AA4 submission to the Economic Regulation Authority No. 2: Western Power's proposed standard electricity transfer access contract

8 December 2017

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A. EXECUTIVE SUMMARY

Matter	Western Power's (**WP**) proposed Standard Electricity Transfer Access Contract (**SETAC**).
Context	On 6 October 2017, the Economic Regulation Authority (**Authority**) released WP's proposed SETAC for the fourth Access Arrangement Period (**AA4**) which was lodged with the Authority by WP on 2 October 2017. The role of the Authority is to determine whether WP's proposed SETAC complies with the requirements of the *Electricity Networks Access Code 2004* (WA) (**Access Code**). In doing so, the Authority is guided by specific provisions of the Access Code relating to a *standard access contract*, as well as the Access Code objective of promoting economically efficient investment in and operation and use of electricity *networks* and *services* of *networks* in Western Australia, to promote competition in markets upstream and downstream of the *networks*. The Authority is also required to perform its functions under the Access Code in a manner consistent with matters the Authority is required to have regard under section 26(1) of the *Economic Regulation Authority Act 2003* (WA) (**ERA Act**).
Scope	Synergy's submission: ▪ Outlines the Synergy operational impacts of the proposed SETAC, noting there will be technical and cost-prohibitions on Synergy to implement internal monitoring, compliance and enforcement procedures which would necessarily result from WP's proposed amendments. Due to time constraints, Synergy has not definitively identified the precise character of these technical and cost prohibitions in preparing this submission. ▪ Outlines the customer impacts of the proposed SETAC. ▪ Sets out its view of the Access Code requirements against which the Authority must assess the SETAC. ▪ To the extent that it has been able, expresses Synergy's views on certain areas where Synergy considers the SETAC does not meet relevant legal requirements including the Access Code requirements and Access Code objective.
Key issues	▪ WP's proposal to impose a strict obligation on Users to ensure that Contracted Capacity in respect of a Connection Point is not exceeded is inconsistent with the Access Code objective. Prudent compliance with this obligation by retailers would be cost-prohibitive and represents a barrier to entry in the retail markets of the South West interconnected system (**SWIS**). The proposal is unreasonable and commercially unworkable. Synergy considers the Authority must therefore refrain from *approving* the provision consistent with its obligations under section 5.5(b) in light of sections 5.3(a) and 5.3(b) of the Access Code.

- WP's proposal to obtain rights for WP to change the Service applicable at a Connection Point for more than 1 million Small Customers (as that term is proposed to be defined in the SETAC) would allow WP to unilaterally transfer Small Customers to Reference Services and Non-Reference Services alike, including in circumstances where a Non-Reference Service was not agreed between WP and a User. This could, in turn, create a situation where Eligibility Criteria and service standard benchmarks could be unilaterally amended by WP, effectively allowing WP broad rights to unilaterally impose any change on Small Customers and Synergy as WP sees fit. This is an unreasonable proposal, which Synergy considers is also commercially unworkable and as such the proposal is inconsistent with sections 5.3(a) and 5.3(b) of the Access Code.

- The proposal and any attempt to rely upon the clause if approved could also, in Synergy's view, constitute a breach of section 115 (prohibitions on hindering or preventing access) of the *Electricity Industry Act 2004* (WA) (**EI Act**). Synergy also considers the proposal is inconsistent with the matters the Authority must have regard to under section 26(1) of the ERA Act. Further, Synergy notes the Authority approved Standard Form Contract, which applies as a standard to Synergy's supply to customers consuming not more than 160MWh per annum does not entitle Synergy to pass through the financial effect of these changes to customers. As such, Synergy considers the Authority must refrain from *approving* the proposed amendment.

- Synergy notes the Authority's obligation under section 4.34 of the Access Code to ensure that it must not *approve proposed revisions* that would, if *approved* have the effect of depriving a person of a contractual right that existed prior to the earlier of the date on which the *proposed revisions* were due to the Authority and the date on which the *proposed revisions* were submitted to the Authority. Synergy notes that it is therefore critical that any Reference Services *approved* by the Authority must be compatible with existing *access contracts* and retail contracts.

- Synergy currently has a number of rights it considers it will be prevented from exercising if certain of WP's changes are approved by the Authority. Synergy is currently precluded from discussing these rights with the Authority by virtue of the confidentiality provisions in place between Synergy and WP and Synergy and its customers. Synergy would be pleased to discuss these matters with the Authority provided the Authority issues a suitable notice under section 51 of the ERA Act compelling Synergy's production of relevant information.

- WP's proposal to address risks associated with the modification of Generating Plant by establishing a mechanism for circumstances where the applications and queuing policy (**AQP**) applies and where it does not actually compounds the uncertainty around the proper application of the AQP when it comes to modification of Generating Plant. Further, the mechanism proposed to apply when the AQP does not apply imposes a strict, continuing obligation on the User to ensure modified Generating Plant does not adversely impact the safety or security of the WP network, without properly defining the parameters of that obligation. As such, the

