

8.11 User Funded Expansions

8.11.1 Process where Users intend to fund an Expansion

- (a) If an Access Seeker intends to fund its relevant portion of the cost of an Expansion under **clause 8.8(a)**:
- (i) each proposed Funding User must give written notice to Aurizon Network of its bona fide intention to negotiate a User Funding Agreement for its relevant portion of the cost of the Expansion;
 - (ii) after receiving such written notice, Aurizon Network and the proposed Funding Users will negotiate in good faith and in accordance with the principles outlined in this Undertaking a User Funding Agreement;
 - (iii) upon the User Funding Agreement being agreed by Aurizon Network and the Funding Users, or its terms being determined through dispute resolution, in accordance with this Undertaking:
 - (A) Aurizon Network will issue the proposed User Funding Agreement to the proposed Funding Users and other relevant parties (for example, the State – if applicable), as applicable; and
 - (B) subject to the proposed Funding Users and other relevant parties (for example, the State, if applicable) first executing that User Funding Agreement, Aurizon Network will execute the User Funding Agreement; and
 - (iv) the User Funding Agreement must be in the form of the Standard User Funding Agreement unless otherwise agreed by Aurizon Network and the proposed Funding Users, or determined through dispute resolution.
- (b) Where **clause 8.11.1(a)(iii)** applies, Aurizon Network will use reasonable best endeavours to procure the State to enter into a User Funding Agreement.

8.11.2 Disputes about completion of SUFA schedules

- (a) If Aurizon Network and any User do not reach agreement on the completion of schedules to a User Funding Agreement that is in the form of the Standard User Funding Agreement, then any of those persons may at any time refer the matter to the QCA for determination under **clause 11.1.5**.
- (b) The determination of a dispute under **clause 8.11.2(a)** will be binding on all proposed Funding Users and Aurizon Network. Aurizon Network does not breach this Undertaking in doing anything necessary to comply with that determination.
- (c) Where **clause 8.11.2(a)** applies, **clause 11.1** will be applied in respect of a User who is a Customer as though a reference to:
- (i) an Access Seeker includes a reference to that Customer; and
 - (ii) a Related Party for a Customer includes the Access Seeker for that Customer.

8.11.3 Operation of a User Funded Expansion and Capital Indicator allocation

- (a) A User Funded Expansion will be leased from the State, an Authority or

a trustee as contemplated by SUFA or owned, and in either case operated, by Aurizon Network in accordance with the provisions of the relevant User Funding Agreement and must constitute part of the Rail Infrastructure.

- (b) If Aurizon Network nominates a Capital Indicator to the QCA for approval which includes any allowance for the expected capital expenditure in relation to a User Funded Expansion, Aurizon Network must identify the proportion of the relevant nominated Capital

Indicator which reflects the expected capital expenditure in relation to the User Funding Agreement(s) for that User Funded Expansion.

8.11.4 Capacity Shortfalls for User Funded Expansions

Without limiting **clauses 8.4(c)(i)** and **8.5(b)(i)**, any Capacity and Capacity Shortfall issues as between Aurizon Network and the Funding Users (including all relevant Access Seekers or Access Holders) in relation to a User Funded Expansion will be dealt with in accordance with the terms of the relevant User Funding Agreement. **[Anglo note: Aurizon Network should be specifically prevented from contracting away Capacity Shortfalls that are due to an Aurizon Network Cause]**

8.11.5 Inconsistency with a User Funding Agreement

To the extent of any inconsistency, the terms of an executed User Funding Agreement prevail over the terms of this Undertaking as between Aurizon Network and the Funding Users (including any Access Seeker or Access Holder for which a Funding User is Customer in relation to the User Funded Expansion).

8.11.6 Regulatory pre-approval of scope

~~Promptly after a written request from a Funding User, Aurizon Network must either seek:~~

~~(a) a vote by Interested Participants under **clause 8.13** to accept; or~~

~~(b) approval from the QCA for,~~

~~the scope and standard of work for the relevant Expansion.~~

Promptly after a written request from a Funding User, Aurizon Network must seek approval from the QCA for the scope and standard of work for the relevant Expansion.

