

3 September 2009

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
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Canberra ACT 2601  
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Dear Dr Chadwick

## **Authorisation applications by Port Waratah Coal Services Limited, Newcastle Coal Infrastructure Group Pty Limited and Newcastle Port Corporation**

I refer to the applications for authorisation Nos. A91147 – A91149, A91168 and A91169 lodged by Port Waratah Coal Services Limited (**PWCS**), Newcastle Coal Infrastructure Group Pty Limited (**NCIG**) and Newcastle Port Corporation (**NPC**), and to the Commission's Decision of yesterday to revoke the interim authorisation previously granted.

As you are aware, Hunter Valley Energy Coal Pty Ltd (**BHP Billiton**) is a shareholder of NCIG.

### **1. Current Status**

As indicated in NCIG's letter of 31 August 2009, NCIG, NPC and PWCS were not able to finalise the Capacity Framework Documents by this date as there were (and still remain) a small number of significant outstanding issues yet to be resolved. For your information, we have summarised the key outstanding issues from BHP Billiton's perspective below.

BHP Billiton is unable to approve the relevant Capacity Framework Documents until these issues are resolved satisfactorily and therefore NCIG is not in a position to approve the documents.

BHP Billiton's inability to approve the Capacity Framework Documents is as a result of the NSW Government and PWCS introducing in the final weeks of negotiations provisions into the Capacity Framework Documents, which:

- were not contemplated by nor agreed by NPC, NCIG and PWCS as part of the Implementation Memorandum signed in April 2009 (**IM**) or at the time of the submission to the Commission of the authorisation application in July 2009 (**Authorisation Application**);
- introduce considerable uncertainty in relation to critical aspects of the Capacity Framework Arrangements and undermine the long term nature of the Arrangements;

- undermine producers' certainty and security of access at PWCS; and
- impose additional unacceptable risk on BHP Billiton as an NCIG shareholder.

BHP Billiton advised the NSW Government of its position in relation to these issues at the earliest opportunity to seek to resolve the issues before 31 August 2009. However, our concerns have not been addressed. We remain committed to engaging with the NSW Government on these issues.

## **2. Outstanding Unresolved Issues**

The outstanding issues are summarised under the sub-headings below:

### **2.1 Stage 2 Phased Expansion at NCIG**

The IM and the Authorisation Application clearly provide that NCIG's obligation is to offer 12Mtpa of Stage 2 capacity to non-NCIG Producers once Stage 2 expansion of the terminal is committed by NCIG. After the later of, NCIG offering this capacity or 1 January 2010, NCIG producers can participate in the nomination and allocation procedure for expansions at the PWCS terminals.

As a shareholder of NCIG, BHP Billiton has progressed the negotiation of the Capacity Framework Documents on this basis and remains committed to offering the 12Mtpa to non-NCIG producers in return for a guaranteed base tonnage at PWCS for a total of approximately 24Mtpa to NCIG producers.

In mid-August, the NSW Government introduced a requirement in the Capacity Framework Documents for NCIG to commit to expand to a capacity of 66Mtpa before NCIG producers could nominate for additional capacity at PWCS. Although the express reference to 66Mtpa was removed in the "final" draft of the Capacity Framework Documents issued on 31 August (after a meeting between the Minister and PWCS on Sunday 30 August), the revised proposal put forward in those documents is equally unacceptable.

The revised proposal is such that if NPC is satisfied (in its sole discretion) that NCIG has undertaken "the largest expansion practicable at that time having regard to physical and operational constraints", NCIG producers will be permitted to access additional capacity at PWCS.

Both the requirement to expand to 66Mtpa and the revised proposal are inconsistent with what was clearly agreed in the IM and at the time of submission of the Authorisation Application. This is such a fundamental issue that it should have been raised by the NSW Government and PWCS at the time of the IM negotiation.

The proposals do not take into account the commercial viability of an expansion for NCIG shareholders and impose unacceptable project risk on BHP Billiton as a shareholder in the privately owned terminal.

Not more than 4 years after finalisation of the lease arrangements with the same NSW Government, the new Minister is seeking to remove NCIG's right under lease arrangements to undertake a phased expansion where NCIG is satisfied that it is commercially and technically viable for NCIG to do so. NCIG's intention in relation to possible phased expansions have been clearly articulated to the NSW Government's ports adviser in meetings in December 2008 and January 2009 and in a presentation to the NPC Board in 2008.

Finally, giving such broad discretion to the Minister to determine future access to port capacity by NCIG producers clearly erodes certainty as to the basis on which future port

capacity is allocated to producers. This fundamentally undermines a stated objective of developing the long term solution, which was to achieve long term certainty for allocation of capacity to producers.