	provision is not reasonable and imposes commercially unworkable obligations upon Users. It is also inconsistent with the matter to which the Authority must have regard under section 26(1) of the ERA Act. Synergy separately makes detailed submissions on WP's proposed AQP for AA4.[1] ▪ WP's proposal to introduce an obligation for Intermediaries (as that term is defined in the Wholesale Electricity Market Rules (**Market Rules**)) to indemnify WP will have unreasonable adverse consequences for Users and more generally results in WP seeking to externalise risk to third parties. Synergy considers the proposal is not consistent with the Access Code objective. Further, the proposal represents a material and unreasonable change in the approach to risk allocation adopted in previous *access arrangement periods*. As such, the proposed provision is inconsistent with section 5.3(a) of the Access Code. However, if the proposal is approved by the Authority, then the Authority should take this and other instances of WP's reduction in risk when determining price control under Chapter 6 of the Access Code. ▪ WP's proposed amendment to the insurance obligations set out in schedule 5 greatly expands the scope, and cost of, insurance cover to WP's benefit from a "claim" to "any claim, demand, action or proceeding made or instituted against a Party". Given WP's public submission provided no background or rationale to this change, Synergy considers it is an unreasonable amendment and is as such inconsistent with section 5.3(a) of the Access Code. ▪ Synergy considers that the existing Force Majeure provisions contained at clause 22 of the SETAC ought to be amended to incorporate the suggestions made by Synergy in its submission dated 20 November 2017 in relation to WP's proposed Model Service Level Agreement (**MSLA**) under the *Electricity Industry (Metering) Code 2012* (WA) (**Metering Code**). Synergy's proposed amendments are contained at paragraphs 68 and 69 of this document. ▪ A summary of the key matters requiring the Authority's consideration and determination is detailed in Attachment 3.

[1] Refer Synergy's "AA4 submission to the Economic Regulation Authority No. 3: Western Power's proposed applications and queuing policy."

B. INTRODUCTION

1. Synergy is pleased to provide the following specific comments to the Authority on the SETAC.

2. Synergy is Western Australia's largest electricity retailer and is also WP's largest *network user*. Synergy's retail and generation electricity transfer access contracts (**ETACs**) with WP collectively involve more than one million *connection points*. Synergy pays WP more than $1.2 billion annually for transport services under its two existing ETACs.

3. Synergy provided submissions to WP on 24 July 2017 on a draft of the proposed SETAC (**Consultation Draft**).

4. Synergy has reviewed WP's current proposed changes to the SETAC as a part of the access arrangement review process. Synergy notes in some areas, WP has addressed some of the concerns Synergy raised in submissions on the Consultation Draft. Unfortunately, however, many of the current proposed changes to the SETAC have not changed from the Consultation Draft. Consequently, the concerns Synergy raised in its submissions to WP on 24 July 2017 continue to apply to the current proposed changes.

5. Further, there are some current proposed changes which WP did not consult stakeholders on in the AA4 development phase. Synergy provides submissions on those proposed changes. A summary of the key matters requiring the Authority's consideration and determination is detailed in Attachment 3.

C. REGULATORY REQUIREMENTS

6. In preparing this submission Synergy has had particular regard to the following provisions under the Access Code, the ERA Act and the EI Act.

7. These provisions are detailed in Attachment 1. In this submission, words shown in *italics* have the meaning given under the Access Code unless the context otherwise requires. Capitalised terms have the meanings given under the SETAC unless the context otherwise requires.

Access Code provisions

8. Sections 2.1 and 2.2 – sets out the Access Code objective.

9. Section 2.4A – essentially, describes the manner in which the Access Code and related instruments apply in the context of parties' freedom to contract.

10. Section 2.6 – provides that nothing in the Access Code or an *access arrangement* prevails over or modifies the provisions of a *contract for services*, except for, amongst other things, the *applications and queuing policy* and the *technical rules*.

11. Section 4.30 when read in conjunction with section 4.52 – provides that in determining whether to *approve* a *proposed revision*, the Authority must have regard to, amongst other things, the contractual obligations of the *service provider* or other persons (or both) already using the *network*.

12. Section 4.34 when read in conjunction with section 4.52 – provides the Authority must not *approve proposed revisions* that would, if *approved*, have the effect of depriving a person of a contractual right that existed prior to the earlier of the date on which the *proposed revisions* were due to the Authority and the date on which the proposed revisions were submitted to the Authority.

13. Section 4.52 – provides that certain of the provisions relating to the Authority's consideration of a *proposed access arrangement* apply to the Authority's consideration of *proposed revisions* submitted by WP under section 4.48 of the Access Code.

14. Section 5.1(b) – sets out the requirement that an *access arrangement* include, amongst other things, a *standard access contract* for each *reference service*.

15. Section 5.3 – which requires a *standard access contract* to be reasonable and sufficiently detailed and complete to form the basis of a commercially workable *access contract* and enable a *user* or *applicant* to determine the value represented by the *reference service* at the *reference tariff*.

16. Section 5.5 – which requires the Authority to determine the SETAC is consistent with section 5.3 and the Access Code objective to the extent that it produces without material omission or variation the model standard access contract contained in the Access Code, and otherwise must have regard to the *model standard access contract* in determining whether the *standard access contract* is consistent with section 5.3 and the Access Code objective.

ERA Act

17. Section 26(1) – specifies additional matters the Authority must have regard to in considering WP's proposed SETAC:

    - the need to promote regulatory outcomes that are in the public interest;
    - the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets;
    - the need to encourage investment in relevant markets;
    - the legitimate business interests of investors and service providers in relevant markets;
    - the need to promote competitive and fair market conduct;
    - the need to prevent abuse of monopoly or market power; and
    - the need to promote transparent decision-making processes that involve public consultation.

