

16.817.8 Determination by court

- (a) If any Dispute is not otherwise resolved in accordance with this **clause 17.9**, then the Dispute may be referred to one of the courts of the State having jurisdiction, and sitting in Brisbane, Queensland.
- (b) Each Party irrevocably and unconditionally:
 - (i) agrees that the courts of the State, and any courts which have jurisdiction to hear appeals from any of those courts, are to have exclusive jurisdiction to settle Disputes which may arise out of or in connection with this Agreement and that accordingly any suit, action or proceeding (**Proceedings**) arising out of or in connection with this Agreement may be brought in, and only in, such courts;
 - (ii) waives any objection which it may have now or hereafter to the laying of the venue of any Proceedings in such courts and any Claim that any such Proceedings have been brought in an inconvenient forum; and
 - (iii) agrees that a final judgment in any Proceedings brought in such courts will be final and binding upon such Party and may be enforced in the courts of any other jurisdiction.

16.917.9 Discrimination Dispute

- (a) This **clause 17.9** applies in respect of a Discrimination Dispute.
- (b) If a Discrimination Dispute is not resolved in accordance with **clause 17.3** within 10 Business Days of referral of the chief executive officers the Discrimination Dispute must be referred to an Expert to determine in accordance with the procedure in clauses 17.4, 17.5 and 17.6 whether or not Aurizon complied with the relevant Non-Discrimination Provision.

Formatted: Font: Not Bold

Formatted: Font: Not Bold

Industry Note: Discrimination Dispute

The subject matter of the Dispute may not be limited to whether or not the NDP was complied with – broader matters of dispute could arise out of the fact of the non-compliance and these should properly be open to the Expert to determine. It should also be open to the Expert to determine how the relevant provision should be complied with – otherwise Aurizon could keep acting in a discriminatory matter and the matter would simply get referred back to an Expert who would be limited to determining that there had been non-compliance in fact. This would result in delay and a potentially circular outcome.

Formatted: Font: Not Bold

- (c) If it is agreed or determined through the Dispute resolution process that Aurizon failed to comply with the relevant Non-Discrimination Provision, Aurizon must, as soon as reasonably practicable after such agreement or determination (and, in any event, within ten Business Days), exercise the relevant right, power or discretion in a manner that complies with the relevant Non-Discrimination Provision (having regard to the agreement or determination, as applicable).

(d) Despite a Discrimination Dispute, the exercise of the relevant right, power or discretion by Aurizon which is the subject of the Discrimination Dispute is taken to be valid unless and until:

(i) it is agreed or determined through the Dispute resolution process under this **clause 17.9** that Aurizon failed to comply with the Non-Discrimination Provision; and

(ii) Aurizon has, in accordance with **clause 17.9**, exercised the relevant right, power or discretion in a manner that complies with the relevant Non-Discrimination Provision, and any binding Expert determination.

~~16.10~~**17.10** Injunctive relief

Nothing in this Agreement will prevent a Party from seeking urgent injunctive relief from a court.

~~16.11~~**17.11** Disputes involving Unit Holders

If:

(a) a Dispute which arises under this Agreement, or the outcome or consequences of that Dispute, may be relevant to the Trustee and/or one or more Unit Holders under the Unit Holders Deed; or

(b) a "Dispute" (as defined under the Unit Holders Deed) which arises under the Unit Holders Deed, or the outcome or consequences of that Dispute, may be relevant to the Trustee and/or Aurizon under this Agreement,

then:

(c) as applicable:

(i) Aurizon and/or the Trustee may join all (for the avoidance of doubt, not only some) of the Unit Holders to the dispute resolution process under this Agreement; or

(ii) the Trustee may join Aurizon to the dispute resolution process under the Unit Holders Deed; and

(d) Aurizon, the Trustee and each Unit Holder joined to participate in the dispute resolution process under this Agreement or the Unit Holders Deed (as applicable) will be bound by the outcome of the resolution of the Dispute irrespective of whether or not Aurizon, the Trustee and the Unit Holder (as applicable) choose to actively participate in the dispute resolution process.

~~16.12~~**17.12** Time bar

If a Party does not give a Dispute Notice under **clause 17.1(a)** in respect of a Dispute within 12 Months after the date the Party became aware, or ought reasonably to have become aware, of the occurrence of the event or circumstance giving rise to the Dispute:

(a) the Party must not give the other Party such a Dispute Notice;

(b) any such Dispute Notice which is given by the Party will be taken to be of no effect; and

(c) the Party will not have, and must not make, any Claim against the other Party in respect of the Dispute.

(e) For the purposes of this clause, knowledge of the Trustee is confined to the knowledge of the Trustee personally, and not its Associates or agents.

Formatted: Normal Indent,Para,bold,h
-12.25, Hang. Indent 1.25, Hang Ind
1.5, ni, Normal Indent Char 1, Normal
Indent Char Char 1, Normal Indent
Char 2 Char Char, Normal Indent Char
Char 1 Char Char, Normal Indent Char 1
Char Char Char Char, Normal Indent
Char 1 Char 1 Char Char

17.18 Confidentiality

17.18.1 Confidentiality obligations

A Party (**Recipient**):

- (a) may use Confidential Information of the other Party (**Disclosing Party**) only for the purposes of this Agreement or another Transaction Document; and
- (b) must keep confidential all Confidential Information of a Disclosing Party except for disclosures permitted under **clause 18.2**.