## 2.2 PWCS Long Term Ship or Pay Agreements

The proposed PWCS Long Term Ship or Pay (LTSOP) agreements, which are integral to the Capacity Framework Arrangements, also contain provisions that were not contemplated in the IM and undermine the certainty and long term nature of the Capacity Framework Arrangements.

Each of the provisions has the potential to undermine and introduce uncertainty into the long term solution.

- As a part of the Capacity Framework Documents and IM, NCIG agreed to offer 12Mtpa at NCIG to non-NCIG Producers in consideration for retaining its allocation at PWCS on a long term basis. This is a fundamental element of the Capacity Framework Arrangements. In order to preserve this arrangement and provide NCIG producers with certainty as to allocation, BHP Billiton requested that where common user is reinstated at the PWCS terminals then NCIG producers allocations will be protected from any consequent compression or, if subject to compression, NCIG should have the right to make an off-setting adjustment to the 12Mtpa contracted to non-NCIG Producers at NCIG Stage 2.
- The PWCS LTSOPs are intended to give producers certainty as to allocation of capacity and to enable PWCS to undertake expansions. Therefore, BHP Billiton had requested that where the PWCS' lease is terminated (due to, for example, a breach by PWCS of its obligations under the Capacity Framework Documents), NPC and PWCS should use their best efforts to ensure that LTSOPs are transferred to any new lessee. PWCS has agreed to this undertaking in its LTSOPs however given the transfer of the LTSOPs is a matter within the control of NPC as lessor, NPC also needs to undertake this obligation.

If the LTSOPs for NCIG producers cannot be transferred to the new lessor then BHP Billiton proposes that NCIG should be able to vary or terminate the non-NCIG Producer LTSOPs at NCIG Stage 2 to offset any reduction in NCIG producer capacity at PWCS. If the LTSOPs are terminated then this should have the effect that the Capacity Framework Documents would unwind given the LTSOPs are an integral component of the long term solution.

BHP Billiton's proposals in this regard are intended to preserve the Capacity Framework Arrangements as a whole.

- PWCS has a right to unilaterally vary the PWCS LTSOPs after 5 years and after consultation with producers. In order to retain certainty in relation to the key terms of the LTSOPs, BHP Billiton requested that where the proposed variations are material then producer consent is required. For other variations, such as those that are required for operational reasons, the variations can be made unilaterally after consultation but should not have the effect of discriminating between customers or groups of customers.
- The PWCS LTSOPs do not include principles for the basis for calculation of the coal handling charge, which we understand to be a cost recovery basis. PWCS may vary the charge at any time by making a posting on its website. BHP Billiton requested that these principles be included in the LTSOPs and that any pricing variations made by PWCS are made on a transparent basis in accordance with the cost recovery principle. This is essential to enable producers to understand the price of the LTSOPs and have certainty as to their financial exposure under the contracts.

### 2.3 Entrenchment Of Terminal 4 Governance Principles

It is a fundamental principle of the IM and the Capacity Framework Arrangements that the NCIG producers would be offered non-discriminatory access to Terminal 4 (T4) after committing to Stage 2 and offering the 12Mtpa to non-NCIG Producers. Although the NSW Government and PWCS have now agreed to include this principle in the T4 lease between NPC and PWCS, the bilateral nature of this lease means that this commitment should also be reflected in the Capacity Framework Agreement, to which NCIG will be party. Incorporating this principle in the T4 lease will also ensure the long term preservation of an integral aspect of the long term solution.

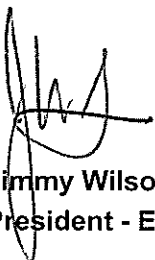
Non-discriminatory access to T4 is a particularly important issue given that, as part of the "Tripodi Solution" and the IM, the parties conceded that the T4 lease would be awarded to PWCS on an exclusive basis without the Government going through an open process.

BHP Billiton remains committed to achieving a solution for access to and expansion of capacity at the Port of Newcastle that is certain and durable over the long term. We consider that an industry supported solution can still be achieved. We are seeking to progress discussions with the Government in an effort to resolve the remaining issues as soon as practicable.

BHP Billiton would be supportive of a further interim authorisation of the Capacity Framework Arrangements until these issues have been resolved.

If you have any questions about this letter, please contact Rachel Agnew on (02) 9376 0151.

Yours sincerely



**Jimmy Wilson**  
President - Energy Coal

CC: Newcastle Coal Infrastructure Group Pty Ltd  
The Hon Dr Craig Emerson MP  
The Hon Martin Ferguson AM, MP  
The Hon Anthony Albanese MP