EI Act

18. Section 115(1) – which prohibits a network service provider in relation to network infrastructure facilities covered by the Access Code or an associate of the network service provider, from engaging in conduct for the purpose of hindering or preventing, relevantly, access by a person to services in accordance with the Access Code and the access to which a person is entitled under an access agreement.

    18.1 Breach of section 115(1) carries a maximum penalty of $100,000 and a daily penalty of $20,000.

D. OVERARCHING ISSUES

Strict obligation to ensure Contracted Capacity is not exceeded – proposed clause 3.1(c)

19. The SETAC imposes a strict obligation on Users to ensure Contracted Capacity in respect of a Connection Point is not exceeded.[2]

20. WP's rationale for the change, communicated to Synergy and other stakeholders during WP's preparation of its AA4 submission to the Authority, is given the potentially severe impact of exceeding Contracted Capacity on network integrity, the proposed amendment is necessary.

21. WP also contends the obligation "to endeavour" is unclear,[3] ambiguous or sets too low a standard. Synergy considers the obligation to "endeavour" is commonplace in contractual agreements. In the case of clause 3.1(c) as provided for in the current Authority *approved standard access contract*, the performance standard against which compliance is measured is the objective standard of what a person acting as a *reasonable and prudent person* would do.

22. WP acknowledged to Synergy that some Users, such as retailers, do not themselves control the equipment at a Connection Point. Instead they supply electricity to a customer at a Connection Point. However, WP suggested that Users should impose contractual obligations on their customers to effect a strict obligation not to exceed Contracted Capacity.

23. In Synergy's view, WP's proposal is not reasonable because, for it to be effective, it would require retailers to develop comprehensive technical, telemetry and internal monitoring, compliance and enforcement processes to ensure the ongoing compliance of customers. Such a contract management regime would be cost-prohibitive for a party of Synergy's scope; for smaller Users that function as retailers, it may operate as a barrier to entry. This is the case even if WP's Advanced Metering Infrastructure (**AMI**) proposal is approved by the Authority and infrastructure sufficient to allow for real time monitoring is brought into effect because of the unavoidable contract management infrastructure and monitoring required.

24. WP's proposal also seeks to externalise existing risk to *users* and *applicants*. For the reasons described below, Synergy considers the proposal should not be approved by the Authority. If, however, the Authority decides to approve the proposal, Synergy considers the Authority must take this re-allocation of risk into account when determining the commercial risk faced by WP in accordance with chapter 6 of the Access Code in relation to such matters as the calculation of the weighted average cost of capital.

25. Further, WP has not demonstrated or provided any examples of instances during the third access arrangement period (**AA3**) where there have been difficulties in Users not meeting the current obligation in clause 3.1(c), which are sufficient to justify the imposition of such an onerous requirement. Indeed, Synergy notes under its Reference Services, WP permits Controllers to exceed Contracted Capacity and where they do so, charges an Excess Network Usage Charge. Synergy notes if WP intends to adopt this approach subsequent to the adoption of the proposed change there is a material likelihood that Excess Network Usage Charges will amount to a penalty, which will be unenforceable. Alternatively, the Authority should be aware that a breach of the proposal may, depending on the factual circumstances that apply, give WP a right to seek damages, curtail supply at the relevant Connection Point or terminate the SETAC with a particular *user.*

[2] Amendment to clause 3.1(c) of the proposed SETAC.
[3] Western Power, *Model ETAC for AA4 Change Summary* (dated 2 October 2017), page 16.

26. Synergy considers the Authority must not approve WP's proposed amendment to clause 3.1(c) of the SETAC because, having regard to clause A3.14 of the *model standard access contract* as required by section 5.5(b) of the Access Code, the proposed provision:

    26.1 departs from the standard adopted in the Access Code;

    26.2 externalises a risk to *users* and *users'* customers that WP is better able to manage;

    26.3 imposes an onerous performance standard for which there is no clear technical or operational basis; and

    26.4 would be likely to impact on small retailers entering the retail electricity market via the WP network.

The proposed provision is therefore not reasonable and being inconsistent with section 5.5 of the Access Code, the Authority must **not** *approve* it. Further, the proposed provision exceeds WP's legitimate business interests, contrary to section 26(1)(d) of the ERA Act, and the proposed provision would **not**, if *approved*, promote competitive and fair market conduct as contemplated by section 26(1)(e) of the ERA Act.

Selecting Services – proposed clauses 3.2(b) and 3.2(c)

27. As at 30 June 2017 Synergy had 1.06 million Small Customers.

28. WP did not consult with Synergy, nor to the best of Synergy's knowledge did it consult with any Small Customer, on the proposed addition of clauses 3.2(b) and 3.2(c) of the SETAC.

29. The proposed additions of clauses 3.2(b) and 3.2(c) would give WP an extremely broad right to change the Service applicable to the Connection Point for Small Customers without the agreement or consent of a User where WP:

    29.1 modifies or replaces the equipment at or in proximity to the Connection Point and as a result of that modification or replacement, WP considers the Service should be changed; or

    29.2 the change is made in connection with new policies implemented by WP in respect of Small Customers (for example changes to the type of Metering Equipment to be used).

30. WP claims "without this ability to vary Small Customer services Western Power cannot vary services to adapt to the changing configuration and characteristics of the network".[4] WP further claims that a right of this kind "is becoming more critical in an era of rapid technological change."[5] In essence, WP asserts that it is responsible for setting *reference services,* which Synergy considers to be an incorrect characterisation of the Access Code.

