

## Further submission in support of application for minor variation

Authorisations A40062 – A40070 and A91205 – A91207

18 September 2023

1. On 20 July 2023, on behalf of Rio Tinto Aluminium Limited (ACN 009 679 127) and the Gladstone Power Station Joint Venture Participants (**JV Participants**), we made an application under subsection 91A(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for a minor variation of authorisation A40062 – A40070 and authorisation A91205 - A91207 (**Application**).
2. Further to the meeting held with the ACCC on 11 August 2023, we now provide further submissions in support of the Application. The diagrams of the Gladstone Power Station arrangements are also included at Annexures A to C to these further submissions.
3. Section 87ZP of the CCA defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
4. **The ACCC's** Guidelines for Authorisation of Conduct (non-merger) provide that a variation can only be **considered 'minor' if it changes the conduct or the nature of the authorisation which has been granted in a way** that is not substantial or significant.<sup>1</sup> In determining whether that is the case, the ACCC will typically consider both a quantitative and a qualitative element:<sup>2</sup>
  - (a) The quantitative element considers the extent of the change to the conduct that is authorised. The greater the extent of the change, the more likely that the change will be material.
  - (b) The qualitative element considers the nature of the change. A change that relates to conduct that is likely to contravene the competition provisions of the Act, or which is central to generating a public benefit or a detriment, is more likely to be material than one which is ancillary or peripheral to such matters.
5. If the ACCC is concerned about the number of amendments to the OMA, the applicant further submits that the ACCC could consider the amendments to the OMA as separate minor variations under section 91A(7) of the CCA. In those circumstances, the applicant submits that the combined effect of those variations, if all were granted, would not involve a material change in the effect of the authorisations, and that the ACCC could therefore deal with the variations as a single minor variation.

### Conduct authorised in relation to the OMA and public benefits

6. As set out above, in relation to the OMA, authorisation was originally sought and granted in 1994 and 2010 in respect of the following conduct:<sup>3</sup>
  - (a) **the JV Participants' agreement to appoint NRG Gladstone Operating Services Pty Limited ACN 061 519 275 (NRGGOS)** to operate and maintain the Gladstone Power Station (**GPS**);
  - (b) **the JV Participants' agreement of the terms and conditions of that appointment including the fee payable to NRGGOS; and**
  - (c) the JV Participants acquiring all operating and maintenance services for the GPS from NRGGOS.
7. Authorisation of the conduct referenced at paragraphs 6(a) and 6(b) was sought because the provisions raised issues in relation to price fixing under the cartel conduct provisions and arrangements or contracts containing a

<sup>1</sup> ACCC Guidelines for Authorisation of conduct (non-merger), [11.2].

<sup>2</sup> ACCC Guidelines for Authorisation of conduct (non-merger), [11.3] – [11.4].

<sup>3</sup> 1994 Authorisation Determination, page 19; Former Submission, page 29.

provision which may substantially lessen competition.<sup>4</sup> Authorisation of the conduct at paragraph 6(c) was sought because this raises issues in relation to exclusive dealing.

8. In the 1994 Authorisation Determination, the ACCC:
  - (a) agreed that the OMA will not lessen competition in any relevant market;<sup>5</sup> and
  - (b) considered that there would be public benefits to the extent that the proposed plant improvements result in a reduction in the level of environmental pollution associated with the operation of the GPS (the JV Participants had proposed plant improvements at the GPS aimed at reducing chimney stack particle emissions and oxides of nitrogen emissions, and control of coal dust and drainage effluent);<sup>6</sup>
  - (c) was unable to determine the extent to which the arrangements relating to the proposed acquisition and operation of the GPS are likely to result in a reduction in the cost of power to Queensland consumers, but considered that any such reduction would be of benefit.<sup>7</sup>
9. In the 2010 Authorisation Determination, the ACCC considered there would be the following public benefits:<sup>8</sup>
  - (a) benefits associated with a mechanism that provides for a secure, reliable and cost effective supply of power to the Smelter, including contributions to the value of exports and the development of the Australian economy; and
  - (b) a mechanism that facilitates the supply of electricity into the National Electricity Market (**NEM**) and **enhances the flexibility of Stanwell's ability to utilise the GPS** to participate in the NEM.
10. In its 2010 Authorisation Determination, the ACCC did not consider that the amendments to the GPS arrangements would be likely to give rise to any significant competition detriments.<sup>9</sup>