8.11.7 Obligation to seek inclusion of Expansion cost in Regulated Asset Base

(a) The Regulated Asset Base will include User Funded Expansions (subject to approval by the QCA), notwithstanding that the cost of such Expansions are not paid for by Aurizon Network.

(b) Subject to **clause 8.11.7(c)**, as soon as is reasonably practicable, Aurizon Network will apply to the QCA to have all of the costs of a User Funded Expansion included in the Regulatory Asset Base. ~~The application will identify that it is made at the request of the Funding Users in accordance with this **clause 8.9.7**.~~

(c) In addition to any application, submission or communication made in accordance with **clause 8.11.7(b)** Aurizon Network and the Funding Users may each choose to make their own independent submissions to the QCA in relation to any application made under **clause 8.11.7(b)**. Aurizon Network is not obliged to make a supportive submission.

8.11.8 **Tax rulings**

SUFA documentation will govern Aurizon Network's obligation to seek a tax ruling on relevant aspects of executed SUFA documentation.

8.11.9 **Review of the SUFA**

(a) Promptly after executing the first User Funding Agreement in the form of the SUFA (or in the event that Aurizon Network and the Funding Users are unable to agree on any User Funding Agreement for execution after at least 60 Business Days of good faith negotiations), Aurizon Network will:

- (i) review the SUFA including having regard to the principles developed by Aurizon Network in consultation with industry participants; and
- (ii) consult with the Funding Users and Access Seekers about the workability of the SUFA for User Funding,

and, after doing so:

- (iii) submit to the QCA any amendments that Aurizon Network (acting reasonably) considers will improve the workability of the SUFA in the form of a draft amending access undertaking under the Act; or
- (iv) if Aurizon Network (acting reasonably) considers no amendments are required, Aurizon Network must make a submission to the QCA giving detailed written reasons for that belief, which will be published on the QCA's website.

(b) The QCA will consider Aurizon Network's submission and either approve or reject Aurizon Network's submission. If the QCA:

(i) does not approve Aurizon Network's submission, Aurizon Network must resubmit its submission (including any relevant amendments to SUFA) as is necessary to comply with the QCA's decision;

(ii) does approve Aurizon Network's submission, it shall have the effect of a Draft Amending Access Undertaking under the Act.

8.12 **Contracting for Capacity**

8.12.1 **Access Agreements conditional on an Expansion**

If Access Rights sought by an Access Seeker require an Expansion, then Aurizon Network must only enter into an Access Agreement with that Access Seeker if:

- (a) that Access Agreement is subject to a condition precedent that requires the relevant Expansion to have been completed and commissioned;
- (b) that Access Agreement includes terms and conditions so that the Access Rights relevant to the Expansion are limited to the available Capacity for the Expansion; and
- (c) either:
 - (i) the Access Seeker and Aurizon Network have agreed the scope

- of work the subject of the Expansion; or
- (ii) where the Expansion is not (or will not be) an Expansion to be funded on Commercial Terms, in the absence of agreement on the scope of works the subject of the Expansion, the scope has been determined by the QCA.

Where an Access Seeker and Aurizon Network do not reach agreement on the scope of work (including standard of work) for an Expansion (other than an Expansion to be funded on Commercial Terms), either party may at any time refer the matter to the QCA for dispute resolution under **clause 11.1.5**. In such circumstances involving a User Funded Expansion **clause 8.12.2** will apply.

The determination of such a dispute will be binding on all relevant Access Seekers and Aurizon Network.

8.12.2 **No amendment of scope of work**

- (a) Aurizon Network may not amend the agreed or determined scope of work for an Expansion (other than a User Funded Expansion, which should be amended in accordance with the provisions of the relevant User Funding Agreement) or Customer Specific Branch Line, other than with the written agreement of the relevant Conditional Access Holders or as determined under **clause 8.12.1(b)**.
- (b) If Aurizon Network and Conditional Access Holders cannot reach agreement on an amendment to a scope of work referred to in **clause 8.12.2(a)**, either party may refer the matter to an expert for dispute resolution in accordance with clause 11.4.1.
- (c) The decision of an expert referred to in **clause 8.12.2(b)** is binding on all relevant Conditional Access Holders and Aurizon Network.
- (d) It is acknowledged that a Conditional Access Holder must not withhold its approval to an amendment to the scope of work to the extent that that amendment is necessary to address a latent condition, change in law or force majeure event.