31. The consequences of WP's proposed clauses 3.2(b) and 3.2(c) are as follows:

    31.1 WP's right to unilaterally vary Services as drafted in clauses 3.2(b) and 3.2(c) means WP could substitute an existing Service provided to a User's Small Customer under the SETAC with a Reference Service or a Non-reference Service, even if that Non-reference Service is developed without the agreement, prior negotiation or engagement with either of the User or those Small Customers. This is because Service is defined with reference to Exit Service and Entry Service and each of these definitions incorporate

[4] Western Power, *Model ETAC for AA4 Change Summary* (dated 2 October 2017), page 4.
[5] Western Power, *Model ETAC for AA4 Change Summary* (dated 2 October 2017), page 4.

the defined term Covered Service which can be a Reference Service or a Non-reference Service. Such a unilaterally developed Non-reference Service would obviously be subject to price, service standard and eligibility criteria that may not have been the subject of agreement between WP and the User.

31.2 If a User attempted to revert the Small Customer to the previous Service, WP could simply rely on these clauses to again transfer the Small Customer to a different Service.

32. In Synergy's view, this approach is unworkable from a contract management point of view. It is also inconsistent with the following provisions of the Access Code:

32.1 the proposed clauses are not reasonable and therefore are inconsistent with section 5.3(a) of the Access Code;

32.2 the clauses are not commercially workable and are therefore inconsistent with section 5.3(b) of the Access Code;

32.3 the clauses are entirely inconsistent with the *model standard access contract* and the Authority must have regard to this when considering the clauses consistency with sections 5.3(a) and 5.3(b) of the Access Code; and

32.4 the clauses would result in WP breaching its obligation under section 2.7 of the Access Code to use all reasonable endeavours to accommodate an *applicant's* requirement to obtain *covered services*.

33. In Synergy's view both these clauses and WP's attempt to have these clauses approved by the Authority may constitute a breach of section 115 (prohibitions on hindering or preventing access) of the EI Act. This is because section 115 of the EI Act provides that a network service provider in relation to network infrastructure facilities covered by the Code must not engage in conduct for the purpose of, relevantly, hindering or preventing access by any person to services in accordance with the Access Code or the access to which a person is entitled under an access agreement.

34. "engaging in conduct" is defined in section 115(4) of the EI Act to include a reference to making a contract or arrangement or giving effect to a provision of a contract or arrangement.

35. Further, Synergy considers that "preventing access by a person to services in accordance with the Access Code" may include a circumstance where WP attempts to contract out of its obligation under section 2.8 of the Access Code to, to the extent reasonably practicable, in accordance with *good electricity industry practice*, permit an *applicant* to acquire a *covered service* containing only those elements of the *covered service* which the *applicant* wishes to acquire.

36. The penalty for breaching section 115 of the EI Act is $100,000 with a daily penalty of $20,000.

37. With respect to the matters the Authority is required to have regard to under section 26(1) of the ERA Act, WP's proposed clauses:

37.1 exceed WP's legitimate business interests and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act;

37.2 will not promote regulatory outcomes that are in the public interest and as such is inconsistent with the matter at section 26(1)(a) of the ERA Act;

37.3 network charges comprise approximately 45% of a residential customer's bill.[6] It is not in the long-term interests of consumers to enable a monopoly service provider to unilaterally determine a customer's network Service and price without any independent oversight and as such is inconsistent with the matter at section 26(1)(b) of the ERA Act;

37.4 will not encourage investment in relevant markets compared to the existing regulatory model whereby Users select the Service on behalf of their customers subject to meeting the Service Eligibility Criteria determined by WP and as such is inconsistent with the matter at section 26(1)(c) of the ERA Act;

37.5 is counter to the legitimate business interests of Users relative to the current regulatory arrangement whereby the User selects the Reference Service based on the customer's needs. The current model permits a network user to optimise its customers' network costs; on the other hand, WP's proposal will optimise its transport revenue without any external review and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act;

37.6 will substantially increase WP's monopoly market power and limit competitive market conduct as a result of the absence of User network Service choice and as such is inconsistent with the matter at section 26(1)(f) of the ERA Act; and

37.7 will not promote transparent decision-making processes that involve public consultation as WP has no obligation to notify Small Customers of a change in network Service either before or after the change and as such is inconsistent with the matter at section 26(1)(g) of the ERA Act.

Primacy of pre-existing contractual rights; Reference Services must not be inconsistent with existing ETACs

38. Section 4.34 of the Access Code, when read in conjunction with section 4.5.2, provides the Authority must not *approve proposed revisions* that would, if *approved*, have the effect of depriving a person of a contractual right that existed prior to the earlier of the date on which the *proposed revisions* were due to the Authority and the date on which the *proposed revisions* were submitted to the Authority (**Pre-existing Contractual Right**).

39. Synergy notes section 4.34 of the Access Code is not limited to effectively grandfathering Pre-existing Contractual Rights of a *user* or an *applicant* nor is the subject category of contractual rights limited to a right contained in an *access contract* or a *contract for services.*

40. Nevertheless, for the Authority to perform its obligation in accordance with the Code objective, Synergy considers the Authority must first consider and identify any relevant Pre-existing Contractual Rights. Synergy currently has a number of rights it considers will be prevented from exercising if certain of WP's changes are approved by the Authority. Synergy is currently precluded from discussing these rights with the Authority by virtue of the confidentiality provisions in place between Synergy and WP and Synergy and its customers. Synergy would be pleased to discuss these matters with the Authority provided the Authority issues a suitable notice under section 51 of the ERA Act compelling Synergy's production of relevant information.