17.18.2 Disclosure of Confidential Information

A Recipient may disclose Confidential Information of a Disclosing Party:

- (a) to any person, where the Disclosing Party has consented in writing to such disclosure (such consent not to be unreasonably withheld or delayed, and may be given subject to reasonable conditions, such as the signing of an appropriate confidentiality undertaking);
- (b) to the extent necessary to progress negotiations with any other person relevant to matters contemplated in this Agreement who executes a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (c) to the extent necessary to effect the administration or enforcement of this Agreement, or further negotiations pursuant to this Agreement, by employees, professional advisers (including legal advisers) and consultants of the Recipient;
- (d) to any Related Body Corporate of the Recipient to the extent necessary for reporting purposes within a relevant group of companies, governance and oversight of the relevant group of companies and obtaining any approval or consent (whether or not directly from that Related Body Corporate) in relation to the Recipient entering into this Agreement;
- (e) to potential purchasers, assignees or transferees of the shares in the Recipient or a Related Body Corporate of it or of the rights or obligations of the Recipient under this Agreement and the other Transaction Documents who execute a confidentiality undertaking in favour of the Disclosing Party on terms reasonably acceptable to it;
- (f) to a bank or other financial institution (and its professional advisers and any security trustee or agent for it) who execute a confidentiality

undertaking in favour of the Disclosing Party on terms reasonably acceptable to it in connection with and for the purpose of any loan or other financial accommodation sought to be arranged by, or provided to, the Recipient or a Related Body Corporate of it;

- (g) to legal, accounting and financial or other advisers or consultants to the Recipient or a Related Body Corporate of it:
 - (i) whose duties in relation to the Recipient or the Related Body Corporate require the disclosure;
 - (ii) who are under a duty of confidentiality to the Recipient; and
 - (iii) who have been advised of the confidential nature of the Confidential Information;
- (h) to any officers or employees of the Recipient or a Related Body Corporate of the Recipient (excluding, in the case of Aurizon, any Related Body Corporate that provides rail haulage services) who:
 - (i) have a need to know for the purposes of this Agreement or another Transaction Document (and only to the extent that each has a need to know); and
 - (ii) before disclosure, have been directed by the Recipient to keep confidential all Confidential Information of the Disclosing Party;
- (i) if, and to the extent, the Recipient is required to do so by law (other than by section 275 of the *Personal Property Securities Act 2009* (Cth)), any taxation authority or by any rules or regulations of a recognised stock exchange (including where the disclosure is to a Related Body Corporate of the Recipient that is responsible for making such disclosures for the relevant group of companies and for the purpose of such a Related Body Corporate determining whether, and the extent to which, such a disclosure is required to be made);
- (j) to any Governmental Agency to the extent required by law or where such disclosure is determined by the Trustee to be reasonably required for the administration of the Trust;
- (k) if disclosure is lawfully required by the Access Regulator or in accordance with the Access Undertaking;
- (l) to an Auditor or Expert under this Agreement or an "Expert" (as defined in the Unit Holders Deed) under the Unit Holders Deed;
- (m) to a Unit Holder or a Related Body Corporate of a Unit Holder; or
- (n) to advisors of the Unit Holders and their Related Bodies Corporate:
 - (i) whose duties in relation to the Unit Holder require that disclosure;
 - (ii) who are under a duty of confidentiality to the Recipient; and
 - (iii) who have been advised of the confidential nature of the Confidential Information.

~~17.3~~18.3 **Conditions of disclosure**

If a Recipient discloses Confidential Information of a Disclosing Party to a person under **clause 18.2 (Disclosee)**, the Recipient must:

- (a) ensure that the Disclosee is aware that the Confidential Information is confidential information of the Disclosing Party; and
- (b) use reasonable endeavours to ensure that the Disclosee does not improperly disclose or improperly use the Confidential Information.

1819 GST

~~18.1~~19.1 **Construction**

In this **clause 19**:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*; and
- (c) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.

~~18.2~~19.2 **Consideration GST exclusive**

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

~~18.3~~19.3 **Payment of GST**

If GST is payable on any supply made by a Party (or any entity through which that Party acts) (**Supplier**) under or in connection with this Agreement, unless the consideration is expressly stated to be inclusive of GST, the recipient will pay to the Supplier an additional amount equal to the GST payable on the supply. Subject to **clause 19.4**, the recipient will pay the amount referred to in this **clause 19.3** in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

~~18.4~~19.4 **Tax invoices**

- (a) (**Supplies by the Trustee**) The Parties agree that:
 - (i) Aurizon will issue a recipient created tax invoice (**RCTI**) in respect of any taxable supply which the Trustee makes to Aurizon under or in connection with this Agreement (**Trustee Supplies**);
 - (ii) the Trustee will not issue tax invoices in respect of the Trustee Supplies;
 - (iii) the Trustee is registered for GST as at the date of this Agreement and must notify Aurizon if it ceases to be registered;

- (iv) Aurizon is registered for GST as at the date of this Agreement and must notify the Trustee if it ceases to be registered;
 - (v) Aurizon will issue an adjustment note to the Trustee for any adjustment events that arise in relation to a supply for which a RCTI has been issued;
 - (vi) each RCTI to be issued in accordance with this Agreement is a tax invoice belonging to the class of invoices that the Commissioner of Taxation has determined in writing may be issued by the recipient of a taxable supply; and
 - (vii) the agreement in this **clause 19.4(a)** will terminate immediately if Aurizon or the Trustee cease to satisfy any of the requirements under the GST Law for issuing a RCTI.
- (b) (**Supplies by Aurizon**) Aurizon must deliver a tax invoice or an adjustment note to the Trustee before Aurizon is entitled to payment of an amount on account of GST under **clause 19.3** in respect of the supplies it makes to the Trustee. The Trustee can withhold payment of the amount on account of GST until Aurizon provides a tax invoice or an adjustment note, as appropriate.

~~18.5~~19.5 **Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause 19.3** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

~~18.6~~19.6 **Reimbursements**

Where a Party is required under this Agreement to pay or reimburse an expense or outgoing of the other Party, the amount to be paid or reimbursed by the first Party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other Party is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

~~19.20~~ **Assignment**

~~19.4~~20.1 **Assignment**

Subject to **clauses 20.2, 20.3 and 20.4**, a Party must not assign, transfer, mortgage, charge, make the subject of a trust or otherwise deal with or encumber all or any of its rights or liabilities under this Agreement (or procure or permit any of those things) without the prior consent of the other Party.

