

Part 4: Negotiation Framework

4.1 Overview

- (a) The granting of Access will be underpinned by an Access Agreement that will be developed and finalised as part of the negotiation framework.
- (b) **Part 4** addresses the process by which an access seeker may apply for, negotiate and develop an Access Agreement. In particular, under **Part 4**:
 - (i) An access seeker may obtain Preliminary Information prior to submitting an application for Access from the Website or, if Capacity Information is required, by lodging a request with Aurizon Network (**clause 4.2**).
 - (ii) An Access Application for Access by an Access Seeker must be provided in the appropriate form and by submitting an Access Application the Access Seeker agrees to be bound by this Undertaking. Aurizon Network will provide notice of any incorrectly completed sections or missing information and may request additional evidence regarding the use of Access Rights and to assess Capacity Allocation (**clause 4.3**).
 - (iii) Aurizon Network will provide an Acknowledgement Notice and confirm preparation of an Indicative Access Proposal once additional information or a properly completed Access Application is received. In specified circumstances the negotiation process may be suspended (**clause 4.4**).
 - (iv) Aurizon Network will develop an appropriate Indicative Access Proposal (IAP) for the Access Rights sought. The Access Seeker may notify Aurizon Network regarding concerns about the IAP (**clause 4.5**).
 - (v) An Access Seeker must provide written notification to Aurizon Network if it intends to progress its Access Application, based on the arrangements within the IAP (**clause 4.7**).
 - (vi) Where multiple Access Applications for the same Access Rights are made, **clause 4.8** provides a mechanism for determining who shall be treated as the Access Seeker. In these circumstances, Aurizon Network may disclose certain information without breaching its confidentiality obligations (**clause 4.8**).
 - (vii) The Negotiation Period commences once the notification of intent to progress an Access Application is provided by the Access Seeker. Specific issues are to be addressed during the Negotiation Period. Aurizon Network may provide Additional Information to the Access Seeker (**clause 4.10**).
 - (viii) Aurizon Network may issue a Negotiation Cessation Notice to an Access Seeker in certain circumstances (**clause 4.12**).

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4.2 Initial enquiries

- (a) Prior to submitting an Access Application, a prospective access seeker may meet with Aurizon Network to discuss the Access Application process and to seek clarification of the process as outlined in this Undertaking.
- (b) Aurizon Network will provide prospective access seekers with information regarding the Access Application process. All Preliminary Information and the application form(s) for Access Applications will be displayed on the Website.
- (c) A prospective access seeker may lodge a request for Capacity Information with Aurizon Network and Aurizon Network will provide that Capacity Information within 10 Business Days after receiving that request.
- (d) Aurizon Network must keep the Preliminary Information current.

4.3 Access Application

- (a) Requests for Access must be submitted to Aurizon Network in the form of an Access Application.
- (b) By submitting an Access Application the Access Seeker agrees to be bound by all the provisions of this Undertaking as they relate to Access Seekers. [Note: The deleted sentence is unnecessary as Aurizon Network's ability to provide a Negotiation Cessation Notice in such circumstances is already provided for under clause 4.12.]
- (c) If an Access Application has not been properly completed, Aurizon Network must, within 10 Business Days after receipt of the Access Application, write to the relevant access seeker:
 - (i) notifying them that the Access Application is incomplete; and
 - (ii) specifying what information is required to make the application complete and compliant. [Note: Notifying of an incomplete application should be mandatory not optional.]
- (d) Within 10 Business Days after receipt of an Access Application Aurizon Network may write to the person who lodged the Access Application,
- (d) requesting more evidence or information to the extent reasonably required, including evidence or information:
 - (i) regarding their ability to fully utilise the requested Access Rights (on the basis of the factors listed in clause 4.12(c), to the extent such evidence or information is available) and from other providers of infrastructure to be used as an entry or exit point to the Rail Infrastructure such as operators of unloading facilities; and
 - (ii) required to assess Capacity allocation related issues and to prepare an IAP.
- (e) A person referred to in clause 4.3(c) and clause 4.3(d), must provide the revised Access Application or the requested information under clause 4.3(c), within 20 Business Days of Aurizon Network's notice or request, as applicable, or such other period as may be agreed. If the revised Access Application or required information is not provided to Aurizon Network within that time, Aurizon Network may provide the relevant person with a Negotiation Cessation Notice.