[6] WP claims that network charges comprise approximately 36% of a residential customer's bill but Synergy considers that this number inappropriately excludes the Tariff Equalization Contribution portion of a bill from the network component, instead allocating it as a retail component of the cost stack.

41. Importantly, the Authority should not limit its enquiries to considering previous approved *standard access contracts* or *reference services* because there will be a number of *access contracts* and *non-reference services* that deviate from the Authority's approved documents and services. Further, it will be important to determine whether in the case of the transfer and relocation policy (**TaRP**) parties have modified various rights and obligations under that document.

42. Importantly, the Authority should not limit its enquiries to considering previous approved *standard access contracts* or *reference services* because there will be a number of *access contracts* and *non-reference services* that deviate from the Authority's *approved* documents and services. Further, it will be important to determine whether in the case of the AQP parties have modified various rights and obligations under that document.

43. The principle of freedom to contract enshrined in section 2.4A of the Access Code provides that WP and a *user* or *applicant* may negotiate regarding, and may make and implement, an *access contract* for *access* to any *service* (including a *service* which differs from a *reference service*) on any terms (including terms which differ from a *standard access contract*). This provision is subject to an *applications and queuing policy* in an *access arrangement,* and any applicable *technical rules.*

44. Section 2.6 of the Access Code provides nothing in the Access Code or an *access arrangement* prevails over or modifies the provisions of a *contract for services*, except for present purposes the *applications and queuing policy* and the *technical rules*. But importantly, this provision does not entitle the Authority to approve any *proposed revisions* that would have the effect, if approved, of depriving a person of a Pre-existing Contractual Right.

45. In addition, to give effect to clause 4.34 of the Access Code, it is crucial the Authority ensures that all *reference services* approved by the Authority can be obtained by a *user* based on the pre-existing terms and conditions of access. That is, the new reference services must be compatible with Pre-existing Contractual Rights including in *access contracts* and retail contracts.

Consequential breach – proposed deletion of clause 3.3(b)

46. The effect of the current clause is, in essence, a User will not be in breach of its obligation to comply with relevant Eligibility Criteria in respect of a Reference Service if WP has not complied with the AQP.

47. WP notes the statement in clause 3.3(b) of the SETAC "is not correct as to preserve network integrity the User must comply with the Eligibility Criteria at all times, even if WP is in breach of the AQP".[7]

48. However, removing clause 3.3(b) will mean a User may be in breach of its obligation to comply with relevant Eligibility Criteria even where its breach arises as a result of WP's breach of the AQP. For example, WP may place a User on a Reference Service that is different to the Reference Service requested by the User or exercise its rights under clause 6.2(b). In such circumstances it would be unfair for the User to be in breach of its obligation under clause 3.3(a).

49. WP submits the logic for the removal of clause 3.3(b) is the User must comply with the Eligibility Criteria for a Service until it moves to a new Service.[8]

[7] Western Power, *Model ETAC for AA4 Change Summary* (dated 2 October 2017), page 5.
[8] Western Power, *Model ETAC for AA4 Change Summary* (dated 2 October 2017), page 17.

50. WP has not provided any commercial, policy or operational evidence why the deletion of clause 3.3(b) is necessary to protect WP's legitimate commercial interests, as contemplated by section 26(1)(d) of the ERA Act or network safety and security, nor whether the operation of this clause in the third access arrangement (**AA3**) has adversely affected WP, Users or Consumers. If there is such evidence, then it should properly be reviewed and discussed at the Technical Rules Committee to determine if amendments, consistent with section 12.1 of the Access Code, need to be made to the Technical Rules (rather than the SETAC).

51. In addition to the foregoing, Synergy considers WP's proposal would require a User to make a legal claim against WP to address the consequential nature of its breach should WP take action or seek to recover under an indemnity under the SETAC. This would increase the likelihood of expensive and time consuming legal proceedings. This outcome is, in Synergy's view, inconsistent with the Access Code objective and is unreasonable contrary section 5.5 of the Access Code, particularly in view of the balanced nature of the clause WP proposes to amend.

52. Therefore in Synergy's view, the Authority must refrain from *approving* this provision because it is not reasonable within the contemplation of section 5.3 of the Access Code.

New obligations with respect to the AQP – proposed amendments to clause 13(c)

53. WP proposes new obligations on Users in respect of the material modification of Generating Plant in circumstances where such modification does not require an application under the AQP.[9]

54. Synergy supports WP taking reasonable steps to address the current lack of clarity in respect of how the AQP applies in particular circumstances. However, WP's proposed approach lacks that clarity and cannot be described as reasonable in its character. Rather, WP's proposal instead compounds the uncertainty that already exists (which is the subject of Synergy's separate submission in respect of WP's proposed AQP for AA4)[10].

55. WP has addressed a number of Synergy's concerns on WP's initial proposed amendments to clause 13(c). However, the following concerns remain:

    55.1 The proposed new clause 13(c)(ii) does not specify what "materially modify" means and this compounds current uncertainty about the proper application of the AQP. Synergy suggests the access arrangement review process is an opportune time to provide clarity on this term particularly given the existing residential photovoltaic system (**PVs**) uptake and the future electric vehicle and battery uptake.

