



Supplementary Reasons and Amendment

Final Decision on the Proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline

Submitted by

EPIC ENERGY (WA) TRANSMISSION PTY LTD

**Independent Gas Pipelines Access Regulator
Western Australia**

18 November 2003



CONTENTS

BACKGROUND	3
EPIC ENERGY'S PROPOSED SERVICES POLICY	3
BASIS FOR THE FIRM SERVICE AS THE ONLY REFERENCE SERVICE	4
DESCRIPTION OF NON-REFERENCE SERVICES	6
SEASONAL SERVICE	7
OTHER POSSIBLE REFERENCE SERVICES	9
ZONES 9 AND 10	9
GAS QUALITY SPECIFICATION	11
SURCHARGE PROVISIONS	12
LIABILITY	14

BACKGROUND

1. On 23 May 2003 I issued my Final Decision¹ on the proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline (“**DBNGP**”).
2. Western Power Corporation has claimed that the Final Decision is affected by reviewable error.
3. I have formed the view that there is a need for me to clarify the reasons for my Final Decision by expressing views I formed in making my Decision but which were not recorded in my published reasons. I have also formed the view that it is necessary and appropriate for me to correct certain matters in my Final Decision.²

EPIC ENERGY’S PROPOSED SERVICES POLICY

4. Epic Energy elected in its proposed Services Policy to distinguish between a Reference Service and a range of Non-Reference Services.
5. The Services Policy would commit Epic Energy to making available a single Service (the “**Firm Service**”) to Prospective Users as a Reference Service.
6. The Services Policy also indicates that Epic Energy is prepared to negotiate (subject to operational availability) on the provision of other Services or elements of Services sought by a Prospective User and for which a Reference Tariff is not specified in the Access Arrangement (“**Non-Reference Services**”). In sub-section 6.1 Epic Energy stated that a non-exhaustive list of Non-Reference Services that Epic Energy would be prepared to negotiate is as follows.
 - Secondary Market Service, comprising a trading system to be operated by Epic Energy for trading Firm Service capacity on a daily “spot” basis. Epic Energy has proposed “Secondary Market Rules” and “Secondary Market Terms and Conditions” for this system, which were submitted to me as part of the proposed Access Arrangement documentation.
 - Park and Loan Service, proposed as a negotiated, interruptible Non-Reference Service to allow Users to remedy imbalances (between capacity shipped and delivered) in excess of the Firm Service imbalance limits.
 - Seasonal Service, proposed to comprise capacity made available by Epic Energy out of capacity over and above Firm Service capacity that becomes available due to seasonal factors. The Seasonal Service is proposed as a negotiated Non-Reference Service to allow Shippers to contract additional capacity for particular months of the year to supplement their contracted Firm Service capacity.

¹ Capitalised terms used in this document are defined terms with definitions provided either in this document, in the Code, or in Epic Energy’s proposed Access Arrangement documents.

² *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597

- Peaking Service, proposed to cater for hourly-capacity demands at a Delivery Point in excess of 120 percent of Maximum Hourly Quantity (“**MHQ**”, equal to one twenty-fourth of the Delivery Point Maximum Daily Quantity – “**MDQ**”).
 - Metering Information Service.
 - Pressure and Temperature Control Service.
 - Odourisation Service.
 - Co-mingling Service.
7. Epic Energy also defined Non-Reference Services to include Services provided by Epic Energy under contracts entered into prior to commencement of the Access Arrangement Period.

BASIS FOR THE FIRM SERVICE AS THE ONLY REFERENCE SERVICE

8. Section 3.2 of the Code requires consideration of Services that may be sought by a significant part of the market. A description of one or more such Services must be included in the Access Arrangement, as well as any Service or Services that in my opinion, as the Relevant Regulator, should be included in the Services Policy. Pursuant to section 3.3(a) of the Code, the Access Arrangement must include a Reference Tariff for at least one Service that is likely to be sought by a significant part of the market. Such a Service is termed a Reference Service.
9. In addition, section 3.3(b) of the Code makes provision for the proposed Access Arrangement to include a Reference Tariff for each Service that is likely to be sought by a significant part of the market and for which I consider a Reference Tariff should be included.
10. As the Access Arrangement proposes the Firm Service as the only Reference Service, I considered:
- whether the Firm Service is a Service likely to be sought by a significant part of the market;
 - whether the Firm Service should be a Reference Service;
 - whether there are other Services that should be described in the proposed Access Arrangement; and
 - if so, whether any of those Services are likely to be sought by a significant part of the market and should be included as a Reference Service.
11. With respect to the Firm Service, Users submitted to me that no significant part of the market for gas transportation in the DBNGP is likely to seek a Service in the form, and on the terms and conditions, proposed in the Firm Service. Therefore, it was submitted, the Firm Service does not satisfy the requirement of the Code that the Service Provider offer a Service that is likely to be sought by a significant part of the market.