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4.4 Acknowledgement of Access Application

- (a) Within 10 Business Days after receiving a properly completed Access Application or the further information requested under **clause 4.3(d)**, as applicable, Aurizon Network will give the relevant Access Seeker a written Acknowledgement Notice:
- (i) acknowledging receipt of the Access Application; and
 - (ii) confirming that Aurizon Network will prepare an Indicative Access Proposal for the requested Access.
- (b) The date of the Acknowledgement Notice will be the date on which the Access Seeker's Access Application will be deemed to have been received for the purposes of this Undertaking.
- (c) If an Access Application is received by Aurizon Network which is, in whole or part, for Access Rights which cannot be provided in the absence of an Expansion or Customer Specific Branch Line, **clause 8.2 to 8.7** will apply and the negotiation process for Access can be suspended by Aurizon Network by written notice to the Access Seeker (before or after the provision of an Indicative Access Proposal) pending agreement on what Expansion or Customer Specific Branch Line is required and how that Expansion or Customer Specific Branch Line is to be funded. **A written notice given under this clause must give reasons for the suspension.** Notwithstanding the service of a written notice under this clause, Aurizon Network and the Access Seeker can agree to restart or continue negotiations for Access in parallel with any negotiations over funding of the required Expansion or Customer Specific Branch Line. **Aurizon Network must not discriminate between a proposed User Funded Project and an Expansion proposed to be funded by Aurizon Network.**
- (d) Where a Provisional Capacity Allocation (as defined under **clause 8.5(i)**) has been granted to an Access Seeker, Aurizon Network may **(acting reasonably and in good faith)** suspend negotiations with other Access Seekers for corresponding Access Rights pending the outcome of negotiations with the holder of the Provisional Capacity Allocation.
- (e) Subject to **clause 4.4(c)**, if an Access Application is received by Aurizon Network for Access Rights which do not commence until more than **five years** after the date on which the relevant Access Application would be deemed to have been received by Aurizon Network under **clause 4.4(b)**, then Aurizon Network may reject the Access Application and the relevant Access Seeker must provide a new Access Application no more than **five years** from when the proposed Access Rights are to commence. **[Note: three years is too short due to the length of time it generally takes to finalise access arrangements, time to construct mine and port expansions and that most AA will require the undertaking of an Expansion.]**
- (f) When Aurizon Network suspends the negotiation process in accordance with **clause 4.4(c)**, the Access Seeker must each six months thereafter write to Aurizon Network to:
- (i) confirm, in writing, the Access Seeker's ongoing requirement for the Access Rights;

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- (ii) confirm, in writing, any material change to the information contained in their Access Application or provided in respect of the matters referred to in **clause 4.3(d)**; and
- (iii) if requested by Aurizon Network, provide information or evidence of the Access Seeker's ability to fully utilise the requested Access Rights (on the basis of the factors listed in **clause 4.12(c)** to the extent such evidence or information is available) and from other providers of infrastructure to be used as an entry or exit point to the Rail Infrastructure such as operators of unloading facilities.
- (g) Where an Access Seeker fails to provide the confirmation and evidence required under **clause 4.4(f)**, Aurizon Network may (acting reasonably and in good faith) issue a Negotiation Cessation Notice to the Access Seeker.

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4.5 Revisions to an Access Application

If Aurizon Network has given an Acknowledgement Notice in accordance with **clause 4.4(a)** but is yet to provide an IAP to the Access Seeker, the Access Seeker may, on a good faith basis and for bona fide reasons, vary or revise its Access Application, provided that the Access Seeker cannot request an increase in Capacity or a shorter term of Access or substantially alter the nature of the Access Rights sought. It will be reasonable, and will not constitute a substantial alteration of the Access Rights sought, where:

- (a) an Access Seeker requests a variation to its Access Application where as a result of further progression of a study it is evident that less capacity is required; or
- (b) an Access Seeker revises the specified origin (within the same System), provided that there is no alteration to Capacity, the term of the Access Agreement or the specified destination.

