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26 July 2012

Dear Stakeholder

**Re: Further consultation on Initial Indicative Service variation - ARTC
proposal to defer implementation of Initial Indicative Access Charges**

The ACCC is currently assessing an application by ARTC to vary its Hunter Valley Access Undertaking (HVAU) in order to implement the Initial Indicative Services and Initial Indicative Access Charges, as required under section 4.17 of the HVAU (the Proposed Variation).

On 13 July 2012 the ACCC received a letter from ARTC which states that under clauses 1.2 and 4.1(a) of Schedule 3 of existing Access Holder Agreements, prices for the first contract year are fixed and ARTC is therefore unable to unilaterally vary existing Access Holders' prices for the 2012 calendar year in order to impose the new charges under section 4.17 of the HVAU. Accordingly, ARTC proposes to defer implementation of the new charges under section 4.17 (including the Initial Indicative Access Charges and charges for other services) until 1 January 2013. Further details regarding ARTC's proposal are contained in ARTC's letter, provided at Attachment A.

The ACCC notes that under section 4.17 of the HVAU, ARTC is required to publish the Initial Indicative Access Charges within 30 business days of receiving approval from the ACCC. The ACCC considers that the intent of section 4.17 is that the Initial Indicative Access Charges should take effect within 30 days of the ACCC's decision. However, the current drafting of clause 4.17 does not reflect this intention.

The ACCC notes that the proposal to defer implementation of the Initial Indicative Access Charges has not been raised by ARTC previously during the ACCC's assessment of the Proposed Variation, and that consequently stakeholders have not had the opportunity to comment on ARTC's proposal.

The ACCC considers that deferring the implementation of the Initial Indicative Access Charges may have a material impact on some Hunter Valley stakeholders, including any party contemplating implementing the Initial Indicative Service prior to 1 January 2013. The ACCC therefore considers that it is necessary to consult with industry on whether ARTC's proposal is appropriate.

The ACCC encourages parties seeking to make a submission to do so as soon as possible, and at the latest by 5:00pm on 9 August 2012.

Submissions should be addressed to:

Mr Matthew Schroder
General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@acc.gov.au

The ACCC notes that this consultation on ARTC's proposal, set out in its letter dated 13 July 2012, stops the clock for the purposes of calculating the 'expected period' within which the ACCC must make a decision on ARTC's proposed variation, in accordance with section 44ZZBC(2) of the *Competition and Consumer Act 2012* (Cth).¹

Yours sincerely



Matthew Schroder
General Manager
Fuel, Transport and Prices Oversight

¹ For further information on these provisions regarding the timeframe for an ACCC decision on an access undertaking application, see Appendix A of the ACCC's 9 May 2012 Position Paper on ARTC's Proposed Variation.

Attachment A – Letter from ARTC to the ACCC dated 13 July 2012



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13 July 2012

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

By e-mail: david.salisbury@accc.gov.au

Dear Mr Salisbury

**Application of Initial Indicative Services and Initial Indicative Access Charges
pending ARTC approval of ARTC's application to vary the 2011 Hunter Valley
Coal Network Access Undertaking (HVAU) – ARTC Proposal**

The ACCC is currently reviewing ARTC's application to vary the HVAU in order to incorporate Initial Indicative Services (**IIS**) and Initial Indicative Access Charges (**IIAC**) submitted under section 44ZZA(7) of the Competition and Consumer Act 2010 (Cth) (**CCA**) and as contemplated by section 4.17(c)(ii) of the HVAU (**Variation**).

As part of its review, the ACCC issued a position paper¹ (**Position Paper**) which prescribed an indicative time frame for assessment of the Variation, indicating an end date of the period of assessment as 13 August 2012². In the Position Paper, the ACCC indicated that it may make a final decision before this date³. Section 44ZZBC of the CCA also provides for the ACCC to extend the period of assessment in certain circumstances.

Section 4.17(d) of the HVAU requires ARTC to publish Initial Indicative Access Charges and Charges for non-Indicative Services (collectively referred to as the **New Section 4.17 Charges**) within 30 Business Days of receiving approval from the ACCC for the Variation. Notwithstanding any further extension to the ACCC's assessment period, ARTC could be required to publish the New Section 4.17 Charges by 24 September 2012 at the latest. If this were to occur, the New Section 4.17 Charges would be published only five weeks ahead of the notification under section 4.20 of the HVAU to Access Holders of Initial Indicative Access Charges and Interim Indicative Access Charges, to apply during the 2013 calendar year (collectively referred to as the

¹ ACCC, position paper in relation to ARTC's HVAU variation, 9 May 2012.