19.220.2 Assignment by Aurizon

- (a) If an entity will acquire all of Aurizon's interest in the parts of the Railway Network which include the Segments, Aurizon must transfer all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires Aurizon's interest in the relevant parts of the Railway Network.
- (b) If an entity will acquire a portion of all of Aurizon's interest in part of the Railway Network which include the Segments, Aurizon must transfer the same proportion of all of its rights and liabilities under this Agreement to that entity at the time that the entity acquires the portion of Aurizon's interest in the relevant part of the Railway Network.
- (c) The Trustee must, promptly upon demand by Aurizon, execute a deed of assignment or novation in a form acceptable to Aurizon (acting reasonably) to give effect to the transfer of any rights or liabilities of Aurizon required under this **clause 20.2**.

19.320.3 Assignment by Trustee

- (a) If the Trustee is replaced by a new trustee of the Trust, the Trustee must, with effect upon the appointment of the new trustee of the Trust, assign its rights and liabilities under this Agreement to the new trustee of the Trust.
- (b) The Trustee must not otherwise assign its rights and liabilities under this Agreement.

19.420.4 Charging

- (a) Aurizon may mortgage, charge or encumber (**Charge**) all or any of its rights and obligations under this Agreement in whole or in part, in favour of any financier, mortgagee or chargee (**Chargee**), with the Trustee's prior written consent and provided that Aurizon, the Chargee and the Trustee execute any reasonable form of covenant, including terms to the effect that the Trustee acknowledges the existence of the Charge, and that the Chargee must comply with the provisions of this Agreement, including this **clause 20**, in the exercise of its rights under the Charge.
- (b) Aurizon must not Charge the Leased Extension Infrastructure or any part of the Leased Extension Infrastructure.
- (c) The Trustee may Charge all or any of its rights and obligations under this Agreement in whole or in part (including for clarification the Extension Infrastructure), in favour of any Chargee, provided that the Trustee, the Chargee and Aurizon execute any reasonable form of covenant, including terms to the effect that Aurizon acknowledges the existence of the Charge, and that the Chargee must comply with the provisions of this Agreement, including this **clause 20**, in the exercise of its rights under the Charge.
- (b)(d) The Trustee must not create or allow to subsist a Security Interest over all or part of the Trustee's rights or interests in the Leased Extension

Formatted: Font: Bold

Formatted: Font: Bold

Infrastructure without the prior consent of Aurizon, which consent shall not be unreasonably withheld, delayed or subject to unreasonable conditions.

Industry Note: Securities

The above changes recognises that, the Trustee may:

- seek to charge its contractual rights under this Agreement as part of its broader security arrangements; or
- encumber its interests in the Leased Extension Infrastructure (prior to it being transferred to the Extension Infrastructure Lessor).

If it seeks the consent of Aurizon to the creation of a Security Interest/enters into Deed of Covenant, then Aurizon should not be entitled to unreasonably withhold or delay the consent. Otherwise, the restrictions in clause 5 on the creation of Securities could be unnecessarily restrictive.

Formatted: Font: Bold

Formatted: Indent: Left: 0 cm,
Hanging: 0.75 cm

2021 Notices

20.421.1 General

A notice, demand, certification, process or other communication (**Notice**) relating to this Agreement must be in writing in English and may be given by an agent of the sender.

20.221.2 How to give a Notice

In addition to any other lawful means, a Notice may be given by being:

- (a) personally delivered;
- (b) left at the Party's current business address for Notices;
- (c) sent to the Party's current postal address for Notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by fax to the Party's current fax number for Notices.

20.321.3 Particulars for giving of Notices

- (a) Each Party's particulars for the giving of Notices are initially the particulars set out in **item 1 of schedule 1**.
- (b) Each Party may change its particulars for the giving of Notices by notice to the other Party.
- (c) A Notice given to a Party which is signed is evidence that the Notice has been signed by a person duly authorised by the sender and that Party is entitled to rely on that Notice without further inquiry or investigation.

20.421.4 Notices by post

Subject to **clause 21.6**, a Notice is given if posted:

- (a) within Australia to an Australian postal address, three Business Days after posting; or

- (b) outside of Australia to an Australian postal address or within Australia to an address outside of Australia, ten Business Days after posting.

20.521.5 Notices by fax

Subject to **clause 21.6**, a Notice is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

20.621.6 After hours Notices

If a Notice is given:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or public holiday in that place.

20.721.7 Process service

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this Agreement may be served by any method contemplated by this **clause 21** or in accordance with any applicable law.

20.821.8 Signature to Notice

The signature to any Notice to be given by the Trustee may be written or printed or stamped and the signature may be that of any authorised officer of the Trustee.

21.22 Warranties

21.422.1 Warranties

Each Party warrants that:

- (a) it is a corporation validly existing under the laws applicable to it;
- (b) it is able to pay its debts as and when they fall due;
- (c) it has the power to enter into and perform this Agreement and has obtained all necessary consents to enable it to do so;
- (d) its obligations under this Agreement are enforceable in accordance with their terms;
- (e) no litigation, arbitration or administrative proceeding has been commenced before, and no judgment or award has been given or made by, any court, arbitrator, other tribunal or Governmental Agency against it which would have a material adverse effect on its ability to observe its obligations under this Agreement; and

- (f) it is not in breach or default under any agreement to which it is a party to an extent or in a manner which would have a material adverse effect on its ability to perform its obligations under this Agreement.

21.222.2 Trustee warranties

The Trustee warrants that:

- (a) it has full power and authority to enter into this Agreement and to perform the Trustee's obligations under this Agreement and the Trust Deed;
- (b) it is the sole trustee of the Trust and no action has been taken to remove or replace the Trustee; and
- (c) it has the right to be fully indemnified out of the assets of the Trust in respect of all its obligations under this Agreement, and the Trustee has not done or omitted to do anything that would result in its right of indemnity being restricted or limited in any way.

22.3 Personal Property Securities Act

- (a) If the Trustee determines that the lease of the Leased Extension Infrastructure in accordance with the terms of this Agreement creates a security interest for the purposes of the Personal Property Securities Act 2009 (Cth), Aurizon agrees to do all things which the Trustee considers (acting reasonably) necessary (including obtaining consents, signing and producing documents, and supplying information) for the purposes of:
- (i) ensuring that the security interest is enforceable, perfected (including, where possible, by control in addition to registration) and otherwise effective;
- (ii) enabling the Trustee to apply for any registration, or give any notification, in connection with the security interest so that the security interest has the priority required by the Trustee; or
- (c)(iii) enabling the Trustee to exercise its rights in connection with the security interest.

