

20 May 2011

Mr Anthony Wing
General Manager
Transport and General Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

Dear Mr Wing

ARTC Hunter Valley Rail Network Access Undertaking

The NSW Minerals Council (NSWMC) welcomes the opportunity to respond to:

- (a) the Australian Competition and Consumer Commission's (ACCC) 13 April 2011 Consultation Paper inviting submissions on Australian Rail Track Corporation Limited's (ARTC) revised 7 September 2010 Hunter Valley Coal Network Access Undertaking (the 'April 2011 HVAU'); and
- (b) the revised versions of certain sections of the April 2011 HVAU posted on the ACCC website on 18 May 2011 ('Revised April 2011 HVAU').

NSWMC wishes to confirm that it has lodged its submission at this time on the basis that the ACCC would continue to accept submissions after the original 11 May 2011 deadline (as reflected in the ACCC's email to interested parties dated 18 May 2011).

NSWMC is making this submission on behalf of the Hunter Rail Access Task Force (HRATF), an associated group comprising all 14 Hunter coal producers using ARTC's Hunter Valley Rail Network (HVRN).

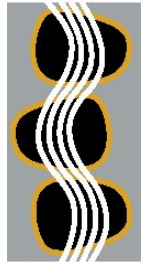
1. Summary

In summary, although NSWMC continues to have reservations about various aspects of the Revised April 2011 HVAU, there is recognition among industry participants of a need to move the HVAU process forward and to achieve at least some of the goals sought to be achieved by industry in the implementation of the HVAU.

Accordingly, NSWMC is willing to support the ACCC's acceptance of the Revised April 2011 HVAU, but for a term of **five** years only and on the basis outlined below. Although progress has been made in relation to the terms of the HVAU, including as a result of the HRATF's discussions with ARTC over the last week, the HRATF believes this reduced term is appropriate given its continuing reservations in relation to aspects of the Revised April 2011 HVAU, including ARTC's unwillingness to agree to an independent review of the HVAU after five years.

It is NSWMC's position that, if ARTC does not:

- (a) make NSWMC's proposed amendments to section 5.1(d)(ii) of the Revised April 2011 HVAU; **and**



- (b) before the ACCC issues its final decision, make a public announcement about the transitional arrangements based on the suggested arrangements included in Attachment 4, or some other wording as agreed with NSWMC,

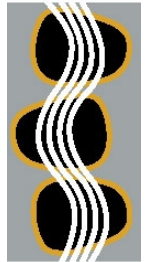
then NSWMC will only support acceptance of the Revised April 2011 HVAU if it includes a real pre-tax WACC of no higher than the 8.57% proposed by the ACCC in its December 2010 Position Paper. If, however, ARTC agrees to NSWMC's approach, then NSWMC would not object to a higher real pre-tax WACC as proposed by ARTC.

2. ARTC has not addressed some key ACCC recommendations

NSWMC believes that in the April 2011 HVAU and Revised April 2011 HVAU, ARTC has not addressed a number of the **key recommendations** raised by the ACCC in its December 2010 Position Paper. These recommendations reflect a number of the key concerns expressed by interested parties in their submissions.

Attachment 1 to this submission is a table that sets out summaries of certain of the key recommendations which the ACCC made in its Position Paper and ARTC's responses in the April 2011 HVAU and the accompanying Explanatory Guide. The table is provided for information purposes and includes commentary which explains why the NSWMC believes ARTC's response to the ACCC recommendations, to the extent they have not been addressed in the Revised April 2011 HVAU, is unsatisfactory.

Please note that Attachment 1 is not intended to be an exhaustive list of key recommendations of the ACCC which ARTC has not addressed. It is provided to ensure that there is a record of issues which NSWMC considers should be considered during future reviews of the undertaking.



3. HRATF and ARTC efforts to have issues addressed

In an attempt to reach agreement on how certain key issues could be resolved (including unaddressed ACCC recommendations), representatives of the HRATF met with ARTC on 10 May. Subsequent telephone conferences between the parties were held on 11, 13 and 17 May, with ARTC also circulating the Revised April 2011 HVAU.

