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Mr Matthew Schroder
General Manager
Infrastructure & Transport – Access & Pricing Branch
Australian Competition and Consumer Commission
Email: transport@accc.gov.au

By: Email

Dear Mr Schroder

Consultation Paper – ARTC’s Proposed Variation to the 2011 Hunter Valley Access Undertaking

Idemitsu Australia Resources Pty Ltd (**Idemitsu**) welcomes the opportunity to provide the following responses in regards to the Consultation Paper issued 6 June 2017) by the Australian Competition and Consumer Commission (**ACCC**) in relation to Australian Rail Track Corporation’s (**ARTC**) proposed variation (the **Variation**) of the 2011 Hunter Valley Access Undertaking (**2011 HVAU**).

The 2011 HVAU is a voluntary access undertaking submitted to the ACCC by ARTC which governs access to the Hunter Valley Coal Network (**HVCN**) which is due to expiry 30 June 2016.

Consultation and negotiations for a new HVAU between Producers and ARTC begun in March 2015, with a universal acknowledgement the 2011 HVAU was serving its purpose and functioning reasonably well, thus creating an expectation of moderate refinements and agreement of the commercial parameters (i.e. WACC and WAML).

Initially, ARTC submitted the 2016 HVAU in 23 December 2015 only to later withdraw its application on 14 June 2016 after failed discussions with Producers, ARTC successfully sought an extension from the ACCC (22 June 2016) to extend the 2011 HVAU until 31 December 2016. Despite the extension, it quickly became apparent Producers and ARTC could not reach a negotiated outcome on the commercial parameters and a formal ACCC determination would be required. ARTC submitted a further application to extend the 2011 HVAU, which was approved by the ACCC (23 November 2016), with a new expiry date of 30 June 2017.

ARTC submitted a revised undertaking (**2017 HVAU**) on 9 December 2016 to the ACCC for assessment. After a typical but compressive consultation process, on the 20 April 2017 the ACCC released its draft decision to reject ARTC’s 2017 HVAU. ARTC subsequently withdrew the 2017 HVAU on 8 May 2017, which was always intended by ARTC and a revised 2017 HVAU would be resubmitted with changes for the OPEX mechanism being developed jointly between Producers and ARTC. Upon the withdrawal of the 2017HVAU it became apparent to Producers, ARTC could not accept the ACCC draft determination and would not be submitting a revised 2017 HVAU. Furthermore, ARTC was considering a transition to IPART and reverting to the NSW Rail Access Undertaking (**NSWRAU**), a natural legislative occurrence upon the expiry of the 2011 HVAU.

It is Idemitsu’s view that reverting to the current NSWRAU would result in significant regulatory and commercial uncertainty, as well as being a considerable backward step in the operational efficiency and capacity framework of the Hunter Valley coal chain. The NSWRAU would require substantial amendments to accommodate access agreements, operational frameworks and industry interfaces (i.e. RCG, HVCCC etc.). To implement such amendments would take considerable time, cost and effort, whilst Access Holders experienced regulatory and commercial uncertainty.

To avoid the default transition to NSWRAU, ARTC has submitted a time constrained application to vary several aspects of the 2011 HVAU, including:

- extending the term to 31 December 2021;
- adjusting the WACC (different to the ACCC draft decision) from 1 July 2016
- adjusting the WAML from 1 July 2016;
- revised methodology for corporate overhead allocators;
- amend the annual compliance process;
- ARTC's obligation to submit a further variation six months after the Variation has been approved, incorporating path based pricing and incremental cost methodology; and
- ACCC information gathering rights (provision of information by ARTC).

Idemitsu is disappointed that after a comprehensive two-year process involving considerable time, effort and cost (for all stakeholders) that ARTC has been unable to accept the ACCC draft determination resulting in the potential expiry of the 2011 HVAU and leading to the introduction of the NSWRAU under another regulatory regime. Through necessity rather than negotiation, ARTC has submitted the Variation to the ACCC for consideration.

To ensure continued operation of the 2011 HVAU it seem Producers will support the Variation proposed by ARTC and Idemitsu would encourage the ACCC to approve the Variation. Despite industry support, it is evident the current voluntary regulatory process in the HVCN (with respect expiry and renewal) lacks regulatory and commercial certainty for Access Holders and has the potential to jeopardise the regulatory future of the HVCN and the efficient operation of the Hunter Valley coal chain.

Idemitsu is an active participant of the Hunter Valley Rail Access Taskforce (**HRATF**), a collective group of nine coal producers and Access Holders utilising the HVCN. The HRATF will be providing a more fulsome submission to the ACCC with respect to the proposed Variation. Idemitsu supports HRATF submission and uses this submission to further highlight specific issues.

(a) Pricing Zone 3 Rebate

ARTC proposes to apply backdating based upon a reconciliation between the current WACC and WAML and the new WACC and WAML contained in the Variation for the period 1 July 2016 to 30 June 2017. With proposed adjustments to the CY2016 and CY2017 compliance periods, the rebate will be returned to Access Holders through the 2016 and 2017 Annual Compliance assessment (unders and overs process) for the Constrained Network. Idemitsu supports this approach, however as an Unconstrained Access Holder, there is no unders and overs process available in Pricing Zone 3. Therefore, Idemitsu seeks ARTC to participate in good faith negotiations to provide the one-off rebate (backdating) to Unconstrained Access Holders in a form which is no worse with respect to calculation or timing, than the Constrained Access Holders.

(b) Variations

ARTC has included an obligation in the Variation, to within six months of the ACCC's approval of the Variation, to participate in good faith negotiations with Access Holders, prepare and submit to the ACCC for consideration variations for:

- (i) Path based Pricing.
- (ii) Incremental Cost Methodology, including Pricing Zone 3 Access Holders contributing only incremental costs for the Term, incremental maintenance and incremental capital allocation, take or pay to include incremental capital based on contracted capacity and the application of the dual ceiling limit in Pricing Zone 3.

Given the time constraints and drafting requirements it is appropriate to consider the above issue within the nominated timeframe post approval, however Idemitsu requests ARTC not be

limited to the above issues and consider other issues which enhance the efficiency and functionality of the HVAU. For example, the role and composition of the RCG, revisions to HVCCC engagement and recommendations; performance management (Network Key Result Areas) etc., (Any of these potential new issues should not delay the ACCC's approval of the Variation).

A collaborative approach between Producers and ARTC in developing any of these issues will assist in accelerating their adoption and ultimate implementation. Furthermore, such an approach will significantly contribute to the evolution of the HVAU into a more efficient undertaking in the longer term and reduce the risk of future regulatory renewals. The ideal evolutionary process would be to conduct several variations throughout the current Term to the point where by the only outstanding item at the time of renewal is the commercial parameters.

It is Idemitsu's view, despite the circumstances that have led to the proposed Variation and the possible alternative of reverting to the NSWRAU, the ACCC should approve the Variation.

Should you have any queries regarding this submission or would like to discuss this matter further please do not hesitate to contact me.

Yours sincerely



Craig Forster
Senior Manager Infrastructure
Idemitsu Australia Resources Pty Ltd