#### **No substantial or significant change to the conduct or the nature of the authorisation**

11. Further to the Submission made to the ACCC on 20 July 2023, the applicant submits that the proposed amendments to the OMA do not change the conduct in respect of, or the nature of, the authorisation which has been granted in a way that is substantial or significant for the following reasons.
12. *First*, in relation to the quantitative element, while there have been a large number of amendments to the OMA, the combined effect of these amendments does not change the conduct or the nature of the authorisation that has been granted in a way that is substantial or significant – the conduct that has been authorised remains substantively the same. Under the amended OMA:
  - (a) the NRGGOS is still appointed to operate and maintain the GPS;
  - (b) the JV Participants have still agreed **the terms and conditions of NRGGOS' appointment** to operate and maintain the GPS, including the fee payable;
  - (c) the GPS Participants are still acquiring all operating and maintenance services for the GPS from NRGGOS; and
  - (d) while there have been minor amendments to the:
    - (i) clauses regarding the fees payable to the NRGGOS under the OMA (see rows 3 and 4, and other minor consequential amendments to Schedule 6, including for example row 6, in Attachment 1); and
    - (ii) clauses containing the other terms and conditions of the appointment of NRGGOS in the OMA (see, eg, rows 1, 2 and 5 – 12 in Attachment 1),

these amendments do not change the characterisation of the conduct, or the nature of the authorisations previously granted. Further detail about the amendments are set out in Attachment 1 and Attachment 2.

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<sup>4</sup> Former Submission, page 29.

<sup>5</sup> 1994 Authorisation Determination, [7.31].

<sup>6</sup> 1994 Authorisation Determination, [7.41].

<sup>7</sup> 1994 Authorisation Determination, [7.42].

<sup>8</sup> 2010 Authorisation Determination, [4.75].

<sup>9</sup> 2010 Authorisation Determination, [4.76].

13. *Second*, in relation to the qualitative element, the nature of the amendments to the terms and conditions of the appointment of the NRGGOS in the OMA, and the clauses regarding the fees payable to the NRGGOS under the OMA, are only periphery or ancillary to the conduct generating the public benefits identified by the ACCC in its 1994 Authorisation Determination and 2010 Authorisation Determination set out at paragraphs 8 and 9 above.
14. In those circumstances, it is submitted that the proposed amendments to the OMA can be considered by the ACCC as a minor variation that does not involve a material change in the effect of the authorisation of the OMA arrangements.
15. By way of example, in relation to the amendments to the fee payable to NRGGOS under the OMA (which are contained in clause 8 and Schedule 6 in the OMA):
- (a) The proposed amendments to the fee payable to the NRGGOS under the OMA include:
- (i) The introduction of [REDACTED], which has a purpose of [REDACTED] (see amendments to clause 8.1(c), and Schedule 6 clause 8A). Further detail about the [REDACTED] is included at Attachment 1. The introduction of this [REDACTED] does not change the authorised conduct as described at paragraph 6 above in any significant or substantial way. The introduction of this [REDACTED] is also ancillary to the conduct generating the public benefits.
- (ii) Providing further detail about the [REDACTED] (see amendments to clause 8.1(c)), and amending the [REDACTED] further detail about which is included at Attachment 1, and in summary:
- (A) in relation to the amendments to clause 8.1(c) – these amendments are operational, and provide for timing of the [REDACTED] which were already included in the OMA;
- (B) in relation to the amendments to the [REDACTED] – these amendments make minor adjustments to the [REDACTED]; and
- (C) table A2 contains a [REDACTED] and has been amended as a consequence of the changes to [REDACTED]. This amendment does not change the authorised conduct as described at paragraph 11 above in any way, and is ancillary to the conduct generating the public benefits.
- (iii) These amendments to the [REDACTED] do not change the authorised conduct as described at paragraph 6 above in any significant or substantial way, and are ancillary to the conduct generating the public benefits.
- (iv) Removing the [REDACTED] (see amendments to clause 8.11 of the OMA), further detail about which is included at Attachment 1. The removal of the [REDACTED] does not change the authorised conduct as described at paragraph 6 above in any significant or substantial way, and is ancillary to the conduct generating the public benefits.
- (v) Removing clause 8.13 which related to the [REDACTED] have been removed from the OMA. The removal of references to [REDACTED] in the OMA does not change the authorised conduct as described at paragraph 6 above in any significant or substantial way, and the previous references to the scheme in the OMA was only peripheral to the conduct that is central to generating a public benefit.
- (b) The applicant submits that these proposed amendments to the fee payable to NRGGOS do not change the authorised conduct as described at paragraph 6 above in any significant or substantial way. The fee payable to NRGGOS has been agreed by the JV Participants, and remains substantively the same subject to these minor proposed changes.

