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**By email**

Mr Paul Bilyk  
Director – Ports and Rail  
Queensland Competition Authority  
GPO Box 2257  
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Email: [rail@qca.org.au](mailto:rail@qca.org.au)

Dear Mr Bilyk,

**Rio Tinto Coal Australia (RTCA) supplementary submission to UT4**

RTCA welcomes this opportunity to make a supplementary submission in response to the further responsive UT4 material filed by Aurizon Network on 29 November 2013.

In making the following comments, RTCA notes that it has also been involved in development of a more detailed response by the Queensland Resources Council (**QRC**).

RTCA fully supports and endorses the QRC submission and its conclusions. RTCA also supports and endorses the related QRC submission in response to the QCA 'cost of capital' process, which separately addresses UT4 cost of capital issues.

In addition to those primary industry submissions, and RTCA's own earlier submission, RTCA wishes to make the following brief additional comments by way of emphasis and response:

1. *RTCA welcomes Aurizon Network's commitment to an early approval of new tariffs by 30 June 2014 and requests an opportunity for industry to respond to any further material*

Aurizon Network has indicated that it will work with the QCA and industry to achieve an 'early' approval of the cost of capital and tariff structure, by mid-2014. RTCA welcomes this commitment.

In doing so, RTCA notes that Aurizon Network has not yet responded substantively to the cost of capital issues raised by the QRC, although it has indicated that it intends to do so as part of the parallel QCA cost of capital process. RTCA will therefore consider any material submitted to that process.

Based on comments and presentations made as part of the WACC Forum held by the QCA in December, it appears that Aurizon Network may wish to file substantive new material, addressing a number of cost of capital issues. If that is the case, RTCA requests that industry be given a fair opportunity to consider and respond to any such new material before the QCA concludes either the U4 or cost of capital processes.

2. *RTCA welcomes the commitment to introduce capacity 'swapping' as part of UT4 and looks forward to working with Aurizon Network to develop this mechanism*

Aurizon Network has acknowledged the need for greater flexibility in the management of access rights and has committed to working with stakeholders to develop a 'capacity swapping' mechanism to be included in UT4.

RTCA welcomes this important step by Aurizon Network and looks forward to actively participating in the development process. As RTCA noted in Section 5 of its primary submission, the lack of an effective short term capacity trading/swapping mechanism is one of the factors significantly impairing the ability of the Queensland industry to implement effective 'whole of coal chain' coordination and contractual alignment. It is also an area where the Queensland regime falls well behind the flexibility and coordination achieved in the Hunter Valley.

As the QCA is aware, RTCA and other stakeholders have been developing significant new industry-led coordination arrangements for the DBCT coal chain, which we hope will be fully implemented early in 2014. The introduction of effective short term capacity swapping/trading is a critical part of the future potential development of this and other similar coal chain coordination models.

In working with Aurizon Network on the swapping mechanism, RTCA notes that to be effective it is important that swapping is available to **all** access holders/customers under their existing access agreements – which is likely to mean implementing the process through the undertaking itself or an 'opt in' amendment to existing access agreements. RTCA queries whether the System Rules is the appropriate mechanism for implementing capacity swapping, but remains open to exploring this with Aurizon Network.

Finally, RTCA retains its concerns over the fairness of operator capping, and the likelihood that this will principally benefit large operators (notably, Aurizon).

3. *The redrafted Expansion process remains unbalanced and has not resolved the lack of a properly integrated "end to end" capital planning and Expansion framework*

While RTCA recognises the willingness of Aurizon Network to engage with industry around the Expansion process, RTCA supports the view of the QRC that the proposed process remains unbalanced and allows Aurizon Network undue commercial discretion over the selection of participants and control over timing, funding and other critical elements in the process.

While Aurizon Network denies that the Expansion Process would give it control over the timing and development of the Queensland industry, it fails to acknowledge that by not being required to accept planning assumptions or capacity requirements provided by other stakeholders, this is the practical consequence of its proposed process.