² Ibid, p8.

³ Ibid, p8.



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2013 Charges). The 2013 Charges could become effective from 1 January 2013, just over three months after the publishing of the New Section 4.17 Charges. ARTC has recently commenced the process for finalising the 2013 Charges in accordance with the HVAU.

Section 4.17 of the HVAU does not prescribe any time frame by which the New Section 4.17 Charges must become effective and available to Access Holders. ARTC notes that the development of Indicative Services under section 4.18 of the HVAU (Final Indicative Service as contemplated in the Variation) provides that Indicative Access Charges (and Charges for Coal Access Rights other than Access Rights for the Indicative Service) to be applied **in the year immediately following the date of variation to the HVAU accepting the Initial Indicative Service and Indicative Access Charge comes into effect.** This is intended to reflect the likely timing of the ACCC's assessment period in relation to any variation submitted by ARTC as contemplated under section 4.18 of the HVAU and is consistent with the annual process for determining Indicative Access Charges under section 4.20 of the HVAU in that year.

It had originally been ARTC's intention to publish and offer the New Section 4.17 Charges during the remainder of 2012. However it has been identified that, under clauses 1.2 and 4.1(a) of Schedule 3 of existing Access Holder Agreements executed earlier in 2012, prices for the first contract year are fixed as set out in each Access Holder's train path schedule. This effectively prevents ARTC from imposing revised access pricing on Access Holders, including the New Section 4.17 Charges, in 2012 that is different to that set out in the relevant Train Path Schedule in existing Access Holder Agreements.

As ARTC is unable to unilaterally vary existing Access Holders' access pricing for the 2012 calendar year, ARTC seeks to adopt a consistent approach to that provided under section 4.18 of the HVAU, where New Section 4.17 Charges would not be offered in 2012. The 2013 Charges currently being developed will take into account the direction and magnitude of differentials inherent in the New Section 4.17 Charges.

To give effect to this, ARTC proposes to take the following steps.

1. ARTC will publish the New Section 4.17 Charges within 30 Business Days of receiving approval for the Variation from the ACCC in accordance with the HVAU. At this time, this would be required by 24 September 2012 at the latest (assuming there are no further extensions to the ACCC's assessment period). The development of the New Section 4.17 Charges (and IIAC proposed as part of the Variation) is based on information currently available to ARTC, being volume and



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cost forecasts for the 2012 calendar year. The New Section 4.17 Charges will not be offered during the 2012 calendar year.

2. ARTC will retain the existing 2012 Interim Indicative Access Charges during the 2012 calendar year.
3. ARTC will continue the process for finalising the 2013 Charges based on forecast information for 2013.

On this basis, whilst the New Section 4.17 Charges will not be offered during the 2012 calendar year, they will still be known to Access Holders and will still act to provide guidance to Access Holders as to the likely direction and magnitude of pricing differentiation that will exist during the remainder of the Interim and Initial Periods.

ARTC incorporated section 4.17 of the HVAU at the request of industry just prior to finalising the HVAU. ARTC understood that providing guidance to the industry as to the likely direction and magnitude of pricing differentiation was the primary driver for the industry seeking ARTC to incorporate the initial indicative process contemplated under section 4.17 of the HVAU. The benefit associated with applying the IIACs for such a short period in 2012 is limited in this context, particularly given advice in industry submissions to the Position Paper that any movement to IIS in 2012 is not yet contracted and likely to be very limited considering that there are significant lead times for equipment investment that will enable Access Holders and their Operators to implement decisions around operational efficiencies and efficient utilisation of Coal Chain Capacity.

ARTC recognises that some stakeholders will, nevertheless, still be incentivised to seek the application of the New Section 4.17 Charges during 2012, irrespective of how short the period of application may be, in order to maximise any short term pricing benefits in 2012.

If ARTC offered the New Section 4.17 Charges after receiving approval from the ACCC for the Variation, Access Holders could, but would not be obliged to, seek to permanently vary the Service Assumptions set out in a Train Path Schedule under clause 11.5(c) of the Access Holder Agreement to access New Section 4.17 Charges, subject to ARTC's approval. Whilst the New Section 4.17 Charges would be offered to all Access Holders currently operating under those Service Assumptions, ARTC considers it unlikely that Access Holders will seek or agree to adopt the New Section 4.17 Charges if it leads to increased TOP Charges for them.