16. Further detail about the amendments to the OMA are set out at Attachment 1 and Attachment 2.

**No increase in the extent to which the conduct lessens competition**

17. As set out in the Former Submission, it is submitted that:<sup>10</sup>

- (a) Absent the joint venture, the JV Participants would not otherwise relevantly be in competition with each other. Thus, the joint appointment of an operator does not contravene the cartel provisions. In addition, there is no substantial lessening of competition as a result of the JV Participants continuing to acquire all operating and maintenance services for the GPS from NRRGOS. It is also necessary on a practical level for the operation of the GPS that there be a single operator (i.e., it would be impractical to split the operation and maintenance of the GPS by the owners' percentages interests in the GPS, with each JV Participant engaging a separate operator).
- (b) The continued appointment of NRRGOS by the JV Participants under the OMA to operate and maintain the GPS will not result in a lessening of competition in respect of the various services or supplies for the GPS.
- (c) While NRRGOS will continue to be paid jointly by the JV Participants, the JV Participants are not competitors and, if they were in any event, the exemption for collective acquisition of services in section 45AU of the CCA applies.

18. In the 1994 Authorisation Determination, the ACCC agreed that the OMA will not lessen competition in any relevant market.<sup>11</sup>

19. The applicant submits that the proposed amendments to the OMA do not change this position.

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<sup>10</sup> Former Submission, page 29. See also: 1994 Authorisation Determination, page 29.

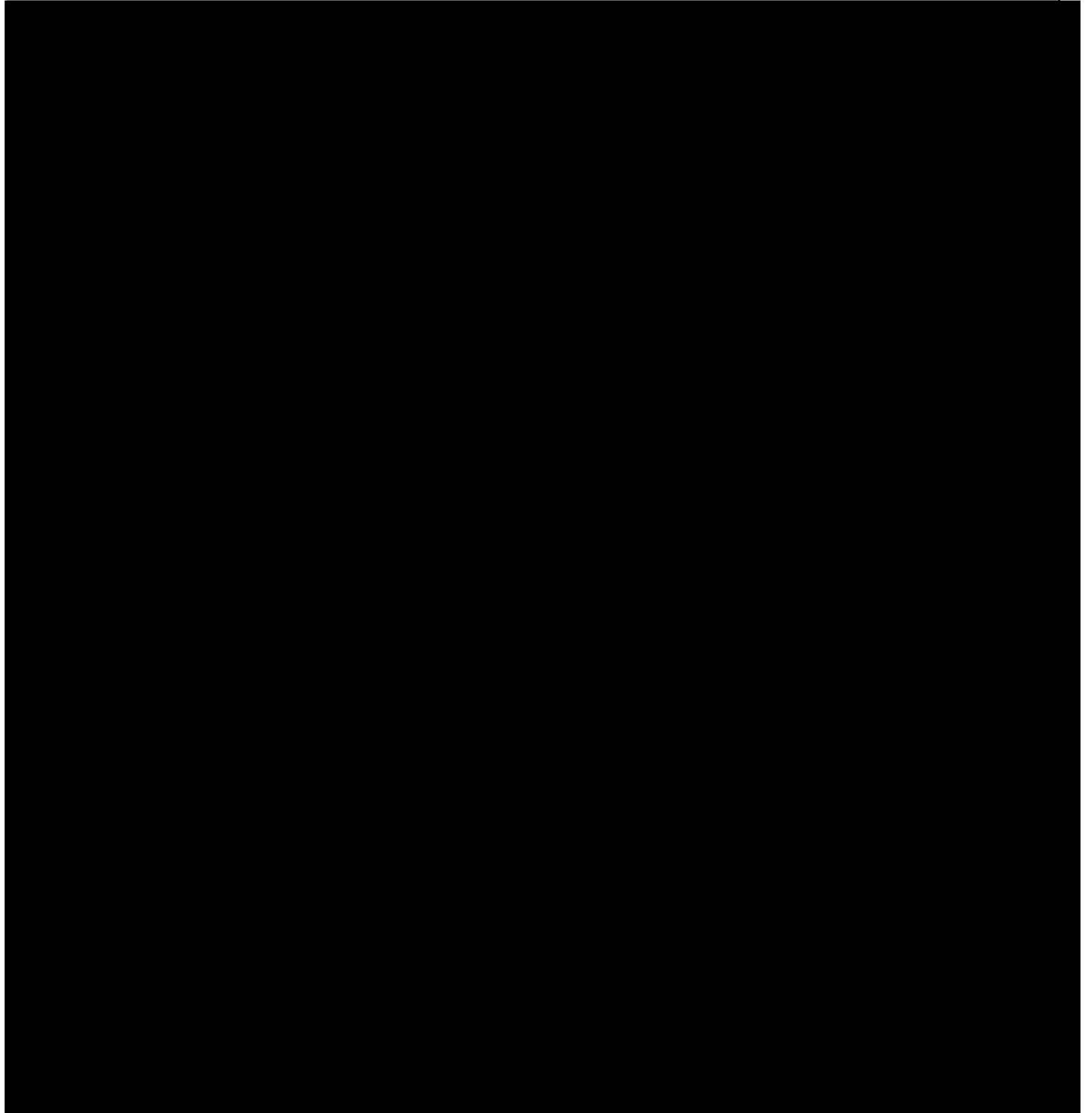
<sup>11</sup> 1994 Authorisation Determination, [7.31].

