



Public Submission

By BHP Billiton

In response to the revised access arrangement submitted by DBNGP (WA) Transmission  
Pty Ltd

18 April 2016

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## 1 Overview

DBNGP (WA) Transmission Pty Ltd (**DBP**) is the operator of the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**). On 31 December 2014, DBP submitted its proposed revisions to the access arrangement for the DBNGP (**Proposed Access Arrangement**) for the regulatory period 2016-2020 to the Economic Regulation Authority (**Authority**).

BHP Billiton made submissions dated 21 May 2015 on DBP's Proposed Access Arrangement (**Initial Submission**).

On 22 December 2015, the Authority issued its draft decision in respect of the Proposed Access Arrangement (**Draft Decision**). On 23 February 2016, DBP submitted its revised DBNGP Access Arrangement in response to the Draft Decision (**Revised Proposed Access Arrangement**) and interested parties were invited to make submissions on the Draft Decision and the Revised Proposed Access Arrangement by 22 March 2016.

On 16 March 2016, the Authority granted BHP Billiton an extension to the period in which to make a submission to 18 April 2016.

BHP Billiton makes this submission in response to the Authority's invitation for submissions. Other than as noted in the further submissions below, BHP Billiton repeats and maintains the submissions made in its Initial Submission.

As a general comment, BHP Billiton notes that the Revised Proposed Access Arrangement does not contain a number of required amendments outlined by the Authority in its Draft Decision. BHP Billiton submits that, unless otherwise indicated in the Initial Submissions and this submission, DBP should be required to accept and adopt these amendments in accordance with the Draft Decision.

Unless otherwise defined, words and expressions used in this submission have the meaning given in the *National Gas Law* (**NGL**) and *National Gas Rules* (**NGR**) as implemented in Western Australia.

This submission considers the following:

- **Tax asset base:** BHP Billiton submits that the Authority should reconsider the position outlined in BHP Billiton's Initial Submission regarding the tax asset base. In particular, BHP Billiton reiterates that:
  - the most relevant date for the commencement of the taxation asset value for the "benchmark efficient entity" is the date at which regulation commenced; and
  - the taxation asset value should be determined with reference to an initial taxation asset value that started in 2000 at the initial capital base.

BHP Billiton submits that the above approach is consistent with the NGR.

- **Interval of delay:** BHP Billiton supports the Authority's determination that there will be an interval of delay from 1 January 2016 until the date the amendments to the current access arrangement take effect (currently contemplated to be 1 July 2016) and that the tariffs should be adjusted

accordingly. DBP does not appear to have made this adjustment, but it should be required to do so.

- **Revision commencement date for next access arrangement:** BHP Billiton submits that the revision commencement date for the next access arrangement should be a fixed and specified date (ie 1 January 2021).
- **Cost pass through:** BHP Billiton supports the Authority's rejection of DBP's amendments to clause 11.5 of the Proposed Access Arrangement and re-states its submissions on this issue from its Initial Submission. Despite rejection of the amendments by the Authority in the Draft Decision, DBP has maintained them in the Revised Proposed Access Arrangement. DBP has failed to provide any persuasive reason why the Authority's required amendments should not be adopted and accordingly should be required to incorporate the Authority's required amendments.
- **Extensions & Expansions Policy:** BHP Billiton supports the Authority's rejection of DBP's proposed changes to the Extensions & Expansions Policy in the Proposed Access Arrangement and re-states its submissions on this issue from its Initial Submission. Despite the Authority's rejection of these amendments in the Draft Decision, DBP has maintained them in the Revised Proposed Access Arrangement. DBP has failed to provide any persuasive reason why the Authority's required amendments should not be adopted and accordingly DBP should be required to incorporate the Authority's required amendments.
- **Exclusion of capacity volumes in relation to the Special Purpose Access Contract:** BHP Billiton supports the Authority's approach in its Draft Decision of including forecast volumes for both capacity and throughput in relation to the Special Purpose Access Contract. BHP Billiton submits that DBP has not provided any new or persuasive reasons for the rejection of the Authority's approach, and accordingly DBP should be required to make this amendment.
- **Reference Service Terms & Conditions:** BHP Billiton repeats its Initial Submission regarding DBP's amendments to the terms and conditions for reference services and supports the Authority's required amendments to the terms and conditions as outlined in its Draft Decision. DBP has failed to provide any persuasive reason why the Authority's required amendments should not be adopted and accordingly DBP should be required to incorporate the Authority's required amendments.