Formatted: Heading 3, (a), Level 1 - 1, h3, h3 sub heading, H3, Head 3, 3m, H31, (Alt + 3), h: 3, 1st sub-clause, 3, d, C Sub-Sub/Italic, Head 31, Head 32, C Sub-Sub/Italic1, Head 33, C Sub-Sub/Italic2, Head 311, Head 321, C Sub-Sub/Italic11, h31, Bold Head, bh, Level 1 - 2, l3, head3, h3, H3, Tas

Formatted: Heading 5, (A), Level 3 - i, H5, Block Label, s, 1. 1. 1. 1. 1, Level 3 - (i), Para5, Para51, Heading 5 (unused), h5, h51, h52, sub-sub-sub-para, l5, Sub4Para, 5, l5, A, Heading 5 StGeorge, Lev 5, Body Text (R), Appendix A to X, Heading 5 - Appendix A to X, Appendix A to X1, Com

Industry Note: New clause 22.3

This clause has been included so that the Trustee will be able to obtain the assistance of Aurizon in registering any necessary security interest subsequently determined to arise in respect of the lease under the Personal Property Securities Act.

Formatted: Font: Not Bold

21.322.4 Reliance

- (a) Each Party acknowledges that the other Party has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 22.1**.
- (b) The Trustee acknowledges that Aurizon has entered (or will enter) into this Agreement in reliance upon the warranties contained in **clause 22.2**.

22.23 General

22.23.1 Survival

This **clause 23** and **clauses 18** and **[#]** survive the termination of this Agreement.

22.23.2 Applicable law

- (a) This Agreement will be governed by and construed in accordance with the laws applicable in the State of Queensland.
- (b) Each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Queensland and courts of appeal from them in respect of any proceedings arising out of or in connection with this agreement. Each party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

Formatted: Heading 4, (i), Level 2 - a, h4, H4, 2nd sub-clause, D Sub-Sub/Plain, h4 sub sub heading, 4, a, h41, h42, h411, h43, h412, h44, h413, h45, h414, h46, h415, h47, h416, h48, h417, h49, h418, h421, h4111, h431, h4121, h441, h4131, h451, h4141, h461, h4151, h422, h4112, h432, h4122, h442, h4132, H-4, I

22.323.3 Subcontracting

- (a) For the avoidance of doubt, Aurizon may delegate or subcontract the performance of all or any of its obligations under this Agreement to a third party (including a Related Body Corporate of it).
- ~~(a)~~(b) Aurizon is not permitted to subcontract all or any of its obligations under this Agreement to a third party (including a Related Body Corporate) that provides Rail Haulage Services on the Central Queensland Coal Network.
- ~~(b)~~(c) The subcontracting or delegation of an obligation, as applicable, under **clause 23.3(a)** does not relieve Aurizon of any liability or obligation under this Agreement in respect of the obligation which has been subcontracted or delegated (as applicable) and Aurizon will be liable to the Trustee for the acts and omissions of the subcontractor or delegate, as applicable, their employees and agents involved in undertaking those obligations as if they were the acts or omissions of Aurizon.

22.423.4 Waiver

- (a) Waiver of any right arising from a breach of this Agreement or any right arising from a default under this Agreement must be in writing and signed by the Party granting the waiver.
- (b) A single or partial exercise or waiver by a Party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (c) A failure or delay in exercise, or partial exercise, of a right arising from a breach of this Agreement does not result in a waiver of that right.

22.523.5 Duty

- (a) As between the Parties, the Trustee is liable for and must pay all duty (including any fine or penalty except where it arises from default by

Aurizon) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

- (b) If Aurizon pays any duty (including any fine or penalty) which the Trustee is liable to pay under **clause 23.5(a)**, the Trustee must pay that amount to Aurizon on demand.

Industry Note: Clause 21

This provision is subject to further discussions with between Industry and Aurizon Network regarding the ability to obtain stamp duty relief.

Formatted: Font: Not Bold

22.623.6 Legal costs

Except as expressly stated otherwise in this Agreement, each Party must pay its own legal costs and expenses of the drafting, negotiating and execution of this Agreement.

22.723.7 Amendments to be in writing

Except where this Agreement expressly provides a process for amendment or variation, an amendment or variation of this Agreement will only be effective if it is in writing and executed by both Parties to this Agreement.

22.823.8 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a Party under this Agreement are cumulative and are in addition to any other rights of that Party.

22.923.9 Consents

Except as expressly stated otherwise in this Agreement, a Party may conditionally or unconditionally give or withhold any consent to be given under this Agreement and is not obliged to give its reasons for doing so.

22.1023.10 Further assistance

Each Party must promptly sign, execute and complete all additional documents which may be necessary and do whatever else is reasonably required to effect, perfect, or complete the provisions of this Agreement and to perform its obligations under it.

22.1123.11 Counterparts

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

22.1223.12 Entire understanding

- (a) This Agreement and the other Transaction Documents together contain the entire understanding between the Parties as to the subject matter of this Agreement.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and the other Transaction Documents and are of no effect. Neither Party is liable to the other Party in respect of those matters.

- (c) No oral explanation or information provided by a Party to the other Party:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between the Parties.

22.13 23.13 Relationship of Parties

Except to the extent expressly provided in this Agreement, this Agreement is not intended to create a partnership, joint venture or agency relationship between the Parties.

22.14 23.14 Severability

- (a) Subject to **clause 23.14(b)**, if a provision of this Agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Agreement.
- (b) **Clause 23.14(a)** does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this Agreement; or
 - (B) relative commercial or financial positions of the Parties; or
 - (ii) would be contrary to public policy.

22.15 23.15 Survival of representations and warranties

All representations and warranties in this Agreement will survive the execution and delivery of this Agreement and the completion of the transactions contemplated by it.