    55.2 WP has not provided a reason as to why it requires written notice at least 60 days prior to the anticipated modification. Synergy previously advised WP that such a notification period will impact Synergy's customers and the small-scale renewable energy industry in the SWIS.[11] Synergy recommends the notification period is shortened.

    55.3 Further, the requirement the modified Generating Plant does not "adversely impact" the safety or security of the Network effectively imposes a continuing and strict obligation on the User, the parameters of which are not entirely clear. In particular, there is no settled legal meaning of the phrase "adversely impact" but it is clearly intended to have a broad meaning.

[9] Amendment to clause 13(c) of the Proposed Model ETAC.
[10] Refer Synergy's "AA4 submission to the Economic Regulation Authority No. 3: Western Power's proposed applications and queuing policy."
[11] It is a very common for customers to increase their inverter and/or panel capacity when an existing PV system fails.

55.4 Synergy's concern is the proposed addition of clause 13(c)(ii) does not restrict the continuing obligation to ensuring a Generating Plant's design or installation is undertaken consistent with Good Electricity Industry Practice; however, the proposed new clause goes to the unreasonable lengths of imposing a continuing obligation on the User to ensure the modified Generating Plant does not adversely impact the safety or security of the Network. This is not an obligation that Users presently have under existing ETACs, so the practical effect of this proposed provision will be that WP allocates risk it currently carries to Users with each material modification of Generating Plant, even where such modification does not require processing under the AQP. Synergy contends WP is best placed to manage this risk as it is WP and not a User who approves (or does not approve) the connection of Generation Plant to its network.

55.5 Further, the strict and continuing obligation is substantially more onerous than the provisions regarding compliance with the Technical Rules. For example, the User is not in breach of the Technical Rules where that breach by the User is caused by another party (except if the User is negligent or has not acted as a Reasonable and Prudent Person). In Synergy's view, WP's proposed provision for the SETAC is unreasonable and should not be approved by the Authority.

56. For these reasons, Synergy considers the proposed clause is unreasonable and therefore not consistent with section 5.3 of the Access Code. The proposed clause compounds the complexity of how the AQP applies, and therefore also fails to form the basis of a commercially workable *access contract* as required by section 5.3(b) of the Access Code.

57. Further, with respect to the matters the Authority is required to have regard to under section 26(1) of the ERA Act, WP's proposal:

57.1 exceeds WP's legitimate business interests and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act;

57.2 will not promote regulatory outcomes that are in the public interest and as such is inconsistent with the matter at section 26(1)(a) of the ERA Act;

57.3 will not encourage investment in relevant markets, being in particular the market for behind-the-meter energy solutions and as such is inconsistent with the matter at section 26(1)(c) of the ERA Act; and

57.4 is contrary to the legitimate business interests of Users and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act.

58. Finally, Synergy considers these matters should be addressed in the Technical Rules. Previous amendments to the Technical Rules have made it clear the requirements for modifications and who is responsible for inspecting and ensuring continued compliance. For example, see the amendment, proposed by the Technical Rules Committee, made to clause 3.7.8.3 of the Technical Rules.

New obligation for intermediaries to indemnify WP – proposed new clause 19.11

59. WP's proposed clause 19.11 imposes an entirely new indemnity for third party claims where the User is the Intermediary (as defined in the Market Rules) of a person and that person is not a party to the SETAC.

60. Clause 2.28.16A of the Market Rules provides if a person applies for an exemption from an obligation to register under the Market Rules as a "Rule Participant" in the "Network Operator" class, "Market Generator" class, "Market Customer" class, as an "Ancillary Service Provider", under clause 2.28.16 of the Market Rules, that person may in the application nominate a person to be registered instead of the applicant. That nominee is defined as an "Intermediary".

61. Synergy has the following concerns with proposed clause 19.11:

    61.1 To be the Intermediary of a person, it is not necessary the application for exemption described above be approved, simply that a nomination be made in an application that is submitted. This means clause 19.11 would operate to capture Users that are not registered on behalf of an exempted party because an application may have been withdrawn or been rejected by the Australian Energy Market Operator. This could give rise to a situation where a User is required to provide this indemnity despite having no contractual or other relationship with that third party.

    61.2 The exclusion of Indirect Damage provided in clause 19.3(b) is unlikely to apply to the indemnity because clause 19.11 clearly indicates the subject of the indemnity is "any costs, expenses, losses or damages suffered or incurred", all of which are likely to be costs, expenses, losses or damages in the nature of Indirect Damage. If the exclusion in clause 19.3 applies, then clause 19.11 will have no work to do; it therefore seems the intention is for clause 19.11 to have a similar effect as the phrase "the exclusion of Indirect Damage in clause 19.3 does not apply".

    61.3 This means a User would be liable for this class of costs arising in respect of Claims made by the third party against WP which are in connection with the provision of the Services or which relate to a matter for which WP's liability would have been limited or excluded had that person been party to the SETAC. "Claims" is defined in the SETAC to mean "any claim, demand, action or proceeding made or instituted against a Party". Use of the SETAC defined term "Claim" makes it clear the indemnity will be activated in relation to a broad range of triggers and is intended to cover a broad range of costs, with only the liability cap of $80 million, indexed, set out in clause 19.5 to apply as a cap.