The key issues raised by the HRATF are set out in Attachment 2 to this submission, but in summary are:

- (a) the need for the deliverable Capacity of the Network, and in turn the calculation of 'Network Path Capability' for the purposes of the True Up Test, to be based on relevant System Assumptions for the Coal Chain, not merely track-related assumptions, and for any disagreement of ARTC with the System Assumptions published by the HVCCC from time to time to be resolved independently rather than by unilateral determinations of ARTC. These changes are **vital** to:
- (i) achieving Coal Chain alignment in ensuring that ARTC does not contract for more rail capacity than can be delivered in reality in the context of the Network's interaction with the other components of the Coal Chain; and
 - (ii) the robustness of the True Up Test – which is the only recourse which users have against ARTC for failing to deliver its contractual obligations
- (b) the conditionality of ARTC's commitment to Additional Capacity projects, including:
- (i) ARTC's ability to choose not to proceed or continue with a Project at **any** stage on the basis that 'Technical Criteria' and/or 'Financial Criteria' are not satisfied, and the consequences of this lack of a clear commitment point on the effectiveness of the user funding option; and
 - (ii) as part of this, ARTC's ability to choose not to proceed or continue with a Project on the basis of its undefined 'legitimate business interests', including in the case of Projects which are to be user-funded

- (c) the appropriateness of the nature and process for ARTC's determination of the most efficient train size and the appropriate pricing basis for rail paths
- (d) the uncertain and unclear process for the transition to the HVAU and the continuing uncertainty in relation to how mutually exclusive applications will be determined both at the transition stage and in the future
- (e) the capacity trading system for track and port entitlements needing to be consistent
- (f) the need for the voting rights at the RCG of uncontracted applicants for capacity to be reviewed; and
- (g) the lack of independence of the proposed five year review of the HVAU.

It was NSWMC's view that if agreement with ARTC could be reached on how these matters could be resolved, then NSWMC may have been prepared to support the acceptance of the April 2011 HVAU by the ACCC, so long as the resolutions were appropriately reflected in drafting amendments.

4. Outcome of discussions

NSWMC welcomes ARTC's willingness to discuss the above key issues over the last week and is pleased to report that those discussions have resulted in positive progress on certain of the issues outlined in section 3. However, NSWMC considers that further changes are required to satisfactorily address the issue referred to in paragraph (a), which remains of paramount importance to producers. It is also the case that ARTC has not agreed to make changes to the April 2011 HVAU to address the issues referred to in paragraphs (b) and (g). Finally, industry remains waiting for clarity around the operation of the transitional arrangements. These are discussed in more detail below.

Dispute resolution process for the development of System Assumptions

NSWMC welcomes the recent amendments adopted by ARTC but is concerned that some of the protections offered by these changes will not be available to producers without further minor amendment. At present, in relation to the dispute resolution process for the development of System Assumptions (see paragraph (a) above), proposed section 5.1(d)(ii) of the Revised April 2011 HVAU provides that:

If ARTC disagrees with the assumption on the basis that it considers (acting reasonably) that the practical adoption of:

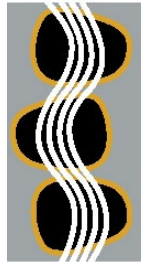
- (i) ...
- (ii) the HVCCC's assumption would have an **adverse commercial implication** for ARTC,

then ARTC's notification under section 5.1(c) must state that this is the basis for the disagreement. (emphasis added)

Section 5.1(e) of then states that:

... The HVCCC is **not permitted** to raise a dispute if ARTC disagrees with an assumption on the basis of one of the grounds in section 5.1(d) but to avoid doubt, this does not prevent the HVCCC raising a dispute on whether ARTC has acted reasonably in relying on section 5.1(d). (emphasis added)

The HRATF is concerned that an effect of sections 5.1(d)(ii) and 5.1(e) may be that ARTC may be able to rely on clause 5.1(d)(ii) inappropriately, in particular, by claiming that if a particular HVCCC assumption was adopted, and that assumption resulted in ARTC having to pay a rebate under the True-Up Test, that the payment of the rebate would be an 'adverse commercial implication for ARTC'. Consequently, this assumption would not become a System Assumption, would **not** be



open to dispute by the HVCCC and ARTC would **not** be required to pay the rebate. Such a circumstance would appear to defeat the intent of the True-Up Test.

The HRATF proposed drafting changes to ARTC to make clear that section 5.1(d)(ii) would not apply in relation to an 'adverse commercial implication' which would arise for ARTC as a result of the operation of the HVAU and AHA in accordance with their terms, including ARTC having to pay a True Up Test rebate under schedule 2 of the AHA. ARTC has declined to make this amendment.