**Attachment 1 – Further explanation for amendments to the OMA**



**Minor variations to the OMA**

No.	Clause	Further explanation and context to amendment
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**Minor variations to the OMA**

<b>No.</b>	<b>Clause</b>	<b>Further explanation and context to amendment</b>
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**Minor variations to the OMA**

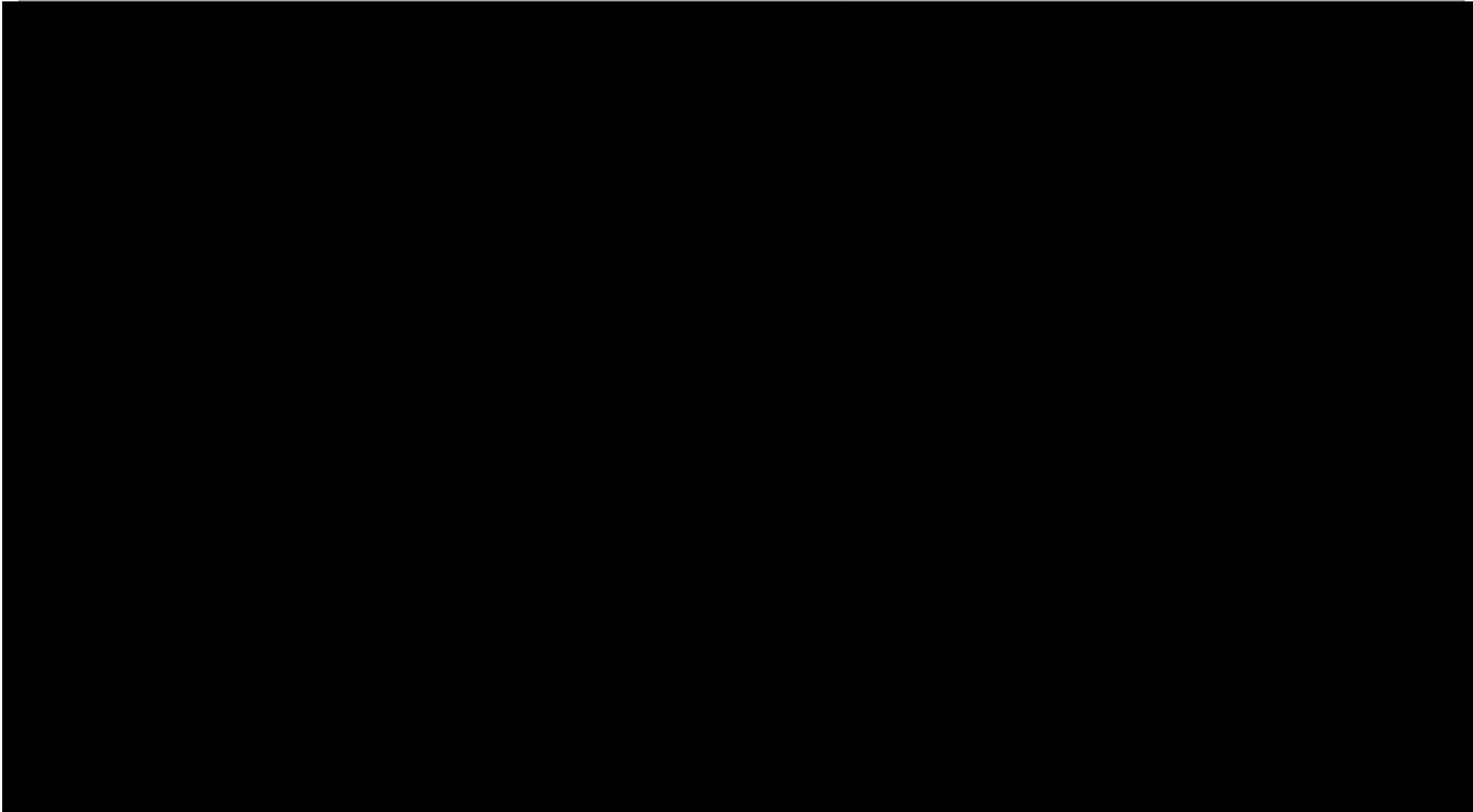
<b>No.</b>	<b>Clause</b>	<b>Further explanation and context to amendment</b>
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**Attachment 2 – Further explanation for amendments to the definitions in the OMA (clause 1.1)**