4.6 Indicative Access Proposal

- (a) Aurizon Network will review the information received and assess the Access Application to develop an Indicative Access Proposal (IAP) for the type of Access Rights being sought and having regard to the appropriate form of Access Agreement referred to in **clause 5.1(c)**.
- (b) The IAP will outline:
 - (i) the Rollingstock and Rollingstock configuration;
 - (ii) the relevant operating characteristics;
 - (iii) an Initial Capacity Assessment (which is subject to confirmation by a Capacity Analysis prepared in accordance with **clause 4.10.2(a)(v)**) together with, for coal carrying Train Services, Aurizon Network's assumptions regarding Rollingstock, section run times and loading and unloading times used in preparing that assessment;
 - (iv) whether any other requests for Access exist that, if approved, would affect Aurizon Network's ability to grant the Access Rights sought by the Access Seeker;
 - (v) an initial estimate of the Access Charge applicable to the Train Service proposed, based on the pricing principles set out in **Part 6** including advice as to whether Aurizon Network has applied **clause**

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6.2.2(b)(i) or clause 6.2.3 in determining the Access Charge and if so:

(A) **the factor associated with the Access Seeker's proposed Access that results in a different cost or risk to Aurizon Network;**

(B) **the impact that the factor has on the Access Charge; and**

(C) **how that impact on the Access Charge was determined;**

(vi) details of further **reasonable** information required from the Access Seeker in preparation for the negotiation stage; **and**

(vii) **in circumstances where Access is contingent on an Expansion, information on Expansion planning including an estimated time at which Access is likely to be provided;**

- (c) The IAP contains indicative arrangements only and does not oblige Aurizon Network to provide Access.
- (d) Aurizon Network will provide the IAP within 20 Business Days of the date of the Acknowledgement Notice. However, where, due to the complexity of the Access Application or other extenuating circumstances it is not reasonable to provide an IAP within that period. Aurizon Network may, by written notice to the Access Seeker (to be given as soon as practicable and in any case no later than **15 Business Days** after the Acknowledgement Notice), extend the period for the giving of an IAP by up to a further 20 Business Days. This period may be further extended by agreement between Aurizon Network and the Access Seeker. **[Note: the timeframe under UT3 was 20 days which converted to Business Days is approximately 15 Business Days.]**
- (e) **Unless agreed otherwise by Aurizon Network and the Access Seeker, the** IAP expires 60 Business Days after the later of the date of its provision to the Access Seeker and the date of issue of a revised IAP (if any) under **clause 4.6(g) or clause 4.7(e).**
- (f) If the Access Seeker believes, acting reasonably, that the IAP has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, the Access Seeker will notify Aurizon Network of its concerns in writing within 20 Business Days of being provided with the IAP, or such other timeframe as Aurizon Network and the Access Seeker agree.
- (g) Aurizon Network will respond to the concerns of any Access Seeker notified under **clause 4.5(f)** including, where appropriate, by making revisions to the IAP:
- (i) within 10 Business Days after being notified under **clause 4.5(f)**; or
 - (ii) if due to the complexity of the concerns or other extenuating circumstances it is not reasonable to provide a response within that 10 Business Day period, **a reasonable period notified by Aurizon Network to** the Access Seeker in writing within 5 Business Days after the Access Seeker's notice to Aurizon Network under **clause 4.5(f).**

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- (h) Aurizon Network has no obligation to produce an IAP for an Access Seeker that notifies Aurizon Network in writing that the Access Seeker no longer wishes to proceed with its Access Application.

