

FOR PUBLIC REGISTER

Port Waratah Coal Services
Limited

Authorisation Applications A91147-
A91149 and A91168 and A91169

Response to submissions from
interested parties

Dated 27 August 2009

Port Waratah Coal Services Limited

Authorisation Applications A91147-A91149 and A91168 and A91169

Response to submissions from interested parties

1 Introduction

1.1 Purpose of submission

The purpose of this submission is to provide:

- (a) the Commission with an update on progress towards the execution of the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents;
- (b) PWCS' response to the question raised by the Commission in relation to whether the proposed vessel sequencing system and the amendments to PWCS' agreements are likely to have any impact on the description of conduct for which authorisation is sought;
- (c) PWCS' comments in relation to the matters raised by Australian Rail Track Corporation ("ARTC") in its submission dated 24 July 2009; and
- (d) PWCS' comments in relation to the matters raised by Felix Resources Limited ("Felix") in its submission dated 24 July 2009.

1.2 Submission by PWCS

Having regard to timing constraints and the significant focus of all the Applicants on finalising the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents, the submission is made by PWCS alone.

1.3 There is widespread industry support for the long term solution

PWCS notes that the long term solution to port capacity, and the Capacity Framework Arrangements which are the subject of the current application for authorisation, have widespread industry support.

PWCS understands that the Commission has received only four submissions from industry participants in relation to the application for final authorisation. Two of those submissions are strongly supportive of the application. The other two would also appear to support the application. However, they also raise certain issues for further clarification which are addressed in this submission.

This very high level of industry support is consistent with the support provided in relation to the application for interim authorisation.

PWCS also understands that the long term solution to port capacity and the Capacity Framework Arrangements are strongly supported by the NSW

Government. This is evidenced by the substantial role that NPC has had, both as a joint applicant and as a leading participant in commercial negotiations.

2 Progress towards finalising the PWCS and NCIG Capacity Framework Documents

As the Commission is aware, over the past few months each of the Applicants has devoted a very significant amount of time and a very significant amount of resources towards developing the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents.

Those documents are in a very advanced form, and over the past few days the parties have sought to negotiate and finalise a relatively small number of outstanding matters.

Over the week ending 28 August 2009, it is proposed that PWCS and NCIG will:

- (a) seek to finalise those outstanding matters;
- (b) provide their comments to NPC on the final drafts of each of their respective agreements;
- (c) provide their comments to NPC on the redacted versions of each others' agreements (which have been exchanged for the purpose of ensuring that each of the capacity framework arrangements set out in the Implementation Memorandum have been accurately reflected in each parties' agreements);
- (d) seek to obtain and finalise any necessary internal and external approvals (e.g. financiers); and
- (e) execute the PWCS Capacity Framework Documents and NCIG Capacity Framework Documents.

PWCS also anticipates that Hunter Valley Coal Chain Coordinator Limited ("HVCCC") will be incorporated and operational by 1 September 2009.

Notwithstanding the best efforts of all parties involved, it remains possible that certain issues may have an unforeseen impact on the timeline set out above (e.g. if issues require further work or discussion in order to implement a workable solution, or if there is a delay in obtaining internal or financiers approvals in relation to the documents).

Given the very aggressive timeframe, the large number of documents, the large number of parties involved in the process, and PWCS' very limited visibility of NCIG's documents and internal processes, it is not possible for PWCS to be definitive in relation to timing. However, PWCS will advise the Commission if there is any potential delay to the timetable outlined above.

In the event that there is any slippage beyond 31 August 2009, PWCS would wish to emphasise strongly to the Commission both the very large amount of work that has taken place. PWCS would also wish to emphasise how genuinely close the Applicants currently are to finalising the very complex issues involved

in implementing the long term solution to port capacity which will deliver very substantial public benefits and result in a fundamental shift in the way that capacity is delivered and contracted in the Hunter Valley coal chain. In PWCS' view, it is important that the attainment of these long term public benefits is not jeopardised by short term timing considerations.

3 Vessel sequencing system and amendments to PWCS' agreements

3.1 The vessel sequencing system and operational protocols

As the Commission is aware, the NSW coal industry is considering a proposed vessel sequencing system. A copy of the presentation consulted on by PWCS has been provided to the Commission on a confidential basis.

These arrangements are primarily operational in nature, and set out the mechanics of how PWCS will manage vessel sequencing, arrivals and loading. On this basis, PWCS considers that the proposed vessel sequencing system supports, and enables PWCS to give effect to, the conduct set out in its proposed customer agreements, rather than representing matters which require separate authorisation from the Commission.

In developing the vessel sequencing system and operational protocols, PWCS has engaged in an extensive consultation process with customers, other service providers (above and below rail) and HVCCC. This consultation is ongoing, and is likely to continue as the new system is rolled out and implemented.

As set out above, the long term port capacity solution involves a fundamental change to the way that capacity is delivered and contracted. It is therefore necessary for PWCS and other participants in the Hunter Valley coal chain to develop new operational systems and protocols to give effect to the new arrangements. The new vessel sequencing system and operational protocols are also necessary to facilitate contractual alignment with other service providers in the Hunter Valley.