NSWMC now proposes that section 5.1(d)(ii) be redrafted so that it would only not apply in the case of ARTC having to pay a True Up Test rebate under schedule 2 of the AHA. NSWMC provides a suggested amendment in Attachment 3 to this submission.

NSWMC considers this to be a fundamental issue, as section 5.1(d)(ii), as currently drafted, provides a means for ARTC to defeat the operation of the True Up Test, which is the Access Holder's only practical recourse against ARTC for non-performance.

It is important to note in this regard that NSWMC's requested amendment to section 5.1(d)(ii) does not prevent the parties seeking to resolve any dispute over the relevant assumption in accordance with the remainder of ARTC's proposed section 5.1 in the Revised April 2011 HVAU. Accordingly, under NSWMC's requested amendment, if ARTC felt that an HVCCC suggested System Assumption was unreasonable, it still has recourse to the dispute resolution process set out in section 5.1, including ACCC arbitration, to protect its commercial position.

The conditionality of ARTC's commitment to Additional Capacity projects

Despite the HRATF's efforts, ARTC has refused to make any significant changes to the sections of the HVAU that provide for its commitment to Additional Capacity projects (see paragraph (b) above).

Transitional arrangements

As regards the HRATF's concerns with the clarity of the proposed transition process (paragraph (d) above), ARTC indicated in its discussions with the HRATF that it would clarify the transition process steps. ARTC has reflected this intention in its letter to stakeholders dated 16 May 2011 by stating that it would provide this further advice in the near future.

The HRATF has set out in Attachment 4 an outline of transition procedures which it considers would provide the necessary clarity.

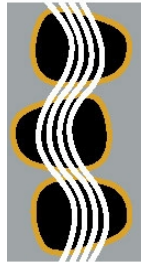
The lack of independence of the proposed five year review of the HVAU

ARTC was unwilling to agree to amendments providing for a more independent review of the HVAU after five years and to undertake to seek variations of the HVAU to give effect to the review's recommendations.

5. The NSWMC position

NSWMC appreciates the efforts of ARTC to progress a number of the issues raised during the final round of negotiations, and wishes to see the HVAU finalised as quickly as possible to bring certainty to all industry participants. Despite this progress, NSWMC continues to have some reservations about the Revised April 2011 HVAU and whether it will provide adequate certainty to, and adequately protect the interests of, the participants in the Hunter Valley coal industry.

Further, the HRATF is concerned that it does not yet have sufficient clarity from ARTC on the proposed transition arrangements. As set out in submissions to the ACCC last October and acknowledged in the ACCC's Position Paper, the significance of the transition arrangements, and the need to ensure equitable treatment of all producers in entering into initial Access Agreements with ARTC (both in relation to existing Network Capacity and the Additional Capacity which will be required to be contracted to satisfy demand over the next 10 years and beyond), cannot be underestimated.



Based on the progress achieved in the final negotiations, but also reflecting its ongoing reservations, the NSWMC is willing to support the ACCC's acceptance of the Revised April 2011 HVAU for a term of **five** years only and on the basis outlined below. The NSWMC believes this reduced term is appropriate given its reservations and the lack of an agreed meaningful independent review of the HVAU after five years.

In addition, the NSWMC's position is that if ARTC does not:

- (a) make the amendments to section 5.1(d)(ii) proposed in Attachment 3; **and**
- (b) before the ACCC's issues its final decision, make a public announcement about the transitional arrangements based on the suggested arrangements included in Attachment 4, or some other wording as agreed with the HRATF,

then the NSWMC will only support acceptance of the Revised April 2011 HVAU if it includes a real pre-tax WACC of no higher than the 8.57% proposed by the ACCC. If, however, ARTC agrees to the HRATF's approach, then the NSWMC would not oppose a higher real pre-tax WACC as proposed by ARTC.

The NSWMC would like to meet you and your officers in the near future to provide more detail on this submission. We will contact you to arrange a suitable time for the meeting.

For further information, please contact Mr Geoff Andrews on (02) 9386 9957 or via email at an53696@bigpond.net.au.

Yours sincerely



Sue-Ern Tan
ACTING CHIEF EXECUTIVE OFFICER

cc. NSW Minerals Council Executive Committee
Mr P O'Grady, Chair, Hunter Rail Access Task Force