22.16 23.16 Enurement

The provisions of this Agreement will, subject as otherwise provided in this Agreement, enure for the benefit of and be binding on the Parties and their respective successors and permitted novatees and assigns.

22.17 23.17 Merger

The obligations contained in this Agreement will continue until satisfied in full.

22.18 23.18 Powers of attorney

An attorney by executing this Agreement declares that he or she has received no notice of revocation of the power of attorney pursuant to which he or she executes this Agreement.

22.19 23.19 Indemnities

- (a) It is not necessary for a Party to incur any expense or make any payment before enforcing a right of indemnity under this Agreement.
- (b) Each indemnity under this Agreement is a continuing obligation separate and independent of the indemnifying Party's other obligations.

~~(c) A Party must pay an indemnified amount under an indemnity given by it under this Agreement within 10 Business Days after being demanded to do so by the Party entitled to be indemnified under the indemnity.~~

Industry Note: Indemnities

~~Paragraph (c) has been deleted on the basis that it is not necessary to prescribe details for the payment of an indemnity.~~

Formatted: Font: Bold

Schedule 1

Agreement details

1 Particulars for Notices

1.1 Trustee

Business address [insert]
Postal address [insert]
Facsimile No. [insert]
Attention: [insert]

1.2 Aurizon

Business address Level 5
192 Ann Street
BRISBANE QLD 4000
Postal address GPO Box 456
BRISBANE QLD 4001
Facsimile No. [insert]
Attention: Vice President, Commercial Development

Schedule 2

Objective (clause 11.1)

Industry Note: The drafting of the objectives for the Rent requires improvement to ensure that there is no inconsistency, and that the objectives are not open to misinterpretation.

1 Objective during regulatory period

1.1 Application

This **item 1** of **schedule 2** applies while the Railway Network is regulated under Access Legislation.

1.2 Definitions

In this **item 1** of **schedule 2**:

Access Agreement means an agreement, ~~in or substantially in the form of any standard access agreement of Aurizon approved by the Access Regulator,~~ between Aurizon and a third party that grants that third party a right to access the System for the operation of train services (and, for the avoidance of doubt, does not include any agreement or arrangement ~~in relation to~~ Aurizon facilitating, constructing, funding, providing or otherwise undertaking any extension, enhancement, expansion, augmentation, duplication or replacement of any part of the Railway Network).

Industry Note: It is not clear why such a narrow definition of Access Agreement is necessary.

Adjustments has the meaning given in **item 1.3** of this **schedule 2**.

Capital Value means:

- (a) in respect of a System, the capital value, under the relevant regulated pricing regime, of the assets comprising the System including any depreciation and appreciation of that capital value; and
- (b) in respect of the System Total Extension Infrastructure, the capital value, under the relevant regulated pricing regime, of the assets comprising the System Total Extension Infrastructure including any depreciation and appreciation of that capital value.

Excluded Revenue means:

- (a) in respect of the Extension Pre-Tax Allowable Revenue and the System Pre-Tax Allowable Revenue, any revenue which, under the relevant regulated pricing regime, may be earned in relation to operation or maintenance (including, to the extent approved by the Access Regulator, OPRA), ~~and any other revenue component not based on the Capital Value of the System or the System Total Extension Infrastructure (as applicable)~~; and
- (b) in respect of the System Capital Revenue, any revenue which, under the relevant regulated pricing regime, is received in relation to operation or maintenance (including, to the extent approved by the Access Regulator, OPRA), ~~and any other revenue component not based on the Capital Value of the System.~~

Extension Pre-Tax Allowable Revenue means, for a System, the pre-tax amount of revenue from the relevant Pricing Component that the relevant regulated pricing regime specifies may be earned under Access Agreements from train services that use the System Total Extension Infrastructure and that is calculated based on the Capital Value of the System Total Extension Infrastructure, as relied on by the Access Regulator for approval of that pre-tax amount of revenue (and, for the avoidance of doubt, excludes all Excluded Revenue).

OPRA means, for a System, the operational and performance risk allowance (if any) approved by the Access Regulator in respect of any relevant commercial or regulatory risk borne by Aurizon in connection with the operation and maintenance of that System.

Pricing Component means a pricing component relating to parts of the Rail Network that differs from pricing components relating to other parts of the Rail Network based on differences in cost and utilisation, as approved by the Access Regulator. For example, under the 2010 Access Undertaking:

- (a) the component of the Reference Tariff (or access charges derived from the Reference Tariff) calculated based on AT₅ is a Pricing Component; and
- (b) the component of the Reference Tariff (or access charges derived from the Reference Tariff) calculated based on AT₂, AT₃ and AT₄ is another Pricing Component.

In this definition, AT₂, AT₃, AT₄, AT₅ and Reference Tariff have the meaning given to those terms in the 2010 Access Undertaking.

SEI Capital Revenue means, for a System, the SEI Proportion multiplied by the System Capital Revenue, ~~subject to item 1.3(b) of this item 1 of schedule 2.~~

SEI Proportion means, for a System, the proportion which the Extension Pre-Tax Allowable Revenue bears to the System Pre-Tax Allowable Revenue.

System means, as applicable, each relevant part of the Railway Network to which a Pricing Component applies. For example, under the 2010 Access Undertaking:

- (a) the relevant parts of the Railway Network in an Individual Coal System for which a component of the Reference Tariff (or access charges derived from the Reference Tariff) calculated based on AT₅ applies is a System; and
- (b) the relevant parts of the Railway Network in that Individual Coal System for which a component of the Reference Tariff (or access charges derived from the Reference Tariff) calculated based on AT₂, AT₃ and AT₄ applies is another System.

In this definition, Individual Coal System, AT₂, AT₃, AT₄, AT₅ and Reference Tariff, have the meaning given to those terms in the 2010 Access Undertaking.

System Capital Revenue means, for a System, the revenue from the relevant Pricing Component received by Aurizon under Access Agreements for the provision of access to the System for the operation of train services (including revenue payable where trains were entitled to operate but did not operate – that is, take or pay revenue) for the same type of train services as those taken into account for the purpose of calculating the System Pre-Tax Allowable Revenue less all Excluded Revenue and adjusted to reflect any increase or decrease to the System Pre-tax Allowable Revenue associated with incentives or other efficiency sharing mechanisms.