4.7 Notification of intent

- (a) If an Access Seeker intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the IAP (as varied in accordance with **clause 4.6(g)**, if applicable), the Access Seeker must notify Aurizon Network of its intention in writing, prior to the expiry date of the IAP. Notification must be in the form set out in the IAP.
- (b) In circumstances where Access is contingent on an Expansion or Customer Specific Branch Line, and Aurizon Network has not suspended the negotiation process under **clause 4.4(c)**, the Access Seeker may require Aurizon Network to suspend the negotiation process by written notice under that **clause 4.4(c)**. **[Note: Whilst clause 4.4(c) allows Aurizon Network to choose to suspend the negotiation process in the case on an Expansion, the Access Seeker should also be provided with the right to request suspension.]**
- (c) If the Access Seeker does not notify Aurizon Network under **clause 4.7(a)** of its intention to progress its Access Application, and the negotiation process has not otherwise been suspended under **clause 4.4(c)** or **clause 4.7(b)**, the Access Application and the IAP are taken to have been withdrawn on the date of expiry of the IAP.
- (d) If Aurizon Network has given an IAP to the Access Seeker in accordance with **clause 4.6** but the Access Seeker is yet to provide notification under **clause 4.7(a)**, the Access Seeker may, on a good faith basis and for bona fide reasons, vary or revise its Access Application, provided that the Access Seeker cannot request an increase in Capacity or a shorter term of Access or substantially alter the nature of the Access Rights sought. It will be reasonable, and will not constitute a substantial alteration of the Access Rights sought, where:
 - (i) an Access Seeker requests a variation to its Access Application where as a result of further progression of a study it is evident that less capacity is required; or
 - (ii) an Access Seeker revises the specified origin (within the same System), provided that there is no alteration to Capacity or the term of the Access Agreement or the specified destination.
- (e) Where an Access Seeker varies or revises its Access Application under **clause 4.7(d)**, Aurizon Network will review the IAP and, if considered necessary, prepare a revised IAP in accordance with **clause 4.6**. Where :
 - (i) a revised IAP is prepared, and the Access Seeker intends to progress its Access Application on the basis of the arrangements outlined in the revised IAP, the Access Seeker must notify Aurizon Network of its intention in writing, prior to the expiry of the date of the revised IAP; or
 - (ii) a revised IAP is not considered necessary by Aurizon Network, and the Access Seeker intends to progress its Access Application on the basis of the arrangements outlined in the original IAP, the Access

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Seeker must notify Aurizon Network of its intention in writing, prior to the expiry date of the original IAP (subject to clause 4.7(b)).

4.8 Multiple applications for the same Access

- (a) Where more than one party has submitted an Access Application for the same Access Rights and:
- (i) one of the parties that has applied for Access is the Customer for that Access, this Undertaking and Aurizon Network will treat the Customer as the Access Seeker and Aurizon Network may negotiate solely with that Customer; or
 - (ii) the only parties that applied for Access are Railway Operators, Aurizon Network will treat the Railway Operator nominated in writing by the Customer to Aurizon Network as the Access Seeker and Aurizon Network may negotiate solely with that Railway Operator.
- (b) Aurizon Network may:
- (i) for the purpose of **clause 4.8(a)**, disclose to the Customer the fact of the Railway Operators' Access Application; and
 - (ii) for the purpose of **clause 4.84.1.1(a)**, disclose to the Customer and the relevant Railway Operators the fact of the multiple Access Applications and the reasons for the notice under **clause 4.84.1.1(a)**.
- Such disclosures will not constitute a breach of the confidentiality obligations owed by Aurizon Network under **Part 3**.
- (c) Access Applications that constitute Mutually Exclusive Access Applications will be dealt with in accordance with **clause 7.5**.

4.9 Train Operators must be supported by a Customer

- (a) A request by a prospective Train Operator for Aurizon Network to enter into a Train Operations Agreement or Standard Access Agreement (Operator) must be provided in writing and:
- (i) identify the relevant Customer; [Note: End User is defined as a party to an End User Agreement.]
 - (ii) provide a copy of the notification from the Customer nominating them as the "Train Operator"; and
 - (iii) contain the information required by an Access Application and any other information reasonably required by Aurizon Network to assess the request and complete the Train Operations Agreement or Standard Access Agreement (as the case may be).
- (b) A negotiation process will apply to the prospective Train Operator as specified in **clause 4.10**.
- (c) By submitting a request under **clause 4.9(a)** the prospective Train Operator agrees to be bound by all the provisions of this Undertaking as they relate to Train Operators. [Note: The deleted sentence is unnecessary as Aurizon Network's ability to provide a Negotiation Cessation Notice in such circumstances is already provided for under clause 4.12.]
- (d) A Train Operator must not:
- (i) apply for Access; or

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(ii) hold Access Rights.

other than for a specified Customer.