12. In assessing whether a Service is likely to be sought by a significant part of the market, it was not necessary for me to consider whether there was significant demand for the precise terms and conditions proposed in the Firm Service, that being a matter for consideration under section 3.6 of the Code once a Reference Service(s) had been identified. However, in assessing whether the Access Arrangement submitted by Epic Energy complies with the Code, I was required to consider whether the nature of the Service described in the proposed Access Arrangement, considered in the context of the range of Services that might be provided using the pipeline, identifies a Service that is likely to be sought by a significant part of the market.
13. In my Final Decision, I indicated that I was satisfied that the Firm Service is a Service that is likely to be sought by a significant part of the market and was appropriate to be specified as a Reference Service.³ In addition to the matters referred to in my reasons, in coming to my view about the Firm Service, I took the factors discussed below into account.
14. At the outset, I should explain that by the term “T1 Service” I refer, both here and in my reasons at paragraphs 60-63 of my Final Decision, to the nature of the Service (excluding the specific terms and conditions) that would be obtained by a User under a contract for T1 Capacity under the *Dampier to Bunbury Pipeline Regulations (1998)* (WA) and DBNGP Access Manual (1998).
15. Firstly, while the Firm Service and the T1 Service differ in regard to certain of the terms and conditions on which each product would be provided and in respect of the “packaging” of the basic transmission Service with ancillary Services, I am satisfied that both of these Services have as their basic character a non-interruptible forward-haul transmission Service. A Service of this character is a type of Service typically demanded by most customers from gas transmission pipelines such as the DBNGP.
16. Secondly, several existing Users of the DBNGP had submitted to me that they did not request the inclusion in the Access Arrangement of a Reference Service that is precisely the same as the T1 Service, but rather a Service that is “equivalent” to the T1 Service.⁴ Moreover, these Users have submitted to me that the request for a Reference Service that is equivalent to the T1 Service is not the result of demand for the characteristics of the bundle of Services which make up the product represented by the T1 Service *per se*, but rather the demand for such a bundle of Services arises from a desire to facilitate determination of a “statutory price” that would apply to existing contracts for the T1 Service.⁵
17. Thirdly, Epic Energy had indicated that the Firm Service “was developed after consultation with a number of existing shippers and producers”.⁶ I had regard to this

³ Final Decision, 23 May 2003, para 37

⁴ Blake Dawson Waldron Lawyers, 15 August 2001, Submission to the Gas Access Regulator on the T1-Equivalent Reference Service: AlintaGas Sales Pty Ltd; Apache Energy; North West Shelf Gas Pty Ltd; Wesfarmers CSBP Limited; WMC Resources Ltd; Western Power Corporation; Worsley Alumina Pty Ltd, section 6.3.1.

⁵ *Ibid.* section 6.3.3.

⁶ Access Arrangement Information, 28 July 2000, p 4.

as evidence that Epic Energy had designed the Firm Service as a Service that is likely to be sought by a significant part of the market.

18. In relation to the Services Policy of the proposed Access Arrangement I gave consideration, in my Final Decision, to the Services included by Epic Energy in the Services Policy and described as Non-Reference Services. I took the view, in my Final Decision, that these Services were likely to be sought by a significant part of the market and that they should be included in the Services Policy.⁷