System Total Extension Infrastructure means, for a System:

- (a) the Total Extension Infrastructure which forms part of the System (from time to time);
- (b) any Removed Infrastructure which forms part of the System and which has a value in the Regulatory Asset Base; and
- (c) any Replaced Part or Removed Obsolete Part which forms part of the System and which has a value in the Regulatory Asset Base.

System Pre-Tax Allowable Revenue means, for a System, the pre-tax amount of revenue from the relevant Pricing Component that the relevant regulated pricing regime specifies may be earned under Access Agreements from train services that use the System and that is calculated based on the Capital Value of the System, as relied on by the Access Regulator for approval of that pre-tax amount of revenue (and, for the avoidance of doubt, includes the Extension Pre-Tax Allowable Revenue but excludes all Excluded Revenue).

1.3 Objective

Industry Note: Paragraph (b) seems unnecessary and confuses the principle.

~~(a)~~ The mutual objective of the Parties is that the Rent payable by Aurizon to the Lessor under this Agreement for a Month will be the sum of the SEI Capital Revenue for each System for that Month.

Formatted: Indent: Left: 1.5 cm, No bullets or numbering

- ~~(b) However, if the calculation of the relevant System Capital Revenue includes:~~
- ~~(i) charges, adjustments, off sets, refunds or any other positive or negative amounts that are payable in respect of access;~~
 - ~~(ii) adjusted access charges that were increased or decreased in relation to an under or over recovery of revenue from that System;~~
~~or~~
 - ~~(iii) any other adjustment,~~
- ~~in respect of a time prior to the relevant Month (**Adjustments**), then the SEI Capital Revenue must be adjusted so that each Adjustment is applied in proportion to the SEI Proportion that would have applied at the time in respect of which that Adjustment relates.~~

2 Objective following regulatory period

Industry Note: The objective detailed in item 2 of this schedule is unjust. The rent is assessed based on the lesser of the actual rent received for the below rail assets and the rent under the regulatory regime. It is illogical for Aurizon Network to retain above regulatory returns. Aurizon Network should be required to seek a commercial post regulatory return. Under the objective, if access charges markedly increase, user funders do not receive any benefit because of the cap under 'Notional Access Revenue'.

In addition, there is a possibility that a Related Body Corporate of Aurizon, providing a CITS, could effectively choose to charge zero to customers for the access, thereby providing a competitive advantage to the Related Body Corporate while the discount is borne by the user funders. This is not a satisfactory outcome.

Full details of Industry's concern with this item 2 are included in the accompanying industry submission regarding the SUFA Documents

Formatted: Normal, Indent: Left: 1.5 cm, Border: Box: (Single solid line, Auto, 0.5 pt Line width), Pattern: Clear (Custom Color(RGB(255,244,204)))

2.1 Application

This **item 2** of **schedule 2** applies after the Railway Network ceases to be regulated under Access Legislation.

2.2 Definitions

Capital Revenue means, in respect of a Section:

- (a) actual access revenue, where access is provided as a separate commercial service;
- (b) Notional Access Revenue where access is provided as part of a CITS; or
- (c) a combination of both actual access revenue and Notional Access Revenue,

as applicable for that Section less Aurizon's reasonable and proper operating and maintenance expenditure for that Section.

CITS means a commercially integrated transportation service for which the provider incurs both below-rail costs and Other Transportation Costs, and

charges its customer an integrated fee for transportation services rendered to it.

CITS Provider means Aurizon or any Related Body Corporate of it that provides CITS to a customer.

Determined Other Transportation Costs means the determined quantum of Other Transportation Costs that the CITS Provider would have avoided had it not provided the Other Transportation Elements, including:

- (a) operating costs of providing the Other Transportation Elements;
- (b) administrative costs related to the provision of the Other Transportation Elements; and
- (c) an appropriate allowance for the capital costs of providing the Other Transportation Elements, which allowance must reflect the opportunity costs of the CITS Provider's relevant assets where they exist or otherwise the acquisition cost of the relevant assets (which may not be new assets), comprising both depreciation and return on assets.

End Regulation Date means the date on which this **item 2** of **schedule 2** commenced to apply.

Final Regulatory Regime means the Access Legislation and Access Undertaking that applied to Aurizon immediately prior to the End Regulation Date.

Notional Access Revenue means, in respect of the CITS provision relating to a Section, ~~the lesser of:~~

~~(a) the access revenue that would have been allowable to Aurizon in respect of that Section at the time of provision of the CITS had the Final Regulatory Regime continued to apply beyond the End Regulation Date, and~~

the revenue received by the CITS Provider for the provision of the CITS less the relevant Determined Other Transportation Costs, both being in respect of that Section.

Industry Note: It is not reasonable that Aurizon receives the upside of the higher than regulatory returns, yet caps the access charges to regulatory returns.

Other Transportation Costs means costs other than below-rail costs incurred by the CITS Provider in providing CITS.

Other Transportation Elements means all elements of the CITS (service) other than the below-rail element.

Section has the meaning given in **item 2.3** of this **schedule 2**.

2.3 Objective

Pricing of access

Where Aurizon provides a customer with access between any two points of rail infrastructure and Total Extension Infrastructure constitute any part of the rail infrastructure over which the access is provided (the rail infrastructure between

Formatted: Definition

those two points being a **Section**), the access agreement or CITS agreement as applicable between Aurizon and the customer must feature:

- (a) a no more favourable pricing regime (from the customer's perspective) for the provision of access or CITS as applicable in respect of Total Extension Infrastructure within that Section; than
- (b) the pricing regime applicable to the provision of access or CITS as applicable in respect of other assets within that Section or other Sections,

due to the Total Extension Infrastructure ownership.

For the avoidance of doubt, Aurizon may be required to adopt

- (i) in an access agreement, pricing in respect of a Section below the maximum amount that would have been allowed had the Final Regulatory Regime continued to apply beyond the End Regulation Date; and
- (ii) in a CITS agreement, pricing in respect of a Section as Aurizon sees fit.