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## 2 About BHP Billiton

BHP Billiton is one of the world's largest diversified natural resources companies with significant positions in major commodity businesses, including energy coal and metallurgical coal, copper, iron ore, uranium, nickel and substantial interests in oil, gas and liquefied natural gas.

BHP Billiton is a key shipper on the DBNGP. It is a significant gas producer and major user of gas and thus has a significant interest in and demand for gas transportation in Western Australia.

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### 3 Tax asset base

In the Initial Submission, BHP Billiton submitted that the Authority should use its discretion to set an appropriate benchmark value for the opening taxation asset base.<sup>1</sup> The Initial Submission highlighted the requirement in the NGR for the allowance for company tax (and implicitly, therefore, for all of the inputs thereto) to reflect the assumption of a benchmark efficient entity rather than the circumstances of the actual entity, with the specific requirement being as follows (Rule 87A):

*ETI<sub>i</sub> is an estimate of the taxable income for that regulatory year that would be earned by a benchmark efficient entity as a result of the provision of reference services if such an entity, rather than the service provider, operated the business of the service provider.*

In the Initial Submission, BHP Billiton further submitted that an appropriate benchmark assumption for the opening taxation asset base would be to set it at a level that is consistent with the initial capital base that was determined for the DBP, which BHP Billiton submitted would be achieved by setting the benchmark opening taxation asset base equal to the (benchmark) initial capital base at the date the latter value was determined. This would create consistency between the two asset values in relation to the DBP because the initial capital base was the deemed investment value for the DBP at the date the initial capital base was determined. This means that it was being assumed implicitly that the asset had been built or transacted for that value at that date. The same assumption would also result in the initial taxation asset value at that date being reset at the same value.

In the Draft Decision, the Authority did not accept BHP Billiton's position outlined above, but accepted DBP's proposal in the Proposed Access Arrangement to determine the initial tax asset value at a level that is consistent with the asset owner's actual tax book.<sup>2</sup> That initial taxation asset value, in turn, was calculated as at the sale date for the DBP, which occurred in 1998.

The Authority did make certain adjustments to DBP's proposed initial taxation asset base, however, to correct for what the Authority thought was an idiosyncratic (and excessive) amount of depreciation between 1998 and 2000. The principal reason the Authority provided for rejecting BHP Billiton's position was that it would be inconsistent with the Authority's previous decisions, and previous decisions of the Australian Energy Regulator (**AER**).<sup>3</sup> The Authority did comment, however, that BHP Billiton's proposal would result in the initial taxation asset value "being notionally reset", which may have been intended as a criticism of BHP Billiton's proposal.

DBP rejected the Authority's adjustment for the idiosyncratic (and excessive) amount of depreciation claimed for 1998 and 1999, explaining that:

- part of the reason is that DBP undertook a sale and leaseback of certain assets, which were thereby removed from the taxation asset value; and
- in any event, investments undertaken in 1998 could be written off for tax purposes over much shorter lives than available from financial year 2000, so that any 1998 investment would be written off today.

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<sup>1</sup> Initial Submission, section 5.

<sup>2</sup> Draft Decision, paras 548-551.

<sup>3</sup> Draft Decision, para 551.

BHP Billiton submits that the Authority should reconsider its position about the appropriate principle to apply when determining the initial taxation asset value. The fact that BHP Billiton's proposal would result in the taxation asset value "being notionally reset" should not cause concern – rather, the rule as quoted above expressly provides for the initial taxation asset value to be set at a notional value (the value consistent with the "benchmark efficient entity") rather than the value in the service providers accounts, and thereby to be "notionally reset" when compared against the latter.