(e) For the avoidance of doubt, where a Train Operator ceases to hold Access Rights for a specified Customer and it does not have a replacement Customer, the Train Operator must Transfer the Access Rights or the Access Rights will be subject to resumption.

[Note: The definition of Customer in clause 12 is currently too loose. Clause 4.9 should apply more broadly than just to Train Operators under a TOA – it should apply to operators under a Standard Access Agreement (Operator).]

4.10 Negotiation process

4.10.1 Negotiation Period

- (a) A Negotiation Period in respect of:
- (i) an Access Seeker's Access commences on the date on which the Access Seeker provides a notification of intent to progress an Access Application in accordance with **clause 4.7**; or
 - (ii) a Train Operator's Train Operations Agreement commences on the date that Train Operator has provided to Aurizon Network all of the relevant information referred to in **clause 4.9(a)**.
- (b) Once the Negotiation Period has commenced the Access Seeker or Train Operator, as applicable, and Aurizon Network will begin negotiations with a view to agreeing an Access Agreement or a Train Operations Agreement (as applicable) as soon as reasonably possible.
- (c) An Access Seeker's Negotiation Period ceases on:
- (i) the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
 - (ii) Aurizon Network receiving written notification by the Access Seeker that it no longer wishes to proceed with its Access Application;
 - (iii) Aurizon Network issuing a Negotiation Cessation Notice to the Access Seeker pursuant to **clause 4.12(a)**;
 - (iv) the date nine months after the commencement of the Negotiation Period unless:
 - (A) both parties agree to extend the Negotiation Period, in which case the Negotiation Period will continue until the expiry of the agreed extended period; or
 - (B) a Dispute arises between the parties in relation to obligations under the negotiation framework in this **Part 4**, in which case, the Negotiation Period will, subject to **clause 4.1.1(a)(i)**, continue until the Dispute's resolution and for any further time agreed by the parties or determined during the Dispute resolution process; or
 - (v) subject to **clause 4.10.1(d)**, Aurizon Network no longer being able to offer Access to the Access Seeker under the terms of the IAP, either because of:

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- (A) Available Capacity being reduced; or
- (B) Infrastructure Enhancements subsequently committed to by Aurizon Network adversely impacting Aurizon Network's ability to develop Infrastructure Enhancements contemplated by the IAP.

(d) If:

(i) Aurizon Network can no longer offer Access to the Access Seeker under the terms of the relevant IAP because of the reasons set out in **clause 4.10.1(c)(v)**; and

(ii) either the remaining Available Capacity can satisfy part of the Access Rights sought by the Access Seeker or the contemplated Infrastructure Enhancements can be altered to provide all or part of the Access Rights sought.

Aurizon Network will notify the Access Seeker of that event and the portion of the Access Rights being sought which can be provided and:

(iii) if requested by the Access Seeker within 10 Business Days after the Access Seeker is given such a notice, prepare and issue to the Access Seeker a revised IAP in accordance with **clause 4.6** in relation to that portion of the Access Rights that can be provided; and

(iv) if, within 10 Business Days after being given the revised IAP, the Access Seeker notifies Aurizon Network that it intends to continue to negotiate for Access Rights in accordance with this Undertaking on the basis of the revised IAP, the negotiation process outlined in this **Part 4** will recommence from that point.

(e) A Train Operator's Negotiation Period ceases on:

- (i) the execution of the Train Operations Agreement;
- (ii) Aurizon Network receiving written notification by the Train Operator that it no longer wishes to negotiate or enter into the Train Operations Agreement;
- (iii) Aurizon Network issuing a Negotiation Cessation Notice to the Train Operator pursuant to **clause 4.12**;
- (iv) the expiration of nine months from the date that the Train Operator is nominated by the relevant End User, unless:

- (A) both parties agree to extend the Negotiation Period, in which case the Negotiation Period will continue until the expiry of the agreed extended period; or
- (B) a Dispute arises between the parties in relation to obligations in this negotiation framework in this **Part 4**, in which case, the Negotiation Period will, subject to **clause 4.12**, continue until the Dispute's resolution and for any further time agreed by the parties or determined during the Dispute resolution process;

(v) the End User being given a Negotiation Cessation Notice in respect of its Access Application; or

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(vi) a notice is given by Aurizon Network under **clause 4.11(d)**.