8.12.3 **Optimisation risk and Capacity Shortfalls**

- (a) This **clause 8.12.3** applies where Aurizon Network is funding all or part of the cost of an Expansion at the regulated rate of return ~~specified by~~ approved by the QCA under this Undertaking.
- (b) Where the scope of works (including the standard of work) for an Expansion is determined by the QCA as contemplated by this **Part 8** or by a nominee under **clause 8.7**, Aurizon Network will promptly apply to the QCA following that determination of scope for pre- approval of the:
 - (i) prudence of scope of the Expansion;
 - (ii) prudence standard of works for the Expansion; and
 - (iii) prudence of the proposed cost of the Expansion, in accordance with the process in **schedule E**.
- (c) Where the QCA provides pre-approval of each of the matters in **clause 8.12.3(b)** the actual cost of the Expansion up to the total of the pre-

approved proposed cost under **clause 8.12.3(b)** will be automatically included into the Regulatory Asset Base in accordance with the process in **schedule E**. The amount of any actual cost above the pre-approved proposed cost will need to be approved by the QCA for it to be included into the Regulatory Asset Base.

(d) Where the QCA does not pre-approve the proposed cost of the Expansion as contemplated by **clause 8.12.3(b)**, Aurizon Network will not be obliged to fund the cost of that Expansion and has no obligation to construct that Expansion in the absence of User Funding.

(e) Where the scope of works (including the standard of work) for an Expansion is determined by the QCA as contemplated by this **Part 8** and:

- (i) the Expansion is constructed in accordance with that scope and standard; and
- (ii) the Expansion results in a Capacity Shortfall (determined in accordance with the process in **clause 8.10.3**),

then:

(iii) Aurizon Network will (acting reasonably) calculate the Capacity Shortfall, if any, that would have existed if the scope of work (including standard of work) previously proposed by Aurizon Network had been constructed, which calculation may (pursuant to **Part 11**) be disputed by Affected Access Holders (**AN Shortfall**);

(iv) If the AN Shortfall is less than the Capacity Shortfall calculated under **clause 8.12.3(e)(ii)**, the Affected Access Holders may:

(A) elect to have their rights of Access remain compressed in relation to that Expansion as a result of the Capacity Shortfall (in accordance with the process for compression in this Undertaking); or

(B) elect to seek to fund an Expansion to address the difference in Capacity between the AN Shortfall and the Capacity Shortfall, in which case Aurizon Network will fund an Expansion to address the AN Shortfall; **[Anglo note: Aurizon Network should fund any Capacity Shortfall where it is the result of an Aurizon Network Cause]**

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(v) where the Affected Access Holders elect to seek to fund an Expansion under **clause 8.12.3(e)(iv)(B)** they can be given a priority allocation of Capacity in an existing or future process for the scoping and funding of a related Expansion that can be utilised to address the Capacity Shortfall without Aurizon Network offending this **Part 8**;

(vi) If the AN Shortfall is equal to or greater than the Capacity Shortfall calculated under **clause 8.10.2(e)(ii)**, Aurizon Network will fund the Shortfall Expansion needed to address the Capacity Shortfall in accordance with and subject to the provisions of **clause 8.10.3(f)**; and

- (vii) Unless otherwise agreed in writing by Aurizon Network and Affected Access Holders, Aurizon Network's obligations in relation to a Capacity Shortfall arising in the context of an Expansion where the scope of the Expansion has been determined by the QCA will be governed solely by this **clause 8.12.3(e)**.