Moreover, if attention is directed to the characteristics of the "benchmark efficient entity" rather than the actual characteristics of the service provider, then the arguments that DBP has presented in reply cease to have any special relevance.

That is:

- the proposition that the taxation asset value should be determined with reference to a starting value as at 1998 can only be correct if that date is relevant to the characteristics of the "benchmark efficient entity" in contrast to the actual position of the service provider. BHP Billiton submits that a 1998 value is irrelevant to the characteristics of the benchmark efficient entity, and it is noted that no argument has been presented to this end; and
- DBP's decisions to undertake sale and leaseback arrangements for its assets similarly is only relevant to the extent that a benchmark efficient entity should be assumed to have entered into those arrangements, and no argument has been presented as to why this should be assumed to be the case.

BHP Billiton reiterates that the most relevant date for the commencement of the taxation asset value for the "benchmark efficient entity" is the date at which regulation commenced, because that was the date at which a new notional "investment value" for the regulated assets was determined. BHP Billiton also reiterates its position that the most reasonable proposition is that the (notional) taxation asset value should be assumed to have been reset by the same process that led to the initial capital base being reset. The result of this is that the taxation asset value should be determined with reference to an initial taxation asset value that started in 2000 at the initial capital base.

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## 4 Interval of delay

In its Draft Decision, the Authority acknowledged that an interval of delay, for the purposes of Rule 92(3), will occur in respect of the period 1 January 2016 – 1 July 2016:

*The Final Decision will not be made in time for the revised tariffs to be in place by 1 January 2016. As permitted under NGR 92(3)(b), the Authority has adjusted the tariffs to reflect the delay in implementation. For the purposes of this Draft Decision, it has been assumed the revised tariffs take effect from 1 July 2016. An adjustment will be made in the Final Decision if necessary to reflect any revised timings.<sup>4</sup>*

BHP Billiton supports the Authority:

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<sup>4</sup> Draft Decision, para 599.

- determining that an interval of delay will occur in respect of the period 1 January 2016 – 1 July 2016 (or later, if the amendments to the access arrangement do not take effect until after this date);
- exercising its discretion to take into account the ongoing application of the current reference tariffs beyond 1 January 2016; and
- in fixing the tariffs in its Final Decision for the next access arrangement, exercising this discretion to make an adjustment to deal with the additional revenue that DBP will receive during the interval of delay as a result of the continued application of the higher 2015 tariffs until the commencement of the next access arrangement period (currently proposed to be 1 July 2016).

DBP does not appear to have made the above tariff adjustment, as required in the Draft Decision. DBP should (in addition to setting the reference tariffs in its Proposed Revised Access Arrangement in accordance with the Draft Decision) be required to make this adjustment.

If such an adjustment is not made, based on the reference tariffs proposed under the Draft Decision, DBP will enjoy a revenue windfall, which would be inconsistent with the national gas objective and the revenue pricing principles under the NGR, in that DBP would recover an amount greater than the efficient costs DBP incurs in providing the reference services during the interval of delay.

## 5 Revision commencement date for the next access arrangement should be a fixed date

In its Revised Proposed Access Arrangement, DBP proposes the following for the revision commencement date for the next access arrangement (ie AA 2021-25):

- 14.3 *The revision commencement date for the Next Access Arrangement is the later of:*
- (a) *the date that is 5 years after the commencement of the Current Access Arrangement Period;*
  - (b) *the date the ERA stipulates in a Final Decision to approve an Access Arrangement Revision Proposal as to which the dates have effect or if no date is so fixed, 10 Business Days after the Final Decision as under NGR 62; and*
  - (c) *if the ERA decides, under NGR 64, to refuse approval of an Access Arrangement Revision Proposal, the date on which the ERA makes a Final Decision under NGR 64 that stipulates the date the revisions are to have effect or if no date is fixed, 10 Business Days.*

BHP Billiton submits that DBP's proposed use of a "later of" mechanism for determining the revision commencement date for the next access arrangement is not consistent with the NGR.

