

Part 7: Available Capacity allocation and management
(clauses 7.3 to 7.5 – Marked up against QCA CDD
amended undertaking)

7.3 Renewals

- (a) This **clause 7.3** sets out provisions that apply where all or any part of an Access Holder's existing Access Rights will expire and:
- (i) that Access Holder (where the Access Holder has no Customer); or
 - (ii) the person nominated by the Access Holder's Customer in writing to Aurizon Network (and, for clarity, that Customer may nominate itself),
- (Renewing Access Seeker)** wishes to hold or to continue to hold (as applicable) equivalent Access Rights (based on the Access Holder's Access Rights immediately prior to that expiry), subject to **clause 7.3(b)**, for a further term commencing immediately after those existing Access Rights will expire (that is, a **Renewal**).
- (b) For the purpose of **clause 7.3(a)**, Aurizon Network will disregard any change to the origin or destination of the relevant Train Services in considering whether the relevant Access Rights are equivalent Access Rights so long as the Train Services for the Renewal:
- (i) continue to have substantially the same Train Paths as the existing Train Services. For clarity, the Train Services for the Renewal may include a longer haul than the existing Train Services;
 - (ii) do not adversely affect the ability of existing Access Holders to use their Access Rights;
 - (iii) have an origin which is located in the same Track Segment as the origin of the Train Services under the existing Access Rights; and
 - (iv) are not in excess of those existing Access Rights under the relevant Access Holder's existing Access Agreement. For clarity, the Train Services for the Renewal may include a longer haul than the existing Train Services and will not be considered to be in excess of the existing Access Rights if **paragraphs (i)(i), (ii) and (iii)(iii) above are satisfied.**
- (c) For clarity:
- (i) a Renewing Access Seeker may elect to renew only part of its existing Access Rights;

Formatted: Font: Bold

Formatted: Font: Bold

- (ii) that part of the Renewing Access Seeker's existing Access Rights not Renewed will become Available Capacity on the expiry of those existing Access Rights;
 - (iii) an Access Holder does not have Access Rights beyond the term of its Access Agreement; and
 - (iv) a Renewal includes Access Rights that were granted to the Renewing Access Seeker as a Transferee if the Renewing Access Seeker's existing Access Agreement includes those transferred Access Rights at the date of expiry of that Access Agreement.
- (d) Despite any provision in **Part 4**, Aurizon Network must not:
- (i) negotiate the provision of Access that will use Capacity that will become Available Capacity on the expiry of an existing Access Right; and
 - (ii) enter into an Access Agreement in relation to such Capacity, with a person other than the relevant Renewing Access Seeker unless and until:
 - (iii) the relevant Access Holder, where the Access Holder has no Customer, or otherwise the relevant Access Holder's Customer, has notified Aurizon Network that the Access Holder does not intend to seek a Renewal; or
 - (iv) the Renewing Access Seeker has not (other than because of a delay by or breach of this Undertaking by Aurizon Network) executed an Access Agreement for that Capacity with Aurizon Network under this **clause 7.3** at least twelve (12) Months prior to the expiry of the Access Rights (or such later date as agreed between Aurizon Network and the Renewing Access Seeker).
- (e) Aurizon Network may refuse to negotiate, or to enter into, an Access Agreement with a Renewing Access Seeker for a Renewal more than five (5) years prior to the expiry of the Access Rights. For clarity, a refusal by Aurizon Network to negotiate an Access Agreement as a result of the operation of this **clause 7.3(e)** does not affect the Renewing Access Seeker's right to seek a Renewal under this **clause ~~7.37-3~~** within the period that is five (5) years prior to the expiry of the Access Rights.
- (f) If a Renewing Access Seeker is seeking a Renewal at least twelve (12) Months (or such other later date as agreed between Aurizon Network and the Renewing Access Seeker) but no more than sixty (60) Months (or such earlier date as agreed between Aurizon Network and the Renewing Access Seeker) prior to the expiry of the relevant Access Rights, then:

Formatted: Font: Bold

- (i) the term of an Access Agreement relating to the Renewal must be:
 - (A) for coal carrying Train Services, the lesser of ten (10) years and the remaining life of the relevant mine (as evidenced to Aurizon Network's satisfaction (acting reasonably) by the Renewing Access Seeker); or
 - (B) for other Train Services, the lesser of ten (10) years and the same length of time as the term of the relevant current Access Agreement; and
- (ii) if:
 - (A) the Renewing Access Seeker's Access Application is not seeking a Renewal for; or
 - (B) the Renewing Access Seeker does not agree to an Access Agreement for,
 - a term referred in **clause 7.3(f)(i)**, then the Renewing Access Seeker's Access Application will not be treated as an Access Application for a Renewal under this **clause 7.3**.
- (g) While this **clause 7.3** sets out how Aurizon Network will differentiate in the treatment of a Renewing Access Seeker as compared to other Access Seekers, this **clause 7.3** does not affect the rights and obligations of the Renewing Access Seeker or Aurizon Network under **Part 4** or **Part 5** or the remaining provisions of this ~~Part 7~~ **Part 7** except as set out in this **clause 7.3**.
- (h) ~~Aurizon Network must enter into an Access Agreement for a Renewal on the same terms as the relevant Access Holder's Access Agreement for the existing Access Rights, except to the extent that the Renewing Access Seeker agrees with Aurizon Network to:~~
 - (i) ~~vary the terms of the relevant Access Holder's Access Agreement for the existing Access Rights in accordance with its terms; or~~
 - (ii) ~~enter into an Access Agreement in accordance with Part 5 based on the Standard Access Agreement and including any amendments negotiated under clause 5.1(d).~~

This clause has been removed so that renewing access holders contract on the terms of the current Standard Access Agreement, consistent with Part 5 of the Undertaking (see clause 5.1(c)).
- (i)(h) For clarity:
 - (i) a Renewing Access Seeker must complete and submit an Access Application for Access Rights it is seeking to renew; and

Formatted: Font: Bold

Formatted: Font: Bold

- (ii) subject to this ~~Part 7~~**Part 7**, the negotiations for those Access Rights will be conducted in accordance with **Part 4** and **Part 5**, including:
 - (A) the Negotiation Cessation Notice provisions under **clause 4.12**;
 - (B) the Renewing Access Seeker and Aurizon Network beginning negotiations as soon as reasonably possible once the relevant Negotiation Period has commenced under **clause 4.10.1(a)**; and
 - (C) both the Renewing Access Seeker and Aurizon Network negotiating the terms of the relevant Access Agreement for the Renewal acting reasonably and in good faith; and
- (iii) despite the provisions of this **clause 7.3**:
 - (A) the Access Rights the subject of the Renewal are not included in the Queue; and
 - (B) the Renewing Access Seeker is deemed to have first right to the Access Rights as regards other Access Seekers in the Queue in respect of those Access Rights.

~~(j)~~(i) Aurizon Network acknowledges that any provision under **Part 4** which permits Aurizon Network:

- (i) to treat an Access Application as being withdrawn (except where the Access Seeker expressly withdraws the Access Application); or
- (ii) to cease negotiation under **clause 4.10.1(c)(v)** or otherwise issue a Negotiation Cessation Notice because there is insufficient Available Capacity,

does not apply in respect of a Renewal.

Formatted: Font: Bold

7.5 Mutually Exclusive Access Applications

7.5.1 Notification and assistance

- (a) Aurizon Network will identify Access Applications that are or have become Mutually Exclusive Access Applications and will notify an Access Seeker as soon as practicable after Aurizon Network identifies that the Access Seeker's Access Application is or has become a Mutually Exclusive Access Application.
- (b) Aurizon Network will, if requested, provide reasonable assistance to an Access Seeker to identify whether its Access Application can be modified so that it is not a Mutually Exclusive Access Application.

7.5.2 Queuing mechanism

- (a) This **clause 7.5.2**:
 - (i) applies in respect of Mutually Exclusive Access Applications or where this Undertaking otherwise specifies that an Access Seeker has joined the Queue; and
 - (ii) does not apply to:
 - (A) an Access Application for Access Rights that can only be granted subject to an Expansion creating additional Available Capacity; or
 - (B) in relation to the allocation of Available Capacity that:
 - (1) is subject to a Provisional Capacity Allocation under **Part 8** (including a Provisional Capacity Allocation arising from a reallocation under **Part 8**, for example under **clause 8.2.3(b)**);
 - (2) is or was subject to a Provisional Capacity Allocation that Aurizon Network, in accordance with **Part 8**, is seeking to reallocate following a withdrawal of that Provisional Capacity Allocation; or
 - (3) is or was subject to a Provisional Capacity Allocation in respect of which the relevant Access Seeker has entered into an Access Agreement, Access Conditions or User Funding Agreement relating to the corresponding Access Rights; or
 - (C) an Access Application for Access Rights which are sought according to a Transfer under **clause 7.4.2** or in accordance with the terms of an Access Agreement.