DESCRIPTION OF NON-REFERENCE SERVICES

19. I indicated in my Final Decision that I had some concern as to the lack of information describing the nature of the proposed Non-Reference Services and thus whether the Services Policy met the requirement of section 3.2(a) of the Code to “include a description of one or more Services that the Service Provider will make available to Users and Prospective Users”. I accepted, however, that the list of Services utilises terms that have generally understood meanings within the gas transmission industry and I took the view that no further descriptive information in the Access Arrangement itself is necessary to comply with section 3.2(a) of the Code.⁸
20. For the purpose of clarifying the reasons for my Final Decision, I indicate here that my understanding of the nature of the proposed Non-Reference Services at the time of my Final Decision was as follows.
- Secondary Market Service: means a secondary market established by Epic Energy based on Secondary Market rules amended or varied by Epic Energy from time to time, and providing for Users of the Firm Service to sell anticipated unused capacity for a Day.
 - Park and Loan Service: is a Service where Epic Energy agrees that a Shipper may deliver a quantity of gas into the DBNGP at a Receipt Point on a Day, without the Shipper taking delivery of that gas at a Delivery Point on the same Day (“Park Service”) OR where Epic Energy agrees that a Shipper may take a quantity of gas at a Delivery Point without supplying an equivalent quantity of gas at a Receipt Point on the same Day and consequently that gas is delivered to the Shipper out of Linepack (“Loan Service”).
 - Seasonal Service: means capacity that becomes available to Epic Energy in relation to a particular month out of incremental capacity available due to seasonal factors.⁹
 - Peaking Service: provision by Epic Energy of a Service to enable an increase in the MHQ at a Delivery Point.

⁷ Final Decision, para 65.

⁸ Final Decision, para 67.

⁹ See further clarification at paragraph 21 and following.

- Metering Information Service: the provision of metering and operational data to a third party.
- Pressure and Temperature Control Service: the provision by Epic Energy of a Service to vary the temperature and/or pressure at which Epic Energy shall deliver gas at a Delivery Point.
- Odourisation Service: the provision of a Service by Epic Energy to odourise the gas being delivered at a Delivery Point.
- Co-mingling Service: a Service whereby Epic Energy agrees with a Shipper to blend Out-of-Specification gas with the main gas stream such that the aggregate of the main gas stream is within specification.

SEASONAL SERVICE

21. The term “seasonal service” may commonly be used to describe two forms of Service.
22. The first form of seasonal Service is a Service that provides for utilisation of capacity of the DBNGP that is only available for part of the year because the capacity of the pipeline is related to factors that vary on a seasonal basis. This is the form of the seasonal Service offered by Epic Energy under the proposed Access Arrangement (notwithstanding the reference to a narrower form of seasonal Service in paragraph 2.1(b)(ii) of Epic Energy’s Access Arrangement Information which refers only to capacity available due to ambient temperature). It is also the form of seasonal Service that I refer to in paragraphs 69 to 74 of my Final Decision.
23. The second form of seasonal Service is a Service that provides for a User to contract for different levels of pipeline capacity (typically expressed as MDQ) for different parts of the year according to that User’s different demands for the service in different parts of the year, not necessarily related to the seasonal availability of capacity. This appears to be the form of seasonal Service provided under the *Dampier to Bunbury Pipeline Regulations 1998* (WA) and the DBNGP Access Manual (1998).
24. Information provided to me by Epic Energy prior to my Final Decision indicated that two current Users of the DBNGP utilise the ability under the T1 Service to contract for different levels of pipeline capacity in different periods of the year. One of these Users has contracted for greater capacity in the period defined in the Access Manual as “Summer” and the other has contracted for greater capacity in the period defined in the Access Manual as “Winter”.¹⁰
25. I was satisfied that it would be typical for a User of the DBNGP that is transporting gas for retail sale to domestic households and small businesses to have greater demand for gas transmission in cooler months of the year. As one of the principal seasonal factors affecting pipeline capacity is ambient temperature (with higher pipeline capacity corresponding to cooler ambient temperatures in winter months) this demand would be able to be met, at least in part, by the seasonal Service proposed by

¹⁰ DBNGP Access Manual, 10 March 1998, Part 1. Summer is defined as the period from 8.00am on 1 November to 8.00am on 1 May, and winter as the period from 8.00am on 1 May to 8.00am on 1 November.