The AER has previously rejected the use of the "later of" mechanism when determining the revision commencement date, instead proposing that the revision

commencement date be a fixed and specified date.<sup>5</sup> In addition, in the Envestra (Victoria) Final Decision, the AER relevantly observed:

*The NGR ... refers to a date. It doesn't refer to processes or mechanisms to determine dates. A revision commencement date must be a specific time, that is, a fixed, singular date.*<sup>6</sup>

The definition of "revision commencement date" in the NGR refers to a "date fixed" as "the date" on which revisions to an access arrangement are intended to take effect. BHP Billiton submits that this language requires the revision commencement date to be a fixed and specified date. Furthermore, if a "later of" mechanism is approved it will have the effect of rendering rule 92(3) potentially inoperable.

While the Authority appears to have interpreted the revision commencement date in the current access arrangement to be 1 January 2016 for the purposes of Rule 92(3) (which BHPB supports), BHP Billiton submits that this should be hard-coded to avoid ambiguity in the next access arrangement review process.

In light of the above, BHP Billiton submits that the revision commencement date for the next access arrangement in the Revised Proposed Access Arrangement should be a fixed and specified date (ie 1 January 2021).

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## 6 Cost pass through

BHP Billiton supports the Authority's rejection of DBP's proposed changes to the cost pass through mechanism in its Draft Decision. BHP Billiton notes that DBP has refused to incorporate the Authority's required amendments in the Revised Proposed Access Arrangement, and submits that DBP should be required to do so.

Consistent with BHP Billiton's Initial Submission,<sup>7</sup> BHP Billiton submits that:

- the breadth of expenses potentially captured by the amendments in the Revised Proposed Access Arrangement to the New Cost Pass Through Variations is too broad; and
- DBP's proposed cost pass through mechanism improperly imposes a burden on the Authority to disprove the validity of a proposed cost through requested by DBP, which the Authority is required to discharge within an unreasonable timeframe.

Rule 97(4) of the NGR provides that the mechanism should give the Authority adequate oversight or powers of approval. BHP Billiton submits that DBP's Revised Proposed Access Arrangement seeks to erode the Authority's oversight and approval in a manner that is inconsistent with Rule 97(4).

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<sup>5</sup> See Australian Energy Regulator, "Access Arrangement final decision, Envestra (Victoria) 2013-17 - Part 2: Attachments", March 2013, at 13.7.4; Australian Energy Regulator, "Access Arrangement final decision Envestra Ltd (Albury) 2013-17", March 2013, p 49; Australian Energy Regulator, "Access Arrangement final decision, APA GasNet Australia (Operations) Pty Ltd 2013-17 - Part 2: Attachments", March 2013, at 12.4.4 and 13.7.3.

<sup>6</sup> See Australian Energy Regulator, Regulator, "Access Arrangement final decision, Envestra (Victoria) 2013-17 - Part 2: Attachments", March 2013, at 13.7.4.

<sup>7</sup> Initial Submission, section 7.

In particular, consistent with the Authority's Draft Decision<sup>8</sup>, DBP's amendments to clause 11.5(a) and (b) should be rejected as the intent of the tariff variation mechanism is to ensure that only those legitimate new costs in relation to changes outside DBP's control are passed on to customers.

In addition, DBP's amendments to clause 11.5(d) provide that the reference tariff may be varied to reflect a new cost provided that the Authority does not object to such a cost pass through. Moreover, the clause appears to contemplate that the Authority may have as little as 20 business days from being notified of a variation to lodge an objection. Furthermore, the amendments specify limited grounds on which the Authority may reject a cost pass through.

This is different to the approach in the current access arrangement whereby the reference tariff cannot be varied until the Authority *approves* the variation (without reference to specific grounds). BHP Billiton submits that DBP's amended process redirects the Authority's efforts into justifying why a variation should be rejected, by reference to limited grounds and within a potentially restrictive timeframe, and not towards whether it should be approved. Accordingly, BHP Billiton submits that clause 11.5 as proposed by DBP in its Revised Proposed Access Arrangement should be rejected.

BHP Billiton submits that the above observations in relation to 11.5(d) apply equally to clause 11.4(d) (regarding tax changes) as proposed by DBP in its Revised Proposed Access Arrangement.