    61.4 Finally, Synergy's position is the Controller provisions contained at clause 6 of the SETAC are not sufficiently robust to address WP's legitimate business interests in respect of third party claims. Those provisions require the User to procure a Controller releases WP from claims, which WP can then enforce under section 11 of the *Property Law Act 1969* (WA).

    61.5 The indemnity set out in clause 19.11 is not reasonable, and as such inconsistent with section 5.3(a) of the Access Code. It also fails to form the basis of a commercially workable *access contract* in breach of section 5.3(b) of the Access Code.

    61.6 The provision is also inconsistent with the Access Code objective.

Expanded insurance obligations on User

62. The SETAC contains a number of minor amendments by WP to capitalise certain terms.

63. Item 1(a)(i)(A) of Schedule 5 to the SETAC includes a capitalisation of the term "Claim" in relation to the insurances the User must procure under clause 21.

64. That capitalisation greatly expands the scope, and consequently the cost, of insurance cover to WP's benefit from a "claim", which applies when the term is not capitalised to "any claim, demand, action or proceeding made or instituted against a Party", which applies when the term is capitalised.

65. In its public submission to the Authority, WP provided no rationale for making this change. Nor is Synergy aware of any legitimate basis for why the scope of Users' insurance obligations and hence Users' liability to WP under the SETAC, should be so expanded.

66. In the absence of any justifiable rationale for the amendment, Synergy considers the proposed clause is not reasonable and is therefore inconsistent with clause 5.3(a) of the Access Code. Nor is WP's proposed amendment, being that its basis has not been clarified, consistent with the need to promote transparent decision-making processes that involve public consultation and as such the provision is inconsistent with section 26(1)(g) of the ERA Act.

67. Other capitalisations of terms give rise to circular definitions or awkward meanings – for example the circular definition created by using the term "Default" in the definition of Default at clause 27.1, or the capitalisation of "Contract" in clause 6.2(b), which amendment means the User and Controller must enter into the SETAC between the User and WP, which cannot have been WP's intention.

Existing Force Majeure provisions

68. In its submission relating to WP's MSLA, Synergy raised objections in relation to the incorporation of existing Force Majeure from the AA3 *standard electricity transfer access contract* provisions into the MSLA.

69. Synergy considers that the following changes ought to be made to clause 22 of the SETAC:

    69.1 the reporting standard on the Affected Person in clause 22.3(a) should be amended to read "promptly notify the other Party of the occurrence of the Force Majeure Event and in any event within two days of the occurrence of the Force Majeure Event";

    69.2 in relation to clause 22.4 of the SETAC, an Affected Person should not be obliged to incur any expenditure in complying with clause 22.3(b) if the Force Majeure Event is constituted by a breach of, or a failure to comply with, either of the SETAC or the Metering Code. Synergy considers that reference to the Metering Code ought to be incorporated into clause 22.4 of the SETAC.

Electricity Network Access Code 2004 (WA) requirements
(Extracts from Code, with footnotes omitted)

2.1 The objective of this Code (**"Code objective"**) is to promote the economically efficient:

(a) investment in; and

(b) operation of and use of,

networks and *services* of *networks* in Western Australia in order to promote competition in markets upstream and downstream of the *network*s.

2.2 The Minister, the *Authority* and the *arbitrator* must have regard to the *Code objective* when performing a function under this Code whether or not the provision refers expressly to the *Code objective*.

2.4A Subject to this Code and to—

(a) an *applications and queuing policy* in an *access arrangement*; and

(b) the *ringfencing objectives* and any *ringfencing rules* approved for a *network* by the *Authority* under Chapter 13; and

(c) any applicable *technical rules*,

a *service provider* (including Electricity Networks Corporation) and a *user* or *applicant* may negotiate regarding, and may make and implement, an *access contract* for access to any *service* (including a *service* which differs from a *reference service*) on any terms (including terms which differ from a *standard access contract*).

2.6 Nothing in this Code or an *access arrangement* prevails over or modifies the provisions of a *contract for services*, except for:

(a) if an *access arrangement* is in effect for the *network* – the *applications and queuing policy*; and

(b) the *ringfencing objectives*, to the extent that they apply to the *network*, and any *ringfencing rules* in effect for the *network*; and

(c) any provisions of the *technical rules* which by this Code are expressed to prevail over such a contract; and

(Note: See section 12.5.)

(d) subject to section 10.32(a), an *award* by an *arbitrator*.

5.1 An *access arrangement* must:

...

(b) include a *standard access contract* under sections 5.3 to 5.5 for each *reference service*;

5.3 A *standard access contract* must be:

(a) reasonable; and

(b) sufficiently detailed and complete to:

(i) form the basis of a commercially workable *access contract*; and

(ii) enable a *user* or *applicant* to determine the value represented by the *reference service* at the *reference tariff*.

5.5 The Authority:

(a) must determine that a *standard access contract* is consistent with section 5.3 and the *Code objective* to the extent that it reproduces without material omission or variation the *model standard access contract*; and

(b) otherwise must have regard to the *model standard access contract* in determining whether the *standard access contract* is consistent with section 5.3 and the *Code objective*.

