



SUBMISSION 48: Overarching

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1. INTRODUCTION

- 1.1 On 14 March 2011, the Economic Regulation Authority (**ERA**) made its draft decision (**Draft Decision**) in relation to the full access arrangement proposal filed by DBNGP (WA) Transmission Pty Ltd (**DBP**) on 1 April 2010 (**Original AA Proposal**).
- 1.2 The Draft Decision indicates that the ERA:
 - (a) is not prepared to approve the Original AA Proposal; and
 - (b) requires 109 amendments to the Original AA Proposal in order to make the access arrangement proposal acceptable to the ERA.
- 1.3 The Draft Decision also fixes a period for amendment of the Original AA Proposal (**revision period**), which revision period expired on 18 April 2011.
- 1.4 On 18 April 2011, DBP submitted the following documents pursuant to Rule 60 of the NGR, which make up the amended access arrangement proposal (**Amended AA Proposal**):
 - (a) Amended Proposed Revised Access Arrangement; and
 - (b) Amended Proposed Revised Access Arrangement Information.
- 1.5 Rule 59(5)(c)(iii) of the NGR requires the ERA to allow at least 20 business days from the end of the revision period for submissions to be made (in relation to both the Draft Decision and the Amended AA Proposal). The ERA has advised that interested parties are able to make submissions on the ERA's Draft Decision up until 4:00pm (WST) Friday 20 May 2011.
- 1.6 While DBP has submitted to the ERA that the Amended AA Proposal contains the information that the NGA (which includes the WA National Gas Access Law text (**NGL**) and the National Gas Rules (**NGR**) requires to be included in order to enable it to be approved by the Economic Regulation Authority (**ERA**), on 18 April 2011, DBP also submitted that DBP will also be filing the following supporting submissions that explain and substantiate the amendments and additions in the Amended AA Proposal that have been made to address various matters raised in the Draft Decision:
 - (a) Submission (47) Revised Amended Access Arrangement Proposal (this was filed on 18 April 2011)
 - (b) Submission (48) Overarching (being this submission)
 - (c) Submission (49) Response to Specific Amendments
 - (d) Submission (50) Reference Service
 - (e) Submission (51) Terms & Conditions
 - (f) Submission (52) Opening Capital Base
 - (g) Submission (53) Capital Expenditure
 - (h) Submission (54) Operating Expenditure

- (i) Submission (55) Rate of Return
 - (j) Submission (56) Other Tariff Matters
 - (k) Submission (57) Non Tariff Matters
- 1.7 In this Submission, DBP addresses an overarching issue that applies to a number of aspects of the ERA's reasoning - whether the ERA has correctly exercised its discretion and correctly undertaken its task in rule 40 of assessing for compliance and consistency with the relevant criteria in the NGL and NGR.

2. DISCRETION UNDER THE NGL & NGR & ASSESSING FOR COMPLIANCE AND CONSISTENCY

Discretion under the NGL

2.1 The NGL prescribes the manner in which the ERA is to perform or exercise its economic regulatory function or power. Specifically, section 28 of the NGL states that the ERA:

- (a) must perform or exercise its regulatory function or power in a manner that will or is likely to contribute to the achievement of the national gas objective;
- (b) must take into account the revenue and pricing principles:
 - (i) when exercising a discretion in approving or making those parts of an access arrangement relating to a reference tariff; or
 - (ii) when making an access determination relating to a rate or charge for a pipeline service;
- (c) may take into account the revenue and pricing principles when performing or exercising any other ERA economic regulatory function or power, if the ERA considers it appropriate to do so.

2.2 The NGL expressly clarifies how the terms "may" and "must" are to be interpreted when used in the NGL. Clause 12 of Schedule 2 of the NGL states that where the word "must" (or similar word) is used in relation to a power, it indicates that a power is required to be exercised, whereas when "may" (or similar word) is used in relation to a power, it indicates that the power may be exercised or not, at discretion. This means that, with respect to the requirements referred to at clause 2.1(a) and 2.1(b) above, the ERA has no discretion as to whether it performs its regulatory function or power in accordance with those requirements.

2.3 In addition to the requirements set out in section 28 of the NGL, the ERA must also exercise its discretion in accordance with administrative law principles so that its decisions, among other things, are factually and legally correct and are reasonable in all the circumstances, which necessarily requires the ERA to take into account relevant considerations and not take into account irrelevant considerations.

Discretion under the NGR

2.4 When and how the ERA may exercise its discretion is further clarified under Rule 40 of the NGR. Rule 40 sets out the levels of discretion which apply to the ERA's decision making process regarding access arrangement proposals under the NGR and sets out the criteria which applies to each level, namely:

- (a) no discretion - DBP notes that there is only one rule which entirely excludes the ERA's discretion and it is not relevant for the purpose of this submission;
- (b) limited discretion (discussed at paragraphs below); and
- (c) full discretion (discussed at paragraphs below).

2.5 Furthermore, in exercising its discretion (whether limited or full) in making decisions under the NGR, the ERA must:

- (a) comply with the mandatory requirements set out in section 28 of the NGL; and
- (b) act in accordance with administrative law principles.