Epic Energy. I was satisfied that there is a demand by a significant part of the market for a seasonal Service as proposed by Epic Energy and I therefore maintain my conclusions in my Final Decision that the Services Policy should specify this as a Service to be provided.¹¹

26. In my Final Decision I did not consider whether the second form of seasonal Service should be required to be provided as part of the Firm Service or as a further Reference Service or as a Non-Reference Service. I now do so by reference to the material before me when I made my Final Decision.
27. I am satisfied that it would be possible for a User of the DBNGP transporting gas for use in electricity generation – particularly generation to meet peak demand conditions for electricity – to have greater demand for gas transmission in warmer months of the year. While there may be some seasonal factors that give rise to availability of capacity in summer months (such as peak demand of other Users in winter months), the seasonal Service proposed by Epic Energy would not typically cater for provision of capacity in summer months.
28. I am satisfied that there is a demand for the second type of seasonal Service described in paragraph 23 above, which provides for Users to contract for greater capacity according to seasonal variation in demand for gas transmission regardless of whether or not this demand coincides with seasonal variation in the capacity of the DBNGP. However, in my view provision of such a Service could reduce Firm Service capacity able to be contracted on a year-round basis. This is significant because for the term of the proposed Access Arrangement the DBNGP will need to be operated close to capacity to meet demand. Moreover, reduced ability to provide Firm Service capacity on a year-round basis would be likely to result in a higher Reference Tariff for the Firm Service.
29. I am also aware of other options available to Users with peak demands for pipeline capacity in summer months to secure such capacity only for the period required. These include:
 - purchase of additional capacity and trading with other Users, including on a spot basis;
 - purchase of capacity for the entire year and sale of capacity in months that it is not required; and
 - negotiation with Epic Energy for provision of capacity only in the months required, as a Service outside of the scope of Services provided for in the Services Policy (although I recognise that there would be no obligation for Epic Energy to provide such a Non-Reference Service).
30. While recognising that requiring the provision of a seasonal Service of this type would be in the interests of some Users and Prospective Users, I am not satisfied that requiring Epic Energy to provide such a Service would be consistent with the economically efficient use of the DBNGP, or the legitimate business interests of Epic

¹¹ Final Decision, para 74.

Energy in its operation of the DBNGP. To include the seasonal Service of the type referred to in paragraph 23 above in the Services Policy could adversely affect the utilisation of capacity and Epic Energy's legitimate business interests where capacity is reserved for only part of the year, but this capacity is not available out of incremental capacity available due to seasonal factors.

31. I am therefore of the view that, in these circumstances it is neither practical nor reasonable to require a seasonal Service of the type described in paragraph 23 above to be included in the Services Policy.
32. In my Final Decision I expressed reasons for the view that Epic Energy should not be required to provide the proposed seasonal Service as a Reference Service or as part of the Firm Service.¹² In my view, noting the distinction between the two types of seasonal Service described above, those reasons are also applicable to the seasonal Service referred to in paragraph 23 above. As stated above, requiring Epic Energy to provide a seasonal Service of the type referred to in paragraph 23 could result in a higher Reference Tariff when it is not a Service sought by all Users. I am further of the view that for a seasonal Service of the type described in paragraph 23, the costs of providing such a Service would vary on a case by case basis and would be difficult to predict in advance of the Service being provided. As such, there would be considerable practical difficulty in making that Service a Reference Service.

OTHER POSSIBLE REFERENCE SERVICES

33. In my Final Decision I considered, but did not require, the Non-Reference Services proposed by Epic Energy to be either individually provided as Reference Services or to be incorporated into another Reference Service.
34. The reasons for my view were that each Non-Reference Service proposed by Epic Energy is likely to vary in its nature and in its specific terms and conditions according to the particular requirements of the User and the capacity of the DBNGP for the Service to be provided at the times and locations required by different Users. It follows that the costs of Service provision could vary significantly between Users. For these reasons, I considered that it would be both practically difficult and of limited benefit to Users and Prospective Users to define a single set of terms and conditions for each or for all of the proposed Non-Reference Services and an associated Reference Tariff or Tariffs.

ZONES 9 AND 10

35. In my Final Decision, my consideration of the Reference Tariff proposed by Epic Energy for the Firm Service, included consideration of, inter alia, the zonal structure of the Reference Tariff and, in particular, the division of that part of the pipeline south of Compressor Station 9 into two zones (zones 9 and 10).¹³

¹² Final Decision, para 74.

¹³ Final Decision, para 396 – 406.