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**Minor variations to OMA**

Item	Definition	Further explanation and context to amendment
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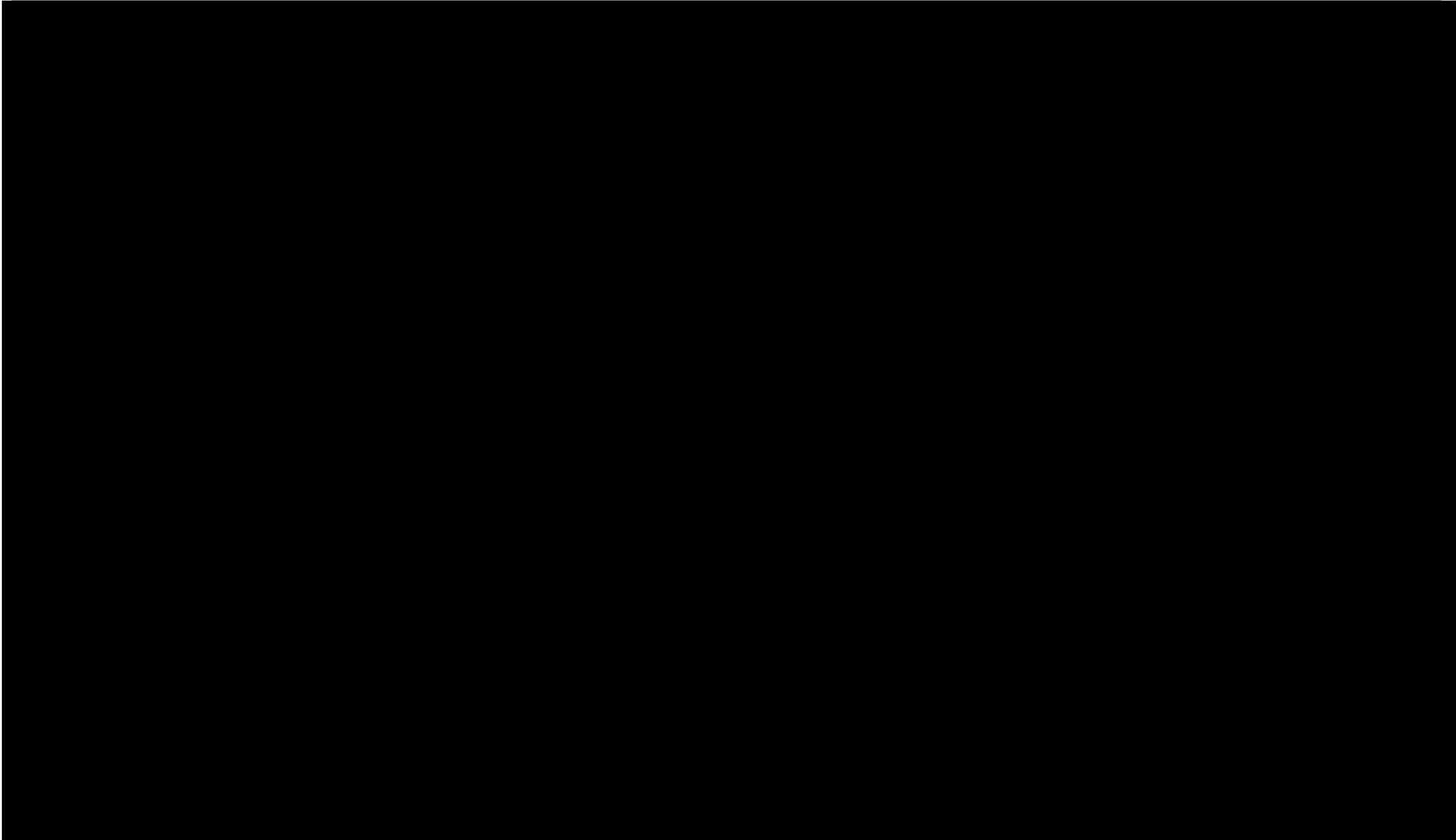


Minor variations to OMA

Item	Definition	Further explanation and context to amendment
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Minor variations to OMA

Item	Definition	Further explanation and context to amendment
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Minor variations to OMA