26. Authority to have regard to certain matters

(1) In performing its functions, other than the functions described in section 25(c) and (d), the Authority must have regard to —

(a) the need to promote regulatory outcomes that are in the public interest;

(b) the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets;

(c) the need to encourage investment in relevant markets;

(d) the legitimate business interests of investors and service providers in relevant markets;

(e) the need to promote competitive and fair market conduct;

(f) the need to prevent abuse of monopoly or market power;

(g) the need to promote transparent decision-making processes that involve public consultation.

115. Prohibitions on hindering or preventing access

(1) The network service provider in relation to network infrastructure facilities covered by the Code, or an associate of the network service provider, must not engage in conduct for the purpose of hindering or preventing –

(a) access by any person to services in accordance with the Code;

(b) the making of access agreements or any particular agreement in respect of those facilities; or

(c) the access to which a person is entitled under an access agreement or a determination made by way of arbitration.

Penalty: $100,000
Daily penalty: $20,000

Item ref.	Key points
19 - 26	**Strict obligation to ensure Contracted Capacity is not exceeded – proposed clause 3.1(c)** • Given the reasons outlined in items 19-26 the proposed provision is not reasonable and is inconsistent with section 5.5 of the Access Code, it is Synergy's position that the Authority must **not** *approve* it. Further, the proposed provision exceeds WP's legitimate business interests, contrary to section 26(1)(d) of the ERA Act, and the proposed provision would **not**, if *approved*, promote competitive and fair market conduct as contemplated by section 26(1)(e) of the ERA Act.
27 - 37	**Selecting Services – proposed clauses 3.2(b) and 3.2(c)** • In Synergy's view both these clauses and WP's attempt to have these clauses approved by the Authority may constitute a breach of section 115 (prohibitions on hindering or preventing access) of the EI Act. • Further, for the reasons outlined in items 27 – 37 WP's proposal is inconsistent with section 26(1) of the ERA Act
38 - 45	**Primacy of pre-existing contractual rights; Reference Services must not be inconsistent with existing ETACs** • To give effect to clause 4.34 of the Access Code, it is crucial the Authority ensures that all *reference services* approved by the Authority can be obtained by a *user* based on the pre-existing terms and conditions of access. That is, the new reference services must be compatible with Pre-existing Contractual Rights including in *access contracts* and retail contracts.
46 - 52	**Reference Services must not be inconsistent with existing ETACs, and consequential breach – proposed deletion of clause 3.3(b)** • Removing clause 3.3(b) will mean a *user* may be in breach of its obligation to comply with relevant eligibility criteria even where its breach arises as a result of WP's breach of the AQP; Synergy considers the proposed deletion of clause 3.3(b) is unreasonable and should not be approved by the Authority in view of its inconsistency with section 5.3 of the Code.

Item ref.	Key points
53 - 58	**New obligations with respect to the AQP – proposed amendments to clause 13(c)** • For the reasons outlined in items 53 - 58, Synergy considers the proposed clause is unreasonable and therefore not consistent with section 5.3 of the Access Code. The proposed clause compounds the complexity of how the AQP applies, and therefore also fails to form the basis of a commercially workable access contract as required by section 5.3(b) of the Access Code. • Further, with respect to the matters the Authority is required to have regard to under section 26(1) of the ERA Act, WP's proposal: – exceeds WP's legitimate business interests and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act; – will not promote regulatory outcomes that are in the public interest and as such is inconsistent with the matter at section 26(1)(a) of the ERA Act; – will not encourage investment in relevant markets, being in particular the market for behind-the-meter energy solutions and as such is inconsistent with the matter at section 26(1)(c) of the ERA Act; and – is contrary to the legitimate business interests of Users and as such is inconsistent with the matter at section 26(1)(d) of the ERA Act.
59 - 61	**New obligation for intermediaries to indemnify WP – proposed new clause 19.11** • For the reasons set out in items 59 – 61, the indemnity set out in clause 19.11 is not reasonable, and inconsistent with section 5.3(a) of the Access Code. It also fails to form the basis of a commercially workable access contract in breach of section 5.3(b) of the Access Code.
62 – 67	**Expanded insurance obligations on User** • Item 1(a)(i)(A) of Schedule 5 to the SETAC includes a capitalisation of the term "Claim" in relation to the insurances that the User must procure under clause 21; this capitalisation greatly expands the scope, and the cost, of insurance cover to WP's benefit from a "claim" to "any claim, demand, action or proceeding made or instituted against a Party". • In the absence of any justifiable rationale for the amendment, Synergy considers the proposed clause is not reasonable and is therefore inconsistent with clause 5.3(a) of the Access Code. Nor is WP's proposed amendment, being that its basis has not been clarified, consistent with the need to promote transparent decision-making processes that involve public consultation and as such the provision is inconsistent with section 26(1)(g) of the ERA Act.

Item ref.	Key points
68 - 69	**Existing Force Majeure provisions** • Synergy considers that the following changes ought to be made to clause 22 of the SETAC: – The reporting standard on the Affected Person in clause 22.3(a) should be amended to read "promptly notify the other Party of the occurrence of the Force Majeure Event and in any event within two days of the occurrence of the Force Majeure Event"; – In relation to clause 22.4 of the SETAC, an Affected Person should not be obliged to incur any expenditure in complying with clause 22.3(b) if the Force Majeure Event is constituted by a breach of, or a failure to comply with, either of the SETAC or the Metering Code. Synergy considers that reference to the Metering Code ought to be incorporated into clause 22.4 of the SETAC.