For completeness, PWCS notes that it is currently proposing to conduct a trial for vessels to be loaded on a contracted sequence basis by no earlier than July 2010.

3.2 Amendments to PWCS' contracts and Terminal Access Protocols

As previously discussed with the Commission, PWCS, NCIG and NPC have devoted significant resources to developing and finalising their respective agreements to give effect to the long term port solution. This has involved substantial consultation with customers, other service providers, contractual alignment discussions, and consideration of how the long term solution will be contracted and implemented at each terminal from a practical, commercial and operational perspective.

During this process, PWCS has identified a number of matters that have needed further clarification and/or development in its customer agreements and terminal access protocols. The developments in the draft contractual arrangements do not involve any fundamental change to the arrangements previously advised to

the Commission (and which form part of the Capacity Framework Arrangements for which authorisation has been sought and interim authorisation granted). However, the draft agreements and protocols, of necessity, reflect a number of developments and clarifications.

As those documents are now being finalised with NPC and NCIG, PWCS is currently in the process of determining which (if any) of those matters may require a variation to the current application for authorisation. PWCS understands that NCIG and NPC are, or will shortly be, conducting a similar exercise.

If it is determined that matters included in the suite of documents prepared by PWCS, NCIG and NPC require authorisation from the Commission (and are not currently set out in Attachment 1 to the Applicants' current application for authorisation), the relevant documents may be executed subject to an ACCC authorisation condition precedent, and if a revised application for authorisation is appropriate, it will be provided to the Commission as soon as practicable.

As the Commission will appreciate, the process proposed above arises because of the very tight timeframes provided for the finalisation of the relevant documents, and the need for those documents to be largely finalised before the Applicants' can determine whether any variations to the current application for authorisation are necessary.

4 Response to matters raised by ARTC

As the Commission is aware, ARTC is a member of the Contractual Alignment Working Group and has had substantial input into discussions concerning the operational mechanisms for achieving contractual alignment across the Hunter Valley Coal chain.

In its submission dated 24 July 2009, ARTC raised concerns that it had not seen the details of PWCS' and NCIG's proposed contractual arrangements and that:

“ARTC cannot fully consider alignment until the detailed port mechanisms are developed and made available.

The lack of detail in relation to the documents (contractual arrangements) that will give effect to the Capacity Framework Arrangements also makes it difficult for ARTC to provide detailed comments to the ACCC in relation to reasonableness of the balance of interests between interested parties as well as the consistency between port and track “contractual” arrangements”.

ARTC also set out in an Attachment a number of issues that it considered required clarification.

As the Commission will appreciate, PWCS was, at that time, still developing its proposed contracts and Operational Protocols. Those documents and arrangements were also subject to approval by NPC. Accordingly, PWCS was not at that time in a position to provide a clear position to ARTC.

However, since that time, PWCS has met with and engaged in constructive discussions with ARTC in relation to the development and implementation of

the System Assumptions, the PWCS Operating Protocols, PWCS' proposed vessel sequencing system, PWCS' proposed contracting arrangements, and the proposed capacity transfer system.

These matters are all critical to the operational implementation of contractual alignment, and PWCS is confident that ARTC is now in a much better position to understand the proposed port operational and contracting environment and, conversely, PWCS has a clearer understanding of ARTC's proposed arrangements under the draft Hunter Valley Access Undertaking.

Accordingly, PWCS considers that a number of the issues raised in ARTC's submission have now been addressed, and the parties are well placed to continue the processes necessary to constructively facilitate contractual alignment. PWCS would anticipate that the Commission would confirm this with ARTC directly.

5 Response to matters raised by Felix

In its letter to the Commission dated 24 July 2009, Felix raised certain matters relating to the operational details of the PWCS contracts and Operational Protocols.

PWCS appreciates receiving those comments as it had previously sought feedback from its customers on a number of operational issues, and Felix' comments have (together with feedback from other customers) enabled it to further develop those operational arrangements.

Since the date of Felix's letter, PWCS (and other industry participants including NCIG, NPC, ARTC and HVCCC) have undertaken a large amount of work to develop and refine the proposed operational and contractual arrangements. PWCS has also engaged in a substantial process of consultation with its customers. In particular, PWCS conducted 4 consultation meetings with producers on 13-14 August 2009 to discuss:

- (a) the Operating Protocols, including the vessel sequencing system;
- (b) the key amendments to the Long Term Ship or Pay Agreements and Terminal Access Protocols since the consultation meetings held in July 2009; and
- (c) developments to the System Assumptions.

PWCS has also received and responded to a number of written comments from Producers.

While the proposed operational arrangements are different to what has been implemented in the past, and will necessarily involve adjustments by all participants in the Hunter Valley Coal Chain, PWCS is hopeful that through the extensive consultation process, producers have a greater understanding of how the new arrangements will work. As previously submitted to the Commission, the transitional period from 1 July 2009 to 31 December 2009 will also enable industry participants to adjust to the new contractual and operating environment.

PWCS is therefore hopeful that the key issues raised in Felix's submission have now been addressed.

6 Further questions

If the Commission has any questions in relation to the matters raised in this submission, PWCS would be pleased to assist.

Port Waratah Coal Services Limited
27 August 2009