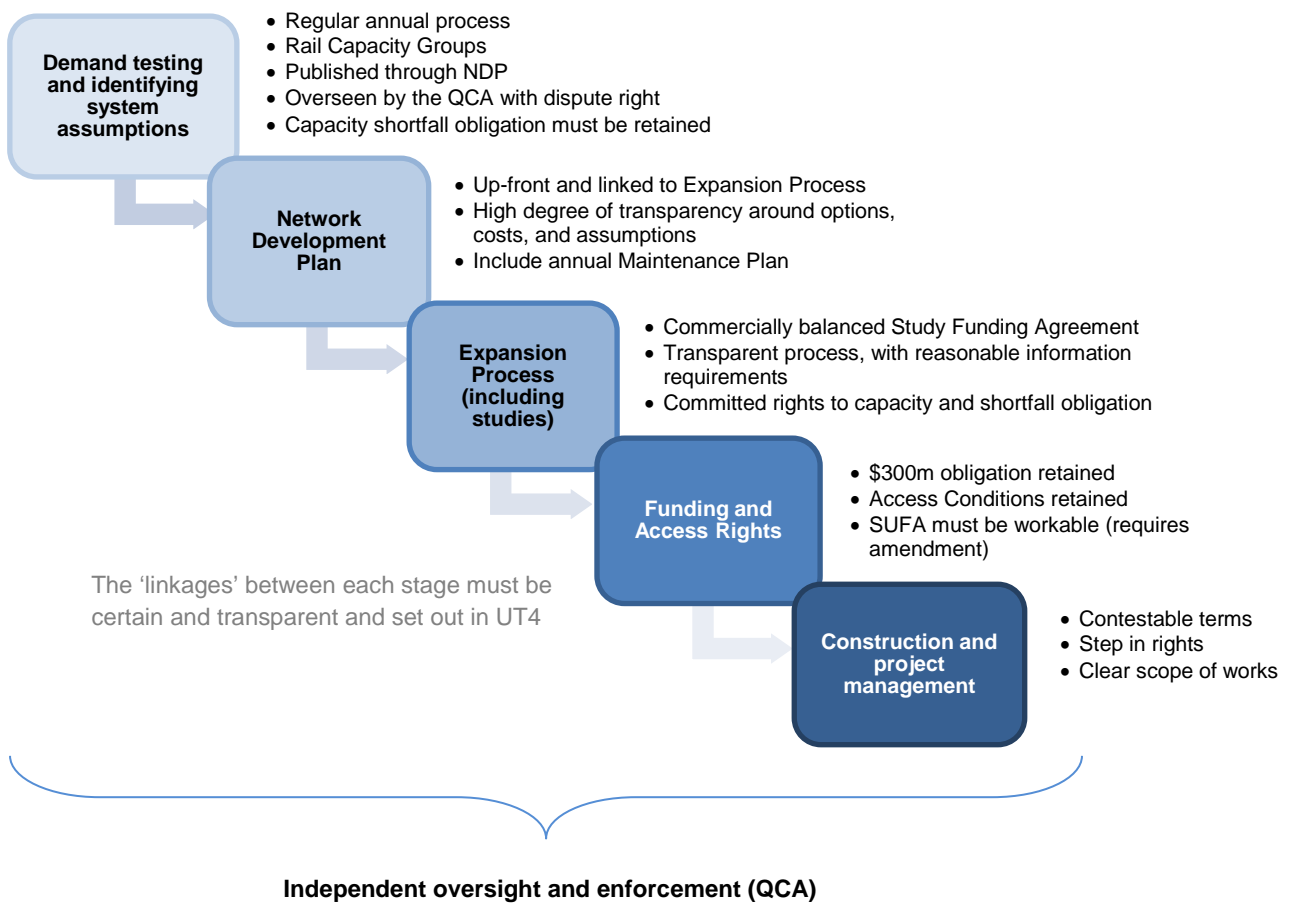
UT4 needs instead to establish an integrated 'end to end' capital planning and Expansion process, with direct involvement by all stakeholders. This has been achieved elsewhere. RTCA refers the QCA to Chapter 4 of its primary submission and reiterates that a 'standalone' Expansion process which is dictated by Aurizon Network, as currently proposed, is inefficient and out of step with good regulatory practice.

Examples include:

- Aurizon Network has not accepted the introduction of Rail Capacity Groups, which in the Hunter Valley provide an important and formal role for coal producers and rail operators in establishing system planning and capacity assumptions.
- The Network Development Plan (**NDP**) remains a poorly-defined, “information-only” document, which risks being of limited value to others in coal chain planning. To be meaningful, and to enable industry to plan their own activities with confidence, Aurizon Network must be required to develop Expansions in accordance with the NDP, unless it explains and justifies any departures.
- Similarly, all Expansion planning (and the NDP) must reflect the System Operating Assumptions and the published outcomes of each capacity review. If Aurizon Network wishes to use alternative planning or capacity assumptions as an input to either the NDP or Expansion planning, these must be explained, consulted upon and open to challenge by relevant stakeholders.