For the avoidance of doubt, nothing in this Schedule allows Aurizon to do anything for the purpose of minimising the Rent payable to the Lessor.

Formatted: Font: Not Bold, Not Italic

Revenue sharing

Aurizon will pay to the Trustee the percentage of Capital Revenue attributable to each Section on the basis that would have applied at the time that Aurizon earned that Capital Revenue had the Final Regulatory Regime continued to apply beyond the End Regulation Date.

Drafting note: A special dispute resolution process for a Dispute in respect of **item 2 of schedule 2** (to be absolutely clear, this special arrangement is required only for a post regulatory dispute) is to be included. The special dispute resolution process will involve expert determination by a panel of three Experts, with one nominee by the Trustee, another nominee by the Lessee and the third by agreement or failing that by an independent party. Panel decisions require any two panel members to agree. Each Expert must meet the standards set out in **clause 176.4(f)**, as modified to reflect decision by a panel of experts rather than a single expert.

Industry Note: The expert under the proposed 'special resolution process' should have broad discretions to assess the revenue being collected as a result of the Total Extension Infrastructure. There should be an unrestricted list of matters which the expert should have regard to, including:

- the arm's length (or otherwise) nature of the charges being levied for stand-alone use;
- charges being levied for comparable infrastructure funded by Aurizon;
- the margin between the CITS charge and other costs of providing a CITS;
- additional value created by the CITS which is not reflected in the DOTC and which is reasonably attributable to the integrated service offering;

- the previous regulated charge (but this is not to be considered a ceiling, nor is it a guaranteed floor) and the general direction (increase/decrease) of access charges following deregulation; and
- charges which would arise under a DOTC methodology (but not to be a ceiling or a floor).

Formatted: Definition, Outline
numbered + Level: 1 + Aligned at: 1.5
cm + Indent at: 1.5 cm

Schedule 3

Rent Calculation Methodology

(clause 11.2)

Industry Note: There are a number of issues and concerns with this schedule, and QRC suggests that Aurizon Network, the QCA and the QRC should work together to further develop it. Full details are included in the accompanying industry submission regarding the SUFA Documents.

Some of the concerns relate to the following:

- the Revenue Adjustment Amount calculations appear to diverge from the objective for the calculations that QRC would have expected;
- clarification is necessary as to where the amounts of 'any approved...operating costs for the relevant mainline system for the month' from the definitions of 'AT2-4 Distribution Pool' and 'AT5 Distribution Pool' are sourced;
- QRC has some concerns relating to the approach for 'Adjustment Charges' for prior years, and in particular:
 - o more flexibility needs to be built into this methodology to allow this calculation to be varied and determined on a case by case basis, as these amounts may not be recovered through tariffs under the 2010 Access Undertaking; and
 - o an 'Adjustment Charge' collected under the methodology may relate to the current rent year. QRC is unclear as to whether the proposed drafting works in such a case, and it is vital for QRC to understand the purpose of this provision;
- it is not clear how relinquishment fees payable in respect of an access holder's relinquishment or transfer of access rights, and which form part of the AT2-4 or AT5 revenue, will be allocated between user-funders (through the formulas contained in this schedule 3) and Aurizon Network;
- the capital indicator and tariff smoothing arranged under the 2010 Access Undertaking has the consequence that revenue attributable to extension infrastructure may be collected before the extension exists. The drafting of this schedule needs to include an allocation method for this revenue, and deal with any relevant corrections to payments for subsequent years; and
- a worked example should be included within the schedule to demonstrate the proposed calculation mechanisms.

Formatted: Indent: Left: 0 cm

Determination of Rent for each Month

For each mainline system upgraded by Aurizon, the Rent for each Month due to the Trustee in respect of any Month during the period from the Initial Rent Month until the end of the Term shall be:

$[AID_t * (AT_{2-4} \text{ Distribution Pool})] +$

$[AID_{(t-2)} * AT_{2-4} RAA_{(t-2)}] +$

$[AIE_t * AT_5 \text{ Distribution Pool}] +$

$[AIE_{(t-2)} * AT_5 RAA_{(t-2)}] +$

$$\sum_{n=1}^{n=q} (AID_{(t-n)} * AC_{AT2-4(t-n)} + AIE_{(t-n)} * AC_{AT5(t-n)})$$

The Rent for each Month shall be subject to adjustment for:

- (a) invoicing corrections for prior months that fall within the period from the Initial Rent Month until the end of the Term; and
- (b) bad debts in prior months that fall within the period from the Initial Rent Month until the end of the Term.

Definitions

AC_{AT2-4(t-n)} means an amount that is one twelfth of the annual Adjustment Charge in relation to AT₂₋₄ for the relevant mainline system as set by the Access Regulator for the Year n years prior intended to be adjusted in this year.

AC_{AT5(t-n)} means an amount that is one twelfth of the annual Adjustment Charge in relation to AT₅ for the relevant mainline system as set by the Access Regulator for the Year n years prior intended to be adjusted in this year.

Adjustment Charge has the meaning given to it in the 2010 Access Undertaking.

Applicable Interest – Diesel (or AID) means the greater of:

- (c) zero, and
- (d) $(X - Y) / (Z - T)$

where:

X = the capital component of the System Allowable Revenue Amount for AT₂₋₄ attributable to the System Total Extension Infrastructure;

Y = OPRA in relation to non-electric, to the extent it is included in X;

Z = the capital component of the System Allowable Revenue Amount (including the portion due to the Total Extension Infrastructure) for AT₂₋₄; and

T = OPRA, to the extent it is included in Z,

expressed as a decimal for any part or full Year that falls within the period from the Initial Rent Month until the end of the Term, and shall be calculated at the commencement of that Year.