36. Taking into account the required amendments of the proposed Access Arrangement specified in my Final Decision, and in particular, the amendment of provisions relating to the “compression charge” components of the Reference Tariff,¹⁴ the division of the pipeline into zones has relevance only in respect of one of the charges that make up the Reference Tariff – the Pipeline Capacity Charge. In my Final Decision I recorded my assessment of the zonal structure of the Pipeline Capacity Charge against criteria of “efficiency” and “equity” and found no basis to object to the proposed zonal structure on the basis of either criterion.¹⁵
37. As indicated in my Final Decision, I considered that the zonal structure proposed for the Pipeline Capacity Charge (which establishes an allocation of costs across Users) is consistent with the principles of section 8.38 of the Code,¹⁶ in particular that it meets the objectives of section 8.1 of the Code and is otherwise fair and reasonable. In addition to the reasons stated in my Final Decision, this conclusion was reached after consideration of the following factors.
38. Through providing for the recovery of a share of Total Revenue, the zonal structure for the Pipeline Capacity Charge provides Epic Energy with the opportunity to earn a stream of revenue that covers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service which is an objective pursuant to section 8.1(a) of the Code.
39. The zonal structure for the Pipeline Capacity Charge results in a level of gas transmission cost that for any User is likely to be in excess of the avoidable costs of providing the Firm Service to that User, but less than the cost that would be incurred in providing the Firm Service to that User on a stand-alone basis. As such, I considered that the zonal structure for the Pipeline Capacity Charge provides for the recovery of the “fixed” costs of providing the Firm Service (consistent with the objective of section 8.1(a) of the Code) and is consistent with a tariff structure that may occur as an outcome of a competitive market (consistent with the objective in section 8.1(b) of the Code).
40. I accepted that the zonal structure of the Pipeline Capacity Charge results in a “stepped” tariff as the distance of gas transmission in the pipeline increases. I also accepted that the difference in tariffs between locations of Delivery Points either side of a zone boundary could, at least in principle, motivate a User to construct an additional pipeline to enable partial bypass of the DBNGP and to take delivery of gas at a location upstream of a zone boundary. I considered that the evidence before me did not establish that the difference in tariffs between zones would be of sufficient magnitude to motivate a User to behave in this manner. I was also aware that if such a situation did arise, Epic Energy would face a strong incentive to negotiate a different tariff with the relevant User. As such, I was not convinced that the zonal structure of the Pipeline Capacity Charge is likely to distort investment decisions in

¹⁴ Final Decision, para 398.

¹⁵ Final Decision, para 399, 400.

¹⁶ Section 8.42 of the Code relates to the allocation of Revenue (Costs) between Users and requires that a particular User’s share of the portion of Total Revenue to be recovered from sales of a Reference Service is consistent with the principles described in section 8.38.

pipeline infrastructure and hence I did not consider the zonal structure to be inconsistent with the objective of section 8.1(d) of the Code.

41. Taking into account the factors set out in paragraphs 39 and 40, I was of the view that the zonal structure of the Pipeline Capacity Charge is consistent with efficiency in the level and structure of the Reference Tariff and would be neutral to providing an incentive to reduce costs and may provide an incentive to develop the market for Reference and other Services (sections 8.1(e) and (f) of the Code).
42. I was of the view that the objective for a Reference Tariff as set out in section 8.1(c) of the Code did not have direct relevance to consideration of the zonal structure of the Pipeline Capacity Charge. I was also of the view that there is no conflict between the objectives of section 8.1 of the Code in consideration of the zonal structure of the Pipeline Capacity Charge.

GAS QUALITY SPECIFICATION

43. In relation to the gas quality specification that forms part of the terms and conditions for the Firm Service, I took the view in my Final Decision that it is reasonable that Epic Energy maintain discretion over acceptance of Out-of-Specification gas, as provided for in clause 2.3 of the proposed Access Contract Terms and Conditions.
44. An absolute discretion to accept Out-of-Specification gas as part of the Firm Service is the same as Epic Energy having no obligation to accept such gas, i.e. Epic Energy may refuse to accept Out-of-Specification gas as part of the Firm Service. I concluded that such an outcome is reasonable. In coming to this view, I took into account the following factors.
45. Firstly, the acceptance of Out-of-Specification gas into the DBNGP may give rise to costs for Epic Energy. Epic Energy may not be able to recover these costs from a User of the Firm Service, who is able to insist on paying just the Reference Tariff for that Service.
46. Secondly, the gas specification stated in Epic Energy's Access Contract Terms and Conditions and the discretion for Epic Energy to refuse to accept Out-of-Specification gas applies only to the Firm Service. The Access Contract Terms and Conditions, including the gas specification and the provisions in relation to acceptance of Out-of-Specification gas, would not apply to Services, including the Firm Service sought on the basis of other terms and conditions, unless agreed to as an outcome of negotiation or arbitration of an access request for another Service. Epic Energy indicated, prior to my Final Decision, its willingness to consider acceptance of Out-of-Specification gas by inclusion of a Co-mingling Service as a Non-Reference Service in the proposed Services Policy. In the event of a dispute in regard to an access request for a Service involving receipt into the DBNGP of Out-of-Specification gas, a Prospective User would have resort to arbitration under the provisions of section 6 of the Code.
47. In view of the inclusion of the Co-mingling Service in the Services Policy of the proposed Access Arrangement, I was not convinced that the discretion for Epic Energy to accept or not accept Out-of-Specification gas under the terms and conditions of the Firm Service is unreasonably contrary to the economically efficient