(b) In allocating Access Rights, Aurizon Network will formprioritise Access Seekers in a chronological queue of Access Seekers and the order of that queue must be based on the date when Aurizon Network is deemed to have received each Access Seeker's Access Application as outlined in **clause 4.4(b) (Queue)**, except that:

(i) a Renewing Access Seeker will be placed ahead of all other Access Seekers in the Queue in respect of the Access Rights the subject of the Renewal;

(ii) subject to clause 7.5.2(b)(i), in respect of Conditional Access Rights where:

(A) Aurizon Network has notified relevant Access Holders in accordance with **clause 8.9.2** of its Reduced Conditional Access Rights; and

(B) an Access Application is deemed to have been lodged in respect of the reduction as a result of the Conditional Access Holder providing notice to Aurizon Network under **clause 8.9.3(a)(ii)**; and

(C) either:

(1) there is Available Capacity which is capable of satisfying that Access Application in respect of the reduction; or

(2) an Affected Access Holder elects to seek to fund an Expansion in accordance with **clause 8.9.3(e)**,

then:

(D) the Conditional Access Holder and Affected Access Holder (as applicable) will be given priority in the Queue behind any Renewals in respect of the Access Application for that reduction; and

(E) where there are two (2) or more Conditional Access Holders or Affected Access Holders (as applicable) affected, each Conditional Access Holder and Affected Access Holder (as applicable) will be treated as having the same position in the Queue for the purpose of negotiating and allocating the Available Capacity; and

(c) subject to clauses 7.5.2(b)(i) and (ii), Aurizon Network may re-order the Queue where:

(i) Aurizon Network reasonably considers that an Access Seeker has no genuine intention of obtaining Access Rights or is unlikely to be able to utilise Access at the level sought, taking into account in both instances and without limitation, the factors listed in clause 4.13(c); or (Note: The clause

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold, Highlight

references to Part 4 in paragraphs (i) and (ii) above are based on Aurizon Network's proposed amended Part 4. While Aurizon Network could remove some such applications from the queue altogether in accordance with 7.5.2 (d), if there is no realistic prospect of the relevant access seeker achieving Supply Chain Rights, re-ordering the queue may be a fairer and more practical outcome if there is some prospect the party may achieve Supply Chain Rights in the future.]

Formatted: Font: Bold, Highlight

- (ii) subject to clause 7.5.2(h), Aurizon Network reasonably considers that its commercial performance is better served by allocating Access to an Access Seeker who is in the Queue but not first in the Queue.

Formatted: Font: Bold, Highlight

Formatted: Font: Bold

Formatted: Heading 5,2014 DAU H5

[This clause 7.5.2(c) and clause 7.5.2(h) below reflect the queue re-ordering provisions in UT3 which Aurizon Network considers should be reinstated as the QCA's redrafted undertaking has restated the UT3 queue provisions.]

~~(e)~~(d) An Access Seeker will be removed from the Queue if:

- (i) the Access Seeker's Access Application has been withdrawn or the Negotiation Period for an Access Seeker has ceased in accordance with **Part 4**;
- (ii) Aurizon Network has determined not to allocate Available Capacity to an Access Seeker as a result of the operation of **clause 7.2.1**;
- (iii) the Access Seeker is a Conditional Access Holder and it has not provided notice to Aurizon Network under **clause 8.9.3(a)(ii)**; or
- (iv) the Access Seeker is an Affected Access Holder and it has made an election under **clause 8.9.3(e)(i)**.

~~(d)~~(e) Aurizon Network will notify each Access Seeker who has an Access Application in the Queue of the initial position of their Access Application in the Queue and thereafter of any change to that position in the Queue and the reason(s) for that change.

~~(e)~~(f) An Access Seeker may assign its position in the Queue to another party who:

- (i) is a Railway Operator and the Access Seeker has entered into an agreement with that Railway Operator to provide the Train Services and requires that Railway Operator to hold the Access Rights;
- (ii) is a Related Party of the Access Seeker and the assignment is not a Material Variation; or

(iii) has acquired the whole or a substantial part of the assets of the Access Seeker.