8.12.4 Capacity Shortfalls

- (a) If Aurizon Network grants Access Rights (**Conditional Access Rights**) to Access Seekers (**Conditional Access Holders**) that are conditional on an Expansion being completed and commissioned, then Aurizon Network will, no more than six months following commissioning of the Expansion and subject to **clause 8.12.4(b)**, undertake an assessment of the change in Capacity arising as a result of that Expansion (**Capacity Change**) after the Expansion is commissioned by calculating the Capacity Change as:
 - (i) the Existing Capacity at the time; less
 - (ii) the Existing Capacity of the system in the absence of the Expansion, using consistent System Operating Parameters. Aurizon Network must ~~notify provide~~ all ~~of the relevant~~ Conditional Access Holders with results of, and comprehensive reasons for, an assessment undertaken under this clause 8.12.4(a) ~~of the conclusions of that assessment and the basis for these conclusions.~~
- (b) Aurizon Network may by written notice to all relevant Conditional Access Holders defer an assessment for the purposes of **clause 8.12.4(a)** until such time as Aurizon Network reasonably considers that the relevant Expansion is fully operational and the demand conditions are such that a reasonable assessment can be undertaken.
- (c) If a Conditional Access Holder disputes an assessment by Aurizon Network under **clause 8.12.4(a)**, the Conditional Access Holder may refer that dispute to an expert in accordance with **clause 11.1.4**. The determination of the expert will be binding, except as specifically provided for under that clause 11.1.4. The expert will determine which party or parties should bear the costs of the expert.
- (d) If Aurizon Network's assessment under **clause 8.12.4(a)** indicates that there is a Capacity Shortfall in relation to Conditional Access Holders, then:
 - (i) the Conditional Access Rights of each Conditional Access Holder are reduced in accordance with its Access Agreement; and
 - (ii) subject to **clause 8.12.4(e)**, where those Conditional Access Rights are reduced, each Conditional Access Holder will be taken to have lodged an Access Application with Aurizon Network for Access Rights equivalent to that reduction if they notify Aurizon Network within 20 Business Days after the reduction occurs that they wish to seek Access Rights equal to that reduction (unless their Access Agreement provides to the

contrary).

- (e) For the purpose of a Conditional Access Holder's Access Application under **clause 8.12.4(d)**:
 - (i) the Access Application is taken to be on the same terms as the previous Access Application made by that Conditional Access Holder for those Conditional Access Rights but only to the extent that its Conditional Access Rights have been reduced in accordance with its Access Agreement as a result of the Capacity Shortfall;
 - (ii) Aurizon Network and the Conditional Access Holder are taken to have complied with **clauses 4.2 to 4.4(b)**; and
 - (iii) **clause 4.4(c)** applies to the Access Application.
- (f) Subject to **clause 8.12.3**, and subject to any agreement with the relevant Conditional Access Holders, where an Expansion (**Shortfall Expansion**) is required as a result of a Capacity Shortfall arising in respect of an earlier Expansion (**Earlier Expansion**) and that Shortfall Expansion is technically and economically feasible:
 - (i) subject to **clause 8.12.4(f)(ii)**, if the Earlier Expansion:
 - (A) was funded by Aurizon Network, Aurizon Network will bear the cost of the Shortfall Expansion;
 - (B) was partly funded by Aurizon Network:
 - (1) Aurizon Network will bear the proportion of the cost of the Shortfall Expansion that represents the proportion of the Earlier Expansion that was funded by Aurizon Network; and
 - (2) the Conditional Access Holder(s) who (or whose Customers) provided funding in respect of the Earlier Expansion will bear the remainder of the cost of the Shortfall Expansion if they require it (in which case Aurizon Network and the Conditional Access Holder(s) (or their Customers) will promptly enter into User Funding Agreements on the same terms); or
 - (C) was not funded (in whole or part) by Aurizon Network, a Conditional Access Holder will bear the cost of the Shortfall Expansion if they require it; and
 - (ii) if the Capacity Shortfall was caused by a default by, or the negligent acts or omissions of, Aurizon Network, Aurizon Network will bear the cost of the Shortfall Expansion.
- (g) Unless agreed otherwise by the relevant Conditional Access Holders, any Shortfall Expansion must be addressed in accordance with the provisions of this Undertaking relating to Expansions.
- (h) Nothing in this **clause 8.12** obliges Aurizon Network to do or not to do anything that would cause or contribute to Aurizon Network failing to comply with this Undertaking, ~~any legal obligation or any agreement.~~

[Anglo note: this is potentially ambiguous in any instance where Aurizon Network has side contracts with parties - those contracts might not be visible to users, but could still enliven this subclause (h) to absolve Aurizon Network of the need to fix a Capacity Shortfall]