RTCA takes this opportunity to set out again below the key elements of a well-designed and integrated capital planning framework, of the kind which should be required by the QCA to be included in UT4 in order to satisfy the s.138(2) standard.

## Capital planning elements and linkages



RTCA also refers the QCA to the more detailed overview of a 'best practice' capital planning framework for UT4 set out at Annex A to its primary submission.

4. *Critical elements within UT4 should be included in the Undertaking, and not shifted to access agreements*

In arguing that greater emphasis under UT4 should be placed on 'commercially negotiated' outcomes, Aurizon Network suggests that stakeholders (and the QCA) should be indifferent as to whether requirements are defined in the undertaking or access agreements. It says (at page 17):

*Aurizon Network frequently encounters a perception that there is greater protection to access seekers and access holders if a matter is included in the body of the undertaking proper, rather than an agreement, as it is sometimes thought that the QCA will not scrutinise agreements. However, the entire 2013DAU (Volumes 1, 2 and 3) is collectively "the undertaking" for the purpose of the Act, with the agreements subject to the same statutory tests and scrutiny for their approval as the undertaking itself.*

With respect, this response does not accurately reflect the important differences between the undertaking and access agreements.

RTCA maintains that there is significantly stronger protection for stakeholders if requirements are set out in the undertaking, including for the following reasons:

- While the standard form of access agreement forms part of the undertaking (as defined in UT4), *executed* access agreements do not and therefore compliance with executed access agreements remains a matter of contract between the parties – the QCA's role is limited and its statutory powers of investigation are unlikely to apply.
- At most, the QCA Act provides a power for the QCA to act where Aurizon Network, in negotiating or giving effect to an access agreement, contravenes the high level non-discrimination requirement in section 104 of the QCA Act. With respect, this high statutory threshold will seldom be an effective constraint and falls well short of the degree of practical enforcement which is available to the QCA in relation to detailed provisions of the undertaking.
- Aurizon Network concedes (at section 4.5.2) that for the QCA to play a role in arbitrating and resolving disputes under an access agreement requires the consent of both parties.
- While Aurizon Network has included some information gathering powers for the QCA within UT4 (cl.10.3.2) – these are more limited than under the QCA Act (s.150AA) and impose significant constraints on the QCA. They also are of no value to the QCA, from an enforcement perspective, unless they reveal a contravention of the undertaking itself. Because the QCA is not able to share this information readily with access seekers, this information would not support a breach of contract claim, in many cases making the information useless.
- The 'audit' arrangements under UT4 that apply to access agreements are limited – and certainly no substitute for the strong, discretionary powers of investigation granted to the QCA under the QCA Act.

- The scope of remedies which is available to the QCA or industry under the QCA Act for a contravention of the undertaking is wide (including compensation orders) and significantly wider than would apply to a breach of the access agreement (likely to be limited, in most cases, to damages).

Put simply, where obligations are of significant importance to the wider industry and are suited to direct oversight and enforcement by the QCA (rather than as matters of contractual dispute) – they must be included in the undertaking.

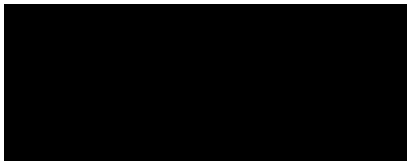
Obligations should therefore be left in the undertaking unless the relevant obligations:

- are of a nature best enforced contractually by individual access holders;
- do not involve matters of wider collective interest to industry (matters of collective interest are more efficiently managed by the QCA than through a series of separate disputes);
- are unlikely to require significant information to be provided by Aurizon Network, in which case the QCA's powers of investigation under the QCA Act are far stronger and more effective; and
- are resolved best through contractual remedies (notably damages) and not through other remedies, such as variation of the undertaking, compensation orders etc.

For completeness, as noted in its primary submission, RTCA views the System Rules as a critical part of the overall undertaking structure and UT4 therefore needs to be amended to make clear that System Rules in place under the undertaking also form part of, and take effect as provisions of, the undertaking and not as a separate 'quasi' regulated/contractual instrument. This status is presently not clear in the draft of UT4.

Please do not hesitate to contact me on 3625 5197, if you would like to discuss any aspect of this or our earlier submission.

Yours sincerely,



**Xiao Fan Zhuang**  
Manager – Infrastructure  
Rio Tinto Energy