(g) If a dispute concerning positions in the Queue or any other aspect of Aurizon Network's management of the Queue is referred for resolution under **Part 11**, Aurizon Network must not change an Access Seeker's position in that Queue unless and until that Dispute is resolved in favour of such a change in position.

This clause 7.5.2(h) and clause 7.5.2(c) above reflect the queue re-ordering provisions in UT3 which Aurizon Network considers should be reinstated as the QCA's redrafted undertaking has restated the UT3 queue provisions.

(h) Without limiting **clause 7.5.2(c)(ii)**, Aurizon Network may reasonably consider that its commercial performance is better served by allocating Access to an Access Seeker who is in the Queue but not first in the Queue:

(i) if:

(A) that Access Seeker's Access Application (**Higher NPV Application**) has a NPV Value that is at least 2% higher than the NPV Value of an earlier Access Application (**Lower NPV Application**) in that Queue; and

(B) no more than one of the Higher NPV Application and the Lower NPV Application is an Access Application for coal carrying Train Services operating on a Coal System (**CQCR Application**);

(ii) if:

(A) that Access Seeker has a CQCR Application seeking Access Rights for a term of at least ten years and is ready and willing to execute an Access Agreement that is consistent with a Standard Access Agreement; and

(B) there are one or more other CQCR Applications with a higher position in the Queue seeking Access Rights for a term of less than ten years (excluding any Renewal Application for an existing mine with a proposed term representing a reasonable estimate of the remaining life of that existing mine) (**Earlier CQCR Applications**); or

(iii) if that Access Seeker has an Access Application seeking Access Rights for a term of less than ten years but that term is longer than the term sought by one or more of the other

Formatted: Indent: Left: 3 cm, No bullets or numbering

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Heading 5,2014 DAU H5

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Access Applications higher in the Queue (**Shorter Term Applications**).

Formatted: Font: Bold

provided that:

Formatted: Normal Indent, Indent: Left: 3 cm, Tab stops: 3 cm, Left

(iv) if **clause 7.5.2(h)(i)** applies, Aurizon Network moves the Higher NPV Application so that it is above the Lower NPV Application in the Queue;

Formatted: Font: Bold

Formatted: Heading 5, 2014 DAU H5

(v) if **clause 7.5.2(h)(ii)** applies, Aurizon Network moves that Access Seeker's CQCR Application so that it is above the Earlier CQCR Application in the Queue; or

Formatted: Font: Bold

(vi) if **clause 7.5.2(h)(iii)** applies, Aurizon Network moves that Access Seeker's Access Application so that it is above the Shorter Term Application in the Queue.

Formatted: Font: Bold

(i) If Aurizon Network, in determining the NPV Value for an Access Application for the purposes of **clause 7.5.2(h)**, took into account a contribution from other sources of revenue that would reduce or be eliminated as a consequence of Aurizon Network not providing Access to the particular Train Service, Aurizon Network must, on request, provide an Access Seeker adversely affected by that assessment with a copy of the reasons for the assessment.

Formatted: Font: Bold

Formatted: Font: Bold

(j) In this **clause 7.5.2**, "**NPV Value**" means the net present value, calculated at the Discount Rate, of the contribution to Common Costs by a Train Service the subject to an Access Application including any contribution from other sources of revenue that would reasonably be expected to reduce or be eliminated as a consequence of Aurizon Network not providing Access for that Train Service (for example, Access Charges from another Train Service or combination of Train Services).

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

7.5.3 Mutually Exclusive Access Application

(a) If Aurizon Network has received Mutually Exclusive Access Applications for Available Capacity, then Aurizon Network will enter into negotiations for Access Agreements (including any agreements to allow Access Rights to be exercised or created – for example, a Rail Connection Agreement) for the Available Capacity for those Access Applications that meet the requirements of **Part 4**, but may not enter into an Access Agreement with an Access Seeker lower in the Queue in priority to an Access Seeker higher in the Queue ~~without the written consent of that Access Seeker which is higher in the Queue.~~

Formatted: Font: Not Bold

(b) Where Aurizon Network has allocated Available Capacity under this **clause 7.5.2** and none of the remaining Access Seekers can be granted the Access Rights sought as there is insufficient Available Capacity to do so, then negotiations with those remaining Access Seekers are suspended and **clause 4.4(c)** will apply.