Item    Definition

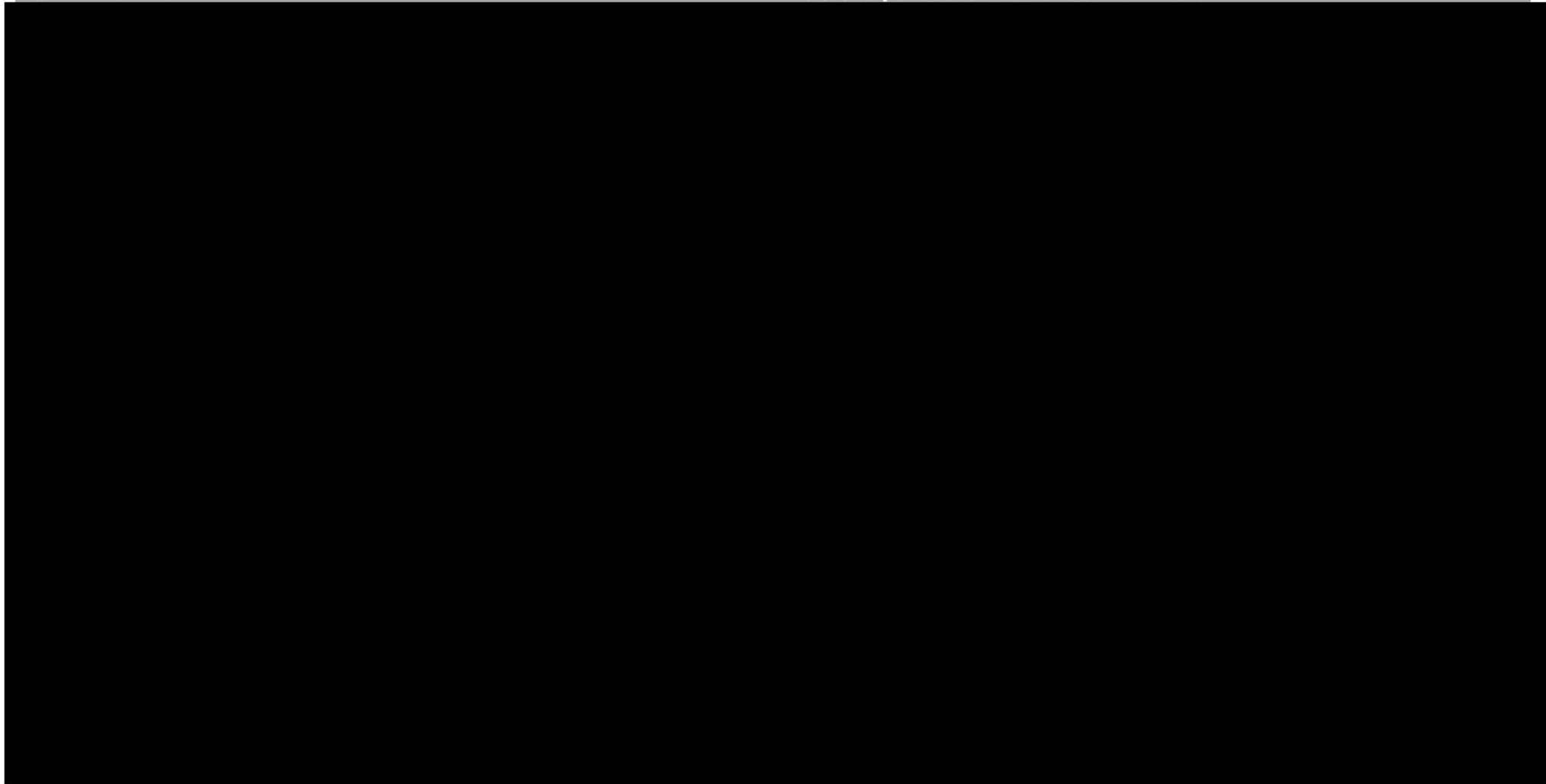
Further explanation and context to amendment