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4.10.2 Issues to be addressed during negotiation

- (a) During the Negotiation Period, Aurizon Network and the Access Seeker or Train Operator, as applicable, will negotiate and endeavour to agree on the elements comprising, for an Access Seeker, the relevant form of Access Agreement referred to in **clause 5.1(c)** for the type of Access Rights being sought or, for a Train Operator, the matters to be completed in the relevant Train Operations Agreement. In order to facilitate this process:
- (i) an End User must (if it has not done so already) nominate its Train Operator by written notice to Aurizon Network;
 - (ii) Aurizon Network will provide to the Access Seeker Additional Information (together with any requested Capacity Information) relevant to the rail corridor applicable to the Access Seeker's Access Application and will ensure such information is the most current available to Aurizon Network and is provided within a reasonable timeframe;
 - (iii) an Operating Plan is to be prepared by the Access Seeker (other than End User) or the Train Operator, as applicable;
 - (iv) an Access Charge, determined in accordance with the pricing principles set out in **Part 6**, is to be provided by Aurizon Network including advice as to whether Aurizon Network has applied **clause 6.2.2(b)(i)** or **clause 6.2.3** in determining the Access Charge and if so:
 - (A) the factor associated with the Access Seeker's proposed Access that results in a different cost or risk to Aurizon Network;
 - (B) the impact that the factor has on the Access Charge; and
 - (C) how that impact on the Access Charge was determined;
 - (v) a Capacity Analysis and an investigation of operational impacts are to be undertaken by Aurizon Network and any Expansions necessary to accommodate Access by the Access Seeker are to be advised by Aurizon Network except to the extent that Aurizon Network considers that such matters are not required;
 - (vi) the definition of the relevant Train Service Entitlement and, where applicable, advice of the initial timetable for the proposed Train Services is to be provided by Aurizon Network;
 - (vii) the Access Seeker (other than an End User) or the Train Operator, as applicable, is to demonstrate that the Rollingstock and Rollingstock Configurations for which the Access Rights are applicable are subject to certificates of compliance or a Compliance Statement (as that term is defined in the Standard Access Agreement (Operator), as applicable, with the Rollingstock Interface Standards; and
 - (viii) unless otherwise agreed, the terms and conditions comprising the Access Agreement are those provided by the Standard Access Agreement.

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- (b) Without limiting the matters that an Access Seeker (other than an End User) or a Train Operator, as applicable, and Aurizon Network may address during the Negotiation Period, Aurizon Network (jointly with the Access Seeker or Train Operator) will, or will commence to, conduct an Interface Risk Assessment and prepare an IRMP during the Negotiation Period in accordance with the provisions set out in a Standard Access Agreement in respect of such matters:
- (i) if requested by the Access Seeker or Train Operator; and
 - (ii) it is reasonably necessary to do so prior to the Access Seeker or Train Operator and Aurizon Network executing an Access Agreement or Train Operations Agreement, as applicable.
- (c) It would be reasonably necessary to conduct an Interface Risk Assessment for the purposes of **clause 4.10.2(b)** where, for instance:
- (i) the relevant Access relates to the transportation of coal from a new mine or load out facility;
 - (ii) the Train Operator is seeking to operate new Rollingstock; or
 - (iii) the proposed mode of operation is “non-standard” in that it differs from the scope and standard of existing rail operations on the network [Note: The reference to a “non-standard” mode of operation is unclear and ambiguous].
- (d) During the Negotiation Period Aurizon Network may seek further evidence of the Access Seeker’s ability to fully utilise the requested Access Rights from the Access Seeker (on the basis of, the factors set out in clause 4.12(c), to the extent such evidence or information is available), and from other providers of infrastructure to be used as an entry or exit point to the Rail Infrastructure such as operators of unloading facilities. The Access Seeker will provide the evidence requested, to the extent such evidence or information is available, within 20 Business Days of the request (or such other period as may be agreed with Aurizon Network) and will facilitate the provision of such information from Third Parties, as applicable.
- (e) During the Negotiation Period, the Access Seeker may review and revise the information in its Access Application on a good faith basis and for bona fide reasons, provided that the Access Seeker cannot request an increase in Capacity, a shorter term of the Access Agreement or substantially alter the nature of the Access Rights sought, It will be reasonable, and will not constitute a substantial alteration of the Access Rights sought, where:
- (i) an Access Seeker requests a variation to its Access Application where as a result of further progression of a study it is evident that less capacity is required; or
 - (ii) an Access Seeker revises the specified origin (within the same System), provided that there is no alteration to Capacity or the term of the Access Agreement or the specified destination.
- (f) If a revision under clause 4.10.2(e) substantially alters the nature of the Access Rights sought by the Access Seeker, Aurizon Network will notify the Access Seeker in writing. If, within five Business Days of Aurizon Network giving that notice:

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- (i) the Access Seeker gives Aurizon Network a notice in writing that it wishes to continue negotiating on the original Access Application without the proposed revisions, the negotiation process under this Undertaking will continue; or
- (ii) if the notice in **clause 4.10.2(f)(i)** is not given, the original Access Application and revised information will together be deemed to constitute a new (replacement) Access Application, will be deemed to have been submitted to Aurizon Network on the date five Business Days after Aurizon Network gave the notice under this **clause 4.10.2(e)** and the negotiation process recommences from that date with Aurizon Network to comply with **clause 4.6(a)**.

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(h) In respect of the details required to be developed by the parties in accordance with **clause 4.10.2(a) and 4.10.2(b)**, the parties may agree, for example:

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- (i) to finalise certain aspects after the execution of the Access Agreement or the Train Operations Agreement, as applicable; **or**
- (ii) to make the commencement of Train Services under the Access Agreement or the Train Operations Agreement, as applicable, subject to the satisfaction of conditions (including, for example, the completion of schedules to the Access Agreement or the securing of access rights to an unloading facility or the securing of access to adjoining infrastructure **where it is not practical to complete such information**).

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4.11 **Negotiation of End User Access Agreements and Train Operations Agreements**

(a) Each:

- (i) End User shall have the right to be present **and participate** in any negotiation between Aurizon Network and a Train Operator for a Train Operations Agreement or the End User's Access Rights; and
- (ii) End User shall have the right to require Aurizon Network to permit their Train Operator to be present **and participate** at all negotiations between Aurizon Network and the End User for Access Rights proposed to be wholly or partially utilised by that Train Operator.

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(b) In negotiating an End User Access Agreement and for the purposes of this **Part 4:**

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- (i) Aurizon Network and an End User will seek to agree an assumed Operating Plan (which the End User may involve its Train Operator in the preparation of); and
- (ii) if the End User does not provide required information regarding Rollingstock and Rollingstock Configurations for the End User's Train Services, Aurizon Network may assume:
 - (A) a Reference Train Service in respect of the Rollingstock and Rollingstock Configurations; and
 - (B) such other Above Rail operational matters as are reasonably necessary (having regard to any existing

standard manner of conducting Above Rail Services on the relevant parts of the Rail Infrastructure).

- (c) If one or more Train Operations Agreements is negotiated between Aurizon Network and the relevant Train Operator(s), the Train Operations Agreement(s) must not (alone, or in aggregate if there is more than one) grant rights to utilise the Rail Infrastructure that exceed the corresponding Access Rights granted, or to be granted, to the relevant End User.
- (d) If, for whatever reason (except by reason of execution of the End User Access Agreement):
 - (i) negotiations in respect of the End User Access Agreement expire or are terminated; or
 - (ii) the End User ceases to be an Access Seeker in respect of the Access Rights that relate to the relevant Train Operations Agreement; or
 - (iii) where the End User has already executed an End User Access Agreement, the End User ceases to be an Access Holder in respect of the Access Rights that relate to the relevant Train Operations Agreement,

then Aurizon Network will, by notice to the Train Operator, terminate its negotiations in respect of the corresponding Train Operations Agreement.

