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7 SEPTEMBER 2023

Dear Luke and Sophie

**Application for revocation and substitution of AA1000425: NSW Track Access collective bargaining**

We refer to the Application for revocation and substitution of AA1000425 submitted to the ACCC by One Rail Australia, Manildra Group, Pacific National, Qube, Southern Shorthaul Railroad, Sydney Rail Services, LINX and Aurizon (together, the **Applicants**) on 16 June 2023.

As discussed on 28 August 2023, the Applicants understand that the ACCC is now likely to issue a draft determination in relation to the Application in late September 2023, and publish its final determination some time after that.

The Applicants respectfully request that the ACCC grants interim authorisation in respect of some of the Proposed Conduct described in the Application so they can progress collective discussions with TfNSW, TAHE and ARTC prior to the likely date the ACCC will make its final determination.

We have set out further details to support the Applicants' request below.

**Likely timelines for progressing discussions with TAHE and ARTC**

Since the Applicants' submission to the ACCC dated 7 August 2023, both TAHE and ARTC have provided further information about the proposed timelines for progressing discussions on their respective access arrangements. In particular:

- on 10 August 2023, TAHE contacted all of the Applicants (as well as other industry stakeholders), seeking feedback by 7 September 2023 on broad pricing structures for the proposed new NSW track access agreement. TAHE has proposed a consultation process which involves:
  - rail operators providing feedback to TAHE by 7 September 2023
  - reserving time for one-on-one discussions with TAHE in relation to that feedback – week commencing 11 September 2023
  - a pricing information session - from October 2023

- rail operators providing any further feedback to TAHE – 27 November 2023, and
- in July 2023, ARTC contacted some of the Applicants to progress discussions in relation to the interstate access undertaking and related track access agreements, and the Applicants understand that ARTC is seeking further engagement over the coming month with a view to ARTC submitting its new access undertaking to the ACCC in Q4 2023.

#### **Request for interim authorisation**

Given these proposed timelines, and the likely timing for the ACCC's final determination, the Applicants respectfully request that the ACCC grants interim authorisation in respect of part of the Proposed Conduct to enable them to:

- collectively discuss and negotiate with TfNSW and TAHE the broad pricing principles that will apply to use of the MRN and CRN. In particular, ROG is seeking to provide collective views to TAHE ahead of the pricing information session scheduled for October 2023 to enable that session to be more informed and productive. The scope of these potential discussions and collective negotiations is set out in the Application for revocation and substitution and in the Applicants' submission dated 7 August 2023
- collectively discuss and negotiate non-price terms and broad pricing principles with ARTC prior to ARTC submitting its draft undertaking to the ACCC, and
- continue to engage in the conduct currently authorised under AA1000425 (collective negotiations of non-price terms of access to TfNSW's relevant rail networks) in the event the current authorisation expires before the ACCC issues a final determination in relation to the Application dated 16 June 2023,

(together, the **Interim Conduct**).

The Applicants consider that interim authorisation will enable them to engage effectively with TfNSW and TAHE in relation to the broad pricing principles that will apply under the proposed new NSW track access agreement, and will also enable them to commence collective discussions with ARTC in relation to the interstate access undertaking. Interim authorisation will therefore bring forward the benefits described in the Application by a number of months, and will not result in any public detriments. In particular:

- the Applicants are only seeking interim authorisation to enable collective discussions and negotiations with TfNSW, TAHE and ARTC. The Applicants are not seeking interim authorisation in respect of discussions or negotiations with any other RNOs (i.e. as the Applicants do not anticipate that any collective negotiations with those other RNOs will occur prior to the ACCC's final determination)
- as set out in the Application and the Applicants' submissions dated 16 June 2023 and 7 August 2023, the Interim Conduct will not involve collective negotiations in relation to the actual prices or price terms available to individual Applicants
- even if the ACCC grants interim authorisation, participation in any collective negotiations by TfNSW, TAHE and/or ARTC remains entirely voluntary
- the Interim Conduct relates only to collective negotiations and discussions to progress TfNSW, TAHE and ARTC's proposed standard access arrangements. The Applicants do not anticipate that any agreements will be entered into during that time (although this remains a matter for each individual access seeker)
- the Interim Conduct can cease at any time and there will be no permanent changes to market structure or competitive dynamics, and conduct that cannot be 'unwound' if authorisation is not ultimately granted

- the Interim Conduct spans a very limited timeframe (a matter of weeks to a month or two) between the date the ACCC grants interim authorisation and between the expiry of the current Authorisation and/or the date of the final determination, and
- the Interim Conduct is referable to a narrow set of circumstances (e.g. where TAHE has sought feedback on pricing options and structures as part of its industry engagement process, and ARTC is requesting industry input to progress its draft access undertaking before it is submitted to the ACCC).

The Applicants consider that the ability to engage collectively with TAHE, in line with its proposed timeline, will enable the ROG to identify issues earlier, consider a common position, and discuss key issues with TAHE. Without interim authorisation, TAHE would need to engage repeatedly and individually with each Applicant (and other customers) to obtain their views, analyse and consolidate those views, and provide feedback. Collective discussions will expedite the process and lead to a better-informed information session in October 2023. The one-on-one discussions will also remain available if any Applicant or TAHE wishes to take that option (in addition to, or instead of, collective discussions via the ROG).

In relation to ARTC, the Applicants consider that there will be substantial benefits in engaging collectively with ARTC before it submits the draft replacement undertaking to the ACCC (which may happen any time from October 2023). The Applicants consider that prior and proactive consultation is more likely to ensure that the draft undertaking appropriately takes into consideration the Applicants' collective views and addresses any concerns as early as possible.

#### **Publication on the ACCC's public register**

The Applicants acknowledge that this letter will be made public and can be placed on the ACCC's authorisation register.

If the ACCC has any further questions, the Applicants would be pleased to assist.

Yours sincerely



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