Minor variations to OMA

Item    Definition

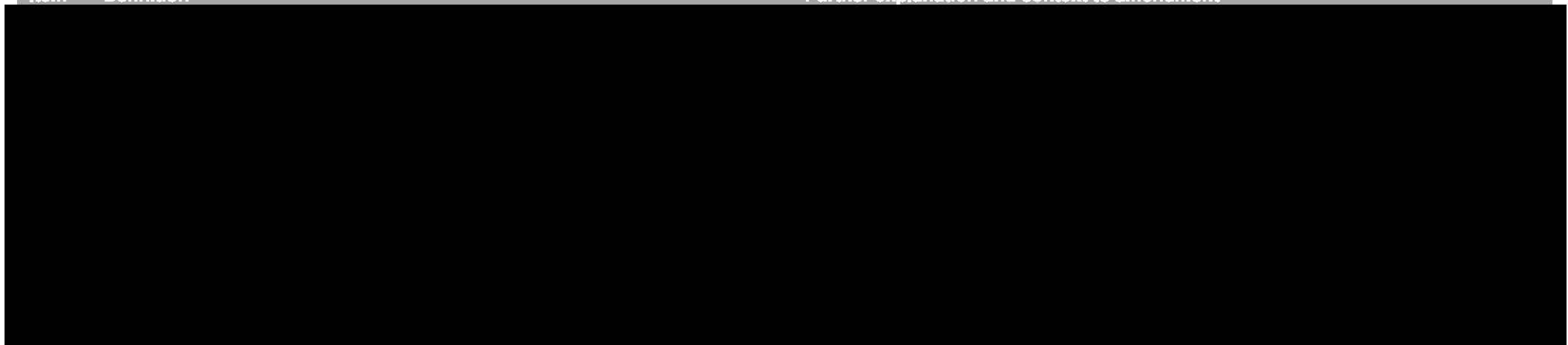
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Minor variations to OMA