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ARTC sees serious and uncertain distortions arising from the application of New Section 4.17 Charges being offered during the rest of 2012 because ARTC is contractually prevented from varying an existing Access Holder's access pricing for the 2012 calendar. Essentially, existing Access Holders will have the opportunity to retain existing 2012 Interim Indicative Access Charges as set out in their respective Train Path Schedules or access the New Section 4.17 Charges by submitting a request to vary the Service Assumptions for a Train Path in their Train Path Schedule under clause 11.5(c) of the Access Holder Agreement. ARTC expects that decisions will mainly be based on whatever pricing delivers the cheaper cost of access to the Network, effectively 'cherry picking' opportunities made available through an undesirable pricing framework and eroding any intended benefits from the application of New Section 4.17 Charges during 2012.

At this time, ARTC sees the only way for such an adverse outcome to be mitigated would be to individually negotiate a variation to each Access Holder's Access Holder Agreement that permitted ARTC to impose the New Section 4.17 Charges in 2012. Once again, ARTC expects that only those existing Access Holders that will benefit from such a variation will agree to a variation.

If the New Section 4.17 Charges were to apply for the short period between the date of publishing of these Charges and 31 December 2012 (**2012 Offer Period**) significant cost and efficiency imposts will arise for ARTC and the industry involving billing system changes and necessary amendments to Access Holder Agreements.

The following steps will all need to occur during the same period contemplated for the development and finalisation of the 2013 Charges if the New Section 4.17 Charges were to be offered for the 2012 Offer Period:

- ARTC to finalise the IIACs to apply during the 2012 Offer Period based on an analysis of train configurations operating on the network and anticipated requests by Access Holders to vary their respective Access Holder Agreements under section 11.5(c) to adopt the New Section 4.17 Charges during the 2012 Offer Period;
- ARTC to consult with the ACCC to finalise the Variation and establish a best estimate for the timing of the ACCC in relation to the Variation;
- ARTC to finalise differentiation factors, weights and calculations of Interim Indicative Services and non-Indicative Services and publish the characteristics and publish the New Section 4.17 Charges 30 days after receiving approval from the ACCC for the Variation ;
- Access Holders to request ARTC under section 11.5(c) of the Access Holder Agreement to vary the Service Assumptions for a Train Path to adopt the New



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Section 4.17 Charges with at least 30 days notice of the new Service Assumptions becoming effective;

- ARTC to amend applicable Train Path Schedules to reflect the new Services Assumptions requested by each Access Holder; and
- ARTC to negotiate and agree with Access Holders amendments to Train Path Schedules to adopt the New Section 4.17 Charges.

Effectively, ARTC and Access Holders will have to concurrently negotiate requested variations to Service Assumptions during the 2012 Offer Period and finalise the 2013 Charges.

Further, whilst ARTC has sought to propose or publish New Section 4.17 Charges that will seek to minimise the total unders and overs amount that might arise in 2012, the application of changed pricing at some point during the year may well give rise to undesirable Constrained Coal Customer Account balances depending on actual utilisation of entitlements before and after that price change.

To this end, whilst ARTC considers this proposal as being consistent with the contractual arrangements currently in place with Access Holders, and does not see this proposal as being inconsistent with the intent of section 4.17 of the HVAU, ARTC seeks the ACCC's consideration of this proposal and a formal expression of the ACCC's views in relation to ARTC's proposed application of the New Section 4.17 Charges and operation of section 4.17 of the HVAU proposed to be incorporated into the Variation.

In order to assist the ACCC in coming to a view in relation to this proposal, ARTC provides an updated version of the Variation for consultation which incorporates this proposal and all changes in mark-up proposed in the formally submitted variation in December 2011, the response to ACCC's information request in February 2012, the proposed Variation in March 2012 and the drafting changes proposed in Table 1 of ARTC's May 2012 submission in response to the ACCC's Position Paper that are not inconsistent with this proposal.

ARTC notes that a requirement to determine the New Section 4.17 Charges on the basis that they will be offered during the 2012 Offer Period gives rise to specific activities and contractual uncertainties in relation to how the New Section 4.17 Charges will be applied for the 2012 calendar year and possible further delays in the process for their determination, which will exacerbate the timing issues described above. ARTC would envisage that a number of these activities and uncertainties may not arise through the absence of a 2012 Offer Period. To this end, ARTC would welcome the ACCC's views on this proposal as soon as possible to enable ARTC to progress the development of the New Section 4.17 Charges.



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Should the ACCC require, ARTC would be happy to consult further with the ACCC on matters contained in this proposal.

If you have any queries, please contact myself (08) 8217 4239 or Glenn Edwards on (08) 8217 4292.

Yours sincerely

Kylie Gallasch
A/Executive General Manager
Strategy & Growth