operation of the DBNGP, the public interest, nor the interests of Users and Prospective Users. I was also mindful that the acceptance of Out-of-Specification gas potentially has ramifications for the safe and reliable operation of the pipeline and that this would support provision for the discretion of Epic Energy as to the acceptance of Out-of Specification gas.

48. Finally, I note that the Co-mingling Service is to be provided as a Non-Reference Service which allows parties to negotiate delivery of Out-of-Specification gas and that such negotiation will take into account any cost of providing the Service. This approach is more appropriate where the specific parameters for Out-of-Specification gas will need to be agreed which in itself is a matter affected by the quality of gas delivered into the DBNGP by other Users. Costs (and therefore price) will vary depending upon the nature and extent of variation from the gas specification. Epic Energy would be obliged to provide the Service unless it could demonstrate, acting as a prudent pipeline operator, it was unreasonable to do so.

SURCHARGE PROVISIONS

49. In Epic Energy's proposed Access Arrangement, the terms and conditions for the Firm Service include various charges and surcharges, being the Out of Specification Gas Charge, the Nominations Surcharge, the Excess Imbalance Charge, the Peaking Surcharge and the Unavailability Charge. In my Final Decision I referred to these items collectively as penalties and I considered whether these were, pursuant to section 3.6 of the Code, reasonable. As was the case in determining the reasonableness of all terms and conditions in my Final Decision, in assessing whether the penalties should be included in the proposed Access Arrangement, where appropriate, I gave weight, as fundamental elements in my assessment, to the factors listed in section 2.24 of the Code.
50. When I used the term "penalty" in my Final Decision, I did so on the basis that the proposed Access Arrangement gave Epic Energy the ability to impose a monetary amount upon Users to penalise specific conduct engaged in by Users which caused actual pecuniary loss or damage or was likely to cause loss or damage to other Users and/or Epic Energy due to its effects on the operation of the pipeline.
51. However, based upon Epic Energy's submissions, I considered that Epic Energy would only be able to impose such a monetary amount where actual loss or damage was caused by the particular behaviour or the behaviour threatened the integrity of the pipeline. For example, I relied upon submissions by Epic Energy that the penalties were justified in circumstances where the "*impact of **excessive** imbalance of hourly peak flows can have a catastrophic consequence on the integrity of the pipeline system*".¹⁷ Further, I relied upon examples given by Epic Energy supporting the application of penalties. An example by Epic Energy showed "*the impact on Kwinana Junction pressure due to **prolonged** maximum hourly quantities above the permissible level (as proposed by Epic Energy) for this Delivery Point. In the first graph, the system performs to its designed conditions by supporting maximum hourly*

¹⁷ Epic Energy submission CDAP#2 Additional Response to DD Amendments, 28 February 2003 at paragraph 5.4 (emphasis added).