Limited discretion

- 2.6 Rule 40(2) provides that if the Law states that the ERA's discretion is limited, then the ERA may not withhold its approval to an element of an access arrangement proposal that is governed by the relevant provision of the Law if the ERA is satisfied that it:
- (a) complies with applicable requirements of the Law; and
 - (b) is consistent with applicable criteria (if any) prescribed by the Law.
- 2.7 To assist with interpretation of this Rule, the NGR gives the example of Rule 89 (design of a depreciation schedule) under which the ERA's discretion is stated to be limited and notes that the effect of that limited discretion is that, assuming that the schedule otherwise complies with the law and there is no inconsistency between the schedule and the applicable criteria, "even though the ERA might consider change desirable to achieve more complete conformity between the schedule and the principles and objectives of the Law, it would not be entitled to give effect to that view in the decision making process".
- 2.8 There are five elements of an access arrangement proposal, with respect to which the NGR provides that the exercise of the ERA's discretion in its decision making is prescribed as limited. However, only the following four elements are relevant for the purpose of the Draft Decision:
- (a) Rule 79 (1)-(6) - new capital expenditure;
 - (b) Rule 89 (1)-(2) - depreciation schedule;
 - (c) Rule 91(1) - operating expenditure; and
 - (d) Rule 95 (1) - (3) - transmission pipeline tariffs.
- (together the **Limited Discretion Elements**)
- 2.9 As noted at paragraphs 2.6 and 2.7 above, in making a decision with respect to whether to accept or refuse or amend an element of an access arrangement proposal which is one of the Limited Discretion Elements, the ERA is confined to assessing whether or not the element complies with the applicable requirements of the Law and is consistent with applicable criteria (if any) prescribed by the Law. In the case of decisions relating to the Limited Discretion Elements, in making its assessment as to compliance and consistency, the ERA must take into account the revenue and pricing principles and the national gas objective.
- 2.10 Furthermore, in making an assessment as to compliance and consistency, the ERA must take into account all relevant considerations and must not take into account any irrelevant considerations.
- 2.11 DBP submits that a number of the ERA's assessments as to compliance and consistency of Limited Discretion Elements of the Original AA Proposal with the NGR appear to:
- (a) contain errors of fact;
 - (b) indicate that the ERA has applied an incorrect construction of the law;
 - (c) indicate that the ERA has taken into account an irrelevant consideration;
 - (d) do not indicate that the ERA has taken into account all relevant considerations; or
 - (e) include a combination of the above.

2.12 DBP has detailed its concerns about the manner in which the ERA has assessed whether the Limited Discretion Elements comply or are consistent with the Law, in the following submissions:

- (a) Submission 52 - Opening Capital Base. An example is the ERA's assessment of whether DBP may rely on the ACCC undertakings as a regulatory instrument for the purpose of Rule 79(2)(c)(iii).
- (b) Submission 53 – Roll forward of the Capital Base. An example is the ERA's assessment of certain items of forecast capital expenditure.
- (c) Submission 54 – Operating Expenditure. The ERA's assessment of whether DBP's proposal is prudent and efficient and complies with the criteria in Rule 91;
- (d) Submission 56 – Other tariff matters. DBP contends that there are concerns with the ERA's assessment of DBP's proposal and its consistency or compliance with Rule 95 (1) - (3) - transmission pipeline tariffs. The assessment is contained in paragraphs 946 – 974 of the Draft Decision.

Full discretion

2.13 Rule 40(2) provides that if the Law does not state that the ERA's discretion is limited (including entirely), then the ERA has discretion to withhold its approval to an element of an access arrangement proposal if, in the ERA's opinion, a preferable alternative exists that:

- (a) complies with applicable requirements of the Law; and
- (b) is consistent with applicable criteria (if any) prescribed by the Law.

2.14 As noted at paragraph 2.5 above, in exercising its full discretion in making decisions in relation to elements of an access arrangement proposal, the ERA must also take into account section 28 of the NGL, together with administrative law principles.

2.15 DBP submits that a number of the ERA's decisions in which the ERA has proposed alternatives which replace or substantially amend elements of the Original AA Proposal do not meet the compliance and consistency requirement under Rule 40(2) or otherwise:

- (a) contain errors of fact;
- (b) indicate that the ERA has applied an incorrect construction of the law;
- (c) indicate that the ERA has taken into account an irrelevant consideration;
- (d) do not indicate that the ERA has taken into account all relevant considerations; or
- (e) include a combination of the above.

2.16 DBP has detailed its concerns about the manner in which the ERA has exercised its discretion in replacing elements of the Original Access arrangement, in the following submissions:

- (a) Submission 49 – Response to Specific Amendments. The ERA's requirement to change the CPI measure proposed by DBP.
- (b) Submission 50 - Reference Services. The ERA's contentions in relation to what is the market for pipeline services and what services should be offered as reference services.

- (c) Submission 51 – Terms and Conditions
- (d) Submission 55 - Rate of Return. The ERA has failed to properly apply the requirements of Rule 87(1) and has failed to take into account relevant considerations contained in that Rule
- (e) Submission 56 – Other tariff matters. The ERA has failed to correctly assess both the rebate mechanism and the tariff variation mechanism for compliance and consistency with the Law.
- (f) Submission 57 - Non Tariff Matters. The ERA's requirement for a by-pass mechanism in relation to the queue and rejection of DBP's ability to seek recovery of costs associated with the change in gas quality which it is not able to recover under the *Gas Supply (Gas Quality Specifications) Act 2009* (WA).;