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## 7 Extensions and Expansions Policy

BHP Billiton supports the Authority's rejection of DBP's proposed changes to the Extensions & Expansions Policy in its Draft Decision.<sup>9</sup> BHP Billiton notes that DBP has refused to incorporate the Authority's required amendments in the Revised Proposed Access Arrangement, and submits that DBP should be required to do so.

BHP Billiton also reiterates its position in its Initial Submission<sup>10</sup>. In summary, BHP Billiton submitted that DBP's proposed amendments to the extensions and expansions policy should be rejected by the Authority, and the current extensions and expansions policy should continue to apply unamended on the basis that DBP's proposed amendments to the extensions and expansions policy:

- propose a procedure that is not sufficiently timely;
- improperly impose the obligation on the Authority to demonstrate to DBP why an expansion should or should not become part of the covered pipeline; and
- provide inadequate time for the Authority to consider any election by DBP for non-coverage of an expansion.

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<sup>8</sup> Draft Decision, para 635.

<sup>9</sup> Draft Decision, paras 945 and 949.

<sup>10</sup> Initial Submission, section 8.



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## 8 Exclusion of the SPAC capacity volumes from forecasts

Despite the Authority's required amendment in its Draft Decision,<sup>11</sup> DBP has excluded capacity volumes in relation to the Special Purpose Access Contract (SPAC) from the forecasts but continued to include throughput volumes.<sup>12</sup>

BHP Billiton submits that DBP has not provided any new or persuasive reasons for the rejection of the Authority's approach. DBP has not given any reason for why the SPAC should be treated differently during this access arrangement (ie as opposed to how it was treated in the previous access arrangement). DBP's submissions appear to focus on explaining the difficulty involved in determining forecast capacity in relation to the SPAC. BHP Billiton submits that this difficulty doesn't justify the dismissal of capacity volumes altogether.

Accordingly, BHP Billiton submits that the Authority should maintain its approach taken in the Draft Decision in relation to the SPAC. Furthermore, BHP Billiton submits that the Authority should carefully interrogate DBP's proposal to use an amount of 10TJ for the purposes of capacity forecasts, given that interested parties do not have the information to do so.

If DBP's approach to the SPAC is accepted, BHP Billiton submits that more information in relation to this contract, and the volumes thereunder, must be provided to interested parties so that they may make adequate submissions on this issue (particularly in relation to the adequacy of DBP's proposed maximum capacity of 10.5TJ in respect of the SPAC). Alternatively, if more information cannot be provided, then the Authority should, on behalf of the interested parties, carefully consider the information provided by DBP in relation to the SPAC to ensure that these volumes have been properly dealt with in accordance with the NGR.

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## 9 Reference Services Terms and conditions

In relation to the terms and conditions for reference services, BHP Billiton notes that the Revised Proposed Access Arrangement does not contain a number of the Authority's required amendments outlined in its Draft Decision.

To the extent that DBP has rejected the Authority's required amendments to the terms and conditions for reference services and BHP Billiton has already made submissions on these amendments, BHP Billiton repeats its Initial Submission.<sup>13</sup> Furthermore, BHP Billiton submits, in relation to the terms and conditions, that:

- DBP should be required to accept and adopt the Authority's required amendments in the Draft Decision in its Access Arrangement;
- DBP has not provided any new or persuasive reasons for the rejection of the Authority's required amendments; and

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<sup>11</sup> Draft Decision, Required Amendment 7.

<sup>12</sup> See "Proposed Revisions DBNGP Access Arrangement 2016-2020, Response to Draft Decision Other Tariff Amendments - Supporting Submission 57", February 2016, paras 2.1 to 2.12.

<sup>13</sup> Initial Submission, section 10.

- consistent with its Initial Submission, DBP's rejection of the Authority's required amendments will erode shipper protection, increase inefficiency, raise costs and would be contrary the achievement of the NGO.

Accordingly, BHP Billiton supports the Authority's Draft Decision to reject DBP's amendments to the terms and conditions for reference services, and DBP should be required to incorporate the Authority's required amendments.