Applicable Interest – Electric (or AIE) means the greater of:

- (a) zero, and
- (b) $(P - Q) / (R - S)$

where:

P = the capital component of the System Allowable Revenue Amount for AT₅ attributable to the [System] Extension Infrastructure;

Q = OPRA in relation to electric, to the extent it is included in P;

R = the capital component of the System Allowable Revenue Amount (including the portion due to the Total Extension Infrastructure) for AT₅; and

S = OPRA, to the extent it is included in R,

expressed as a decimal for any part or full Year that falls within the period from the Initial Rent Month until the end of the Term, and shall be calculated at the commencement of that Year.

AT_{2.4} has the meaning given to it in the 2010 Access Undertaking.

AT_{2.4} Distribution Pool means AT_{2.4} Received Amount less

- (a) any AT_{2.4} RAA;
- (b) any AC_{AT2.4(t-n)};
- (c) any approved non-electric operating costs for the relevant mainline system for the month; and
- (d) OPRA to the extent it is included in AT_{2.4} Received Amount

AT_{2.4} Received Amount means, in respect of a month:

- (a) the amount received by Aurizon as payment for invoices provided by Aurizon in respect of AT_{2.4} for that month for the relevant mainline system (noting that any Direction to Pay Amount will be deemed to be received, other than in the calculation of R_i in accordance with **clause 10.6**); **plus**
- (b) the amount received by Aurizon as payment for invoices provided by Aurizon in respect of AT_{2.4} for any previous month for the relevant mainline system, not yet included in AT_{2.4} Received Amount for any previous month.

AT_{2.4} RAA means one twelfth of the annual AT_{2.4} Revenue Adjustment Amount for the relevant mainline system that is set by the Access Regulator, to the extent that the amount applies in respect of the Month for which the Rent is to be calculated.

AT_{2.4} Revenue Adjustment Amount has the meaning given to it in the 2010 Access Undertaking.

AT₅ has the meaning given to it in the 2010 Access Undertaking.

AT₅ Distribution Pool means AT₅ Received Amount less

- (a) any AT₅ RAA;
- (b) any AC_{AT5(t-n)};
- (c) any approved electric operating costs for the relevant mainline system for the month; and
- (d) OPRA to the extent it is included in AT₅ Received Amount

AT₅ Received Amount means, in respect of a month:

- (a) the amount received by Aurizon as payment for invoices provided by Aurizon in respect of AT₅ for that month for the relevant mainline system (noting that any Direction to Pay Amount will be deemed to be received, other than in the calculation of R_i in accordance with **clause 10.6**); **plus**
- (b) the amount received by Aurizon as payment for invoices provided by Aurizon in respect of AT₅ for any previous month for the relevant mainline system not yet included in the AT₅ Received Amount for any previous month.

AT₅ RAA means an AT₅ Revenue Adjustment Amount that is set by the Access Regulator, to the extent that the amount applies in respect of the Month for which the Rent is to be calculated.

AT₅ Revenue Adjustment Amount has the meaning given to it in the 2010 Access Undertaking.

OPRA has the meaning given in **schedule 2**.

'**q**' means the maximum number of years previous to t to which an Adjustment Charge applying in respect of t related.

Regulatory Asset Base has the meaning given to it in the 2010 Access Undertaking.

Revenue Adjustment Amount has the meaning given to it in the 2010 Access Undertaking.

System Allowable Revenue has the meaning given to it in the 2010 Access Undertaking.

System Allowable Revenue Amount means

- (a) if during that Year the Access Regulator does not approve a variation to/of the System Allowable Revenue for that Year, the System Allowable Revenue for that Year; or
- (b) if during that Year the Access Regulator approves a variation to/of the System Allowable Revenue for that Year, the System Allowable Revenue as varied and approved by the Access Regulator as from the effective date of that approved variation.

System Total Extension Infrastructure means, for a System:

- (a) the Total Extension Infrastructure which forms part of the System (from time to time);
- (b) any Removed Infrastructure which forms part of the System and which has a value in the Regulatory Asset Base; and
- (c) any Replaced Part or Removed Obsolete Part which forms part of the System and which has a value in the Regulatory Asset Base.

'**t**' means, in relation to the AID or the AIE as applicable, the Year that includes the month in respect of which the current Rent for the Month is determined.

'**t-n**' means, in relation to the AID (or the AIE), each Year, that is n years prior to t and to which the AC_{AT2-4(t-n)} (or the AC_{AT5(t-n)}) applies for adjustment in t.

'**t-2**' means, in relation to the AID, the AIE, the AT₂₋₄RAA or the AT₅RAA as applicable, the Year 2 years prior to the Year that includes the Month in respect of which the Rent is determined.

Year has the meaning given to it in the 2010 Access Undertaking.

Schedule 4

Calculation of Direction to Pay Amount

(clauses 1.1 and 10.1)

Industry Note: This schedule should refer to Nominated Access Agreements also.

The Direction to Pay Amount for each Extension Access Agreement for the Month is the amount calculated in accordance with the following formula:

$$DPA_{EAA} = AC_{EAA} \times \text{the lesser of } Z \text{ and } 1$$

where:

DPA_{EAA}	=	The Direction to Pay Amount for the relevant Extension Access Agreement for the relevant Month
AC_{EAA}	=	The Access Charges for the Month payable to Aurizon under the relevant Extension Access Agreement for the relevant Month
ER	=	The Expected Rent for the relevant Month
Z	=	ER / AC_{EAA}

Schedule 5

Form of confidentiality agreement for engagement of Auditor
(clause 12.2)

Drafting note: Form of confidentiality agreement for engagement of Auditor to be included in this schedule 5.

Schedule 6

Form of Direction to Pay Undertaking (clause 1.1)

Drafting note: Form of direction to pay to be included in this schedule 6.

Executed as an agreement.

Executed by [Independent Trustee])
as trustee for the **[Name of Trust]** in)
accordance with section 127 of the
Corporations Act 2001 (Cth):

.....)
Company Secretary/Director Director

.....)
Name of Company Secretary/Director Name of Director (print)
(print)

Date: / /

Executed by Aurizon Network Pty)
Ltd in accordance with section 127 of)
the *Corporations Act 2001* (Cth):

.....)
Company Secretary/Director Director

.....)
Name of Company Secretary/Director Name of Director (print)
(print)

Date: / /