*quantity of up to 120%. In the second graph the maximum hourly quantity is increased to 125% while keeping the total daily throughput at the same level as the first graph. The results show that the pipeline pressure collapsed at the end of day one. This would result in an interruption to all customers downstream of Kwinana Junction”.*¹⁸

52. It was in light of these submissions that I understood Epic Energy intended to impose penalties where the behaviour caused pecuniary damage or loss and also in circumstances where the behaviour threatened the integrity of the pipeline even though, for serendipitous reasons, no actual pecuniary loss was caused by the behaviour in a particular case. For example, behaviour such as prolonged imbalance of a significant quantity that would otherwise cause actual pecuniary loss may not cause such loss because it occurred in circumstances where coincidental behaviour by another party (including the Service Provider) counteracted the effect of the first mentioned behaviour.
53. Further, in my Final Decision I concluded that, in all but one case, the level of the monetary liability proposed in the Access Arrangement was unreasonable and I required an amendment to reduce the level of the charge. In considering the level at which the charge should be set, I took into account common industry practice. In doing so, I considered the extent of the loss and damage that may be caused by the particular behaviour in respect of which the charges may be imposed. I was aware that the consequences of such behaviour were such that it would make precise pre-estimation of loss or damage almost impossible as the consequences could vary in value and be up to many millions of dollars.
54. I was also mindful of the fact that the behaviour, the subject of the penalties, has the potential to adversely affect the operational and technical requirements necessary for the safe and reliable operation of the pipeline and that such behaviour could cause loss of supply without warning. In my view, those circumstances would result in very significant adverse consequences to Users and the Service Provider and would be against the public interest.
55. To limit the penalty to cases where actual loss and damage was suffered or to vary the penalty by reference to the extent of loss and damage may encourage parties to run the risk of exceeding operational limits that had been established for reasons of both safety and to maintain the integrity of the DBNGP as a shared resource. I was of the view that extending the application of penalties so that they applied with certainty to the behaviour was more likely to modify that behaviour, and so prevent risk taking by Users, than was the uncertain prospect of liability for damages. If the only mechanism used to impose penalties was actual loss and damage then this would not adequately take into account the fact that different parties adopt different methods to assessing risk and so respond differently to risk.

¹⁸ *ibid* (emphasis added) Note that graphs referred to in this quotation are included as part of Epic Energy submission CDAP#2 Additional Response to DD Amendments. See also CDS#5, 31 December 2002, at page 23, where Epic Energy submit that the Nominations Surcharge “*is only payable in the event of persistent breach of the shipper’s obligation to nominate in good faith over an extended period.*”

56. It was in light of these matters and the matters set out in my reasons that I formed the view that, as the pipeline is a shared resource, there needed to be contractual consequences for avoidable behaviour which, if engaged in, would be likely to result in either:
- (a) loss or damage to Users or Epic Energy; or
 - (b) an increase in the cost of operating the shared resource.
57. It is difficult to quantify these costs. As I noted in the reasons for my Final Decision, the usual industry practice is to include penalties to modify the behaviour.
58. On reflection, the amendment required in the Final Decision (Amendment 17) did not reflect my intention that the penalties be imposed only in the event of actual pecuniary loss or behaviour that was so significant as to threaten the integrity of the pipeline. Therefore, I require an amendment to reflect my understanding of Epic Energy's intention as to the circumstances in which penalties are to be imposed. I require the proposed Access Arrangement and Access Contract Terms and Conditions be amended to provide that the Out of Specification Gas Charge, Nomination Surcharge, Overrun Charge, Excess Imbalance Charge, Peaking Surcharge and Unavailability Charge are to be imposed only where:
- (a) the conduct contemplated by those penalties causes actual pecuniary loss or damage; or
 - (b) in the reasonable opinion of the pipeline operator the conduct contemplated by those penalties exposes the pipeline to a significant risk (whether or not that risk becomes manifest) that threatens the integrity of the pipeline (**Amendment 48**).

LIABILITY

59. I have reviewed the interpretation I gave in my Draft and Final Decisions to clause 13.4(a) of the Terms and Conditions of the proposed Access Arrangement. I accept that there is some uncertainty as to whether the clause only imposes liability on Users in respect of damage caused by them or whether the clause is not so limited. It was for this reason that, in my Draft Decision, I required clause 13.4(a) to be amended to limit the liability of the Shipper to situations where loss or damage occurs and is directly caused by the Shipper's actions. Epic Energy submitted that, in requiring such an amendment, I had misinterpreted the intent of clause 13.4(a), that the clause was aimed at dealing with the issue of causation and that the effect of the last sentence of the clause was that if the Shipper caused the damage it should be liable for it.
60. In my Final Decision, based upon Epic Energy's submission that it was the intent of clause 13.4(a) to apply to situations where loss or damage occurs and is directly caused by the Shipper's actions, I decided not to require an amendment to the clause. I would expect that the Access Arrangement would reflect that intent.