4.12 Cessation of negotiations

- (a) At any time during a Negotiation Period, Aurizon Network may give a Negotiation Cessation Notice to an Access Seeker or a Train Operator, as applicable, if:
 - (i) the Access Seeker or Train Operator, as applicable, does not comply with the relevant obligations and processes contained in this Undertaking, and ~~such non-compliance is relevant and material;~~
 - (ii) ~~there is no reasonable likelihood that the Access Seeker or the Train Operator will comply with the terms and conditions of an Access Agreement or Train Operations Agreement, as applicable, in a material way;~~
 - (iii) ~~the Access Seeker has no genuine intention of obtaining Access Rights or has no reasonable likelihood of utilising Access at the level sought;~~
 - (iv) subject to **clause 11.1.4(d)**, the Access Seeker or Train Operator, as applicable, does not comply with a determination of an expert pursuant to **clause 11.1.4**; or
 - (v) the Access Seeker or the Train Operator, as applicable, does not comply with a determination of the QCA pursuant to **clause 11.1.5** in relation to a Dispute.
- (b) ~~For the purpose of clause 4.12(a)(ii), there may be no reasonable likelihood that the Access Seeker or the Train Operator will comply with the terms and conditions of an Access Agreement or Train Operations Agreement if:~~
 - (i) the Access Seeker or the Train Operator, as applicable, is subject to an Insolvency Event; or

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- (ii) the Access Seeker or the Train Operator, as applicable, or a Related Party of the Access Seeker or Train Operator, is currently, or has in the previous two years been, in Material Default of:
 - (A) any Access Agreement or Train Operations Agreement, as applicable; or
 - (B) any other agreement where its performance under that other agreement is relevant to its likely performance under any proposed Access Agreement or Train Operations Agreement, as applicable.

(c) ~~The following factors are relevant in considering~~ whether the circumstances in **clause 4.12(a)(iii)** apply:

- (i) whether the Access Seeker has secured, or is reasonably likely to secure, Supply Chain Rights;
- (ii) whether the Access Seeker has secured, or is reasonably likely to secure, a rail haulage agreement for the operation of the Train Services the subject of the Access Application; **and**
- ~~(iii)~~ where the Access Rights are sought to transport the output of a mine, whether the anticipated output of the mine is **or is reasonably likely to be**, sufficient to support full utilisation of the Access Rights sought.

~~It is acknowledged that prior to and during the Negotiation Period it is sufficient for the Access Seeker to have a reasonable likelihood of satisfying paragraphs (i) to (iv) by the time that the Access Rights are to commence.~~

(d) If an Access Seeker or Train Operator disputes that Aurizon Network was entitled to give it a Negotiation Cessation Notice and seeks to resolve the Dispute in accordance with **clause 11.1**, for the purposes of **clause 4.12(a)**, the Negotiation Cessation Notice will be deemed to have been issued only if and when the Dispute is resolved in Aurizon Network's favour. If the resolution of the Dispute identifies that Aurizon Network was not entitled to give the Negotiation Cessation Notice:

- (i) Aurizon Network will recommence negotiations with that Access Seeker or Train Operator immediately; and
- (ii) the time between the issuing of the wrongly issued Negotiation Cessation Notice and the date of the finding that Aurizon Network was not entitled to issue the Negotiation Cessation Notice will be added to the original period of negotiation for the purpose of determining the nine month period referred to in **clause 4.10.1(c)(iv)** or **4.10.1(e)(iv)**, as applicable.

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In the event that the Customer fails to nominate the relevant Railway Operator under **clause 4.8(a)(ii)** within a reasonable time and providing the Access Seeker has already served a notice of intention under **clause 4.7**, Aurizon Network may by written notice to the Customer and the competing Railway Operators, suspend the negotiation process under this **Part 4** for each Access Seeker pending the provision of that notification.

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Where Aurizon Network, acting reasonably, considers that a prospective Train Operator has materially failed to comply with the provisions of this Undertaking, Aurizon Network may, without prejudice to any other rights it may have, cease negotiations for a Train Operations Agreement by written Negotiation Cessation Notice to the prospective Train Operator.

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