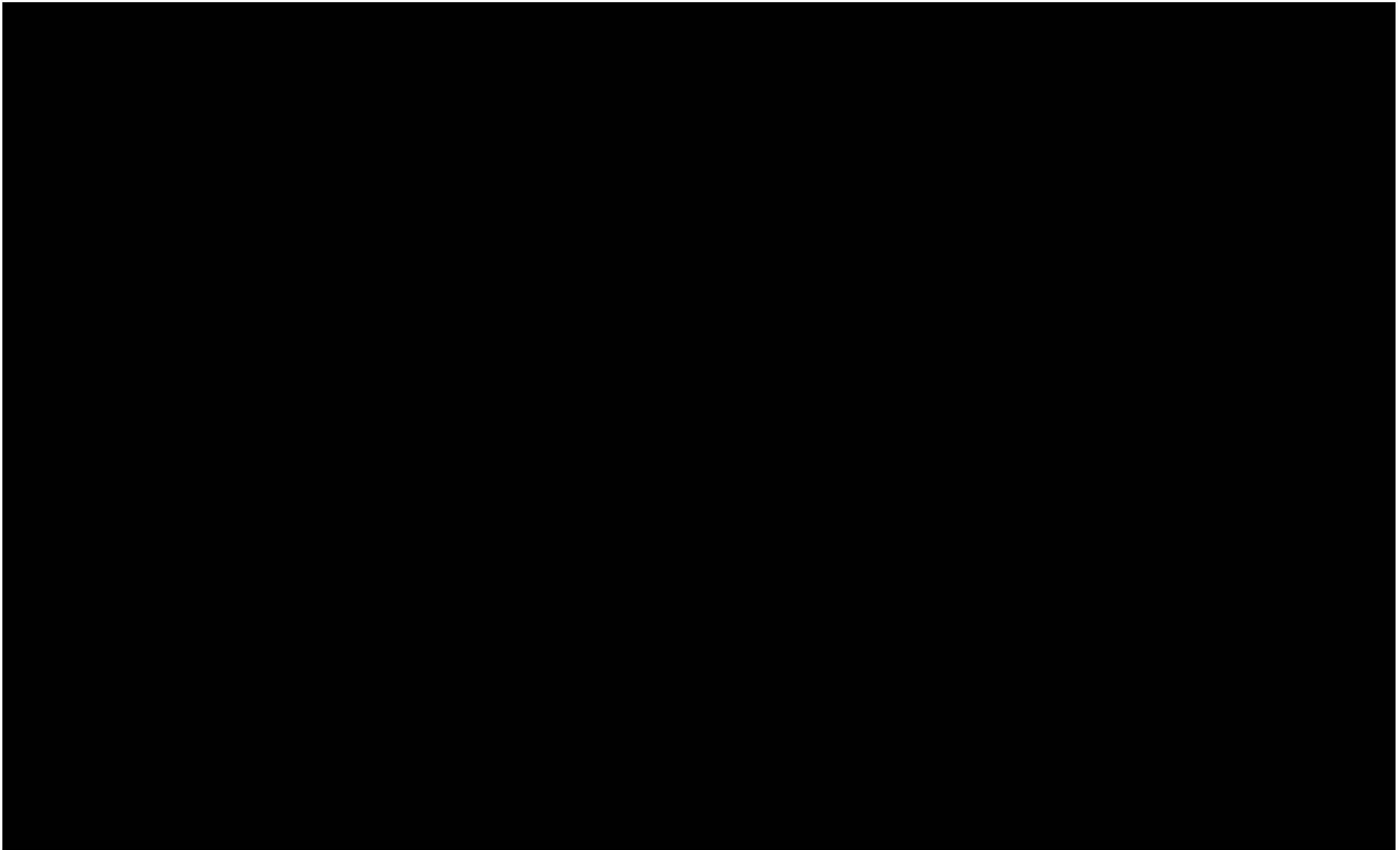
Item Definition

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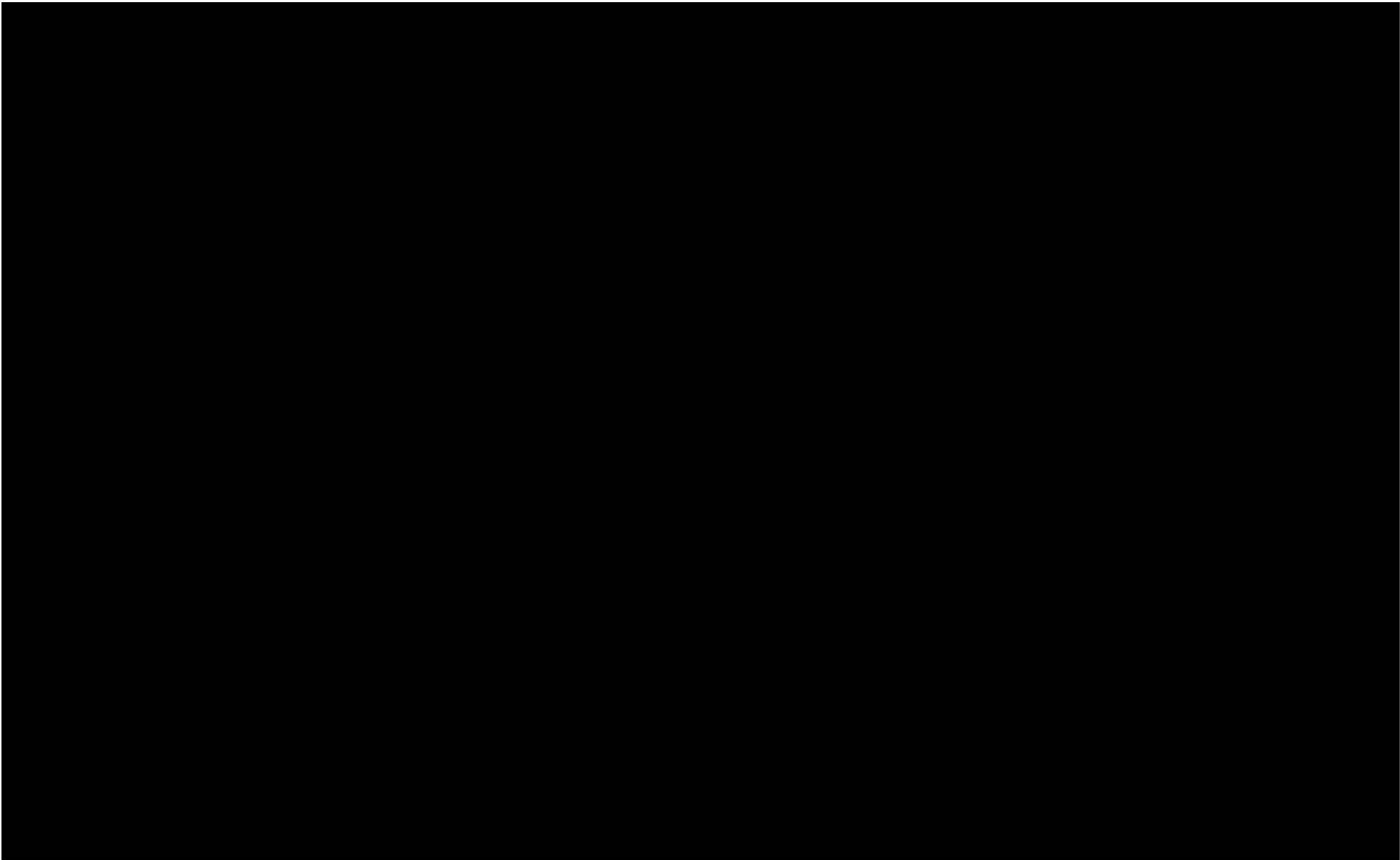
## Annexure A – GPS Diagram: Supply Chain Diagram

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**Annexure B – GPS Diagram: Scope of Authorisation**

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**Annexure C – GPS Diagram: Scope of Application**

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